BEFORE THE UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AVCON, INC.; VASILIOS SAITES AND NICHOLAS SAITES, Respondents.	Nos. 98-0755 and 98-1168
SECRETARY OF LABOR, Complainant, v. ALTOR, INC. and/or AVCON, INC., and/or VASILIOS SAITES, individually, and d/b/a ALTOR, INC. and/or AVCON, INC. and NICHOLAS SAITES, individually and d/b/a ALTOR, INC., and/or AVCON, INC., Respondents.	No. 99-0958
SECRETARY OF LABOR, Complainant, v. SHARON and WALTER CONSTRUCTION, INC., Respondent.	No. 00-1402

Brief of *Amicus Curiae,* ORC Worldwide™

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I. THE *AMICUS CURIAE* AND ITS INTEREST IN THIS LITIGATION

ORC Worldwide™ (ORC) is an international management consulting firm offering professional assistance in a wide range of human resources management issues for industrial, nonprofit, and public organizations. Soon after the passage of the Occupational Safety and Health Act of 1970, ORC formed its Occupational Safety and Health Group, which is now composed of more than 245 large corporations in diverse industries. The focus of the Group is to promote effective occupational safety and health programs and practices in business, and to facilitate constructive communications between business and government agencies responsible for establishing national occupational safety and health policy.

ORC's members frequently sell and buy entire industrial facilities or product lines from other employers, and sometimes go through bankruptcy reorganizations. Excessively broad or erroneous doctrines of successorship and veil piercing could be used to greatly upset settled and long-held expectations as to the legal consequences of such sales, purchases and reorganizations. The legal doctrines advocated by the Secretary would do exactly that and would fly in the face of recent Supreme Court case law. ORC's interest here is not the outcome of these cases, but in the preservation of settled and predictable rules of corporate organization.

II. ARGUMENT

A. Summary of Argument

There is a deeply-held misconception about common law doctrines such as veil piercing, successorship, and employer-employee relations that is current among federal agencies – that these doctrines are so plastic that federal agencies and courts may freely invent special statute-specific versions of them. This tenacious misconception has metastasized through many federal statutory schemes and was recently exposed as such by the U.S. Supreme Court. Yet, the misconception infects nearly every aspect of the Secretary's brief.

The correct approach to the issue is embodied in the presumption that, when Congress uses terms such as "employer," "employee" and "person," it is legislating against a common law background and thus is presumed to have used these terms in their common law senses. The presumption can be rebutted if something in a statute shows that Congress meant to reject the common law meaning. Such evidence is difficult to find in most statutes, and it is completely absent from the Occupational Safety and Health Act. Therefore, there is no basis for the Secretary's argument that the Commission may construct an OSH Act-specific set of veil piercing, successorship and employment doctrines. The contrary cases that the Secretary cites are either cases that precede or fail to consider the Supreme Court's most recent line of cases on this issue, or are labor law cases and hence distinguishable. The Commission must adhere to the common law principles that were part of the legal canvas onto which Congress painted.

Finally, *amicus* urges the Commission to firmly and clearly reject the Secretary's argument that it should defer to her statutory construction argument.

B. The Common Law; the Holding in *Bestfoods* and Other Cases.

The general common law on successorship liability is that an entity is not liable as a successor merely because it takes over a business, even if it retains the same local management. Consider the simple case of the sale of a car; a purchaser is not liable in tort to a plaintiff whom the previous owner hit with the car. More precisely stated, the common law rule, and its exceptions, are as follows: Successor liability does not attach unless:

(1) a merger, consolidation or reorganization has occurred;
(2) the transaction is a fraud;
(3) the successor contractually agrees to assume the liabilities of the predecessor; or
(4) the predecessor no longer exists, and only negligible differences exist between the predecessor and successor companies and between their shareholders and management;

> under this exception, there is "little more than a shuffling of corporate forms, lacking any fundamental change with independent significance."[1]

See Phillip I. Blumberg, *The Continuity of The Enterprise Doctrine: Corporate Successorship in United States Law,* 10 FLA. J. INT'L L. 365, 369-372 (1996) (hereinafter "*Blumberg*"); Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law,* 68 U.CINN.L.REV. 1157, 1164 (2000) (hereinafter "*Mank*"); RESTATEMENT (THIRD) OF THE LAW OF TORTS, PRODUCTS LIABILITY § 12 (1998).

Despite this, the idea had taken root among federal agencies that when a selling corporation transfers ownership of a facility to a buying corporation (in an asset transfer, not a stock transfer), and the buyer retains the same form of operation (same product, same workforce, same equipment, etc.), the buyer becomes responsible for all the liabilities of the seller, as opposed to the usual responsibility for compliance. As discussed below, this idea first originated in the labor law context, spread to the products liability field, and then to the environmental and other fields. The idea was crystallized in the so-called "continuation of the enterprise" or similar "substantial continuity" tests for successorship, *i.e.,* special rules of successorship liability that agencies and courts in effect specially tailored to each federal statutory scheme. These loose tests did not represent the common law test and have been rejected in most jurisdictions. *Blumberg* at 376. (The Secretary's assertion (Supp.Br. at 23) that the "mere continuation" test represent the common law is, therefore, wrong.) That the "continuation of the enterprise" or "substantial continuity" tests were inconsistent with the common law was usually considered unimportant by the agencies, however, for the common law and kindred state laws were often seen as parochial, non-uniform and irrelevant to the special concerns underlying a federal law.

[1] Phillip I. Blumberg, *The Continuity of The Enterprise Doctrine: Corporate Successorship in United States Law,* 10 FLA. J. INT'L L. 365, 371 (1996).

And, as might be expected, the special statute-specific rules that federal agencies borrowed, created or advocated were always much more favorable to liability, and more amorphous and less predictable, than the common law rule or general state law rule.

In a recent series of cases, however, the United States Supreme Court made clear that, in the absence of explicit congressional direction, federal courts construing federal statutes must respect general common law principles and, with specific regard to corporate identity,[2] may not freely supplant them with statute-specific doctrines. The most recent of these cases is *United States v. Bestfoods,* 524 U.S. 51 (1998), in which the Court held that, because federal courts must adhere to "general principles of corporate law deeply ingrained in our economic and legal systems," a parent corporation would be liable under an environmental law (CERCLA) only if veil piercing were permitted under common law principles. 524 U.S. at 61 (interior quotation marks omitted). "[T]o abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." 524 U.S. at 63. The Court specifically rejected "a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability." The Court added that "such a [statute-specific] rule does not arise from congressional silence," and hence that silence by Congress does not permit courts to treat CERCLA "as though it displaced or fundamentally altered common law standards of limited liability."

Another case requiring respect for state law is *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 114 (1994), which forbade creation of a federal law of imputation of fraudulent conduct and instead required state law to be followed. It held that there is a "heavy presumption" in favor of

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[2] We use the term "corporate identity" as a short-hand for successorship and veil-piercing doctrines, including the special case of veil-piercing known as "alter ego," and whether one is an "employer."

state law that may not be displaced except in "extraordinary" circumstances and in "few and restricted cases." This case effectively overruled the loose test suggested by *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979), which heavily emphasized the need for the application of uniform legal principles, *i.e.*, federal ones. *O'Melveny & Myers* was re-affirmed in *Atherton v. FDIC*, 519 U.S. 213 (1997). Likewise in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992), the Court held that, when construing the term "employee" in a federal statutory context, the common law definition of the term must generally be followed rather than one derived from a statute-specific test. These cases reflect a deliberate course of decision by the United States Supreme Court to put a stop to the disregard or loose treatment of common law and state law that had become endemic in federal court and agency case law.

The Secretary states, however, that "nothing in *Bestfoods* suggests that the Court intended to overrule decades of federal common law." That is exactly wrong. The Court's specific purpose in *Bestfoods* was to stem the metastasis through each federal statutory scheme of the fallacy that one may ignore the common law background against which Congress legislated and freely create statute-specific corporate identity tests. As one commentator observed, "*Bestfoods* is strongly inconsistent with cases that attempt to create an expansive federal common law standard ...." *Mank* at 1194. For precisely this reason, the Second Circuit recently required that any federal common law of veil piercing reflect the view of the majority of the states. Thus, in *New York v. National Services Industries, Inc.*, 352 F.3d 682 (2d Cir. 2003), the Second Circuit rejected the substantial continuity test because it "departs from the common law rules of successor liability" and held that it "not a part of general federal common law" because it is only a minority rule in the states. *See* also *United States v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001), and *Atchison, Topeka & Santa Fe Rwy. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363 (9th Cir. 1998).

It is also doubtful that the substantial continuation test could rightly be applied to an OSHA enforcement case, for it is "restrict[ed] to situations in which the plight of the injured party is most compelling," *i.e.,* it is "used only *in extremis* when the law would otherwise be unable to provide any remedy to an innocent victim. *Blumberg* at 379. See, for example, *Terco, Inc. v. FMSHRC,* 839 F.2d 236 (6th Cir. 1987) (three fired miners left without remedy because predecessor "ceased operations," "was left without assets," and was "a hollow shell"). In sum, any "federal common law" must reflect *the* common law and not become a balkanized series of statute-specific corporate identity doctrines.

To be clear, ORC does not dispute the Secretary's assertion that common law successorship or veil-piercing principles can be applied under the OSH Act, for as the Secretary argues, such a common law doctrine is presumed to be one of the common law principles against which statutory terms such as "person" and "corporation" must be measured. Where the Secretary goes wrong is to imply that such common law principles may be disregarded in favor of, or twisted into, an OSHAct-specific scheme for successorship or veil piercing different from the common law test. They cannot, for nothing in the OSH Act even suggests that the Commission is free to depart from the common law tests for successorship and veil piercing. "[T]o abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Bestfoods*, 524 U.S. at 63. (We discuss below how the OSH Act fares in this respect.) Nor may state law be displaced out of speculative fear that a state will make itself a haven for successors seeking to dodge legal liability, for, to paraphrase one court, "[i]t is unrealistic to think that a state would alter general corporate law principles to become a peculiarly hospitable haven" for violators of OSHA standards. *Atchison, Topeka & Santa Fe Rwy Co. v. Brown & Bryant*, 132 F.3d 129, 364 (9th Cir. 1998) (CERCLA case).

Is there anything in the text or legislative history of the OSH Act that could support a holding that Congress intended to abrogate common law principles of entity liability? The Secretary places much weight on the phrase "other appropriate relief" in Section 10(c). While this phrase broadly empowers the Commission to issue remedial orders, it falls far short of constituting the specific indication of authority demanded by *Bestfoods* to justify a departure from common law principles of corporate identity. For one thing, it does not speak at all to corporate identity or who may be sanctioned by a Commission order. It deals merely with the modes of *relief* available.

The Secretary also briefly observes that the definition of "person" in Section 3(4) of the Act, 29 U.S.C. § 652(4), states that a "person" includes "any organized group of persons." Hence, the Secretary argues, "an organized group that includes an individual and a corporation may also be an employer under the OSH Act." Sec.Supp.Br. at 2. The argument would swallow up every state and common law principle of corporate identity. Every corporation constitutes with its managers "an organized group"; if they were not "organized," they would be unprofitable and cease to exist. The argument overlooks the statutory construction principle that a word is known by the company it keeps.[3] The Act's definition of "person" refers to organizations created as an economic unit – not a conglomeration of persons whose "organiz[ation]" can be conjured up by fanciful construction. The argument also does not aid the Commission in its task for, in the end, any "any organized group of persons" alleged to be a "person" must, under *Darden* also meet the common law definition of "employer."

Extending liability to persons who are not "employers" would negate Congress's careful and deliberate limitation of liability under the citation-enforcement provisions of the Act to

[3] *E.g., Jarecki v. G.D. Searle,* 367 U.S. 303, 307 (1961).

"employers." *United States v. Doig*, 950 F.2d 411, 15 BNA OSHC 1401 (7th Cir. 1991); *United States v. Shear*, 962 F.2d 488, 15 BNA OSHC 1686 (5th Cir. 1992); *Atlantic & Gulf Stevedores, Inc. v. OSHRC,* 534 F.2d 541, 4 BNA OSHC 1061 (3d Cir. 1976). By contrast, Congress specifically permitted liability to be imposed on non-employers in Section 11(c) of the Act ("no person"; "any person"), in Section 17(f) ("any person"), (g) ("whoever").

Instead of pointing to something in the text or legislative history of the OSH Act that justifies a departure from the common law rules, the Secretary relies heavily (indeed, nearly entirely) on the Supreme Court holding under the National Labor Relations Act in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973), that a purchaser is liable for the reinstatement obligation of its seller when the purchaser "acquired the substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's operation" and knew of the unfair labor practice before the purchase. But *Golden State* is not apposite here. First, as the Second Circuit noted in *New York v. National Services Industries, Inc.*, 352 F.3d 682 (2d Cir. 2003), *Golden State* may be distinguished as involving a federal law of labor contracts specially required by the LMRA to have been created. Second, the "labor-law doctrine of successorship" evinced in *Golden State* applies to, and was created to apply to, only the special circumstances of labor relations, in which employees sacrifice much to bring themselves to act in concert and organize, and in which employees build up settled and hard-fought expectations of labor-relations stability and union solidarity – all of which could all too easily be voided by the mere sale of an ongoing business.[4] But none of these considerations has the slightest application to the

[4] As the Court explained in *Golden State*:

> When a new employer, such as All American, has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees

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OSH Act. It is in this sense that the Secretary's assertion that the OSH Act is a labor relations statute can be seen as wrong, for the OSH Act does not regulate relations between employers and employees or unions. Rather it is, in its true essence, a workplace environmental statute – *i.e.*, a statute that requires employers to free workplaces from recognized hazards and unsafe or unhealthy conditions or practices. See Sections 3(8) and 5(a)(1) of the OSH Act. Given *Bestfoods*, it is highly likely that the Supreme Court would today disapprove an expansion of *Golden State* to the OSHA sphere.

The Secretary also in effect argues that there is a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 88. But what the Secretary offers as evidence of such a conflict is far too thin to justify departure from the common law background against which Congress implicitly legislated and shows too little respect for the teachings of *Bestfoods*.

The Secretary states at 18 that, "[w]ithout the application of *Golden State*, it would be impossible to redress certain violations of the Act." We are told that without successorship liability, "the succeeding employer will have no duty to abate a cited item." That is thin gruel indeed, for the Secretary overlooks the distinction between abatement and compliance. It is literally true that, unless a purchaser is liable as a successor, it would have no duty to abate a cited item, nor could it be cited for a "repeated" violation. But that is as it should be. Even if the

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may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees identify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities."

new entity or purchaser cannot be prosecuted for failure to abate, it still has a compliance obligation and can be cited for violating that. If the purchaser is indeed a different entity, then the imposition of daily or ten-fold higher penalties is not justified. Moreover, if (as the Secretary hypothesizes) the personnel comprising the management of a factory or business indeed remain the same, then the Secretary can *still* seek a ten-fold increase in penalties if a violative condition recurs; inasmuch as the managers would know from the previous enforcement that the condition is violative, the new employer could be cited for a "willful" violation. In sum, even if penalties for non-abatement are unavailable, substantial penalties are always available for non-compliance. The Secretary's over-stated concerns about enforcement furnish much too slender a reed to justify departure from the common law test or to distort well-settled principles of corporate identity.

The Secretary also speaks much about discrimination cases under Section 11(c). Although such arguments are better directed at the district courts, the *amicus* will briefly address them. These arguments too fall short of the strong showing needed to justify a departure from common law principles. The general case in reality is that, because the previous owner sold its business, it would have the money to pay damages to the wrongly-fired employee – damages that would reflect the lack of reinstatement by the purchaser. The general case in reality is that a purchaser who knows of an unlawful firing would be foolish to fail to hire the former employee when a job does open up; at the very least, it could expect a swift and pointed inquiry by a Section 11(c) investigator. And if an unusual case is presented in which the sale is structured so as to give the injured plaintiff no remedy, courts stand ready to impose equitable remedies for that unusual case. *E.g., Terco, Inc. v. FMSHRC,* 839 F.2d 236 (6th Cir. 1987) (three fired miners left without remedy; previous corporation had "ceased operations," "was left without assets," and was "a hollow shell"). In sum, the Secretary has not even come close to showing that departure from the common law is justified as a rule.

The Secretary suggests that veil-piercing should occur when parent corporations monitor, audit or influence the safety practices of their subsidiaries. But veil-piercing in such circumstances will only harm employee safety and health, just as similar extensions of liability have discouraged sensible participation in safety and health matters. For example, the result of holding conscientious land owners liable because they voluntarily monitored or oversaw safety practices of contractors has been that their attorneys advise them to cease such activities.[5] The result of OSHA prosecutions[6] against design professionals (architects and engineers) who offer safety advice to contractors has been that attorneys advise design professionals to avoid involvement in construction safety issues. Punishing good deeds just ensures that they will be in short supply. *See IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998) (liability reduces incentive to advance safety); *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 5 n.9 (1st Cir. 1993) ("might have the perverse result of causing an employer to discourage his/her employees from making on-site safety inspections for fear of being subjected to OSHA liability").

The Secretary also tells us that the OSH Act is remedial legislation. But this proves nothing of any use here. No one is arguing here that the OSH Act should be narrowly construed

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[5] In *Owens v. Process Indus., Inc.*, 722 F. Supp. 70 (D. Del. 1989), a host employer was found liable for injuries to a contractor's employee because the host required the contractor to obey OSHA trenching standards, conducted safety inspections of the contractor's work, and required the contractor to follow its safety directions. In *Tittle v. Alabama Power Co.*, 570 So. 2d 601 (Ala. 1990), a host employer who spoke to contractor about safety held liable to contractor employee who slipped on some dust.

[6] *E.g., CH2M HILL, Inc. v. Herman*, 192 F.3d 711 (7th Cir. 1999), *rev'g CH2M Hill Central, Inc.*, 17 BNA OSHC 1961 (No. 89-1712, 1997); *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 5 n.9 (1st Cir. 1993).

because it is in derogation of the common law; instead, the argument is that the OSH Act should be construed *according* to the common law. Given this –

> The frequently invoked idea that 'remedial statutes should be broadly construed,'. . . is largely useless. All statutes are in a sense remedial, and it would be odd to suggest that all statutes should be broadly construed. The principle is best defended as a necessary corrective to the canon calling for narrow construction of statutes in derogation of the common law. The legal system would be better off without either canon.

Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 HARV.L.REV. 405, 459-460 n.201 (1989).

Finally, the Commission has asked whether Section 17(l) – which provides for penalty collection actions in the district courts – is relevant here. It is relevant here in at least two ways. First, it makes clear that penalties cannot be collected except against "the employer." Second, in penalty collection actions against a bankrupt employer, collection would be subordinated, and the penalty debt might be discharged, under the bankruptcy laws. Section 726(a)(4) of the Bankruptcy Code subordinates penalty claims that are not compensatory in nature to allowed unsecured claims; 11 U.S.C. § 1129(a)(7)(A)(ii) in effect incorporates this into Chapter 11. In a Chapter 11 reorganization, OSHA penalties are dischargeable (see § 1141(d)(1)(A)); in a Chapter 7 liquidation, the subordination of the penalties might result in their never being paid. The Secretary's attempt to impose liability on purchasers or corporate officers would be inconsistent with the subordination of OSHA penalties in Chapter 7 of the Bankruptcy Code and their dischargeability in Chapter 11. Neither the Secretary nor the Commission may administer the Act so single-mindedly as to undermine other important federal polices. *Southern Steamship Co. v Labor Board*, 316 U.S. 31, 47 (1942).

C. **The Commission Should Emphatically Reject the Secretary's Claim that the Commission Must Defer to Her View of Statutory Construction Issues.**

The Secretary argues that the Commission must defer to her statutory construction arguments, citing such cases as *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991); and *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Mead* in effect holds, however, that the Secretary's position here is entitled not to *Chevron*[7]-style deference but, if anything, merely to *Skidmore*[8]-style weight, for it is not embodied in a formal rulemaking or formal adjudication.

More importantly, Commission precedent holds that the Commission owes no deference to the Secretary on issues of statutory construction. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352 (OSHRC 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). *Amicus* most respectfully urges the Commission to adhere to this precedent and explain clearly to the various courts of appeals why it does not defer to the Secretary on statutory construction. If the Commission does not firmly defend its intended role under the Act, the courts of appeals will continue to pay no attention to employers or *amici* who do. They will continue to fail to closely analyze whether *CF&I Steel* even applies to questions of statutory construction or is limited to interpretation of a standard. If the Commission is not forceful on these distinctions, the courts will implicitly force the Commission to defer to the Secretary on questions of statutory construction, and ultimately the Commission's role under the Act will be destroyed. For these reasons, *amicus curiae* most respectfully suggests that the Commission expressly reject the argument.

At bottom, the Secretary's argument rests on *CF&I Steel*. But that decision says nothing about statutory construction. The Court's actual holding is confined to interpretation of the Secretary's own standards. The Court's discussion did not address deference to the Secretary's

[7] *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[8] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

statutory constructions. And the essential premises underlying the reasoning of *CF&I Steel* — that the Secretary's power to construe standards is derivative of her power to adopt them, and that the Secretary is in a superior position to construe standards she authored – are inapplicable to construction of the Act.

Moreover, there is strong reason why *CF&I Steel* should not be extended further than its precise holding. That reason is *indisputable* congressional intent, not discussed by the Court in *CF&I Steel*, that Congress intended that the Commission be "an autonomous, independent commission which, ***without regard to the Secretary***, can find for or against him on the basis of individual complaints."

In 1970, when Congress was considering various versions of the legislation that became the Act, a central dispute was who would decide enforcement cases. One proposal, advocated by labor unions and congressional Democrats, was to commit adjudication to the Secretary of Labor; the expectation was that the Labor Department would establish a departmental appeals board, *i.e.*, a board established by a cabinet agency or an independent agency (such as the Federal Trade Commission) to adjudicate cases brought by their enforcement bureaus. For example, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801 *et seq.* (1976), gave all administrative functions to the Department of the Interior. That department established an enforcement arm, the Mining Enforcement Safety Administration (MESA), and an adjudication arm, the Interior Board of Mine Operation Appeals (IBMA). The IBMA reviewed questions of law *de novo*, without deference to MESA,[9] and its views were given deference by

[9] *See, e.g., Eastern Associated Coal Corp.*, 7 IBMA 133, 1976-77 CCH OSHD ¶ 21,373 (1976) *(en banc);* 1 COAL LAW & REGULATION, ¶ 1.04[9][b][iii], p. 1-49 (T. Biddle ed. 1990) ("Of course, the Board could independently decide questions of law."). MESA was later transferred to the Labor Department and became MSHA after the Federal Mine Safety and Health Act of 1977 was passed; the (cont'd)

courts for it was *they* who spoke for the cabinet department or officer, not the enforcement office.[10] Such departmental appeals boards were then the rule.

But in 1970, dissatisfaction and suspicion of the independence and objectivity of such boards ran so deep as to endanger passage of the Act.[11] The President threatened to veto any bill that placed all administrative powers in one agency. BOKAT & THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW at 42 (1st ed. 1988). To save the Act, Senator Javits drafted and proposed an "important"[12] compromise – the establishment of an independent adjudicator. In urging that compromise, he assured the Senate that it would establish "an autonomous, independent commission which, ***without regard to the Secretary,*** can find for or against him on the basis of individual complaints."[13] On the strength of that assurance, Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required ...."[14] This remark by Senator Javits – the author of the compromise that saved the Act and established the Commission – is apparently the only piece of legislative history that directly addresses the deference issue.

IBMA's functions were transferred to the newly-created Federal Mine Safety and Health Review Commission.

[10] *Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view "must be given some significant weight").

[11] S. Rep. No. 1282, 91st Cong., 2d Sess. 55 (1970), *reprinted in* Senate Subcommittee on Labor, *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. at 141, 194 (Comm. Print. 1971) (*"Leg. Hist")* (debate "so bitter as to jeopardize seriously the prospects for enactment. . . ."). *See also* the pointed remarks by Senators Dominick and Smith appended to the Senate Report at 61-64, *Leg. Hist.* at 200-03.

[12] MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 3, p. 7 (4th ed. 1998) (Act passed only after the Senate "passed a series of compromise amendments, including an important amendment by Senator Jacob Javits ....").

[13] *Leg. Hist.* at 463 (emphasis added).

[14] *Id. See also id.* at 193-94, 200-03, 380-94, 479; and Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, MONTHLY LAB. REV. 22-23 (March 1981).

The Secretary's position on deference is flatly inconsistent with Senator Javits's statement. The Commission cannot both decide cases "without regard" for the position of the Secretary and give the Secretary's reasonable interpretation controlling regard.[15] Moreover, ignoring Senator Javits's specific remarks on deference would, ironically, make the Commission even more subservient than the bodies that Congress in 1970 specifically rejected as insufficiently independent.

The Secretary argued recently that Mr. Javits' remark does not rule out deference to the Secretary because it reflects only the independent role of courts, which nevertheless defer to agency interpretations. Sec. Br. at 23-24 & n.17 in *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003). The argument fancifully assumes that Senator Javits believed that the kind of deference (if any) that courts gave in 1970 to agencies' views was of the *Chevron* sort. But his use of the phrase "without regard" shows that he did *not* so believe. And this is perfectly understandable, for his remark instead echoed the *de novo* approach to statutory construction that had by 1970 been followed by many courts and been exemplified in, for example, *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), in which agency views were at most given only "weight."[16] Although there was then also a widely-noted[17] line of conflicting

[15] *Amicus* respectfully suggests that questions insistently posed to the Secretary during any oral argument about the consistency of her position with this statement by Senator Javits would likely yield an illuminating response.

[16] *See also United States v. Swank,* 451 U.S. 571 (1981); *Morton v. Ruiz,* 415 U.S. 199, 236-37 (1974); *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 492-93 (1947). *See generally* K. DAVIS AND R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.1, p. 108 (3d ed. 1994). One example of such a decision is *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 719 (D.C. Cir. 1982), *rev'd sub nom. Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[17] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16 (2d ed. 1984); *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (per Friendly, J.) ("there are two lines of Supreme Court decisions on this subject which are analytically in conflict"), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing*
(cont'd)

cases holding that courts must accept an agency interpretation with "a reasonable basis in law,"[18] and the conflict was for a time later resolved entirely against the *Skidmore/de novo* approach, this did not occur until long after Senator Javits spoke, when the Supreme Court issued *Chevron*. Senator Javits's idea of judicial independence was opposed to that in *Chevron*, and it is that conception that is controlling here.

For these reasons, the Commission should not extend *CF&I Steel* beyond its precise holding. Although Senator Javits's statement was noted in one *amicus* brief to the Supreme Court,[19] the employer's brief in *CF&I Steel* failed to quote or cite it.[20] Apparently as a result, the Court did not discuss it or note it. Yet, respect for Congress requires that its undisputed intent be given as much effect as possible. Thus, unless the Secretary can reconcile Senator Javits's statement with her position on deference, or unless there are compelling indications in *CF&I Steel* that it necessarily applies to statutory questions, *CF&I Steel* should not be extended any further than its precise holding.

As noted above, the *CF&I Steel* opinion has no such compelling indications. The Court's statement that the Commission has "the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context," 499 U.S. at 154, is not a compelling contrary indication, for as noted above the case law in 1970 did not make clear whether a court was

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Reasoned Decisionmaking In Reviewing Agency Interpretations of Statutes, 73 TEX. L. REV. 83, 93 (1994) (pre-*Chevron* doctrine "schizophrenic").

[18] *E.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969) (agency view upheld unless "unless there are compelling indications that it is wrong").

[19] Brief of Am. Iron and Steel Institute at 4, available on Lexis at 1989 U.S. Briefs 1541.

[20] The Commission should take official notice that CF&I Steel was then in bankruptcy (see *United States v. Reoganized CF&I Fabricators Of Utah, Inc.*, 518 U.S. 213 (1996)), and was represented by a small practitioner (http://pview.findlaw.com/view/2222453_1?noconfirm=0) that a Westlaw or Lexis search would show had not previously litigated cases before the Commission.

required to give an enforcement agency's view *Chevron*-style deference or mere *Skidmore*-style "weight."[21] Thus, *CF&I Steel* should not be extended beyond the precise rule it established – that the Secretary receives deference or weight only with respect to interpretation of standards.

III. CONCLUSION

The Commission may not devise OSHAct-specific rules for deciding corporate identity questions but should apply the common law. The Commission owes no deference to the Secretary on such statutory construction questions.

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[21] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16 (2d ed. 1984); *see also, e.g., Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (per Friendly, J.) ("there are two lines of Supreme Court decisions on this subject which are analytically in conflict"), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes,* 73 TEX. L. REV. 83, 93 (1994) (pre-*Chevron* doctrine "schizophrenic").

One line of cases required a court to adopt the interpretation it thought correct after giving the agency's interpretation "weight," the degree of which would vary with the technical complexity of the issue, the agency's expertise, etc. For example, in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Court stated that while the agency's interpretations are "not controlling," they "do constitute a body of experience and informed judgment to which courts ... may properly resort for guidance." "The weight" given to the agency's interpretation, the Court stated "will depend upon the thoroughness evident in its consideration, ... [and] its consistency with earlier and later pronouncements...." *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.1, p. 108 (3d ed. 1994).

The other line of cases held that "the reviewing court's function is limited" and that it must accept an agency interpretation with "a reasonable basis in law" (*e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944)) or "unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Inasmuch as the criterion for interpretation under this second line of cases is the reasonableness of the agency's interpretation, not its correctness in a court's eyes, this line of cases appeared to bar courts from interpreting statutes *de novo.*

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2004, the foregoing was served upon the following by first class mail on:

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