CHAPTER 9

COURTS, ARBITRATORS, AND OSHA PROBLEMS: AN OVERVIEW

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The Occupational Safety and Health Act of 1970 (herein sometimes referred to as the "Act") created a sweeping national commitment to the protection of the safety and health of workers on the job. The intent of the Act was to halt and reverse the trend in the incidence of occupational injuries and illnesses of the last 50 years.

The Secretary of Labor is given the task of developing standards to eliminate health hazards found in American industry, and this objective can be met only if such standards can be enforced over the full range of industries and technologies covered by the Act.[1]

The Secretary of Labor issues health and safety standards with the advice of the National Institute for Occupational Safety and Health (NIOSH) and the National Advisory Committee on Occupational Safety and Health (NACOSH). The Secretary has the power to enforce these standards and rules by issuing citations and imposing penalties on employers whose workplace is deemed unsafe. As a general rule, when an employer receives a citation, the result is strict compliance with the Secretary's directive to remove the unsafe working condition(s). Likewise, when new standards are promulgated by the Secretary, employers usually proceed to implement the new standards. Difficulties arise when an employer contests an OSHA citation or when a standard is challenged as vague, burdensome, or unreasonable.

The first stage of review for a citation contest or an OSHA standard challenge is a purely administrative one in which an

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[1]Northrup, The Impact of OSHA (Philadelphia: Industrial Research Unit, Wharton School, University of Pennsylvania, 1978), at 3.

administrative law judge makes findings of fact and conclusions of law affirming, modifying, or vacating the Secretary's proposed citation, penalty, or standard.[2] The administrative law judge may render a final decision, but if the ruling involves an important question of law where there are substantial grounds for difference of opinion and an immediate appeal will materially expedite the proceedings, an interlocutory order may be issued.[3]

The second stage of review, which can commence only after a ruling by an administrative law judge, is a discretionary review by the OSHA Review Commission.[4]

The federal courts represent the final stage of review for any party adversely affected by an OSHA citation or standard.

An overview of the various review processes presents the question: Which body is best suited to review the merits of citations, promulgations, and standards issued by the Secretary of Labor? Because of their everyday exposure and expertise in the field, it is reasonable to conclude that the OSHA Review Commission and administrative law judges are the most qualified to resolve such issues. The review machinery itself has resulted in a number of crucial safety and health issues being brought before the federal courts for resolution. This paper will attempt to identify some of the problems the federal courts will encounter as they are called upon to unravel and simplify a number of novel and sometime volatile issues.

Parties adversely affected by OSHA citations or standards must seek redress in the appropriate court of appeals only after their administrative remedies have been exhausted.[5] Any court must, at the outset, define the scope of its review powers, and it is here that the courts are confronted with conflicting authority. The Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."[6] The legislative history of the Act, however, seems to indicate that instead of a "substantial evidence" test, the courts of appeal should use an "arbitrary and capricious" test in reviewing OSHA standards and citations.[7]

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[2]29 U.S.C. §659(c).
[3]29 C.F.R. §2200.75(c).
[4]29 U.S.C. §661(j).
[5]29 U.S.C. §660(a) and (b).
[6]29 U.S.C. §655(f).
[7]Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Safety and Health Act (Comm. Print 1971), at 1189.

Thus, if a court is asked to review a chemical toxicity standard, there is statutory authority which asks the court to pore over the evidence in the records of administrative law courts and the OSHA Review Commission, while the legislative history of the Act merely asks the court to determine whether the Secretary and the various agencies acted in an arbitrary and capricious fashion. This conflict has resulted in the courts of appeal formulating their own tests for determining the validity of OSHA standards.[8]

Continued technological advances will result in the release of increased levels of noxious chemicals and carcinogenic substances into the ecosystem. These chemicals and substances will eventually take their toll on American workers in the form of high cancer rates and other debilitating illnesses, such as kidney, liver, and lung diseases. OSHA and the Environmental Protection Agency (EPA) have undertaken a campaign to remove carcinogens and noxious chemicals from the workplace, and the federal courts have been somewhat supportive of their efforts. It is submitted that this support stems from the recognition that these two agencies are best suited to carry out such a task. However, interested parties have challenged OSHA's decision-making process in the courts, thus forcing a formulation of new tests, rules, and weight factors used to review OSHA's safety and health standards.

A number of legal scholars have attempted to define the concept of "public policy." The term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency as directed to the welfare or prosperity of the state or the community. Certain classes of acts are deemed to be "against public policy" when the law refuses to enforce them on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state. Traditionally, public policy has been the driving force behind the decisions of government administrators, judges, and arbitrators as they carry out their duties for the public good.

Professor McGarity[9] has recognized that in deciding to regulate human exposure to potentially carcinogenic chemicals,

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[8]Proceedings of the ABA National Institute on Occupational Safety and Health, American Bar Association, Section of Labor Relations Law, 1976, p. 111.

[9]*See* generally, McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in E.P.A. and O.S.H.A.*, 67 Georgetown L.J. 732–747 (February 1979).

agencies such as OSHA have been forced to resolve scientific questions that the scientific community itself has been unable to resolve. OSHA and the courts are thereby forced to solve these questions partially on policy grounds. McGarity refers to these issues as "science policy" questions because both scientific and policy considerations play a role in their resolution.

Types of Science-Policy Issues[10]

Trans-scientific Issues

Trans-scientific issues are those issues which cannot be answered by science for a number of practical reasons. Professor McGarity's example is most helpful in grasping the concept: the extrapolation of carcinogenic effects at high-dose levels to low-dose levels.

If a team of scientists sought to show that cancer would result in only one-in-a-million cases as a result of exposure to a carcinogen, there would be need to expose three million rats to the human-dose level and compare the response with that of a control group also comprised of three million rats *not* exposed to the carcinogen. Since it is impractical to carry out such an experiment, scientists usually test much fewer animals, but at much higher dosage rates. Thus an agency (or a court) can never be certain whether a chemical which causes cancer at high doses will cause cancer at the lower doses to which humans are typically exposed. The regulator, whether it be OSHA or the EPA, is forced to make a subjective, or policy-dominated, decision.

Decisions Based on Insufficient Data

Situations may arise where there are insufficient data to reach a scientifically acceptable conclusion. In this event, the courts are required to recognize OSHA's dilemma: Should OSHA wait until the scientific community has reached the point where the data are made available, thus risking continued exposure to a known carcinogen, or should OSHA implement a standard with the available data?

In *American Petroleum Institute* v. *OSHA,*[11] the Supreme Court

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[10] *Id.*

[11] 581 F.2d 493 (5th Cir. 1978), *judgment aff'd, sub nom. Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute,* 448 U.S.__ (1980).

will address such an issue. In that case, the petitioners challenged OSHA's standard for dermal exposure to airborne benzene. While OSHA conceded that it was unsure that benzene could be absorbed through the skin, it nevertheless promulgated that worker exposure be reduced to zero. OSHA took notice of medical opinion that workers risked contracting leukemia as a result of benzene exposure and found, as a matter of policy, that the risk to workers from *any* dermal exposure was unacceptable.

OSHA's fatal flaw, in the words of the court, was that it failed to use a rather simple skin test to determine the skin-absorption levels of benzene: "When such factual information is so readily available, [the Occupational Safety and Health Act] requires OSHA to acquire that information before promulgating regulations which would require an established industry to change long-followed work processes that are not demonstrably unsafe."

The court looked to a previous holding in *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Commission*[12] and said that "[a]n agency must show that a hazard exists and that its regulation will reduce the risk from the hazard . . . and [required] the agency to assess the expected benefits in light of the burdens to be imposed by the standard."

Although the court did not require OSHA to carry out an extensive cost-benefit analysis in the *American Petroleum* case, it did require a determination that the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard.

Economic Feasibility.[13] While some observers have felt that the Act was intended to protect workers regardless of the economic impact on employers, most commentators will agree that an OSHA standard which is cost prohibitive will be labeled not feasible.

The D.C. Circuit has spoken on the matter in *Industrial Union Dept.* v. *Hodgson:*[14] "Congress does not appear to have intended to protect employees by putting their employers out of business."

The D.C. Circuit has not considered OSHA standards invalid

[12]569 F.2d 831 (5th Cir. 1978).
[13]*Supra* note 8, at 116–117.
[14]499 F.2d 467 (D.C.Cir. 1974).

even though, from the standpoint of the employer, "they are financially burdensome and affect profit margins adversely."[15] The Third Circuit has recognized an employer's defense of economic infeasibility of an OSHA standard in *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC.*[16] Employers there contended that the longshoring hard-hat standard, as applied to them, was economically infeasible, and hence invalid, because attempts at enforcement would provoke a wildcat strike by employees. However, the court found that the employer had failed to establish the infeasibility of the challenged regulation, since it did not show it had taken steps to discipline or discharge employees who defied the standard. The court pointed out that employers have other legal remedies available to them. Because of the significance of the language used by the court, its discussion is set out in full:

> "We must face squarely the issue whether the Secretary can announce, and insist on employer compliance with a standard which employees are likely to resist to the point of concerted work stoppages. To frame this issue in slightly different terms, can the Secretary insist that an employer in the collective bargaining process bargain to retain the right to discipline employees for violation of safety standards which are patently reasonable, and are economically feasible except for employee resistance?
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> "We hold that the Secretary has such power. As part IIIA of this opinion has indicated, the entire thrust of the Act is to place primary responsibility for safety in the work place upon the employer. That, certainly, is a decision within the legislative competence of Congress. In some cases, undoubtedly, such a policy will result in work stoppages. But as we observed in *AFL-CIO* v. *Brennan,* supra, the task of weighing the economic feasibility of a regulation is conferred upon the Secretary. He has concluded that stevedores must take all available legal steps to secure compliance by the longshoremen with the hardhat standard.
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> "We can perceive several legal remedies which an employer in petitioners' shoes might find availing. An employer can bargain in good faith with the representatives of its employees for the right to discharge or discipline any employee who disobeys an OSHA standard. Because occupational safety and health would seem to be subsumed within the subjects of mandatory collective bargaining—wages, hours and conditions of employment, see 29 U.S.C. §153(d)—the employer can, consistent with its duty to bargain in good faith, insist to the point of impasse upon the right to discharge or discipline disobedient employees. *See NLRB* v. *American National Insurance*

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[15] *Id.*

[16] 534 F.2d 541 (3rd Cir. 1976).

Co., 343 U.S. 395 (1952). Where the employer's prerogative in such matters is established, that right can be enforced under §301. Should discipline or discharge nevertheless provoke a work stoppage, *Boys Markets* injunctive relief would be available if the parties have agreed upon a no-strike or grievance and arbitration provision. And even in those cases in which an injunction cannot be obtained, or where arbitration fails to vindicate the employer's action, the employer can still apply to the Secretary pursuant to §6(d) of the Act, 29 U.S.C. §655(d), for a variance from a promulgated standard, on a showing that alternative methods for protecting employees would be equally effective. *See Brennan* v. *OSHRC (Underhill Construction Corp.)* 513 F.2d 1032, 1036 (2d Cir. 1975). Moreover, under §10(c) 29 U.S.C. §659(c), the Secretary has authority to extend the time within which a violation of a standard must be abated.

"In this case petitioners have produced no evidence demonstrating that they actually discharged or disciplined or threatened to discharge or discipline, any employee who defied the hardhat standard, or that they have petitioned the Secretary for a variance or an extension of the time within which compliance is to be achieved. We conclude that as a matter of law petitioners have failed to establish the infeasibility of the challenged regulation."

Technological Feasibility.[17] Employers can be required to implement existing technology in providing a safe workplace. The more difficult question is whether an employer could be required to develop or implement novel technological changes to deal with newly discovered occupational standards. The Second Circuit has placed such a burden on employers in *Society of the Plastics Industry* v. *OSHA:*[18] "The Secretary is not . . . restricted by the status quo. He may raise standards which require the development of new technology, and he is not limited to issuing standards based solely on devices already developed."

The Third Circuit has characterized OSHA as "technology forcing legislation,"[19] and other circuits have allowed other administrative agencies charged with similar safety and health enforcement responsibilities to "force" technological development through the promulgation of standards, providing additional support for such power in the hands of OSHA.[20]

The Third Circuit has defined its scope of review of OSHA standards in *Synthetic Organic Chemical Manufacturers* v. *Brennan.*[21]

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[17]*Supra* note 8.

[18]509 F.2d 1301 (2d Cir.), *cert. den.* 421 U.S. 992 (1975).

[19]*Atlantic and Gulf Stevedores, Inc.* v. *OSHRC, supra* note 16; *see also supra* note 8, at 118.

[20]*Chrysler Corp.* v. *Dept. of Transportation,* 472 F.2d 654, 673 (6th Cir. 1972) (automobile safety standards); *Natural Resources Defense Council Inc.* v. *E.P.A.*, 489 F.2d 390, 401 (5th Cir. 1971) (air pollution standards). *See also supra* note 8.

[21]503 F.2d 1155 (3d Cir.), *cert. den.* 420 U.S. 973, 95 S.Ct. 1396, 43 L.Ed.2d 653 (1970).

In the presence of insufficient scientific data on the effects of exposure to ethyleneimine, the court set up a five-step process for reviewing the Secretary's safety standards as:

"1. determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the actions taken;
"2. determining whether the Secretary's promulgation adequately sets forth reasons for his action;
"3. determining whether the statement of reasons reflects consideration of factors relevant under the statute;
"4. determining whether presently available alternatives were at least considered; and
"5. *if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development,* whether substantial evidence in the record as a whole supports the determination."[22]

The D.C. Circuit, in *Automotive Parts and Accessories* v. *Boyd,*[23] has applied "an arbitrary-and-irrational"[24] reasonableness test in affirming a permanent standard regulating airborne asbestos exposure. While not an OSHA case, the court addressed the quasi-legislative role of an agency and stated: "The paramount objective is to see whether an agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules and general application in the future."

The Second Circuit has used a "non-arbitrary and irrational"[25] test formulated by the D.C. Circuit in upholding an OSHA standard regulating exposure to vinyl chloride. In *Society of Plastics Industry* v. *OSHA,*[26] the Secretary of Labor made a carcinogenicity policy decision based on extrapolation of animal data. The Second Circuit recognized that the Secretary of Labor made a *policy* decision rather than a factual conclusion, and it examined the reasonableness of the Secretary's action. Taking judicial notice of the deaths of 13 workers within a three-year period from overexposure to vinyl chloride, the court found the standard to be overwhelmingly reasonable.[27]

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[22]*Id.,* at 1160, emphasis supplied.
[23]407 F.2d 330, 338 (1968).
[24]*Supra* note 8, at 112.
[25]*Ibid.*
[26]509 F.2d 1301 (2d Cir.), *cert. den.* 421 U.S. 992 (1975).
[27]*Supra* note 8.

Varying Scientific Interpretations

Assuming an abundance of scientific data on a given subject, scientists will still disagree as to how the data are to be interpreted. When a court asks two scientists to cite explicit reasons for their respective positions, the reasons may very well be incomprehensible to the lay judge. The court will surely be in a dubious position when scientists of conflicting views also happen to be statisticians arguing the methodology of their experiments.

Professor McGarity suggests that decision-makers should ask scientists questions limited to those issues which require scientific expertise and should not demand that the scientists exercise policy judgment. It is submitted that pure policy judgments should be left to the courts wherever possible.

Disagreements Over Inferences

If the Secretary of Labor receives input from the National Institute for Occupational Safety and Health and from the National Advisory Committee on Safety and Health, that data will no doubt reflect disagreement among scientists over what types of inferences to draw from scientific fact. Most scientists will agree that if a substance is carcinogenic in laboratory rats, it is also carcinogenic in humans. The EPA and OSHA have relied on animal test data because they are the best data available to them.

The core issue posed is whether the courts should take judicial notice of these disagreements over the inferences drawn by scientists from available data. Judge Harold Leventhal of the D.C. Circuit has offered that judges are in fact qualified to evaluate these inferences that scientists draw from established facts. He maintains that testing scientific inferences requires only "knowledge of how matters are proven, and that is a field in which courts have always had a special interest and in which they cannot escape keeping up with the scientific times."[28]

Arbitrators

Arbitrators will begin to hear more OSHA-type safety and health issues, which will be in keeping with the recognized policy

[28]McGarity, *supra* note 9, at 746–747.

under the *Steelworkers Trilogy*[29] and *Lincoln Mills*[30] cases encouraging the arbitration of labor-management disputes. Every arbitrator will be faced with three choices in resolving safety and health disputes: (1) Should the arbitrator look to external law such as OSHA, NLRA provisions, and the holdings of the federal courts? (2) Should he formulate his own standards and policies, based on contract provisions only, thereby refusing to apply external law? Or (3), should he base his decision on a combination of the two alternatives above?

Three different approaches have been suggested as a possible means of solving the external-law dilemma. These may be referred to as the totality approach, the middle-ground approach, and the isolationist approach.

The Totality Approach. Those arbitrators following this general philosophy believe that arbitrators have a responsibility, where possible, to consider any applicable pronouncements. Every collective bargaining contract inherently includes all such relevant external law.

Such an approach has been formulated and promoted by Arbitrator Robert G. Howlett. Its basis is founded on the premise that "a promise" is enforceable at law, directly or indirectly.[31] His position is that "the law is part of the essence [of the] collective bargaining agreement."[32] Therefore, under the totality approach, arbitrators "should render decisions . . . based on both contract language and the law" and "they must be willing to accept the responsibility of . . . deciding issues arising under the National Labor Relations Act."[33]

The Middle-Ground Approach. Arbitrator Richard Mittenthal represents those arbitrators who choose to maintain the most flexible approach to this continuing problem. He states that the "law may . . . serve to implement general contract language" and "may even be used to resolve ambiguity . . . for the parties presumably intend a valid contract."[34] In support of his posi-

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[29]*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[30]353 U.S. 448, 40 LRRM 2113 (1957).

[31]Corbin, Contracts (St. Paul: West Publishing Co., 1960), 3, at 6.

[32]Howlett, *The Arbitrator, the NLRB, and the Courts,* in Proceedings of the 20th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), at 83.

[33]*Id.*, at 83 and 106.

[34]Mittenthal, *The Role of Law in Arbitration,* in Proceedings of the 21st Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1968), at 43.

tion, Arbitrator Mittenthal points out that the separability clause of a contract (which basically states that if any part of the contract is found to be unenforceable, the rest of the contract should still be held valid) and the final-and-binding clause both indicate that external law should and is intended by the parties to apply to their agreement. In softening his stance, however, Mittenthal is also of the belief that "too great a reliance on the law would encourage a kind of rigidity and uniformity which is foreign to our arbitration system." Statutory law may guide the arbitrator on occasion, but the arbitrator must follow the rule of law established by the contract since "he is part of a private process for the adjudication of private rights and duties."

The Isolationist Approach. At the other end of the spectrum are those arbitrators who believe, as Arbitrator Bernard D. Meltzer does, that the arbitrator should limit himself exclusively to the contract and look no further. It is Meltzer's belief that other issues should be left to the courts and other administrative agencies. Arbitrator Meltzer premises his position on the facts that (1) many arbitrators have no great expertise with respect to the law; (2) arbitrators should generally defer to those with more competence (administrative agencies and courts) in the labor area; and (3) parties utilize arbitration to construe, not destroy, their voluntary agreements.[35]

Obviously, the approach of many arbitrators may not neatly fall within one of these three categories. However, some of the philosophies inherent in these approaches can be found in all awards because, at some time, each arbitrator will be called upon by the circumstances to state his position.

Administrative Agencies and Specialized External Law

Many arbitration cases are intertwined with overlapping issues which fall within the purview of specialized agencies or court pronouncements. Arbitrators are clothed with wide discretion regarding the application of external law. The degree to which an arbitrator may apply or consider such laws varies greatly, depending upon his philosophical approach, the applicable external law, and the specific circumstances before

[35]Meltzer, *Ruminations About Ideology, Law and Labor Arbitration,* in Proceedings of the 20th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), at 16–17.

him. Various external laws which may be considered include:

Common Law and State Statutes. When an arbitrator looks to state common law or state statutes to guide him in making his award, he will generally be guided by specific procedural requirements found in state statutes. If the issue is one that falls within the purview of Section 301(a) of the LMRA, federal substantive labor policies must prevail over any state substantive law, even though state procedure will still apply.

Application to a state court to compel arbitration may be made by motion along with the requested notice and supporting affidavits setting out the details of the disagreement.

The use of state law generally involves more stringent requirements for the enforcement of awards than does federal law. The grounds for vacating an award under state law are derived from common law principles. Some state statutes allow for modification of an award in limited circumstances (e.g., where there has been an obvious miscalculation of back pay). State courts will not review an arbitrator's potential errors of law or fact.

As a rule, arbitrators are unimpressed with previous rulings made by state unemployment compensation commissioners when they are submitted as proof of any particular issue in a later arbitration.

The language of the OSHA Act makes it quite clear that the development of state safety and health plans is to be encouraged, and that the states should assume the burden of enforcing and administering those plans.[36] Section 2(b) of the Act states:

> "The Congress declares it to be its purpose and policy . . . to assure every working man and woman in the Nation safe and healthful working conditions . . . by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . . [and] to develop plans in accordance with the provisions of the Act."

Further evidence of the Act's intent to increase the participation of the states in safety and health plans is presented in provisions calling for the federal government to pay up to 90 percent of the cost of *developing* state plans, and federal outlays to finance the *administration* of such plans.[37]

Notwithstanding the intent of the Act, the matter of state

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[36]Ashford, Crisis in the Workplace: Occupational Disease and Injury (Cambridge, Mass.: The MIT Press, 1976), at 210.

[37]§23(a), (b), and (f); §23(g) of the OSHA Act.

participation in safety and health legislation continues to be an area fraught with dispute between organized labor and the government. National unions, as a general rule, are strongly resisting return of control to the states, while local unions sometimes support the effort. This dispute has created uncertainties for the future of occupational safety and health in the United States.

Valid concerns are often expressed as to the effect of decentralizing health and safety legislation. More specifically, unions are concerned that any protections afforded the worker may be lost or diminished in the changeover from the federal body of law to state plans. Section 18(c) of the Act seeks to allay any fears of underprotection and jurisdictional uncertainties which may develop. The OSHA administration and the Secretary of Labor are required to approve new state plans under development, and the Act itself requires that any new plan meet the following specifications:[38]

"1. It must specify a responsible state agency or agencies to administer the plan.
"2. It must provide for state standards that are or will be as effective as federal standards, and it must ensure that the standards, when applicable to products distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.
"3. It must provide for a right of entry and inspection at least as effective as the federal procedure, and it must include a prohibition of advance notices of inspection.
"4. It must contain satisfactory assurances that the designated agency has legal authority and qualified personnel, and that the state will devote adequate funds to administration and enforcement.
"5. It must contain satisfactory assurances that public employees will be protected to the extent permitted by state law.
"6. It must require employers to make reports to OSHA in the same manner as if the plan were not in effect.
"7. It must require the state agency to supply any information required by OSHA."

After a state plan is deemed to be in compliance with existing federal law and is approved by the Secretary of Labor, Section 18(e) of the Act provides for the new state plan to preempt applicable federal provisions. Even after final approval of a state plan, the Secretary of Labor and the OSHA administration must carry out an on-going evaluation and monitoring of plans to

[38] *Supra* note 36, at 213.

ensure that they are at least as effective as the OSHA Act.[39]

Federal Statutes. Suits to compel arbitration, more likely than not, will be considered under Section 301(a) of the LMRA since state law governs only those disputes which do not involve interstate commerce.

To compel arbitration in a federal suit, a party files suit in federal court and then moves for summary judgment coupled with an order to compel arbitration. The court rules on the summary judgment motion based upon affidavits which set out the circumstances and show that the other party refuses to submit the issue to arbitration.

Federal courts, like the NLRB, will generally abstain from hearing any suit where an arbitration is already in process or where a suit has been filed in a state court to compel arbitration. The existence of an unfair labor practice will not preclude a federal court from considering the suit under Section 301(a) and compelling arbitration. Generally, the requirements for the enforcement of an arbitration award are much less stringent under Section 301(a) than they are under state statutes.

Any suit brought in federal court under Section 301(a) will be governed by state procedural rules, although federal substantive law will apply to the merits of the case. In most instances, an aggrieved employee may bring a Section 301(a) suit only after he has exhausted the grievance in arbitration processes provided for by the applicable collective bargaining contract.

Once an arbitrator has made an award, the courts give great deference to it. They generally will not review the merits of the grievance or the manner in which the arbitrator reached his results. As long as the arbitrator does not order the commission of an illegal act or exceed the scope of his authority, his award will be considered final and binding. Such a result, however, is still circumscribed by the requirements of fair representation and proceedings untainted by fraud or misconduct.

In suits wherein the arbitrator and the NLRB have concurrent jurisdiction, the Board will generally defer to the arbitrator's award, so long as it meets the *Spielberg* test: (1) the proceedings were fair and regular; (2) the parties agreed to be bound; (3) the award violates no public policy; (4) the arbitration resolved the unfair labor practice in disposing of the grievance.

Administrative Agencies. Frequently arbitrators may be faced

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[39]For a thorough discussion of state safety and health plans, see Ashford, *supra* note 36, at 209–232.

with deciding an issue which may also fall within the scope of the Occupational Safety and Health Act. In 1974 the U.S. Supreme Court held that such a case was appropriate for an arbitration hearing.[40] Yet the following year, a district court refused to defer to an arbitrator's ruling in a discrimination proceeding under Section 11(c)(1) of the Act.[41] Therefore, it would seem that while concurrent jurisdiction between the arbitrator and the Commission exists, the arbitrator's award may not preclude later challenge—at least where the case involves discrimination under the Act.

In early 1980, the U.S. Supreme Court held that an employer could not discriminate against an employee who refuses to accept a work assignment which he reasonably believes to pose a grave danger to his safety. In the Court's unanimous decision in *Whirlpool Corp.* v. *Marshall, Secretary of Labor,*[42] the Court found that the Secretary of Labor's regulation providing that "an employee has the right to choose not to perform his assigned work because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available,"[43] was consistent with the Occupational Safety and Health Act. In promulgating a test of "reasonableness" on the part of the employee, the Court pointed out that the employer would be safeguarded from abuse in this area in stating that "any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith."[44]

It is submitted that if the arbitrator is asked to settle a highly technical or scientific safety and health dispute, he should not be reluctant to look to external law (i.e., OSHA, the federal courts, and the NLRB) for guidance. This is consistent with the totality approach as to the use of external law in arbitration, and recognizes that OSHA and the Secretary of Labor are well suited to promulgate viable safety and health standards.

Arbitrators hearing discharge and discipline grievances which concern the safety and health of the workplace will be confronted with conflicts between (1) the right of the employer to manage his business enterprise with the expectation that he will

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[40] *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 85 LRRM 2049 (1974).
[41] *Brennan* v. *Alan Wood Steel Co.,* 3 OSHC 1654 (E.D.Pa. 1975).
[42] 40 CCH S.Ct. Bull., p. B997.
[43] *Id.,* at B1000.
[44] *Id.,* at B1017.

receive a day's work for a day's pay, and (2) the right of workers to earn those wages in a safe and healthful workplace.

Conclusion

Multiple forums are available to the aggrieved employee in safety and health cases. This paper has endeavored to show how forums such as OSHA and the courts interface with arbitration as to such matters. Depending upon the individual philosophies of arbitrators and the nature of the case, the various rules and standards fashioned and adopted by OSHA and the courts may be available to aid in the resolution of safety and health grievances presented to the arbitrator.

Comment—

ADOLPH E. SCHWARTZ*

It is a pleasure for me to be here today and to talk to you about the impact of OSHA on our society and to discuss the role of the arbitrator in settling safety and health disputes between unions and managements. Before I discuss the two areas just mentioned, I am going to make some comments on Professor Britton's overview, "Courts, Arbitrators, and OSHA Problems."

Professor Britton suggests that management claims OSHA and its standards are too broad and vague in scope, while labor feels the standards to be too limited in nature. It has been my personal experience that just the opposite is true. I have participated in numerous OSHA hearings which were conducted for the purpose of promulgating standards. It has been the continual position of management that OSHA should not issue a specification standard, but that OSHA standards should be thought of as goals which management should strive to meet in its own way.

In the lead and coke-oven hearings, for example, the companies fought against the specific requirements for engineering controls, work practices, labeling and posting, and medical surveillance. The union felt that these provisions were essential because they provided specific, unambiguous instructions to management, and because they allow our members to monitor compliance easily. Fortunately, our views prevailed. So it has not been our experience that management believes OSHA standards are too vague.

The overview further suggests that contract provisions on safety and health are approximately 85 percent duplications of regulations enforced by OSHA (*Business Week,* on May 19, 1980, stated that 87 percent were duplications of regulations enforced by OSHA). It would be interesting to me to know how these percentages were determined.

I will not attempt to speak to the contracts on safety and health of other unions, but let me assure you that this is not the case with the United Steelworkers of America. Safety and health language appeared in the very first Steelworker contracts, long

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before OSHA—for example, in the 1936 Carnegie-Illinois agreement. It was a meager beginning, to be sure, but through the years it has been expanded on and improved. Today, Steelworker contracts provide for joint union-management safety and health committees as well as for joint union-company plant inspections, quarterly safety and health meetings, accident investigations and reporting, minutes of safety and health meetings, access to the plant, safety and health education and training, alcoholism and drug-abuse rehabilitation programs, and earnings protection. Workers transferred because of an occupational injury or illness, and all workers, have the right to know the names of the chemicals they are exposed to and the right to know the results of air and noise monitoring.

Few of these provisions are mandated by the Occupational Safety and Health Act of 1970. In the few instances where OSHA standards or rules do overlap with our contract language, we believe that our language is significantly broader, and it predates OSHA standards or interpretations.

The overview also suggests that in the 1980 basic steel negotiations, the industry and the union were willing to work out their own safety and health programs *exclusive* of government regulations, such as that offered by OSHA. This is not the case. While we are extremely desirous of developing our own comprehensive safety and health programs, and hopefully we do not have to utilize the provisions of OSHA, nevertheless we believe the OSHA provisions parallel our own and do not duplicate them. OSHA certainly aids us and our local-union safety and health committees in arriving at more significant safety and health programs. For example, the possibility of an OSHA inspection tends to make management deal in good faith with our safety and health committees. Conversely, the union co-chairman of the committee can be an extremely effective walk-around representative in an OSHA inspection because of his experience on the committee. So, OSHA regulations and our contract language are mutually supportive and complementary.

One final comment on the OSHA portion of Professor Britton's overview. It is suggested that, as a general rule, when an employer receives a citation, the result is strict compliance by the company with the Secretary of Labor's directive to remove the unsafe working conditions. Likewise, when new standards are promulgated by the Secretary, employers usually proceed to implement the new standards. I only wish the foregoing were

true. Too often when citations are issued, the company contests each and every one. When standards are issued, company attorneys usually race to the courthouse, attempting to stay the standard and finally to have it revoked. Our union, in most instances, assists our local unions in Review Commission procedures when citations are contested, and our attorneys, in some cases, join with the Department of Labor solicitors in turning back company challenges to standards. Unfortunately, this is an area that is rapidly expanding, and as far as the Steelworkers are concerned, is a waste of manpower and resources that could be better spent in correcting the unsafe conditions found during an inspection.

The Total Impact of OSHA

I agree with Professor Britton that OSHA created a sweeping, major commitment to the protection of the safety and health of workers on the job. I also believe that the total impact has sent positive waves around the world on safety and health. Environmental groups, public health groups, educators, labor, representatives of industry, and certainly our membership are paying more attention to safety and health issues now than before OSHA came into being.

Very few days go by when there are not items relating to safety and health in our nation's newspapers or on television. Recently, the chemical-waste dump in New York, the Love Canal, has been receiving much attention. DBCPs and PCBs, lead, arsenic, and asbestos are written about and talked about rather frequently by scientists in the media. This does not go unnoticed by our members. The Steelworkers' Safety and Health Department is in daily receipt of requests for information on toxic substances or Occupational Safety and Health rules and regulations. Certainly OSHA has had a great impact in this area.

And recently we have had delegations visit us from Australia, New Zealand, the Philippines, Malaysia, South Korea, Japan, Spain, Canada, Norway, Sweden, and Poland. These delegations are desirous of finding out from us how the Occupational Safety and Health Act is working, what standards have been promulgated under the Act, how they are implemented, and what significant improvements we believe OSHA has made for the safety and health of American workers. Some of the specific

areas of our visitors' interest are coke-oven emissions, lead, arsenic, beryllium, benzene, noise, and toxic substances. We do our best to answer all their questions and to provide them with copies of the Act, rules, regulations, and standards, and such other information as they may be seeking.

I think it is also significant that the International Labor Organization has reviewed OSHA and its rules and regulations for the purpose of possibly making them part of the ILO program. I know that the provinces of Ontario and Quebec, in Canada, have recently enacted significant improvements in their provincial safety and health laws, some of which are along OSHA lines. I do not know specifically how well other nations are doing, but I do know that it is the desire of their labor unions to have OSHA-type safety and health laws in their countries. That is why I believe that OSHA has had a worldwide impact on the safety and health movement.

Union-Management Safety and Health Disputes, and Arbitrators

When a safety or health problem or dispute develops in any of our local unions, the International Safety and Health Department strongly recommends that certain procedures should be utilized before filing a grievance, which may go to arbitration, or before filing an OSHA complaint, which would result in an inspection.

During the past 11 years, the Steelworkers have held well over 300 safety and health training seminars throughout our jurisdiction. The very first order of business is always a statement and discussion of our philosophy—to try to resolve safety and health problems and disputes between the union and the company rather than resorting to outside sources for help.

We begin by telling our safety representatives that the worker should call the problem to the attention of his immediate supervisor. We do this because nobody with a position of responsibility or authority likes to be circumvented. Hopefully, at this point the issue is resolved.

I do not have statistics to prove that this is where the great majority of safety and health problems *are* resolved. However, from personal experience, I believe this to be a fact. If the problem is not resolved at that stage, most of our contracts,

under the dispute section, provide that an employee can either file a grievance in the third step for preferred handling or request relief without losing his right to return to such job if the issue in question is whether or not workers are being compelled to work under conditions which are beyond the normal hazard inherent in the operation.

When the dispute section is utilized, union representatives from the safety committee, including the chairman, local union officers, and the staff representative become involved. Also, their counterparts from management are involved in an attempt to resolve the issue. If the issue is not resolved as a result of the foregoing procedures outlined in the dispute section, then a determination must be made on how to proceed. Should a grievance be filed, or should an OSHA inspection be requested?

This is a serious decision to make, because there are pluses and minuses on either option. If an OSHA inspection is requested, it does take place, and citations are issued, that may be a quick solution to the problem. However, if a company contests the citation, considerable time—up to a year or more—could go by before the issue is resolved by the Review Commission. If it goes beyond that, to the courts, years can go by before the issue is resolved.

On the other hand, if the issue goes to arbitration, the decision of the arbitrator might be quicker than an OSHA inspection, citation, Review Commission procedure, and court proceedings, and, of course, the decision of the arbitrator is binding.

If the issue is going to be arbitrated, the crux of the case is usually whether or not the job or working procedures questioned were beyond the normal hazard inherent in the particular operation. This is the decision that an arbitrator must reach after hearing all of the facts in the case.

At this point it might be well to ask the questions: What does the term "beyond the normal hazard inherent in the operation" mean, and how should it be applied? Where does one draw the line to make a determination as to when buildings, equipment, and work practices are "beyond the normal hazard"?

Plants are built; equipment is installed, if this is a new installation; and people are properly trained. We have every reason to believe that the operation is as safe as we can make it. Age, wear, and tear do set in. Blast furnaces, BOFs, overhead cranes, ground cranes, trucks, railroad equipment, and all of the other

equipment used in the manufacture of goods in this country do deteriorate.

A situation facing an arbitrator, for example, may be one involving a truck that has been in service in a particular plant for several months. On a given day, the driver advises his foreman that there are mechanical difficulties with the truck—no brakes, no lights, no back-up lights, no turn signals, etc. He believes the truck should be taken out of service. It is a few hours until the end of the shift, and the supervisor tells the truck driver, "You can operate this truck until the end of the shift. Be extremely careful. You are a good driver, and I am sure you won't have any problems." The truck driver does as requested by the supervisor.

Several weeks or months later, the same situation arises, only this time the truck driver is adamant in his position that the truck must be taken out of service and repaired. He asks for, and is granted, relief from the job, and a grievance is filed. Ultimately, the grievance reaches the arbitrator, and the issue must be resolved: Was the truck in such a condition as to fall under the definition of "beyond the normal hazard inherent in the operation"?

By and large, companies usually argue that the operator could have operated the truck (or other equipment) in a safe manner until the end of the shift, if he had been careful. They are quick to point out that he, on a prior occasion, had operated the truck, and perhaps they also introduce into the record the names of other people who had operated the truck under like conditions. In addition, they argue that nobody was hurt on the prior occasions, and nobody was hurt on this occasion; therefore, the operation of the truck on the date in question was certainly not a situation which was beyond the normal hazard in the operation.

The union, on the other hand, usually takes the position that if the truck had been operated as the company states, that does not mean that it was in a condition which made it safe within the meaning of the normal-hazard language. They emphasize that the arbitrator should view and decide this issue on the merits of the case as they currently exist, and not rely on the history of the job to make the determination. The union also stresses the fact that many unsafe acts and many unsafe conditions may have existed, and still do exist, in the plant, but this does not mean that this is acceptable. The unsafe conditions should be corrected. If they are not, death can result.

There are many other areas which fall under the provisions of the dispute section where an arbitrator may have some difficulty in arriving at a decision. For example, wherever hot metal is handled in steel-producing, aluminum, and foundry operations, with water present, there is always the very real potential for a violent explosion. One and a half years ago in a foundry in Chicago, there had been complaints about water in the furnace pit. On some occasions, management pumped out the water; on others they didn't. One day a ladle of steel turned over and poured directly into the pit. A violent explosion occurred, killing five of my union brothers. This tragedy should never have happened; yet throughout the hot-metal industries mentioned, it is not uncommon to see standing water where hot metal is handled—under blast furnaces, in O.P. basements, in the steel-pouring aisles, and in a variety of areas of factories. If the workers and the local union safety and health representatives who attend our safety and health conferences are told of these dangers—and they are—and if they go back into the plant and utilize the provisions of the dispute section of the contract to ask for relief from the job, and are discharged, what will the decision be?

So far I have dealt primarily with imminent-danger situations where workers could be killed or maimed if the conditions were not corrected. There is another area which has not seen very many arbitrations. That is the *health area*—one that is of great concern to the Steelworkers. The same procedures of the dispute section are available for handling health-problem questions. However, these problems are going to be far more difficult to solve than those I have just been discussing. If the point is reached where a decision must be made as to whether or not a dispute should be arbitrated or an OSHA inspection should be called for, in matters dealing with health we advise our people to request either an OSHA inspection or a health-hazard evaluation from NIOSH. We do this because OSHA and NIOSH have the personnel and equipment to come in and conduct the necessary environmental sampling and testing as well as the back-up resources to make a determination whether there are overexposures to a substance or the exposure is within OSHA standards. If the issue were to be arbitrated, there would have to be investigation and testimony by hygienists and medical doctors, who would be satisfactory to the union and the company, to enable the arbitrator to reach an informed decision. This could prove

to be far more costly and time-consuming to the union and the company than if the federal agencies just mentioned were used to conduct the investigation.

There are many other areas concerning the health of our workers where the problems would be very difficult for the arbitrator and the arbitration process. For example, many thousands of our members are exposed to lead. We have a lead standard which is currently partially stayed by the courts. I am not going to get into the argument of whether the standard is too stringent, as claimed by management, or too loose, as we feel it is in some areas. I am just going to raise the issue. Most scientists and medical people agree that lead is cumulative in the body. A person can have so-called normal lead levels in his blood and yet have stored enough lead in his system to cause damage to the brain, the nervous system, and the kidneys. In time, if the worker has his blood tested often enough, the level will get above the permissible limit. There is only one way besides chelation in which blood lead can be reduced, and that is to remove the worker from lead exposure. That is why we fought so hard to obtain rate-retention language in the current lead standard.

If the issue of excessive exposure to lead were to reach arbitration, the arbitrator would have to decide when the worker must be removed from the job and awarded rate-retention, and when it is safe for him to return to his job. Arbitrators would face similar determinations in cases involving other toxic substances, such as asbestos, coke-oven emissions, beryllium, arsenic, cotton dust, benzene, and noise. To the best of my knowledge, our local unions have not utilized arbitration very much for these problems. However, that may change, and it was my purpose in raising the issue today to stimulate your thinking about possible solutions.

As I suggested earlier, American workers generally, and our members in particular, are becoming more and more aware and concerned about their safety and health on the job. In the old days, my father used to say, "Where you see smoke, there is work and that is good." Today, where there is smoke, there is probably work, but it is not necessarily good. The primary example that comes to mind are the conditions of our coke ovens where for over 50 years workers were contracting lung diseases at a rate far in excess of that of the general public.

Because workers are more knowledgeable and concerned in

matters of safety and health, they are now taking a far more critical look at their immediate surroundings and their place of employment, and safety and health issues that have lain dormant for years are surfacing in increasing numbers. I believe that the issues that will be forthcoming to arbitrators under the dispute section of our agreement are going to be increasing, and arbitrators will be asked to make decisions in the areas I have touched on today—namely, is a job safe or unsafe, keeping in mind the normal-hazard terminology of the dispute section.

I know that the arbitrators present today are often faced with very difficult decisions—decisions that require much agonizing and strain. During my years in the safety and health field, I have come across some medical advice for the strain and anguish you face: Don't worry, don't hurry. It's a short trip. Take time to smell the flowers.