ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RODERICK A. DeARMENT, ACTING SECRETARY OF LABOR, Petitioner, v. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

CASE NO: 89-1541

PLACE: Washington, D.C.

DATE: November 27, 1990

PAGES: 1 - 49

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- X

RODERICK A. DeARMENT, ACTING SECRETARY OF LABOR, Petitioner : v. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL. : No. 89-1541

- X

Washington, D.C.

Tuesday, November 27, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

CLIFFORD M. SLOAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOHN D. FAUGHT, ESQ., Denver, Colorado; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1541, Roderick A. DeArment, Acting Secretary of Labor v. Occupational Safety and Health Review Commission.

You may proceed, Mr. Sloan.

ORAL ARGUMENT OF CLIFFORD M. SLOAN

ON BEHALF OF THE PETITIONER

MR. SLOAN: Mr. Chief Justice, and may it please the Court:

This case concerns the Occupational Safety and Health Act of 1970. In that act Congress established a comprehensive regime for occupational safety and health. Congress gave the Secretary of Labor the authority to set occupational safety and health standards through issuing regulations, and he gave the Secretary the authority to administer the program through a variety of means, including inspecting businesses and issuing citations for violations of the statute or regulations.

At the same time Congress created the Occupational Safety and Health Review Commission. Its sole function is to hear challenges to the citations. The Commission's decisions, in turn, are reviewable in the courts of appeals. The question in this case is whether,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

when the Secretary and the Commission disagree about the meaning of the Secretary's regulations, deference should be given to the Secretary or to the Commission. We believe that deference should be given to the Secretary because Congress gave the Secretary the authority to make policy through issuing regulations and administering the program, and the ability to provide reasonable interpretations of those regulations is an aspect of that policy-making authority.

QUESTION: Mr. Sloan, does that same principle apply to the Commission itself when it decides issues? Does it have to defer to the Secretary's interpretation?

MR. SLOAN: Yes, it does, Justice O'Connor.

QUESTION: So the error that was made here, in your view, was made at the Commission level by its failure to defer to the Secretary's position?

MR. SLOAN: That's correct. We believe that the Commission failed to give proper deference to the Secretary's position. For the reviewing court, we believe that the question should be the same as for the Commission, which is whether the Secretary's interpretation was reasonable. And so therefore the reviewing court should just address that question directly, considering carefully the Commission's opinion and the light that it can shed on that issue, but

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

basically facing the same question that the Commission was facing.

QUESTION: I'm curious here. There is a regulation that appears to be more clearly in point for this particular violation, and that was (g)(4)(i), and the Secretary, or the department never amended its complaint to refer to that regulation. It chose to rely instead on the training regulation for the violation. Why was that?

MR. SLOAN: The reason for that was that the regulation that was relied on was perfectly appropriate. The particular provision is a training provision, but it has a fitting component. It specifically refers to respirators being fitted properly, and it's important --

QUESTION: Well, when you rely on the training regulation, it's perhaps ambiguous, or you have to stretch to see how it applies. But if reliance had been placed on the other regulation it would seem rather clear, wouldn't it?

MR. SLOAN: Well, in terms of some of the objections that have been raised to it, those objections would not be present.

But let me address the separate fit provision in its context.

QUESTION: Yeah, I just -- it seems the present interpretation would appear to make it duplicative. You

don't even need (g)(4)(i), I guess, in light of the Secretary's reading of the training regulation.

MR. SLOAN: Well, part of the reason --

QUESTION: I might say that I share Justice O'Connor's concern as to why an amendment wasn't made, or why you didn't rely on the other provision.

MR. SLOAN: Two -- there are two reasons. One has to do with (g)(4)(i), and one has to do with (g)(3), which is what incorporates the general respirator provision of section 134. Taking (g)(4)(i) first, what remains of that provision is a vestige of the original provision. It was initially, as promulgated by the Secretary, an entirely different provision. The sentence that is there now, which has the language "fitted properly," which is the same phrase that is in section 134, "fitted properly," that initially was followed by a specific quantitative fit requirement which is very different from the qualitative fit test which is at issue in this case, the banana oil test where an employee puts on a respirator and is asked if he can detect the smell of the banana oil. That's a qualitative fit test. A quantitative fit test actually measures on a quantitative basis the exposure that the respirator is allowing.

Initially (g)(4)(i) included a quantitative fit provision. The "fitted properly" sentence was the first

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

sentence, and it then went on to the quantitative fit provision. The quantitative fit requirement was invalidated in the course of litigation within the year and a half previously to this inspection here, which was in August 1979. That had been invalidated in 1978. Now, the first sentence of (g)(4)(i) ultimately, when the Secretary corrected the regulation, kept the first sentence, but it was a very different provision from the one that had initially been there. And so that's, in terms of the context on (g)(4)(i) --

QUESTION: That may be interesting background, but it doesn't answer the question, because the shorter version was in effect, was it not?

MR. SLOAN: At the time --

QUESTION: Here, yes.

MR. SLOAN: That's correct. At the time --

QUESTION: So why wasn't it used or cited?

MR. SLOAN: Okay, and that gets to the second -- that gets to the second question, the second part of the question. The second part of the question has to do with (g)(3) in Section 134 and its scope. There are many circumstances in which section 134, the general provision that is incorporated by (g)(3), applies, and there is no separate fit provision as in (g)(4)(i). It applies of its own force in many circumstances, and it applies, sometimes

when it's incorporated in another regulation, without a sentence as is now in (g)(4)(i). In those circumstances the Secretary has consistently interpreted section 134 to impose a fit requirement, and if the conclusion that section 134 does not impose a fit requirement because of the existence of this separate fit provision in (g)(4)(i), would strip the regulation of an essential part of its meaning, in the Secretary's view, in those other contexts, even though the predicate for doing so, the separate fit provision, is not -- is not there.

And the reason that I'm going into this background is to say that section 134, which is incorporated, has a broad applicability, and this is the standard way that it has been interpreted. It has been interpreted to include that fitting component.

The reason I went into the background on (g)(4)(i) is that although the shorter version remained in effect, it had been primarily viewed as the quantitative fit requirement, and it had been viewed that (g)(3), which incorporated section 134, imposed, among other things, a requirement that, as the regulations state, the employee had an opportunity to have the respirator fitted properly, and have an opportunity to have the respirator in a test atmosphere.

And so it was a perfectly valid interpretation.

There was no reason to think that it was only covered by (g)(4)(i), and in fact that would be inconsistent with the way section 134 had been interpreted in a wide variety of other contexts.

QUESTION: Mr. Sloan, where in your brief or in the petition are these various sections set out?

MR. SLOAN: The regulations, Justice -- Chief Justice Rehnquist?

QUESTION: What you have just been talking to in response to Justice O'Connor and Justice Blackmun's questions.

MR. SLOAN: Okay. Section 134 is at page 115 -- I'm sorry, section 134(e)(5) is at page 115a of the petition -- of the appendix to the petition. 1029(g), both (3) and (4) is on page 122a. In (g)(4)(i), what is left is one sentence. There was initially another sentence which imposed the quantitative fit requirement which has been deleted from the current regulation and is not reproduced here. So what is here is the vestige that remained after the invalidation of the earlier provision, after the invalidation of the quantitative fit requirement --

QUESTION: Is -- one of the regulations that the Secretary relied on is not reproduced?

MR. SLOAN: No, Chief Justice Rehnquist, that's

not what I'm saying. What I am saying is that one of the regulations that has been discussed in the opinions initially had a different form than it is here. In terms of its applicability and in terms of its current state, it is in the form that it was reproduced on page 122a. So this is the current regulation, and this is the regulation that was effective at the time of the inspection.

QUESTION: Thank you.

MR. SLOAN: As a clerical matter, the second sentence wasn't deleted until somewhat later, but this is what was in effect at the time.

I should point out that these questions about the reasonableness of the Secretary's interpretation are precisely what the court of appeals did not find it necessary to address, because in the court of appeals' view it was sufficient to defer to the Commission's interpretation.

In the court of appeals' view in cases of conflict between the Secretary and the Commission, if it determines that the regulation is ambiguous, it defers to the Commission if it finds that the Commission's view is reasonable. So the court found that the regulation was ambiguous, found that the Commission's interpretation was reasonable, and never explicitly addressed the reasonableness or not of the Secretary's interpretation.

That is exactly the question that we think should have been addressed by the court and was not.

QUESTION: Are you, therefore, Mr. Sloan, asking us to send the case back so the court can address that question, or are you asking us to decide it?

MR. SLOAN: We think that it would be appropriate to send the case back to address the reasonableness after clarifying the threshold question which has divided the courts of appeals, which is whether deference should be given to the Secretary or to the Commission. And we think because the court of appeals did not address the question it would be appropriate to send it back to consider it in the first instance.

QUESTION: Would you agree that if one just reads (e)(5), that the Secretary's position is unreasonable?

MR. SLOAN: No, I would not agree with that, because (e)(5) includes the language that the employee must have an opportunity to have the respirator fitted properly. And if -- and it also includes the language about a test atmosphere. And what the Secretary said is that this imposes two requirements. It imposes a requirement that the employee be exposed in a test atmosphere, and secondly, that if the test results show that the respirator does not fit, the employer must do

something about it, must give the employee a respirator that does fit. That's the meaning of fitted properly.

What the Commission said, and its view was that the regulation required only the first of those. It does require the employer to put the employee in a test atmosphere, but it then leaves the employer entirely free to ignore the test results and to send the worker back into the work environment with the respirator after getting results indicating that the respirator does not fit. And in this particular case there not only is the language of the regulation, but there is the fact that respondent had actual notice that this was the Secretary's interpretation, as is stated in the Commission's decision and in the administrative law judge's decision.

The Secretary's compliance officer explained to the respondent that the respirators had to be fitted with banana oil or another kind of test atmosphere, and respondent revealed this understanding in its own training films by saying to its workers that if a test indicated that its respirators did not fit properly, it would be provided -- the employees would be provided with a respirator that did fit. Yet despite this actual notice, respondent was not doing this, the Secretary's compliance officer discovered, on this inspection.

QUESTION: Mr. Sloan, you spoke of the question

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

of relative deferences between the Secretary and OSHA as being a threshold question. Why isn't the threshold question the one which Justice Stevens began to pose, and that is whether the Secretary's interpretation can be accepted by us as reasonable in the first place? Because if it isn't, I don't see how we get to the question of relative deference.

MR. SLOAN: Well, we agree that that should be the primary -- that that should be the first question that the Court looks at, and that was a serious error in the court of appeals' decision. It would be our view that if a court determines that the Secretary's interpretation is reasonable, then it should be upheld. And I suppose there could be a view that if the Secretary's interpretation was reasonable, that then raised other questions of deference. But that is exactly the question that we think the Court should address, and that it --

QUESTION: But that isn't the question you presented in your petition for certiorari. In your petition for certiorari you present the question of should the Secretary's view receive deference rather than that of the OSHA.

MR. SLOAN: That's correct, Chief Justice Rehnquist. What I was trying to say in my response to Justice Souter is that we believe that a proper analysis

of the issue would be to recognize first that the Secretary is entitled to deference, which means that the Secretary's reasonable interpretation should be upheld. And so therefore the first question that the court of appeals should address is is the Secretary's interpretation reasonable.

QUESTION: You're talking about what the court of appeals should address rather than what we should address.

MR. SLOAN: That's right.

QUESTION: I didn't understand that.

MR. SLOAN: That's right, Chief Justice.

QUESTION: Well, I suppose part of your -- part of the question you presented is whether the Secretary's position is reasonable? Because you don't defer to something that's unreasonable.

MR. SLOAN: You don't defer to something that's unreasonable, I agree with that. And respondent has urged this Court to hold that the Secretary's interpretation is unreasonable. And if the Court --

QUESTION: You may -- I suppose you would think we would be unreasonable if we said that the Secretary's position is unreasonable. But, nevertheless, what if we thought that? I don't know why we should get mixed up with questions of deference then.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SLOAN: Well, in terms of the question, it is related to the question of deference, Your Honor, because if in fact the Commission should receive deference in its reasonable interpretations, then, as the court of appeals did, there is no reason to consider the reasonableness of the Secretary's interpretation.

There's an important legal question at stake here which has splintered the courts of appeals, which is what are they supposed to do, how are they supposed to approach the issue when the Secretary and the Commission disagree. And it, it's our view that the Secretary's reasonable interpretation should receive deference. And once that principle of law is clarified --

QUESTION: Well, if the -- you think the issue here is just whether there should be deference or not, and the court of appeals didn't think that it was entitled to any deference, so it didn't reach the reasonableness.

MR. SLOAN: Of the Secretary's interpretation.

QUESTION: Yes, exactly.

MR. SLOAN: That's right.

QUESTION: Exactly. So we don't need to -- we don't need -- technically we don't need to get mixed up into the reasonableness issue.

MR. SLOAN: Well -- I think that's correct, the Court does not have to get mixed up in the reasonableness

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

issue if it clarifies the general legal principle that has divided the courts of appeals.

QUESTION: Mr. Sloan, I don't know why you, I thought you conceded earlier that the preliminary issue was whether this was a reasonable interpretation of the Secretary or not. It seems to me neither of those two questions is logically prior. We don't have to consider whether deference is due if it's unreasonable, but just as equal -- equally we don't have to consider whether it's unreasonable if no deference is due. I don't know how one can identify either of those two questions as the prior one. You don't have to reach the other if you answer the other one a certain way.

MR. SLOAN: The reason why I think that the threshold question should be which entity receives deference, and I didn't mean to say anything contrary to that --

QUESTION: I thought you did. All right.

MR. SLOAN: The reason why I think that the identity of the entity that should receive deference is the threshold question is because that is the legal rule that then structures the court's analysis in its case-by-case consideration of these cases, and that's exactly the issue that has generated the --

QUESTION: It's the more important question, no

doubt.

MR. SLOAN: That's right.

QUESTION: In whatever might be logically prior in some sort of theoretical analysis, one question is presented by this petition for certiorari, and that is who gets deference.

MR. SLOAN: That's correct, Chief Justice Rehnquist.

QUESTION: Yes, but it's presented on the assumption that there is some ambiguity that needs -- justifying deferring to somebody. If the language were absolutely clear one way or the other, we certainly wouldn't be arguing about deference, would we?

MR. SLOAN: Well, it is -- the question presented arises from the judgment of the court of appeals.

QUESTION: They assume that there was ambiguity, and therefore they decided which one to have to defer to. And you have presented the case on the assumption there is ambiguity. So in other words you have assumed, you have gone past the hurdle that Justice Souter raised. But if you're starting from scratch, you're the first reviewing court, and it looks absolutely clear to you, you're not going to worry about deference, are you?

MR. SLOAN: If there, if there is no ambiguity

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

there is no question of deference presented. And I think that's a very important point in focusing on what the issue in this case is and what exactly is at stake, because we completely agree with respondent that the Secretary's interpretation should be set aside if it is inconsistent with the plain meaning of the regulation or with the plain language of the regulation. And we also completely agree with respondent that the Secretary's interpretation should be set aside if it is unreasonable.

The only category of cases that is affected by the issue in this case is the category of cases in which the Secretary's interpretation is reasonable and would be found to be so by the reviewing court. And in those circumstances we believe that the Secretary's reasonable interpretation should be upheld.

QUESTION: Mr. Sloan, may I ask you one other question? Do you take the position that the same degree of deference is owed to the Secretary if her position is taken only in a compliance order or in the litigation itself, rather than in some other forum, to whit, a consistent interpretation or one adopted by rule, or that sort of thing?

MR. SLOAN: That issue would bear on the reasonableness of the interpretation. In answer to your question whether if it is only in a compliance order it

should receive deference, we would say that it should receive deference, but that there should be a full consideration of the reasonableness of the interpretation. And to the extent that there would be a prior history of such interpretations, then it would strengthen the case for the reasonableness.

It seems that --

QUESTION: Well, suppose it just comes to the Commission to decide, and all they have is that particular compliance order. Do they have to bow down and defer every single time because the Secretary has issued a compliance order?

MR. SLOAN: Well, they --

QUESTION: So the Commission has to defer, and the court subsequently has to defer? How do they apply their analysis when that's all you have?

MR. SLOAN: When that's all you have, which is the hardest question -- I should point out that this issue encompasses a great many other kinds of interpretations by the Secretary which aren't as hard as that hardest case. But in that hardest case, what the Commission and the court should do is to see whether the interpretation that is reflected in that interpretation -- I'm sorry, whether the interpretation that is reflected in that citation is reasonable. Now you have certain questions in those

circumstances that you don't have if the Secretary has previously given some clarifying interpretation, even though not in a regulation. For one thing, the question - -

QUESTION: Why is that? Why isn't the issuance of a citation -- is it the official act of the Secretary or not? Is it?

MR. SLOAN: It is the official act.

QUESTION: Is it a governmental act?

MR. SLOAN: Yes, it is.

QUESTION: And official. Then why -- then why does it get stronger, why would an unreasonable interpretation, you say, only become more reasonable if there have been a large number of citation orders? I mean, it's either reasonable or it's unreasonable. 10,000 repetitions makes it truth?

MR. SLOAN: Well --

QUESTION: I don't understand that.

MR. SLOAN: I agree that it should be upheld if it's reasonable, and that's why my answer to Justice O'Connor on this question was that yes, it should, it should get deference. In terms of comparing that action to other interpretations, the reason why I'm saying that it might bear unreasonableness is for two reasons. One reason is that it relates to the question of notice. If

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the interpretation is only in the enforcement action, you would want to be very careful that -- about notice. Now, normally reasonableness would encompass notice. To the extent that it's a reasonable interpretation, you would think that an employer would fairly have notice of it. But because, if that is the only place that it is appearing --

QUESTION: I think you can play that in reverse. I think a reasonable interpretation gives notice, but I don't think that when you give somebody notice you have thereby achieved a reasonable interpretation. I mean, if I give you notice of an unreasonable interpretation, it doesn't become more reasonable by the fact that I gave you notice of it.

MR. SLOAN: I --

QUESTION: I hereby advise you I'm going to interpret black to mean white. That doesn't make that interpretation reasonable.

MR. SLOAN: I agree with that. And if that interpretation was issued 3 weeks before a citation, then, and then you had a citation reflecting that interpretation, then the only question would be the reasonableness of the black means white. But you wouldn't have a question about notice. In the case where it's only in a citation, you have exactly the same reasonableness

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

inquiry, but you have an additional question, which you don't have in the other case, which is a question of notice, which you would want to be careful about.

And in terms of notice it's important, and the role of the Commission in terms of what it's supposed to do in that circumstance, it's important to point out that in addition to the adjudication of the challenge itself, a very important role that the Commission plays and that it gets deference on is the establishment of the penalty and of the category of violation.

In terms of the penalty, the -- there are four factors that the Commission can consider in determining the appropriate penalty, and in some cases in eliminating a penalty altogether, and those are the size of the business, the gravity of the violation, the good faith of the employer, and the previous history of violations of the employer. And in those kinds of factual discretionary determinations the Commission gets substantial deference, and it is the Commission rather than the Secretary that is entitled to deference on those questions.

And so even if you have a situation where an employer has received notice through a reasonable interpretation, but somehow still was in good faith, then in those circumstances the Commission can still exercise its important role of adjudication by taking that

subjective good faith into account in the assessment of penalties.

QUESTION: Are those statutory factors?

MR. SLOAN: Yes, they are.

I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Sloan.

Mr. Faught.

ORAL ARGUMENT OF JOHN D. FAUGHT

ON BEHALF OF THE RESPONDENTS

MR. FAUGHT: Mr. Chief Justice, and may it please the Court:

What this case is about is a direct attack by the Secretary of Labor on the Occupational Safety and Health Act and the Administrative Procedure Act. The Secretary seeks to overturn a compromise reached by Congress when it considered this legislation more than 20 years ago, and she seeks to upset a system of checks and balances that has been in place since that time.

In considering the alternative bills before it in 1970, members of Congress expressed strong concern that placing all the administrative power in one agency head, the Secretary of the Labor, would not gain the acceptance of the regulated community that was necessary to achieve the objectives of the act.

To resolve these concerns Congress reached a compromise, and that compromise was to remove the adjudicatory authority from the Secretary and place it in an independent agency, the Occupational Safety and Health Review Commission. The Review Commission was given the express authority to carry out the adjudicatory functions of the -- under the act.

The Secretary's position today is that the Commission has no policy-making authority in its role as the adjudicator. The Secretary in a sense -- her position would rip the heart out of the adjudicatory authority that has been given to the Commission, and would render the Commission nothing more than a rubber stamp.

QUESTION: Mr. Faught, I suppose Congress could have just not have provided for administrative adjudication at all. That could have been just a direct enforcement statute where if the Secretary wanted to enforce the statute, the Secretary would have to go to an Article III court.

MR. FAUGHT: That is not --

QUESTION: There are a lot of statutes where you don't have an administrative agency adjudicating. The enforcer just has to go to court. And if that had been the case, I suppose an Article III court would have been faced with the same question, do we have to defer to the

Secretary or not, or should we just make our own completely independent judgment about what the statute means or what the regulation means.

MR. FAUGHT: That is not correct, Justice White.

QUESTION: What?

MR. FAUGHT: What Congress created was an independent administrative agency.

QUESTION: I know that, but let's assume for the moment that they had put it in a court, an Article III court. What would be the rule an Article III court would have to follow with respect to the meaning of a -- the Secretary's regulation?

MR. FAUGHT: The Article III court would look at the -- what Chevron, and apply the analysis under Chevron as to whether it gives way to the court or way to the Secretary.

QUESTION: Do you think the -- do you think the -- you think OSHA, the Commission doesn't have to follow Chevron, is that it?

MR. FAUGHT: Your Honor, Chevron is a judicial --

QUESTION: A court would have to, but the Commission doesn't?

MR. FAUGHT: The Commission would not follow Chevron per se, if I may explain. Chevron is a judicial

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

rule, so it does not directly apply to the Commission. The Commission would, if the Secretary promulgated an unambiguous standard under its rule-making authority, then, as the Commission agreed in its amicus brief, the Commission would be bound by that rule. However, if the rule is ambiguous, as it is in this case, that is exactly the function that Congress wanted this Commission to carry out. And it's particularly important in the Occupational Safety and Health area.

QUESTION: Mr. Faught, maybe that's true, but it's certainly not true because Congress wanted to create an independent, as you have described it, an independent adjudicative agency. I mean, the supreme example of an independent adjudicative agency is an Article III court. And all the Government is arguing for here is to apply the same rule to this adjudicative agency as Article III courts apply. So it has to be something more than just adjudicative power that you're arguing for here.

MR. FAUGHT: As this Court has held in a long series of cases, beginning with SEC v. Chenery, Justice Scalia, is that an administrative agency in adjudicatory power also has the power to make policy. That is the exact kind of thing that Congress wanted to create in the Commission here.

Because in the Occupational Safety and Health

area it applies to many industries. It has a very broad spectrum, and it applies to many aspects of those injuries -- those industries. And therefore the adjudicatory function is important, that based on facts of helping to develop this policy, of, in effect, developing a common law. And that's where the Commission's role is very important in the Occupational Safety and Health area.

QUESTION: Do you think that OSHA can develop regulations through its adjudication the way the labor board can, for example? You know, labor -- it doesn't issue regulations normally. They just make up new rules in adjudication. Can OSHA do that?

MR. FAUGHT: They cannot make up rules in terms of rule-making power, which is given to the Secretary. But they can make up principles of law, and in fact they have.

QUESTION: That impose new substantive obligations that are not imposed by the Secretary's regulations?

MR. FAUGHT: They can -- the Commission can act in a number of ways. It can, one, it can --

QUESTION: Can you answer that? Just answer that one yes or no, and then go on and give me the other ways. Can it enact, impose substantive requirements upon individuals that are not imposed by the Secretary's

regulations?

MR. FAUGHT: Yes, it can.

QUESTION: It can?

MR. FAUGHT: Yes, it can. And it has.

QUESTION: Such as?

MR. FAUGHT: Such as the Commission has interpreted what is a repeated violation under the act. The act provides that an employer may be fined up to $10,000 for a repeated violation. The act, however, does not define what is a repeated violation. The Commission has developed the principles of law in defining what constitutes --

QUESTION: That's not a new substantive rule. That's just interpreting what the statute says. It can interpret what the statute says, it can interpret what the regs say. But can it -- can it make policy in the sense of imposing new obligations upon people, the way an agency can do by adjudication?

MR. FAUGHT: It cannot make policy in the sense of establishing substantive standards, which is the power of the Secretary under its rule-making authority. But under the adjudicatory authority it does include some inherent policy making. And inherent in that policy making is precisely the question the Court has before it today, is you have an ambiguous standard. And in that

inherent adjudicatory power that includes some policy, the Commission can decide that question. It can interpret what that standard means. And that is precisely what it has done in this case.

QUESTION: Well, now, if there were no Commission and the question went to an Article III court, the same question we have here, would the Article III court defer to the Secretary's interpretation of an ambiguous regulation?

MR. FAUGHT: On the facts of this case the answer is no, Justice O'Connor, because the matter that is presented here by the Secretary, her interpretation of the standard is not based on her rule-making authority. If it was based on the rule-making authority, then the court would apply Chevron and could give controlling weight. But what she presents here is not based on rule-making authority. It's her interpretation presented through litigation positions. And those positions, we would maintain, would not be entitled to deference.

QUESTION: Oh, so your answer is that you only defer to certain kinds of interpretations, but not to an interpretation developed and presented during the course of litigation. Is that your position?

MR. FAUGHT: That is correct. That is correct, Your Honor.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: And do you have authority from this Court for that proposition?

MR. FAUGHT: Yes.

QUESTION: Is that clear?

MR. FAUGHT: Bowen v. Georgetown University makes it very clear that litigation positions are not entitled to Chevron deference. As Justice Kennedy wrote, Chevron simply does not apply to litigation positions.

QUESTION: But in this case it was a citation. The Secretary took official action citing the company for a violation of the act. This wasn't just an interpretation that was developed in the course of an adjudicated proceeding to defend a statute -- to defend a regulation.

MR. FAUGHT: What you have here, Justice Kennedy, is an ambiguous standard. And the Secretary, in effect, admits that it's ambiguous. And the only way that she is clarifying it is through the litigation positions that she is presenting in court. She clarifies it by the issuance of the citation by the compliance officer and by the arguments of counsel. That is the only way she is clarifying, and we believe under Bowen that those litigation positions are not entitled to deference.

Had she said, had the standard been unambiguous, then the question of deference would be here for the

Secretary. But it simply does not apply.

The Secretary, in saying --

QUESTION: What was the litigation position involved in Bowen?

MR. FAUGHT: The litigation position involved the retroactive application of a wage index by the Secretary of Health and Human Services.

QUESTION: Right, defending against a suit against the Secretary, right?

MR. FAUGHT: That's correct. And the question was, argument of counsel in the litigation was the reason for the retroactive application of the wage index was because it was a cost adjustment. And the court said that is the first time we have heard that. That's the first expression of the Secretary's interpretation. Very much the same we have here. The first time that the Secretary explains what this standard (g)(3) means is by the citation and the arguments of counsel.

QUESTION: But there, there the mere action that the Secretary had taken in Bowen didn't bespeak that interpretation. When it came to defending itself, the department came up with this interpretation. I thought that's what we meant by a litigating position. But here when the Secretary brings a citation, you don't have to guess what the basis is. It was cited for violation of

this section in particular. That is not a litigating position, except to the extent that any implementation of the law by the agency is a litigating position.

That -- your position then is that the agency can only clarify a regulation by another regulation. Is there anything else, any other way it can clarify the meaning of a regulation?

MR. FAUGHT: And to be entitled to Chevron deference?

QUESTION: Yeah.

MR. FAUGHT: No. The agency must act --

QUESTION: So it can't clarify a regulation. It can only amend it.

MR. FAUGHT: To be entitled to controlling weight, it would have to act through what the authority that Congress has delegated it, which would be rule-making authority. That does not mean that it cannot present its arguments and that the court or the Commission should not give weight to those arguments. The question is controlling weight. Controlling weight is only when it has acted in its rule-making capacity.

QUESTION: Is this so for all agencies, or is this just OSHA?

MR. FAUGHT: It would be for all agencies. We believe that is the appropriate application of Chevron,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

and there has been a recent recommendation of the Administrative Conference of the United States that agrees with our position.

QUESTION: But we have a lot of cases deferring to the agency's interpretation of its own regulation. Indeed some of our cases say that we're even more inclined to defer to an agency's interpretation of its own regulations than we are to an agency interpretation of its statute. And we're not referring to its interpretation through an additional regulation. How do you explain all those cases?

MR. FAUGHT: In those cases, Your Honor, there is -- there is confusing language about the controlling weight under Chevron or whether you give considerable deference. And in our -- we maintain that to be entitled to controlling weight, the ultimate deference, the agency should be acting in the capacity that Congress has delegated. And if the agency is doing something less, such as merely offering an interpretation, the regulation didn't mean what she said it does. She says let me now explain to you what the regulation means. When they offer that kind of an interpretation it may be entitled to some weight, but the court needs to balance the factors in which that interpretation is made and decide how much weight is given.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

That interpretation may be -- may have some many of the wrappings around it that it looks almost like the -- a form of rule making. In that case, the weight that the court would give it would be very high. It may approach controlling weight. But our position is controlling weight is for those delegated authorities --

QUESTION: So when the FCC prosecutes somebody for a violation of one of its regulations in a district court, let's say, and the case comes to a district court, and the FCC's position is reasonable as to the meaning of that regulation, we would not defer to the FCC, you would say?

MR. FAUGHT: If the action of the FCC is based on the authority that Congress has delegated to it, it would be a Chevron question --

QUESTION: No, this is a regulation. It's an FCC regulation that they are proceeding under. The issue is the interpretation of that regulation. And what you say is we would give no deference to the FCC. The only way we would give deference to the FCC is if it amended the regulation. But its interpretation of the regulation is entitled to no deference under Chevron.

MR. FAUGHT: You would give deference to the regulation as an interpretation of its authority under the statute --

QUESTION: But not to the FCC's interpretation of the regulation?

MR. FAUGHT: If they argued in court and gave you their interpretation that added to it, that is not entitled to --

QUESTION: Not just arguing in court. The citation was based on their interpretation of the regulation.

MR. FAUGHT: Your Honor --

QUESTION: And you say it would not get Chevron --

MR. FAUGHT: If the citation -- if the citation conforms with the standard and there is no ambiguity in the standard, then the agency is going to get controlling weight. But if it's something less, then they are not.

If you look at the Occupational Safety and Health Act, Congress makes it very clear the type of authority it placed in the Occupational Safety and Health Review Commission. The citations issued by the Secretary are only enforceable as final orders of the Commission. The Commission has exclusive authority to impose civil penalties. The Secretary only has the authority to recommend.

Under section 659 of the act, if a citation is not contested it becomes a final order of the Commission

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that is not subject to review by any court or any agency. If it is contested, then the Commission conducts a hearing. That hearing is conducted under the Administrative Procedure Act, and the Commission is given the authority to affirm, modify, or vacate the citation of the Commission. Therefore Congress has provided the Commission with a full complement of adjudicatory authority.

This is also made clear by the reference to the Administrative Procedure Act. Congress said that the Commission has the authority to adjudicate under the act. That brings into play the cases decided by this Court, as to the authority an adjudicatory agency has. That includes policy-making power. The Secretary here argues that the Commission has no policy-making power. It does not even have the power to interpret an ambiguous standard. That is directly contrary to what Congress said in the Occupational Safety and Health Act, and it's directly contrary to the precedents of this Court establishing what the powers are of adjudicatory agencies under the Administrative Procedure Act.

We believe it is clear, from the statute and the APA, the kind of authority the Commission is to have in this case.

If the Court believes it is necessary to look at

the legislative history, the legislative history also supports our position. As I said previously, as this matter was being considered by Congress, there were strong concerns presented that placing all of the authority in the Secretary would not gain the confidence of the regulated community necessary to achieve voluntary compliance, necessary to achieve the objectives of the act. So Congress reached a compromise, and that compromise was to place adjudicatory power in the Commission.

The legislative history is outlined in significant detail in the brief of the U.S. Chamber of Commerce, beginning at page 13. But there are two important aspects to highlight. One is the competing interests that were involved and the compromise as reached by Congress. The other is the role models, the agencies that Congress was looking to in deciding what power should be given to this new independent agency, the Commission.

And in looking at the competing interests, what Congress said, and the compromise that was reached, is that in the Occupational Safety and Health area, where it covers such a broad number of industries, there should be significant power, adjudicatory power, in the Commission to deal with factual settings and factual circumstances. And Congress looked to the FTC and the National Labor

Relations Board as the examples under which they decided the authority the Commission should have.

Senator Javitz, who proposed the amendment creating the Commission, referred specifically to the authority of the FTC when referring to the powers of the Commission.

QUESTION: Mr. Faught, is it your position that the, that OSHA does not defer to the Secretary with respect to the Secretary's interpretation of the statute as well as the regulations? Suppose a case comes up in which there is no regulation at issue, but just the terms of the statute, and the Secretary has taken a particular interpretation. Does OSHA defer to the interpretation of the statute?

MR. FAUGHT: If the Secretary interpreted a statute through a rule making, as delegated by Congress, it would be binding on the Commission.

QUESTION: No, no. Not through rule making. He brings a citation just under the terms of the statute. There is no rule specifically addressed to it, but he says the statute authorizes this.

MR. FAUGHT: And the only forum of the Secretary's interpretation was the citation itself, no, it is not entitled to any controlling weight by the Commission. It would be given weight by the Commission,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

but not necessarily controlling weight.

QUESTION: Not controlling weight. But if the Secretary interpreted the same statute in an action that would come to district court or to the court of appeals, the third branch of Government would defer to the Secretary's interpretation?

MR. FAUGHT: It's our position, Justice Scalia, that again it would depend on the forum, that if -- that the Secretary has acted in a fashion authorized by Congress, then the court should apply Chevron and determine whether it is entitled to controlling deference. If it is in a form that is less than that format delegated by Congress, it is entitled to weight, and that weight will depend on a number of factors, for example those spelled out in Skidmore, but it is not entitled to controlling weight. And how much weight is going to depend on those factors. How much consideration was given, the reasoning behind the interpretation.

As I said, looking at the legislative history, it supports our position that Congress intended the Commission to have the power to interpret the standards. Therefore in this case the Commission has acted based on its delegated authority from Congress. And when you apply the Chevron analysis, that action, the final order, which is the subject matter before the Court today, is entitled

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

to controlling weight. The Commission's interpretation of the standard is not arbitrary and capricious, and is in accord with the statute. In fact the Secretary here does not contest that the Commission's interpretation is reasonable. It is therefore entitled to controlling weight.

I would like to turn to the Secretary's position. The Secretary's position here, the interpretation, is nothing more than a litigation position. It was presented by the citation issued by the compliance officer and as argued by the Secretary's counsel in Court. And as I indicated previously, under Bowen we believe that stands for the proposition that litigation positions are not entitled to controlling weight under Chevron.

QUESTION: Well, I just read Bowen, the part that you're interested in, and it seemed to me the Court's opinion there was talking about kind of justifications offered for a regulation in the course of litigation sustaining it. The quotation being that, about the counsel for an agency offering a post-hope justification for it. That really isn't the case here, is it?

MR. FAUGHT: Yes it is, Justice Scalia -- Justice Rehnquist -- Chief Justice Rehnquist. On the face of it, this standard does not require what the Secretary

says. The gravamen of the offense here that the Secretary alleges is that CF&I did not provide new respirators. There is nothing in (g)(3) that says that new respirators must be provided. That only comes about, that requirement is created by the compliance officer when he issues the citation.

QUESTION: But that is done in the context of the exercise of the Secretary's administrative authority. A citation has been issued through the administrative process based on the Secretary's interpretation of the regulation. And we have always said that an administrative construction of the regulation by the Secretary is entitled to great deference. And that is exactly what this is.

MR. FAUGHT: I will distinguish again, Justice Kennedy, between considerable deference and controlling deference. Our position is that controlling deference, as outlined in Chevron, only applies when the agency is acting under its delegated authority by Congress, in a format delegated by Congress. If it's something less than that, yes, it's entitled to weight, but less weight. And I -- there is a lot of confusion around the word deference. We're not saying that interpretation is not entitled to some weight. In fact, it should be given weight by the Commission, and it was. But we are arguing

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that it is not entitled to controlling weight.

QUESTION: Mr. Faught, in Bowen -- I'll try to put it again; I'm not sure you're responding to what seems to be the problem. In Bowen, the official action was simply the denial of benefits. That's the authorized governmental action taken by the agency. And that action didn't necessarily rest on a particular interpretation of the statute. It didn't bespeak anything. It was just a denial of the benefits. Then the litigation comes up, he comes up with this theory. That's a litigating position.

Here the official action was the issuance of the citation. That was not neutral. On the face of it it referred to this section. On the face of it it necessarily was an official administrative interpretation of the regulation. Don't you see a difference between those two situations as to what's a litigating position and what isn't?

MR. FAUGHT: In this situation, Justice Scalia, the only explanation, the only thing that the Secretary has done that places the requirement she is seeking to impose here in this regulation, is the arguments of her counsel and the compliance officer writing. It is not in the standard itself. It is like -- it's imposing a new requirement that is not there. And I view that virtually the same as what was happening in Bowen, is that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Secretary came into litigation and explained -- tried to explain -- a basis for retroactively applying the regulation. And this Court rejected it. It said no, we won't accept your explanation when it is not the basis for the regulation.

In addition to Bowen, this Court has made it very clear that to be entitled to controlling weight an agency must act in the forum that is delegated by Congress. In Batterton the Court distinguished between deference and the kinds of weights that I have been talking about here. In Batterton the Court said if it's a delegated authority, it's entitled to controlling weight. If it's something less than delegated authority, it may be entitled to weight, but it's a different weight.

I referred previously to the recommendation of the Administrative Conference of the United States. The Administrative Conference considered precisely this issue inn 1989, and in July of 1989 issued a recommendation that says in order for an agency to be entitled to controlling weight under Chevron it should act in a rule-making power, a formal adjudication, or in some other forum delegated by Congress. If the agency has not acted in that forum, it is not entitled to controlling weight. And that precisely is what the case is here.

QUESTION: What do you, what would you say if --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

would you say we would be dead wrong if we gave some deference to the -- to the National Labor Relations Board view of the National Labor Relations Act?

MR. FAUGHT: It would depend on the forum, Justice White.

QUESTION: Well, here's the -- they issue a complaint and they adjudicate, and they present a view -- their interpretation of this statute when it's challenged. I thought we frequently gave deference to the NLRB?

MR. FAUGHT: The National Labor Relations Board was carrying out its delegated authority from Congress to adjudicate cases. In that adjudication it said what the act meant? Yes, it's entitled to Chevron deference.

QUESTION: Well, I know, but they've never issued a rule in the history.

MR. FAUGHT: Issued a --

QUESTION: Maybe one or two procedural rules, but they don't have to get up and have a big rule-making authority, proceeding, to announce a construction of the statute that is entitled to deference.

MR. FAUGHT: They have been given adjudicatory authority by Congress, just the same as the Commission here.

QUESTION: Well, that's just -- that's just exactly -- that's just -- that's exactly what the

Secretary did in this case. Just took out after somebody to enforce the statute, and -- and was expressing a -- her view of the statute. Just like the NLRB does when it --

MR. FAUGHT: The difference here, Justice White, is that Congress has separated the functions. Congress took the adjudicatory power from the Secretary, and all that that entails, took that from the Secretary and placed it in the Commission. So in this case you have a split, split agency. You have split powers, that the Secretary can operate through the rule-making power, and the Commission can operate through the adjudicatory power. They both have a policy-making function. The Secretary's policy-making function is exercised through making rules. The Commission's policy-making function is exercised through adjudications.

And as Justice Scalia noted in his concurring opinion in Bowen, is that a rule -- or excuse me, an order based on adjudication is to determine what the law was. That is precisely what the Commission did here. It determined what the law was. It interpreted what the standard meant. That's its -- that's its function under the act, and that is why it should receive controlling weight.

What the Secretary is trying to do here is raise the same questions that were raised before Congress in

1970 and were rejected. The Secretary is saying I want that power. I want all the policy power. The Commission does not have any policy power in its adjudication. That is not what Congress intended, and that is not what Congress said. What Congress said, we are concerned, we will not, and we refuse to place all the power in the Secretary. We are going to give the adjudicatory power to the Commission.

And that's -- that's what the Secretary is trying to take back today. And she's trying to take it back, not in a formal rule-making proceeding, she's trying to take it back through the issuance of a compliance order, or an order by a compliance officer. He is one of a thousand compliance officers. He issues it and says this is my interpretation, this is what the standard means. And now the Secretary is bolstering it in Court by her arguments of counsel. That is not the way she is to operate; that is not the delegated authority by Congress. She is to exercise her policy power through making rules.

She did make a standard in this case, but it's ambiguous. It didn't say what was intended. Therefore she tries to explain it by other means. This Court should reject that explanation. It is not entitled to controlling weight under Chevron. The Secretary should not be allowed to circumvent the procedural requirements

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that Congress set out for her to exercise her rule-making authority.

And therefore we think the judgment, or the judgment of the Tenth Circuit should be affirmed. It was correct when it said it would look to the reasonableness of the final order of the Commission. That final order was reasonable, and therefore was entitled to controlling weight and entitled to deference over the litigation positions of the Secretary.

If there are no further questions, Chief Justice.

QUESTION: Thank you, Mr. Faught.

Mr. Sloan, do you have rebuttal?

REBUTTAL ARGUMENT OF CLIFFORD M. SLOAN

ON BEHALF OF THE PETITIONER

MR. SLOAN: Just a few brief points, Your Honor.

First, respondent places great weight repeatedly on the phrase "controlling weight" as a decisive factor here. Respondent fails to point out that in this Court's consistent decisions on an entity's interpretations of its own regulations, which almost by definition are not embodied in the regulation, the Court has repeatedly said that those interpretations are entitled to controlling weight unless plainly erroneous or inconsistent with the regulation. That has been the settled standard that the

Court has applied in this category of cases.

Secondly, respondent contends that the Commission was given a policy-making function, and there is no evidence of that in the statute or in the legislative history. The contrast between the Commission's role and the role of the NLRB or the Federal Trade Commission could not be more stark, for those entities are specifically given policy-making authority. And, as this Court has held in cases like Chenery and Bell Aerospace, the reason that those entities can announce policies in the course of adjudication is precisely because they have the choice of making that policy in other means. They have been given the policy-making authority, and it is that that the Commission lacks here.

Third, in terms of just the context of this case, the second very case-specific issue that respondent repeatedly talks about, it is not true that the only evidence of the Secretary's interpretation is embodied in the citation in this case. Even if it were, it would be entitled to deference.

As we have pointed out in the reply brief, in January of 1979 the Secretary, in the Industrial Hygiene Field Operations Manual, had said in interpreting this provision that respirators must fit properly, and in subsequent interpretation in April of 1979, which is

Exhibit C(11) before the administrative law judge, at page 2, the Secretary again said -- referred to this specific provision as a training and fitting standard. In 1980 the Secretary issued another instruction, and that has consistently been the Secretary's interpretation with respect to whether a fit requirement is imposed.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sloan.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 89-1541

Roderick A. DeArment, Acting Secretary of Labor, Petitioner

---

v- Occupational Safety and Health Review Commission, et al

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Maryann Hartel

(REPORTER)