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Publication Information
Jay E. Grenig, Whose Interpretation of Occupational Health and Safety Regulations is Entitled to Deference?, 1990-91 Term Preview U.S. Sup. Ct. Cas. 104 (1990). Copyright 1990 by the American Bar Association. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

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Whose interpretation of Occupational Health and Safety regulations is entitled to deference?

by Jay E. Grenig

ISSUE

In this case the Supreme Court is asked to determine whether the interpretation of a Department of Labor regulation by the Secretary of Labor, or the interpretation of the regulation by the Occupational Safety and Health Review Commission, is entitled to deference where the two interpretations conflict.

FACTS

In 1976 the Secretary of Labor determined that coke oven emissions are carcinogenic. The Secretary then promulgated a standard governing occupational exposure to coke oven emissions. (41 Fed. Reg. 46,472-46,790 (1976).) The standard requires that in "regulated areas" an employee's exposure to coke oven emissions be limited to a specified level. The standard permits the use of respirators when controls are not yet sufficient to reduce exposure to the permissible limit.

29 C.F.R. § 1910.1029(g)(3) requires an employer to "institute a respiratory protection program in accordance with § 1910.134 of this part." 29 C.F.R. § 1910.134(e)(5) provides that respirator users must "be properly instructed in its selection, use and maintenance." It further states that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and finally to wear it in a test atmosphere." In August 1979 the Secretary inspected CF&I Steel Corporation's coke oven facility in Pueblo, Colo. The inspection disclosed that CF&I had conducted two kinds of respirator tests with its employees. The first test was a "positive/negative pressure test" in which a worker places the respirator on his face, inhales or exhales, and checks for leakage along the respirator seal. The second was a "banana oil" test in which a worker is exposed to isoamyl acetate ("banana oil") in order to determine whether he or she can detect the odor of the chemical despite the respirator. The Secretary discovered that, during the administration of the banana oil test, 28 CF&I's employees had detected banana oil. The Secretary also determined that CF&I had failed to furnish the employees with different respirators.

The Secretary issued a citation for a willful violation and proposed the maximum penalty of $10,000. The Secretary cited CF&I only for a violation of 29 C.F.R. § 1910.1029(g)(3) and of the general standard on respiratory protection incorporated in that section (i.e., 29 C.F.R. § 1910.134). The citation charged CF&I with failing to "institute a respiratory protection program in accordance with § 1910.134" in that respiratory training did not provide the employees an opportunity to have their respirators fitted properly and to test their face-piece-to-face-seal. The Secretary maintained that § 1910.1029(g)(3), which incorporates § 1910.134(e), requires employers to provide a different type or size respirator, if an employee's equipment fails the test. CF&I contested the citation, on the ground that it had not violated § 1910.1029(g)(3). CF&I contended that § 1910.1029(g)(3) does not require an employer to assure proper fit of a respirator.

Finding that 28 employees had failed their respirator fit test and were not provided with respirators that would fit, an Occupational Safety and Health Review Commission ("Commission") administrative law judge issued an opinion upholding the citation.

Five years later, in September 1986, the Commission reversed the administrative law judge's decision in a 2-1 decision. The Commission concluded that § 1910.134 only requires "the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal," and to give employees the opportunity to wear respirators in a test atmosphere during training. The Commission determined that the Secretary's interpretation of Section 1910.134 would eliminate the purpose and meaning of Section 1910.1029(g)(3)(i), which specifically covers an employer's duty to assure proper fit of a respirator.

Because CF&I's employees had received instruction and
an opportunity to wear respirators in a test atmosphere, the
Commission concluded that the requirements of Sec-
tion 1910.134 had been met. According to the Commission,
"[t]he fact that some employees detected the banana oil
while in the test atmosphere does not establish by itself
that the instructions or training otherwise provided were
inadequate."

The Secretary petitioned for judicial review of the Com-
mission's decision. In December 1989, the U.S. Court of
Appeals for the Tenth Circuit denied the petition and up-
held the Commission's determination. 891 F.2d 1495 (10th
Cir. 1989).

BACKGROUND AND SIGNIFICANCE

In 1970 Congress enacted the Occupational Safety and
Health Act (the OSH Act). The legislation was intended "to
assure so far as possible ... safe and healthful working con-
ditions for every working man and woman in the Nation."
An employer has a duty under the OSH Act to "furnish
to each of his employees employment and a place of em-
ployment which are free from recognized hazards that are
causes or are likely to cause death or serious physical
harm to his employees."

The OSH Act charges the Secretary of Labor with a broad
range of regulatory and enforcement responsibilities, in-
cluding the setting of mandatory occupational safety and
health standards applicable to businesses affecting inter-
state commerce. The Secretary is also charged with enforc-
ing the Act and undertaking various enforcement activities,
including issuing citations to employers determined to have
violated the OSH Act, proposing civil penalties against cited
employers, prescribing abatement periods for cited health
and safety violations, and seeking injunctive relief.

Congress created the Occupational Safety and Health Re-
view Commission to adjudicate challenges to the Secret-
ary's citations. The Commission consists of three
members, appointed by the president and confirmed by
the Senate. The Chairman of the Commission has the
authority to hire administrative law judges to assist the
Commission in the performance of its functions.

An employer may contest the Secretary's citation or no-
tice of penalty before the Commission. When a citation
or penalty is contested, the Commission must afford an
opportunity for a hearing. Following the hearing, the Com-
misson issues an order based on findings of fact, affirm-
ing, modifying, or vacating the Secretary's citation or
proposed penalty. The Commission's decision may be
reviewed by the courts. If the Commission affirms a cita-
tion, or if no challenge to a citation is filed, only the Secre-
tary may seek enforcement of the citation in a court of
appeals.

Here, the court is asked to determine whether deference
should be given to interpretations of the OSH Act regula-
tions by the policymaker (the Secretary of Labor) or by
the adjudicator (the Commission).

In appropriate circumstances, courts defer to an adminis-
trative agency's reasonable interpretation of the agency's
regulations. This judicial deference to administrative in-
terpretation of a regulation recognizes that, by adminis-
tering a statutory regime on a day-to-day basis, the adminis-
trative agency gains expertise from its experience and
should be accorded interpretive discretion to dis-
charge its duty.

Any deference owed to an agency's interpretation of a
regulatory standard is owed only to the reasonable in-
terpretation of the agency. If the Court holds that the Secre-
tary's interpretation of the regulatory standard was
unreasonable, it may avoid determining whether a court
should defer to either the Secretary or the Commission's
interpretation.

ARGUMENTS

For the United States Secretary of Labor (Kenneth W.
Starr, Solicitor General, Department of Justice, Washing-
ton, DC 20530; telephone (202) 514-2217):

1. An agency's reasonable interpretations of ambiguous
provisions of a statute it is entrusted to administer are
entitled to deference because those interpretations are
an integral part of the agency's authority to implement
statutory policy. The Secretary's interpretations of the
Secretary's own regulations under the OSH Act are en-
titled to deference, because the Secretary is charged
with policymaking and enforcement authority, while
the Commission is purely an adjudicatory agency.

2. The legislative history confirms that the Secretary is the
policymaker under the OSH Act and that the Secretary's
interpretations of the Secretary's own regulations are
therefore entitled to deference.

3. Principles established in analogous contexts support the
view that deference is owed to the policymaking ent-
ity (the Secretary), rather than the adjudicatory entity
(the Commission).

For CF&I Steel Corporation (Counsel of Record, Randy
L. Sego, 8400 E. Prentice Ave., STE 1040, Englewood, CO
80111; telephone (303) 740-0846):

1. In those instances under the OSH Act when the Secret-
ary's interpretation of a regulatory standard is clearly
wrong or when the regulatory standard is genuinely
ambiguous, deference should be accorded to the Com-
mission's reasonable interpretation. The Commission's
function as an adjudicator of contested citations neces-
arily includes the power to declare the law by inter-
preting regulations, and this power is necessary and
important to preserve the notice and due process rights
of employers.

2. The Commission's ability to interpret regulations is con-
sistent with congressional intent and does not infringe
upon the Secretary's rulemaking and policymaking
functions under the OSH Act.

3. Because the facts and circumstances of this case demon-
strate that the Secretary's interpretation of the regula-
tory standards was unreasonable and inconsistent with the plain language of the standards, the Tenth Circuit properly deferred to the reasonable construction of the standards by the Commission.

4. In order to preserve the integrity and function of the Commission, a reviewing court should be allowed to scrutinize both the Secretary's interpretation and the Commission's interpretation of a regulatory standard, and deference should be afforded to the most reasonable interpretation of both the Commission and the Secretary, as well as to the purpose and plain language of the regulatory standards at issue.

AMICUS BRIEFS

In Support of the U.S. Department of Labor

1. The AFL-CIO (Counsel of Record, Laurence Gold, 815 16th St., NW, Washington, DC 20006; telephone (202) 637-5383).

In Support of the Occupational Safety and Health Review Commission and CF&I Steel Corporation

1. The National Association of Manufacturers and the Motor Vehicle Manufacturers Association (Counsel of Record, W. Scott Raitt; Brooke Bashore-Smith, Reed Smith Shaw & McClay, Ring Bldg., 1200 18th St., NW, Washington, DC 20036; telephone (202) 557-6152).

2. The Chamber of Commerce of the United States of America; the Industry Council on the Environment, Safety, and Health; and the United States Hispanic Chamber of Commerce (Counsel of Record, Stephen A. Bokat, National Chamber Litigation Center, Inc., 1615 H St., NW, Washington, DC 20062; telephone (202) 463-5337).

3. The American Iron and Steel Institute (Counsel of Record, Albert J. Beveridge, III; Beveridge & Diamond, P.C., 1550 I St., NW, STE 700, Washington, DC 20005; telephone (202) 789-5600).

4. The Occupational Safety and Health Review Commission (Counsel of Record, Robert C. Gombar; Jones, Day, Reavis & Pogue, 1450 G St., NW, Washington, DC 20005-5701; telephone (202) 879-3939).