

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:)

GOODYEAR ATOMIC CORPORATION,)

Appellant,)

No. 86-1172)

v.)

ESTO MILLER AND INDUSTRIAL COMMISSION)
OF OHIO)

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Pages: 1 through 41

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IN THE SUPREME COURT OF THE UNITED STATES

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GOODYEAR ATOMIC CORPORATION, :
Appellant, :
V. : No. 86-1172
ESTO MILLER AND INDUSTRIAL :
COMMISSION OF OHIO :
-----x

Washington, D.C.

Tuesday, January 19, 1988

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

ROBERT E. TAIT, ESQ., Columbus, Ohio;
on behalf of the Appellant.

THOMAS W. MERRILL, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C. ;
on behalf of the United States as amicus curiae
in support of Appellant.

STEWART W. JAFFY, ESQ., Columbus, Ohio;
on behalf of Appellee.

C O N T E N T S

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<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ROBERT E. TAIT, ESQ., on behalf of Appellant	3
THOMAS W. MERRILL, ESQ. as amicus curiae in support of Appellant	11
STEWART R. JAFFY, ESQ. on behalf of Appellee	19
ROBERT E. TAIT, ESQ., on behalf of Appellant - Rebuttal	37

1 P R O C E E D I N G S

2 (10:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 No. 86-1172, Goodyear Atomic Corporation versus Esto Miller and
5 the Industrial Commission of Ohio.

6 Mr. Tait, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF ROBERT E. TAIT, ESQ.

8 ON BEHALF OF APPELLANT

9 MR. TAIT: Thank you, Mr. Chief Justice, may it
10 please the Court.

11 From appellant's perspective, the single issue
12 involved in this case is whether the State of Ohio may be
13 permitted to impose its safety regulations on a nuclear
14 production facility which is exclusively owned and controlled
15 by the United States of America, and essential to the national
16 defense.

17 Very briefly at the time this action arose, the
18 Goodyear Atomic Corporation, the appellant herein, operated a
19 nuclear production and utilization facility located near
20 Portsmouth, Ohio, under contract with the United States
21 Department of Energy. This facility is one of only two of its
22 type in the United States, and is the only facility in America
23 capable of enriching uranium to the assays needed to power our
24 nuclear ships and submarines. Because of the critical
25 importance of this particular operation, Congress has mandated
that the Department of Energy be the exclusive owner of all

1 land, buildings and equipment associated with this operation,
2 and significantly that DOE establish radiological and non-
3 radiological safety regulations with which its contractor
4 operators must comply.

5 Now, as noted in the record, the operating contract
6 under which Goodyear operated the facility in question
7 contained a specific provision implementing that requirement.
8 This particular case arises out of a simple Workers'
9 Compensation claim involving a former Goodyear employee, the
10 appellee, Esto Miller.

11 In 1980, Miller fell from a scaffolding and fractured
12 his ankle. He was paid normal workers' compensation benefits
13 and subsequently returned to work.

14 QUESTION: I take it there's no doubt here, Mr. Tait,
15 that the regular incidence of Ohio Unemployment Compensation
16 law apply to the Goodyear Atomic plant?

17 MR. TAIT: There is no question, Your Honor, that in
18 accordance with 40 U.S.C. 290, the Workers Compensation
19 benefits, normal Workers Compensation benefits do apply to the
20 operations of this plant and to Goodyear employees, yes.

21 And there has never been any question, nor has there
22 ever been any dispute as far as I'm aware with respect to those
23 type of benefits. The dispute arose in this case, however,
24 because in addition to his normal workers' compensation
25 benefits, Miller sought to hold Goodyear liable for an
additional award, allegedly based upon their violation of a

1 specific safety requirement promulgated by the State of Ohio.

2 Now, when he filed this application, the
3 administrative body charged with enforcing these requirements,
4 the Industrial Commission of Ohio, dismissed the application,
5 recognizing their belief that it was preempted by Federal law,
6 by the Atomic Energy Act, and by principles of Federal
7 immunity.,

8 QUESTION: Not a great deal involved, was there?

9 MR. TAIT: No, there was not a great deal involved,
10 and in fact there has never been a great deal involved with
11 respect to this particular claim as a monetary matter.

12 However, through a mandamus action that was initiated
13 on behalf of Mr. Miller, both the Ohio Court of Appeals and the
14 Ohio Supreme Court reversed the administrative determination
15 because of what they perceived to be somehow a significant
16 distinction between radiological and non-radiological hazards.

17 Now, what is clear from those decisions is that
18 neither of the Ohio courts understood the issue in this case.
19 They first and foremost refer to this operation as a power
20 plant. It is not a power plant. They completely failed to
21 recognize the fundamental distinction between an NRC operated
22 power plant and a DOE-owned and controlled Federal nuclear
23 production facility.

24 Thirdly and most importantly, the Ohio Supreme Court
25 in particular failed to recognize the significance of the
Federal ownership of this particular facility.

1 QUESTION: Well, does it make any difference that
2 the Federal facility is being operated by a private contractor?

3 MR. TAIT: Your Honor, we submit that it makes no
4 difference whatsoever. And we submit that this Court's
5 decision in the case of Hancock v. Train should be dispositive
6 of this case. Coincidentally, the Hancock decision involved
7 the sister operation to the Portsmouth facility. That involved
8 Paducah, Kentucky. Now, despite the fact that the Paducah
9 operation does not have the same national defense and security
10 considerations as this facility does, nevertheless, this Court
11 in the Hancock decision reiterated the basic Constitutional
12 doctrine that absent express Congressional authorization, such
13 facilities are free from State regulation.

14 QUESTION: Was there any discussion in Hancock of how
15 to reconcile that with Penn Dairies?

16 MR. TAIT: Well, Your Honor, the Penn Dairies line of
17 cases which are raised by the appellant as a way to try to
18 evade the Hancock immunity in this case, seems to me to involve
19 three different areas of inquiry. First of all, the majority
20 of those cases involved contractors that were providing goods
21 and services to the Federal Government as opposed to actually
22 involved with the day to day operation of a Federal facility,
23 in effect, surrogate Government employees.

24 Secondly, with the exception of the New Mexico tax
25 cases, I'm not aware that any of those matters involved a
nuclear facility or facilities that had any national defense

1 input.

2 Thirdly, and perhaps most significantly, however, the
3 Penn Dairies line of cases it seems to me creates a distinction
4 between an impact upon the expense or cost of the Federal
5 operation of the facility as opposed to the day to day conduct
6 of that facility. And I think that's an important distinction.

7 QUESTION: What if this were a third party tort
8 action under State law not involving an employee. Is that
9 somehow preempted in your view also?

10 MR. TAIT: Well, it would seem to me that the
11 question would become the extent of the effect of the action on
12 the operation of the facility itself. I suppose if you have an
13 action where an employee, for instance, is in the parking lot
14 of the facility and somehow gets run over by a forklift
15 operated by a Goodyear employee, then there is perhaps a
16 question of whether or not the immunity that was established by
17 this Court in Hancock can apply.

18 However, in this particular instance --

19 QUESTION: What's your answer?

20 MR. TAIT: I suppose my answer, Your Honor, is that
21 it depends on the particular circumstance how far the Federal
22 immunity applies. It is dependent upon the affect on the
23 operation, on the affect of the Federal function. If in fact
24 the State law --

25 QUESTION: Well, the effective of a State tort action
is generally in a sense regulatory. If the contractor has been

1 operating negligently, the State tort action will cause the
2 behavior to change.

3 MR. TAIT: If in fact the basis behind the State tort
4 action is contractor operation that is basically in compliance
5 with how the Federal Government has instructed him to operate.
6 And therefore would provide some sort of chilling effect on how
7 he operates the facility. And I guess our position would be
8 that the immunity would apply to that contract because it would
9 go to the very heart of the Federal function.

10 In this particular case, however, we don't have that
11 difficult a situation as far as we're concerned. What you have
12 are literally thousands of pages of safety requirements
13 promulgated by the State of Ohio, enforced by an Agency of the
14 State of Ohio in which they are requiring a Government
15 contractor to comply.

16 QUESTION: Mr. Tait, to add on to Justice O'Connor's
17 question, what if there was a Federal Statute that said State
18 tort law shall apply, notwithstanding otherwise applicable
19 Federal immunity. Then would you still have to say it depends
20 on the circumstances?

21 MR. TAIT: Well, if I interpret the Hancock decision
22 correctly, Your Honor, if in fact there is specific
23 Congressional authorization of the type of State activity that
24 is attempted to be imposed on the facility, then that expresses
25 the Federal Government's Congressional intent to allow that
type of application.

1 QUESTION: Well, here we don't have a statute that
2 says State tort law shall apply. We have a statute that says
3 State Workmen's Compensation laws apply.

4 MR. TAIT: That's correct.

5 QUESTION: And at the time that statute was enacted,
6 as I understand it, what, one-seventh of the States' Workmen's
7 Compensation laws had a provision like this.

8 MR. TAIT: That's correct.

9 QUESTION: You say that they regulate the activity
10 rather than they're just monetary. Well, in a way, they just
11 increase the cost to the Government, and I'm not sure that's a
12 valid way to distinguish the cases that respondent's come up
13 with. Your client can just roll along and pay more money in
14 Workmen's Compensation, I presume, and disregard the State
15 requirements, couldn't it? You're only talking money.

16 MR. TAIT: As a practical matter, Your Honor, I don't
17 think that's possible. If you have a client who is willy nilly
18 disregarding safety requirements, it seems to me in this day
19 and age, that the first thing you're going to have is
20 tremendous labor difficulties where the union is going to say
21 the employer is not encouraging employee safety. In fact, the
22 employer is engaging in activities that fly in the face of
23 employee safety.

24 QUESTION: And your response would be that the
25 Supreme Court didn't say we have to obey these State rules.
The Supreme Court only said that we have to pay the Workmen's

1 Compensation.

2 MR. TAIT: It seems to me that if we would so
3 respond, Your Honor, that's small solace for the union, nor is
4 it going to help our labor difficulties at all.

5 QUESTION: if you rely on the labor situation, would
6 it not be possible independently of a State requirement for the
7 labor union to negotiate a contract which contained a provision
8 that the employer would agree to abide by State regulations
9 even though not compelled by State law to do so. That I
10 suppose would be permissible under --

11 MR. TAIT: It seems to me that that's permissible,
12 Your Honor, but again, we would argue that first of all that
13 was certainly something that was not contemplated by the
14 Congress when they passed the Atomic Energy Act, which requires
15 exclusive control.

16 QUESTION: Well, Mr. Tait, isn't there a Code of
17 Safety, a Federal Code, that your client has to abide by?

18 MR. TAIT: Yes, Your Honor. The important
19 distinction is in fact that the safety regulations which are
20 applied to this plant by reason of the Atomic Energy Act are
21 specifically promulgated by the Department of Energy. These
22 safety regulations which the Department promulgates are
23 applicable to these facilities, this small number of
24 facilities. Congress so intended in the Atomic Energy Act.

25 OSHA has recognized that their requirements do not
apply to these facilities by reason of the Atomic Energy Act.

1 And we submit that if you have such a recognition by another
2 entity of the Federal Government that certainly the State of
3 Ohio's requirements --

4 QUESTION: Well, the question is what Congress
5 intended.

6 MR. TAIT: Absolutely.

7 QUESTION: I suppose if there was some real conflict
8 between a State regulation and this Federal code, I suppose the
9 Federal code would be supreme. But this regulation that was
10 violated here, State regulation, --

11 MR. TAIT: Scaffolding regulation.

12 QUESTION: Scaffolding regulation, that is not
13 inconsistent with any provision --

14 MR. TAIT: The scaffolding regulation itself is not
15 inconsistent with any Federal regulation. They're clearly are
16 regulations again in this three volumes and thousands of pages
17 of regulations that are inconsistent with Department of Energy
18 Regulations, and with which this operation, as I understand it,
19 simply could not economically comply.

20 But the point I believe, Your Honor, as this Court
21 has recognized in International Paper and in Garment and in
22 many of the cases is that where you have an effect, in effect
23 serving two masters, that it creates some sort of chaotic
24 regulatory scheme and invites conflict. And even if we were to
25 leaf through these entire pages of regulations and point out
this regulation being in conflict having to do it on a case by

1 case basis necessarily negatively impacts on the way this
2 operation is conducted.

3 QUESTION: Well, I take it you say that absent this
4 permission to apply the State Workmen's Compensation Act, it
5 would be clear that the State could not regulate anything here.

6 MR. TAIT: That's correct.

7 QUESTION: And you say that this provision of with
8 respect to the Workmen's Compensation Act wouldn't really
9 change that.

10 MR. TAIT: Section 290, yes, Your Honor. And if I
11 may, the United States is going to address that issue more
12 completely and I would like to reserve the remaining time for
13 rebuttal, if I might.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tait.

15 We'll hear now from you, Mr. Merrill.

16 ORAL ARGUMENT OF THOMAS W. MERRILL, ESQ.

17 AS AMICUS CURIAE IN SUPPORT OF APPELLANT

18 MR. MERRILL: Thank you, Mr. Chief Justice, and may
19 it please the Court.

20 The initial question in this case as Mr. Tait has
21 discussed is whether the doctrine of Hancock v. Train applies
22 to a State that seeks to enforce its specific safety
23 regulations at nuclear --

24 QUESTION: Did Hancock v. Train involve anything like
25 Section 290 here?

MR. MERRILL: Hancock v. Train involved what was I

1 think a closer question, Mr. Chief Justice, which whether
2 Section 118 of the Clean Air Act constituted specific
3 authorization to the State of Kentucky to regulate a Federal
4 facility, such as Paducah production plant. And the language
5 of Section 118 was if anything much more of a clear
6 authorization on the part of Congress permitting State
7 regulation than Section 290 is.

8 QUESTION: But if we affirm the judgment here, it
9 doesn't seem to me we're authorizing blanket regulation of
10 these facilities by the State of Ohio. We're simply saying the
11 State of Ohio can impose a Workmen's Compensation judgment one
12 half times again because of violation of its safety
13 regulations. We know that it can impose the initial workmen's
14 compensation award by 290.

15 MR. MERRILL: That's correct, Your Honor. I would
16 emphasize however that at some point, you have to draw the line
17 in determining what a workmen's compensation law is. The
18 relevant language of Section 290 simply authorizes States'
19 workmen's compensation laws to apply on Federal property and
20 facilities.

21 The appellees in this case have conceded that a new
22 provision in the Ohio Statute added in 1986 that allows the
23 Ohio Industrial Commission to issue mandatory orders to
24 employers requiring that they comply with specific safety
25 regulations could not be applied to the Portsmouth Fuel
Production Plant. That by itself suggests that the mere fact

1 that the State has labeled something a workmen's compensation
2 law or has instructed its Industrial Commission to enforce the
3 law is not enough. You have to ask the question of what
4 Congress had in mind.

5 QUESTION: I might also suggest that circumstances
6 alter cases. We don't have that case before us, we have this
7 one.

8 MR. MERRILL: That's correct.

9 QUESTION: I'd also suggest that one-seventh of the
10 States didn't have that kind of a provision at the time this
11 adoption of the workmen's compensation law was enacted by the
12 Congress.

13 MR. MERRILL: That's correct, Justice Scalia. And in
14 many cases, the existing legal landscape or the state of the
15 law in effect at the time that the Congress passes a statute is
16 a relevant consideration to look to in deciding what Congress
17 must have meant.

18 But we would submit that there are several aspects in
19 the background of the language and the legislative history of
20 Section 290, which strongly suggest that Congress did not have
21 any but the narrowest purposes in mind when they enacted that
22 particular statute.

23 First, let me address a more general issue which is
24 raised by the appellee's reliance on another Federal Statute
25 and which I think is also relevant in understanding Section
290, and which has not been adequately brought out in this case

1 because the issue really only arose when the appellees filed
2 their brief.

3 The appellees referred to a statute 16 U.S.C. 457 as
4 being relevant to this case. That statute authorizes the
5 application of state wrongful death and personal liability law
6 on property which is subject to the exclusive jurisdiction of
7 the United States.

8 This particular statute is irrelevant, utterly
9 irrelevant to this particular case because it only applies in
10 Federal enclaves, areas that are subject to the exclusive
11 jurisdiction of the United States. The Portsmouth Gasification
12 Plant is not a Federal enclave. When the Atomic Energy
13 Commission purchased the site in 1952, it did not take the
14 necessary steps to insure that the property would be subject to
15 exclusive Federal jurisdiction, and so by its terms, Section
16 457 does not apply to the Portsmouth Plant.

17 More fundamentally, Section 457 does not go to the
18 question of Federal immunities, the question which is at issue
19 in this case and presented by the Hancock decision, 457
20 concerns the question of the scope of state territorial
21 jurisdiction over Federal property. And Section 457 simply
22 says that any objection to the territorial application of State
23 wrongful death and tort law is waived, but it does not waive
24 any Federal immunities.

25 For example, in this Court's recent decision in
Westfall v. Irving arose out of a tort allegedly committed at

1 an Army depot which was a Federal enclave. The only reason
2 State tort law applied in Westfall at all was because of
3 Section 457, but no one in that case contended that Section 457
4 constituted a waiver of any immunity that the Federal employees
5 had. And in fact, this Court recognized that if the employees
6 were conducting a discretionary function, they would be immune
7 from any such tort action.

8 So there's a distinction between territorial
9 jurisdiction and immunities, and Section 457 only addresses the
10 former claim.

11 QUESTION: Mr. Merrill, may I just ask in that
12 connection, supposing there were a suit by one employee against
13 another arising out of some charge of negligence in the plant.
14 That could be decided as a matter of State law, I suppose?

15 MR. MERRILL: Yes. Yes, Your Honor, or a third
16 member of the public entered the property and was tortiously
17 injured, State law would govern. Not because of Section 457
18 because this is not a Federal enclave but simply because the
19 application of tort law in such a way that it would not
20 constitute a regulation of the facility itself would not
21 trigger the Hancock type Federal facilities immunity.

22 QUESTION: Well, suppose a member of the public slips
23 and falls as he comes in and says it was just unsafely
24 maintained. Now, that certainly has something to do with how
25 the place is kept up in Justice Steven's hypothesis. And your
answer is still the same, I take it?

1 MR. MERRILL: Well, Justice Rehnquist, we think it's
2 a more difficult question. It would present a much more
3 difficult question to what extent the application of ordinary
4 tort principles or State negligence law represents a regulation
5 of a Federal facility, as opposed to simply a regulation of a
6 private dispute between two parties or a regulation of a
7 contractor's relationships to its employees.

8 In some situations, we think that it would be in
9 effect a regulation of the facility. For example, if the
10 predicate for the action was the fact that the defendant had
11 allegedly violated a specific State safety regulation and that
12 was constituted per se negligence. We think that would really
13 be no different from the application of a specific safety
14 regulation in this case.

15 But those difficulties in line drawing with respect
16 to tort actions aren't really presented in this case, because
17 here you have a specific State safety regulation which is
18 clearly regulatory in its effect, and its application, we
19 think, triggers the Federal facilities immunity.

20 Let me turn then to Section 290, and the reasons why
21 we in particular think that Section 290 should not be read as
22 authorizing the application of the State safety regulations in
23 this case.

24 First of all, the problem that gave rise to the
25 enactment of 290 was real a problem very much like that
addressed by Section 457. That is, it was a question of

1 territorial jurisdiction, and specifically, the Golden Gate
2 Bridge was being constructed in California, and both ends of
3 the bridge, private contractors had to perform work on Federal
4 enclaves. And this Court had recently held in a case called
5 Murray v. Gerrick, Section 457 was not broad enough to
6 authorize the application of State workmen's compensation laws
7 on Federal enclaves. And because of that decision, a number of
8 insurance carriers were resisting the payment of workmen's
9 compensation claims for people injured in the construction of
10 the Golden Gate Bridge.

11 So the immediate problem that gave rise to the
12 enactment of Section 290 was a territorial jurisdiction
13 problem, it was not a Federal immunities question. To be sure,
14 Section 2 is drafted more broadly than Section 457. It does
15 not simply apply to enclaves, it applies to all Federal
16 property. But given that there's no suggestion in the history
17 that Congress was thinking beyond the question of territorial
18 jurisdiction, we think that the Court should be reluctant to
19 construe that statute as in effect a waiver of a Federal
20 facility immunity, such as the type recognized in the Hancock
21 case.

22 Second, there is a specific legislative history in
23 the enactment of Section 2980 that addresses the question of
24 State safety regulations,. The version of Section 20 that
25 initially passed the House provided that no only State
workmen's compensation laws but also State safety and insurance

1 laws would apply to Federal buildings and projects.

2 The Senate amended the bill by deleting this
3 particular reference to State safety and insurance laws. And
4 the Senate report specifically observed that the reason for the
5 deletion was that these provisions were objected to by
6 procurement agencies of the Government inasmuch as such
7 provisions would not only produce conflicts of authority
8 between State and Federal officers, but would also mark a wide
9 departure from the well established principle that Federal
10 officers should have complete charge of any regulations
11 pertaining to Federal property.

12 The House then acceded to the Senate's amendment.
13 And that history, we suggest, is strongly probative of the fact
14 that Congress had no intention when it enacted 290 of waiving
15 any immunity objection to the application of State safety
16 regulations to Federal facilities.

17 Finally, as if to underscore the narrowness of 290,
18 Congress added a proviso to the Statute expressly reaffirming,
19 "by the passage of this section, the United States of America
20 in no wise relinquishes its jurisdiction for any purpose over
21 the property named, with the exception of extending to the
22 several States within whose exterior boundaries such place may
23 be, only the powers above enumerated relating to the
24 enforcement of their State workmen's compensation laws."

25 Now, again, this does not define what State workmen's
compensation laws means, but it does strongly suggest, we

1 think, that Congress did not intend Section 290 to be used as a
2 vehicle for enhancing State regulatory control over Federal
3 property.

4 Putting together the background of Section 290, the
5 text and the legislative history, we think that as a matter or
6 ordinary statutory construction the correct conclusion to draw
7 would be that that statute does not authorize the application
8 of anything more than traditional State workmen's compensation
9 laws to Federal facilities. However, this Court's decision in
10 Hancock requires even more.

11 As stated in the companion case of EPA v. Water
12 Resources Board, Federal facilities are subject to State
13 regulation only when and to the extent that Congressional
14 authorization is clear and unambiguous. And whatever can be
15 said about Section 290 as a matter of ordinary Statutory
16 construction, we think it's plain that it can't pass this more
17 exacting standard.

18 If there are no further questions.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Merrill.

20 We'll hear now from you, Mr. Jaffy.

21 ORAL ARGUMENT OF STEWART R. JAFFY, ESQ.

22 ON BEHALF OF APPELLEE

23 MR. JAFFY: Mr. Chief Justice, and may it please the
24 Court.

25 As an employee in the State of Ohio, I'm covered by
the Ohio Workers Compensation law. I'm covered as an attorney

1 during my work. I would be covered if I worked in a factory.
2 I would be covered if I worked for the Goodyear Company, which
3 is an Ohio Corporation, and I would be covered if I worked for
4 Goodyear Atomic, which is a subsidiary of the Goodyear
5 Corporation. And in fact, the appellant and the Solicitor
6 General concede that Mr. Miller, the person who was injured in
7 the industrial accident, is covered under the Ohio Workers
8 Compensation Law, and covered pursuant to 40 U.S.C. Section 20.
9 No argument on that part of it.

10 What the appellant would like to do is to carve out
11 part of that Ohio Workers Compensation law, persuade you that
12 in fact it is not really workers' compensation, and tell you
13 for that reason it does not enjoy the protection of 40 U.S.C.
14 Section 290. I'm going to discuss with you today a little bit
15 of the facts of the case, some of the history that will explain
16 to you how it is that this provision for additional
17 compensation was placed into the Ohio Constitution and provides
18 this additional compensation to injured workers in Ohio.

19 In addition to that, I will discuss some statutory
20 interpretation with you.

21 As is probably clear to you, Mr. Miller, while
22 working for Goodyear Atomic, was engaged in maintenance work.
23 he was not doing radiological work. He was standing on top of
24 a manually propelled scaffold or high horse ladder, as it's
25 called. The ladder is such that it may be lowered to the
ground, it may be raised to a height of sixteen feet. It has a

1 platform on the top of it, and there's a guard rail so that a
2 person does not unwittingly fall off.

3 What really happened was that Mr. Miller needed to
4 lower the ladder. In order to do that, he first had to lower
5 the guard rail. Now, there he is in a squatting position on
6 the ladder starting to lower the guard rail, and what happened
7 was that a projection from the rail, a bolt that protruded,
8 caught the glove that he was wearing, pulled him off balance,
9 he fell to the ground, fractured his ankle, injured his heel.

10 Now, no argument that it happened, no argument that
11 it's covered under Ohio Workers Compensation Law, no argument
12 that in fact Goodyear Atomic is a complying employer under the
13 Ohio law. Goodyear pays premiums to the State of Ohio for
14 workers compensation coverage.

15 And in fact when this accident happened, Goodyear
16 certified the claim. They said to the State of Ohio, yes this
17 happened, yes this man is covered, yes he should be paid the
18 money. And Mr. Miller was paid worker's compensation. He
19 received because he was off work 29 weeks, the sum of \$258 a
20 week.

21 After he returned to work, he was awarded another
22 type of Ohio's worker compensation and that is called a
23 disability award because he still had some residual disability.
24 And so he received another 16 weeks of worker's compensation at
25 the rate of I think it was \$83 a week. And then he applied for
this award that's the subject of the case here today. An award

1 that is called an additional award where there is a safety
2 violation. The additional award is provided under the Ohio
3 Constitution.

4 I'll discuss the history of it with you in a moment.
5 But so that you understand, our Constitution says, if the
6 industrial Commission determines there is a safety violation
7 and that it caused the accident, the Industrial Commission may
8 award no less than 15 percent of what had been paid to this man
9 by way of workers compensation, no more than 50 percent of what
10 has been paid to this man by way of workers compensation, so
11 that the additional award is I think tied into the whole
12 worker's compensation program.

13 What you have in front of you today is a case that
14 involves as a minimum to this claimant, something like an award
15 for additional compensation of \$1328. The record in this case
16 that was filed in this Court cost more than the minimum award.,

17 The maximum award that this individual may receive is
18 \$4439. And that's what we're involved with. Now, how do we
19 get to the additional award, how did the State of Ohio provide
20 for it.

21 If I were that employee working in Ohio in 1900 and I
22 got hurt in 1900, I would have sued Goodyear Atomic for my
23 injury. I had a common law suit is what it amounted to. By
24 1921 Ohio changed the procedure. And Ohio wasn't the only
25 state that changed that procedure, and I may say a few of these
things about worker's compensation because I assume that you're

1 not familiar, and there's no reason for you to be familiar with
2 worker's compensation. They're State matters traditionally.

3 But in 1912, Ohio provided by its constitution, vote
4 of the people, for a worker's compensation program. They were
5 much like many other States. All states were going through
6 this process of adopting workers compensation programs. So
7 that there was created a State Industrial Board and the purpose
8 of it was to pay compensation where a person was injured
9 because everybody recognized the old system didn't work. We
10 had become some type of an industrialized society by then. But
11 there was in that Ohio Constitution in 1912, a provision which
12 retained the right to sue at common law, the right to sue that
13 employer where in fact the injury occurred because the
14 requirements dealing with the preservation of life or safety
15 had not been met by the employer.

16 So here I am in 1912. I, the employee, have a right
17 at common law to sue. And it stayed that way in Ohio from 1912
18 until 1923 because people figured out by 1923 that it was not a
19 good idea to permit the suit, that it really didn't serve the
20 purpose intended by workers' compensation. And in 1923, our
21 Constitution was amended, and it is that amended that we're
22 considering here today. Because in 1923, the right of the
23 worker to sue was taken away, and it was replaced by this
24 additional award which is in front of me today.

25 QUESTION: I take it that you're convinced that this
is compensatory and not regulatory in view of the history

1 you've recited?

2 MR. JAFFY: Yes, sir. I think the history
3 demonstrates that this is compensatory. I think it is designed
4 by the State to pay the worker who is injured. I think in fact
5 when you look at it, you come to recognize that the State has
6 provided a certain amount of compensation for just a plain
7 injury.

8 QUESTION: Well, Mr. Jaffy, would this be a different
9 case at all if the safety standard at issue for the additional
10 award were one that were contrary to the particular applicable
11 safety standard adopted by DOE?

12 MR. JAFFY: I don't think it would be a different
13 issue. I think it would be the same issue. I have to
14 emphasize of course and I'm certain the Court understands, in
15 this instance the safety requirement is virtually identical.

16 QUESTION: I understand that.

17 MR. JAFFY: There's no difference.

18 But if there were a difference, let's assume that for
19 the moment which is your question, I don't think it would make
20 any difference. Ohio, in fact, is saying, you, Mr. Miller,
21 have been hurt as a result of overlooking this particular
22 requirement. If in fact that's so, you're going to be paid
23 additional compensation because we look to this situation as
24 being a situation of some culpability on the part of the
25 employer.

Now, Goodyear Atomic in that situation, same

1 assumption, conflict of provisions, Goodyear Atomic is entitled
2 to do what I think Goodyear Atomic was entitled to do anyway,
3 which is to totally disregard if it so chooses, what it is that
4 the State of Ohio has provided by way of a safety requirement.
5 What triggers anything in Ohio is the fact that there has been
6 an injury.

7 Goodyear Atomic --

8 QUESTION: There has to be a violation, too, Mr.
9 Jaffy, and that's what I'm a little bit hung up on. I have no
10 problem in light of Section 290 of applying the workmen's
11 compensation law by its terms. The trouble is that the Ohio
12 Workmen's Compensation law does not apply and does not provide
13 the added amount unless the employer is within the terms of the
14 compensation law, in violation of a safety rule of the
15 Industrial Commission.

16 So to find that this employer is within that
17 provision of the Compensation law, I also have to find that the
18 employer was violating a safety rule of Ohio, which means, it
19 seems to me, I have to find that he was subject to the safety
20 rule of Ohio.

21 Isn't that what the Statute says?

22 MR. JAFFY: So that you and I are both perfectly
23 clear, I don't think you have to make a finding on whether
24 there is a violation or not. I think where this case is right
25 now is a question of may the State of Ohio proceed to make a
determination that there has been a violation, and if in fact,

1 it so finds, may it then award additional compensation.

2 QUESTION: Well, and don't we also have to find that
3 this employer can be in violation of Ohio's regulatory laws, or
4 can we let Ohio say he's in violation, when he isn't?

5 MR. JAFFY: Justice Scalia, if I may, I think what
6 you need to find is that Congress provided by 40 U.S.C. 290
7 that State workers' compensation laws are applicable. I think
8 the Statute is very clear. I think it is a situation where
9 Congress has spoken, and I think it is entitled so to speak,
10 and I think it is entitled to make a change.

11 QUESTION: I'm willing to say they are applicable,
12 but they only apply if he is in violation of the State law.
13 That's all Congress said. You can apply them but you have to
14 apply them by their terms. This one says he has to be in
15 violation of Ohio law. That raises a totally separate question
16 having nothing to do with the Workmen's Compensation law. Is
17 this employer in violation of the Ohio safety laws?

18 MR. JAFFY: I don't think it raises a separate
19 question, because all that Ohio does, if it determines that the
20 injury is due to the safety requirement not having been
21 followed, all that happens is that compensation is paid to Mr.
22 Miller. Goodyear might choose to do absolutely nothing, other
23 than pay. Goodyear may decide that they couldn't care less that
24 this particular safety requirement of Ohio. Goodyear may never
25 again have to pay anything because no one is ever again hurt in
Ohio.

1 Goodyear came to Ohio, Goodyear Atomic came to Ohio
2 and that plant opened in 1953. And from 1953 through 1980,
3 with these thousands of pages that the attorney for the
4 appellant says exist, Goodyear was never called on to pay any
5 additional compensation. There was never any injury.

6 And I might add to you, there are not thousands of
7 pages, either. The pages for the factory and workshops safety
8 provisions in Ohio number some approximate 230 pages. They are
9 not all those volumes that were exhibited to you.

10 This is actually the Ohio Factory and Workshop
11 Provisions. Goodyear, when that claim was filed, Goodyear
12 advised the State of Ohio that it followed the Ohio Safety
13 Requirements. You will find that in the record at page J-43,
14 is the response of Goodyear. They have followed our Ohio
15 requirements. Apparently, they didn't have any trouble
16 following our Ohio requirement.

17 And so there we are. And as I say, I look at this
18 case and say, I think, it's really a question of did Congress
19 permit this. It seems to me the Statute is clear. And I have
20 to disagree with some of the comments made by the Solicitor
21 General as to the history of that particular statute and as to
22 its significance.

23 And I think it all goes back to 16 U.S.C. 457 when
24 Congress passed 457, it remitted a tort action, and there were
25 courts, as you probably understand, who felt that 16 U.S.C. 457
applied to Workers' Compensation. Until this Court decided

1 Murray v. Gerrick & Co., and kind of threw up in the air the
2 question of, was workers' compensation covered, there had been
3 decisions that said workers' compensation was covered under
4 457. So that had we without even getting to 290, had we had
5 just 16 U.S.C. 457 which applied to workers' compensation, Mr.
6 Miller would have had his claim covered, as permitted by
7 Congress.

8 QUESTION: Mr. Jaffy, you referred us to the letter
9 of Goodyear about this incident at the Joint Appendix at 43.

10 MR. JAFFY: Yes, sir.

11 QUESTION: That letter refers to the fact that the
12 scaffold had been inspected by the Safety Department and found
13 to be in satisfactory condition. Do you know whether that
14 refers to the Ohio Safety Department or the Company Safety
15 Department?

16 MR. JAFFY: It refers to the Company Safety
17 Department.

18 QUESTION: I see. They were not routinely inspected
19 by the Ohio safety inspectors.

20 MR. JAFFY: No.

21 If I might say, not only was the ladder inspected by
22 the Company safety department, you will find in there, and I
23 think it's at JA-50, a report from the Union safety
24 representative who also inspected that particular scaffold.

25 So that this Court understands, the parties entered
into a stipulation of fact, if there's a question, for example,

1 as to the involvement of the security interests of the United
2 States, these parties entered into a stipulation of fact as to
3 what happened. Goodyear provided pictures of the scaffold so
4 that the State of Ohio could see what the scaffold looked like.
5 There was an accommodation, if you will, of --

6 QUESTION: No on site inspection of the plant by the
7 Workmen's Compensation people?

8 MR. JAFFY: No, no on site inspection. And it may
9 very well be that to some extent that makes it difficult for
10 the claimant to establish what happened, because in Ohio, the
11 burden is on the claimant to show that the claimant is entitled
12 to the compensation. Nevertheless, that's the claimant's
13 problem. That's not in front of you today.

14 The point that I make is that it is possible and in
15 fact the parties did make accommodations in connection with
16 this matter.

17 By the time the case got to the Industrial
18 Commission, the Department of Energy had come in, they raised a
19 pre-emption argument, and it may very well have been the first
20 time that kind of an argument has ever been raised to the Ohio
21 Industrial Commission, and they backed off. Both of our
22 Courts, the Court of Appeals, and the Supreme Court, were in
23 favor of granting a mandamus or that the Industrial Commission
24 go forward and make a determination in this matter, and from
25 there, your Court noted probable jurisdiction, and we're here
today.

1 If you look at it in terms of the statute, it seems
2 to me that 290 was and is written about as broadly as a statute
3 could be written. And you can almost see the Congressional
4 people trying to write it in such a fashion that should this
5 Court come to grips with this problem again, the Court would
6 understand that the intent of the Congress is to permit
7 workers' compensation to be paid as the State would provide.
8 And the language they use is in the same way and the same
9 extent.

10 And they have started out in such a fashion that it's
11 about as broadly written as anything could be when they say
12 whatsoever authority the State is authorized to handle workers'
13 compensation has the authority to proceed with this matter.

14 QUESTION: Mr. Jaffy, I think what the Government's
15 position would be is that in the same manner and in the same
16 extent simply means this, that where a person is not in
17 violation of a State regulation, he should not be assessed the
18 surcharge. And they claim that this particular contractor is
19 not within the meaning of the Ohio Workmen's Compensation law,
20 in violation of any State regulation, because those State
21 regulations do not apply.

22 Now, are you maintaining the position that the
23 regulations are applicable, that the Ohio authority has power
24 to regulate plant?

25 MR. JAFFY: No, sir. I do not say the Ohio Industrial
Commission has power to regulate. I say the Ohio Industrial

1 Commission has power to pay the compensation to the person that
2 got hurt.

3 QUESTION: But it's only payable if the person's in
4 violation of a regulation. That's the way the compensation law
5 reads.

6 MR. JAFFY: It is a way of explaining or trying to
7 explain that there is this requirement. It's much different,
8 Justice Scalia, then let's say we brought a suit, and we argued
9 that this was negligence per se that had occurred here, because
10 there is a State statute that says this is a particular
11 requirement. There isn't any real difference. That's exactly
12 the same situation here. The State has tried to protect the
13 work place safety of people, and they have tried to do it in
14 this fashion, and all that happens is, with this particular
15 section we're talking about or this particular safety section,
16 it has provided that the exposed surfaces are not supposed to
17 have any sharp edges, burrs or protruding parts. Which is
18 virtually the same as the OSHA standard.

19 And in fact, it had a protruding part and the man got
20 hurt. And when the union representative made his safety
21 inspection some six or seven months later, the protruding part
22 was still there. It had not changed. Goodyear had not done
23 anything with it, and they didn't have to do anything with it,
24 and no one from the State of Ohio came in to make them do
25 anything with it.

The only thing the State said was, okay, if in fact,

1 this violating is here, there's going to be some money paid to
2 this man. One of the things the Solicitor General talks about
3 in his brief is that the State may provide for compensation but
4 they can't just go throwing it out. We're not going to enrich
5 this person, we can't give him more than full compensation.

6 And I don't really know what full compensation is,
7 but if you look to what Ohio does, Ohio basically gears its
8 compensation on a person's salary. It has a limit which is 66-
9 2\3rds percent of the individual's salary. It also has a limit
10 which is a statewide maximum so regardless of how much you
11 make, you cannot receive more than whatever is the statewide
12 maximum.

13 If in terms of 66-2\3rds percent, it's based on
14 wages, there is no provision for pain and suffering that the
15 individual may have had, there is no provision for loss of
16 consortium, strictly limited to wages. Now, if you add in the
17 additional compensation which is this award, and I've tried to
18 say to you, this is all one package of workers' compensation,
19 let's say you add in the maximum of 50 percent of what has been
20 paid in workers' compensation. If you take the 66, and you
21 take 50 percent of that, the State is going to award another 33
22 percent, bringing you up to roughly 100 percent of the person's
23 wages.

24 That the State of Ohio has considered full
25 compensation. It seems to me that this is not just throwing
money away to a claimant has been hurt, it is a legitimate

1 effort of the State to pay a little more where there is
2 culpability on the part of the employer, it is something that
3 the employees of the State have given up by way of their giving
4 up the right to go into Court and sue. And that was the trade
5 off. They gave up the right to go into Court and sue in return
6 for having the Industrial Commission make the particular
7 awards.

8 The appellant here, and the Solicitor General, would
9 agree that the basic compensation may appropriately be paid
10 under 290, but they want to carve out the additional
11 compensation. Nevertheless, they still want to retain the
12 right of not being sued by the employee, which is what that
13 1923 amendment provided.

14 QUESTION: Mr. Jaffy, can I just clear up a couple of
15 things in my own mind. Would you agree that Ohio could not
16 impose a penalty payable to the State for a safety violation of
17 this kind?

18 MR. JAFFY: Yes, I think that I would agree to that.

19 QUESTION: So to that extent, the regulations are
20 preempted. And they also could not close down the plant, or
21 deny them the opportunity to operate as they did in the Hancock
22 case?

23 MR. JAFFY: Yes. There's no question about closing
24 down the plant, and very frankly, I think that's the key
25 element with the Hancock case and it involved more, as I'm sure
you know, more than just an AEC operation. When the State of

1 Kentucky decided that they were going to impose a permanent
2 requirement, they affected the Army in Kentucky, the affected
3 the TVA in Kentucky and they affected the AEC in Kentucky. And
4 the bottom line of what they were saying was, it doesn't
5 matter.

6 Let me go back one second. Congress provided that
7 the State had authority under the Clean Air Act to make
8 provisions dealing with pollutants of the air. When Hancock
9 hit this Court, you were in the situation of looking at it and
10 saying, it doesn't matter if the Army, the TVA, and the AEC are
11 in compliance with all of Kentucky's requirements on clean air.
12 If they don't get the permit, they will be shut down. And
13 basically I read Hancock to say that -- I don't think Hancock
14 applies to our situation at all -- I read Hancock to say that
15 there is no way any State may shut down an operation of the
16 Federal Government.

17 And I hasten to add, Justice Stevens, that the State
18 of Ohio makes no moves in those directions. All that we have
19 involved here today is we pay the man the additional money.

20 QUESTION: Let me ask you one other question. You
21 showed us the size of the regulations. I imagine the Federal
22 Regulations are probably just about as big, I don't know. But
23 what is the sanction for violating the Federal regulation of
24 this kind? What remedy is the Federal?

25 MR. JAFFY: There is nothing paid to the claimant,
number one. In other words, Congress has made no provision for

1 any kind of a Federal remedy for violation of the OSHA
2 regulations.

3 QUESTION: Well, not OSHA, but there's special
4 regulations, not OSHA regulations, but regulations related to
5 this particular plant as I understood it, or at least to
6 nuclear facilities.

7 MR. JAFFY: They have authority in connection with
8 the radiological aspects to provide regulations.

9 QUESTION: But don't they also provide safety
10 regulations for the non-radiological aspects of the operation?

11 MR. JAFFY: The legislation permits them, the
12 legislation permits them to adopt. They in fact proceeded to
13 adopt the OSHA regulations.

14 QUESTION: Oh, I see, the OSHA regulations do apply.

15 MR. JAFFY: Yes, as to non-radiological aspects,
16 okay. And there is no provision under OSHA for any kind of a
17 remedy to the person who is hurt, no Federal remedy, in other
18 words. And I guess what I'm saying is that there is a
19 presumption that where the Federal Government has not provided
20 for a remedy to the person who is injured, that the State
21 remedies would apply.

22 QUESTION: We'd have no problem here of course, and I
23 assume the Government would concede the case -- I assume the
24 Government would -- if the Ohio provision read that this
25 surcharge is applicable if someone violates a specific safety
rule of the Industrial Commission or of any other Governmental

1 entity which may have jurisdiction. Presumably, Ohio could do
2 that, and if it read that way, I guess the Government would
3 agree with you that the surcharge is chargeable, which means
4 Ohio would look to see whether there had been a violation of
5 OSHA or not.

6 MR. JAFFY: Well, we may be making this more
7 complicated, Justice Scalia, than we need to.

8 QUESTION: Well, we tend to do that.

9 MR. JAFFY: And very frankly, I have to apologize,
10 I'm not certain that I at all understand the distinction that
11 you're trying to make. Our provisions for State requirements
12 are requirements adopted by the Commission or requirements
13 adopted by our State Legislature.

14 QUESTION: Well, what I'm saying is I think it would
15 be unfortunate if this thing sort of falls between the cracks,
16 that is to say, if it didn't violate the Ohio provision, but
17 did violate OSHA, surely there ought to be a surcharge
18 applicable. And I assume Ohio could write it that way. It
19 could say, if you violate our standards or the standards of any
20 other governmental entity that's applicable, we're going to hit
21 you with a 15 percent or whatever surcharge.

22 MR. JAFFY: I think if the State of Ohio were to
23 adopt the OSHA regulations as part of their safety
24 requirements, what you're saying is 100 percent correct. Ohio
25 has not done that. I might say unfortunately, they haven't
done it, but they haven't, and that's the status of where we

1 are today.

2 The Industrial Fabricators case which is in the
3 Appendix which was a Federal District Court case coming out of
4 our Southern District of Ohio, involved an argument which in
5 some ways parallels this because the employer there was arguing
6 that the additional safety award should not be paid because it
7 conflicted with OSHA. The Federal District Court didn't agree
8 with that. The Federal District Court indicated, I thought
9 very clearly, that our additional compensation is a
10 compensation matter, primarily. While it may have some
11 incidental effects in terms of causing an employer, if you
12 will, to clean up his act, that's not the primary purpose of
13 our Ohio law.

14 And I think that case, and the Ohio Supreme Court
15 cases that have been cited, indicate this.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jaffy, your
17 time has expired.

18 Mr. Tait, you have two minutes remaining.

19 ORAL ARGUMENT OF ROBERT E. TAIT, ESQ.

20 ON BEHALF OF APPELLANT

21 MR. TAIT: Thank you very much, Mr. Chief Justice.

22 Very quickly, I'm having a little bit difficult time
23 comprehending where Mr. Jaffy's coming from with respect to
24 first of all, telling this Court he agrees I assume pursuant to
25 the Hancock doctrine, Ohio would not have the authority to
impose fines for violation of a specific safety requirement. At

1 the same time indicate that they have the authority to order an
2 employer to pay compensation to an employee.

3 Clearly, the primary basis behind the specific safety
4 requirements promulgated by the State of Ohio are to promote
5 safety. No one questions that and the Attorney General on
6 behalf of the Industrial Commission concedes that fact, that
7 the primary basis of those requirements are to promote safety
8 through regulation of employer conduct.

9 Now, assuming that you take that as a given, and I
10 don't think that you can simply ignore the practicalities of it
11 --

12 QUESTION: Well, Mr. Tait, what about Justice
13 Scalia's question. Supposing Ohio changed its statute and said
14 that you get the extra money if you violate either a State law
15 or if it's been preempted, a Federal regulation that is
16 applicable to that facility. That would be permissible,
17 wouldn't it? And if that's the case, you're not fighting about
18 much because the legislature of Ohio can correct it very
19 promptly.

20 MR. TAIT: Mr. Justice, I believe that pursuant to
21 Hancock, that decision is placed in the hands of Congress.
22 Hancock says that where you have a Federal facility --

23 QUESTION: No, no. My question is what if the Ohio
24 legislature passes such a statute?

25 MR. TAIT: Yes. But I believe that the answer to
that question, and I assume it's the answer that the United

1 States would maintain is that that decision whether to impose
2 for violations --

3 QUESTION: No, it's not fines, it's additional
4 compensation.

5 MR. TAIT: -- of Federal facilities, or for violation
6 of Federal safety regulations is within the hands of Congress.

7 QUESTION: And that now Congress has said there shall
8 be no remedy for such a violation?

9 MR. TAIT: Congress has given the Department of
10 Energy, and the Department of Energy has promulgated its own
11 regulations, a pervasive scheme and a pervasive scheme of
12 remedies.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tait.

14 The case is submitted.

15 (Whereupon, at 11:54 a.m., the case in the above-
16 entitled matter was submitted.)

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DOCKET NUMBER: 86-1172

CASE TITLE: *GOODYEAR Atomic v INDOUST. Comm. of OHIO*

HEARING DATE: 1-18-88

LOCATION: *WASHINGTON, DC.*

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the *Supreme Court of the United States*

Date: 1/19/88

Margaret Daay

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