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In this issue:

- Eighth Circuit Addresses Deference To Be Given To Administrative Agency's Interpretation Of Its Own Rule

Eighth Circuit Addresses Deference To Be Given To Administrative Agency's Interpretation Of Its Own Rule

In a case that has significance for businesses that are subject to Occupational Safety and Health Agency (OSHA) and other workplace health and safety compliance and enforcement action (and, by extension, to compliance and enforcement actions of any federal agency) the U.S. Court of Appeals for the Eighth Circuit addressed the factors affecting judicial deference to an administrative agency's interpretation of its own rule. The case is *Thomas E. Perez, Secretary, United States Department of Labor v. Loren Cook Company* [No.13-1310, Decided October 13, 2016].

Loren Cook Company is a manufacturer of air circulating equipment and uses industrial lathes of various sizes to cut and form metal pieces used in the manufacturing of its products. A twelve pound piece of metal being shaped on a lathe flew free of the machine at a speed of between 50 and 70 miles per hour and struck the lathe operator on the head killing him. After an investigation by the Secretary of Labor, Loren Cook was cited for seven violations of federal safety regulation requiring "barrier guards" to protect workers from ejected workpieces. The relevant section of the regulation provides that machine guarding "shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." Determining that Loren Cook's failure to employ barrier guards to prevent an accident such as occurred was a violation of the law, the Secretary assesses Loren Cook a fine of \$70,000 for each of the seven violations for a total fine of \$490,000.

Loren Cook Company sought review of the Secretary's action by an Administrative Law Judge who vacated the citation and fine reasoning that the language of the barrier guard regulation did not apply to the catastrophic failure of a lathe such as occurred in the accident and, instead, focused only on risks associated with routine lathe operations such as metal flakes and sparks being thrown off the lathe. The Occupational Safety and Health Review Commission adopted the Administrative Law Judge's decision as its own and the Secretary petitioned the Eighth Circuit Court of Appeals for review. A divided panel of that court reversed the Commission's order (effectively reinstating the citation and fine) and Loren Cook sought rehearing by the full court which here affirmed the Commission's order as adopted from the Administrative Law Judge's report that the regulation did not apply to the situation found in the accident.

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Citing a number of U.S. Supreme Court cases, the Eighth Circuit Court of Appeals identified three factors for assessing the Secretary's interpretation of the regulation as due deference from the courts: (1) the fidelity of the interpretation text to the regulation itself; (2) the consistency of the interpretation with prior interpretations; and (3) the possibility of "unfair surprise" to the party cited.

The court concluded that the Secretary's interpretation under the first factor of fidelity to regulation "strains a commonsense reading of the [regulation]. The regulation's requirement of barrier guards, the court continued, aims "to prevent ingress by the operator into the danger zone while the lathe is running...These guarding devices would do little to prevent the hazard for which Loren Cook was cited—the high speed ejection of a three foot long, twelve pound piece of metal.

Regarding the second factor of consistence with prior interpretations, the court noted that: "We recognize the Secretary's need for flexibility to adapt regulatory language to a variety of situations...and...we also recognize that the Secretary could piece together a series of interpretation that demonstrate a trend toward the current interpretation. But the Secretary has failed to produce a single citation, publication, or interpretation that could fairly be characterized as similar to the position the Secretary announced in the citation against Loren Cook."

On the third factor of "unfair surprise" the court noted that the Secretary was familiar with the manner in which Loren Cook conducted its business, particularly with the operation of its lathes, and so the announcement of the current interpretation amounted to unfair surprise.

Having determined the Secretary's interpretation was not entitled to substantial deference, the court concluded that the section of the law under which the citation was issued and the fine levied did not apply the conduct for which Loren Cook was cited.

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