

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 96-0563

UNION TANK CAR COMPANY,

Respondent.

USWA LOCAL 8923,

Authorized Employee Representative.

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

Union Tank Car Company (“Union Tank”), located in Cleveland, Texas, repairs railroad cars. Following an inspection on March 7, 1996, Union Tank was cited for an alleged violation of 29 C.F.R. § 1910.132(a) for failing to provide personal protective equipment (“PPE”). The citation, as amended, alleged:

29 C.F.R. 1910.132(a): Protective equipment including, equipment, for eyes, head, face, and extremities, protective clothing, respiratory equipment and protective shields and barriers, were not provided:

a. At Hwy 787 East. Employees required to purchase their safety shoes and welding gloves and the company would subsidize the cost of metatarsal guards.

Both parties submitted cross motions for summary judgment to Administrative Law Judge James H. Barkley. The Secretary argued that she interprets the term “provide” in section 1910.132(a)¹ to mean that the employer must pay for the cost of PPE. The judge did not rule on the reasonableness of the Secretary’s interpretation, instead he found that the cited standard, section 1910.132(a), was preempted by sections 1910.136² (addressing foot protection) and 1910.138³ (addressing hand protection) and vacated the citation. We affirm the decision of the administrative law judge, but for different reasons.

I. History of Section 1910.132(a).

Section 1910.132(a) was a national consensus standard promulgated pursuant to section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, in

¹Section 1910.132(a) provides:

(a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

²Section 1910.136(a) provides:

(a) *General requirements.* The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards.

³Section 1910.138(a) provides:

(a) *General requirements.* Employers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.

1971. The Commission first addressed the meaning of the term “provide” in the cited section in *The Budd Co.*, 1 BNA OSHC 1548, 1973-74 CCH OSHD ¶ 17,387 (No. 199, 1974)(consolidated), *aff'd*, 513 F.2d 201 (3d Cir. 1975). The Commission determined that “provide” in section 1910.132(a) could not be interpreted to mean “pay for.”⁴ Reading all three subparts of section 1910.132 together, the Commission held that to read subpart (a) as requiring the employer to provide protective equipment would negate subpart (b), which contemplates the use of employee provided equipment.⁵

Since *Budd*, we are aware of at least five letters of interpretation issued by OSHA from 1976 to 1993 clarifying an employer’s responsibility to “provide” PPE under section 1910.132.⁶ In these letters, OSHA never stated that the standard required employers to pay the cost of PPE. For example, the agency explained that “[t]he OSHA standards do not . . . specify who pays the cost of such protective equipment. This question normally is settled through discussions between the employer and employees, or through the collective bargaining process.” *September 2, 1976 Interpretive Letter to Adlai E. Stevenson*. In a 1990 letter, OSHA stated that it had “conducted a recent hearing on proposals to revise existing OSHA standards covering personal protective equipment. One of the issues discussed at the hearing concerned who should bear the cost of safety equipment necessary to protect

⁴In that case, the employer did not deny that it violated section 1910.132(a), and moved to withdraw its notice of contest. This motion was conditioned on a finding that Budd was not obliged to pay for the required safety equipment -- steel-toed shoes. The Secretary did not object. However, the Authorized Employee Representative argued that the company was required to provide and pay for the equipment.

⁵Section 1910.132(b) provides:

(b) *Employee-owned equipment*. Where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance, and sanitation of such equipment.

⁶These letters of interpretation were published on OSHA’s internet site. We find it troubling that the Secretary made no references to these letters of interpretation in her submissions to the Commission. The Secretary asserts that she has always interpreted the term “provide” in section 1910.132(a) to mean “pay for.”

employees during work situations. We do not expect a formal resolution of this issue in the near future.” *May 9, 1990 Interpretive Letter to Benjamin Schneider*.

In 1989, nine months prior to the Schneider interpretive letter, OSHA issued a notice of proposed rulemaking (“NPRM”) that was intended to create revised standards for PPE that were “more clearly written, more comprehensive, and [that] more accurately reflect[ed] available technology.” 54 Fed. Reg. 33,832. We assume that the hearings conducted in conjunction with the rulemaking were the same hearings mentioned in the Schneider letter. Yet there was no proposal in the NPRM to alter section 1910.132(a). The Secretary argues that the “*Costs of Compliance*” section in the NPRM indicates that employers will bear the costs of PPE. This assertion is not borne out in the plain language of the NPRM published in the Federal Register. The NPRM addressed only the increased cost of compliance with the revised rule, it did not address who will bear those costs. The “Costs of Compliance” section reads in part:

Under both the existing and proposed standards there are requirements to provide PPE wherever there are hazards present in the workplace. OSHA estimates that the incremental cost to comply with the revised rule would be approximately \$28.3 million annually.

54 Fed. Reg. 33,840. The final rule, issued in 1994, used a similar cost analysis. Neither the NPRM nor the final rulemaking addressed any requirement that employers must provide and pay for PPE. Indeed, neither addressed cost allocation at all.⁷

In October 1994, four months after the revisions to the PPE standard went into effect, a 1994 memorandum issued by Deputy Assistant Secretary James W. Stanley to regional administrators and heads of directorates outlined an employer’s obligation to pay for PPE (“Stanley memorandum”). The only stated reasons for the memorandum was that it was “important that a uniform approach be taken by all OSHA offices with respect to the question

⁷The Secretary requested that we take official notice of a document entitled “Preliminary Regulatory Impact and Regulatory Flexibility Analysis of the Personal Protective Equipment Standard.” Pages IV-7 through IV -8 were attached to her motion. Although we find this document to be of limited value, we grant the Secretary’s motion.

of employer responsibility for payment of the cost of . . . PPE.” The memorandum stated that:

OSHA has interpreted its general PPE standard, as well as specific standards, to require employers to provide and to pay for personal protective equipment required by the company for the worker to do his or her job safely and in compliance with OSHA standards. Where equipment is very personal in nature and is usable by workers off the job, the matter of payment may be left to labor-management negotiations. Examples of PPE that would not normally be used away from the worksite include, but are not limited to: welding gloves, wire mesh gloves, respirators, hard hats, specialty glasses and goggles (e.g., designed for laser or ultraviolet radiation protection), specialty foot protection (such as metatarsal shoes and linemen’s shoes with built in gaffs), face shields and rubber gloves, blankets, cover-ups and hot sticks and other live-line tools used by power generation workers. Examples of PPE that is personal in nature and often used away from the worksite include non-specialty safety glasses, safety shoes, and cold-weather outer wear of the type worn by construction workers. However, shoes or outerwear subject to contamination by carcinogens or other toxic or hazardous substances which cannot be safely worn off-site must be paid for by the employer. Failure of the employer to pay for PPE that is not personal and not used away from the job is a violation and shall be cited.

OSHA restated this policy in directive number STD 1-6.6, issued on June 16, 1995, updating the inspection guidelines for 29 C.F.R. Subpart I. This directive noted that “[f]ailure of the employer to pay for PPE that is not personal and not used away from the job is a violation of 29 C.F.R. 1910.132(a) and shall be cited.”

On April 3, 1995, OSHA issued a letter of interpretation that reflected the apparently new requirement contained in the Stanley memorandum that employers must pay for some types of PPE. Neither the Stanley memorandum nor the April 1995 letter of interpretation gave any explanation for the change. Directive STD 1-6.6 reiterated the new interpretation less than a year before Union Tank was inspected on March 6, 1996. Another letter of interpretation, issued on December 9, 1996, similarly reflected OSHA’s change in requirements.

II. Analysis

In *Martin v. OSHRC (CF & I Steel Corp.)* 499 U.S. 144, 150, 157-58 (1991) (“*CF & I*”), the Supreme Court held that reviewing courts must defer to the Secretary’s reasonable interpretation of an ambiguous regulation that otherwise “sensibly conforms to the purpose and wording of the regulation[.]”, taking into account “whether the Secretary has consistently applied the interpretation embodied in the citation,” “the adequacy of notice to regulated parties,” and “the quality of the Secretary’s elaboration of pertinent policy considerations.”

Here, the Secretary claims that she “has consistently applied the interpretation embodied in the citation,” but this claim is unsupported. The Secretary’s new interpretation comes after twenty years of uninterrupted acquiescence in the interpretation the Commission announced in *Budd*. During this twenty-year period, the Secretary stated more than once in interpretative letters that the “standards do not . . . specify who pays the cost of such protective equipment.” Moreover, from 1989 to 1994 the Secretary conducted a rulemaking proceeding dealing with PPE that could have addressed the question of who pays for PPE under section 1910.132(a), but did not. The Stanley memorandum was issued only four months after the publication of the final rules that culminated that rulemaking. Finally, the Secretary’s interpretation also fails to “elaborate” the policy considerations that caused her to change her interpretation. *See CF & I*. Although she claims that she “clearly articulated” her position in the October 1994 memorandum and the 1995 instruction, neither of these “articulations” nor any of the rulemaking documents provide an adequate foundation for the change in her interpretation. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert.denied*, 403 U.S. 923 (1971) (“agency changing its course must supply a reasoned analysis indicating that prior policies and standards were being deliberately changed, not casually ignored”).

The circumstances of the interpretation the Secretary proposes here are in stark contrast to those in *Erie Coke Corp.*, 15 BNA OSHC 1561, 1991-93 CCH OSHD ¶ 29,653 (No. 88-611, 1992), *aff’d on other grounds*, 998 F.2d 134 (3d Cir. 1993), which the Secretary mistakenly relies on. There, the interpretation in question was issued relatively contemporaneous to the issuance of the cited standard, see OSHA Instruction STD 1-6.4

(March 12, 1979), nearly nine years before the inspection of Erie's plant took place. *See CF & I* (reasonableness of interpretation takes consistency of application into account). The standard cited in *Erie Coke* requires that “[t]he employer shall provide and assure the use of appropriate protective clothing and equipment. . . .” (emphasis added). The Commission noted that “[o]ur inquiry is limited, by Erie’s arguments and the language of the citation, to the Secretary’s interpretation of ‘provide’ *only* as it relates to flame resistant gloves under this standard.” 15 BNA OSHC at 1563, 1991-93 CCH OSHD at p. 40,148 (emphasis in original). The Commission distinguished *Budd*, noting that 1910.132(a) requires that protective clothing and equipment “shall be provided” but is silent as to who should do the providing.

Accordingly, under all of these circumstances, we cannot find that the Secretary’s interpretation is reasonable and entitled to deference under *CF & I*. The citation is therefore vacated.

/s/ _____
Stuart E. Weisberg
Chairman

/s/ _____
Daniel Guttman
Commissioner

Dated: October 16, 1997