No. 07-198

In the Supreme Court of the United States

EMCON/OWT, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed a decision by an administrative law judge under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, in light of the substantial evidence standard of review applicable to an agency's findings of fact and the arbitrary and capricious standard otherwise applicable to an agency's determinations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a- 3a) is not published in the *Federal Reporter* but is reprinted in 224 Fed. Appx. 875. The decision and order of the administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (Pet. App. 4a-22a) is reported at 21 O.S.H. Cas. (BNA) 1498.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2007. A petition for rehearing was denied on May 14, 2007 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on August 13, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, requires a covered employer to furnish to each of his employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employees, and to comply with occupational safety and health standards promulgated by the Secretary of Labor (Secretary). 29 U.S.C. 654(a); see 29 U.S.C. 655 (Secretary's authority to promulgate standards). Among the Secretary's standards is a requirement that employers engaged in excavation or trenching work perform daily inspections of excavations for evidence of a situation that "could result in [among other things] * * * hazardous atmospheres[] or other hazardous conditions." 29 C.F.R. 1926.651(k)(1).

The standard provides that a "competent person" must inspect the excavation "prior to the start of work and as needed throughout the shift." 29 C.F.R. 1926.651(k)(1). In particular, such an inspection is required after every "hazard increasing occurrence * * * when employee exposure can be reasonably anticipated." *Ibid.* Where the competent person finds evidence of a hazardous atmosphere or other hazardous conditions, exposed employees must "be removed from the hazardous area until the necessary precautions have been taken to ensure their safety." 29 C.F.R. 1926.651(k)(2).

A "competent person" is "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are * * * hazardous * * * to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. 1926.650(b).

2. Petitioner performs services involving the construction and maintenance of landfills. It was responsible for installing leachate collection systems and expanding gas extraction systems in the Okeechobee Landfill in Florida. Pet. App. 6a. Leachate is rainwater that leaches through garbage in the landfill and is collected in pipes in the landfill and then removed from the landfill for treatment. *Id.* at 7a; see Pet. 4. Gas extraction involves the removal of methane, an odorless gas produced by the deterioration of garbage in the landfill. Pet. App. 6a-7a.

In early 2004, petitioner had replaced a gas collection line and connected (tied in) new gas collection systems to leachate clean-out lines. Pet. App. 6a. On February 19, 2004, five of petitioner's employees were set to do the final tie-in for the gas collection system. *Id.* at 7a. The work involved cutting into a leachate clean-out pipe in an excavated trench. *Ibid.*

The work crew's supervisor (Meier) inspected the work site, then left to pick up supplies. See Pet. App. 7a, 17a. An acting foreman (Diloreti) was left in charge. *Id.* at 7a. While the acting foreman was in charge, one of the workers (Seaborn) cut into the pipe with a gas-powered chainsaw. *Id.* at 7a-8a. The pipe released an odorous gas, and the chainsaw stopped working. *Id.* at 8a. Seaborn then left to get an electric saw. *Ibid.*

About 15 to 20 minutes later, Seaborn returned with the electric saw, entered the excavation, and immediately exited the excavation, remarking on a foul odor. Pet. App. 8a. Diloreti then entered the excavation but also immediately exited, commenting on the bad odor. *Ibid.* Another employee (Warne) then entered the excavation, leaned over to cut the pipe, and immediately stood back up and said "Whew." *Ibid.* Finally, the re-

maining crew member (Garno) entered the excavation and leaned down to cut the pipe, stood back up, and said, "Something is not right." *Ibid.* He then passed out. Seaborn went to help Garno, and Diloreti noticed that Warne's legs were buckling. Diloreti went to pull Warne out of the trench, but passed out as he was doing so. *Ibid.* The employees were pulled from the excavation by other people working nearby and taken to a hospital for treatment. *Ibid.* Warne died either in transit or at the hospital. *Id.* at 1a-2a, 8a.

3. Following an investigation, the Secretary cited petitioner for violating the requirement in 29 C.F.R. 1926.651(k)(1) that a competent person inspect an excavation after a hazard-increasing occurrence if employee exposure can be reasonably anticipated. Pet. App. 15a-16a; see 29 U.S.C. 658.[1] The Secretary also alleged that the violation was "serious." Under 29 U.S.C. 666(k), a "serious violation" is deemed to exist if "there is a substantial probability that death or serious physical harm could result" from a condition or practice at issue "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." *Ibid.*

a. The ALJ affirmed the citation. Pet. App. 15a-22a. The ALJ reasoned that "[t]he hazard increasing occurrence in this instance was the cut made in the leachate pipe." *Id.* at 18a. The ALJ found that "[r]easonable anticipation of employee exposure was raised by three incidents over a span of approximately 20 minutes: the

[1] The Secretary also cited petitioner under 29 C.F.R. 1926.651(g)(1)(ii) and (iv) for failing to take certain steps to protect employees from a hazardous atmosphere. See Pet. App. 10a-12a. The ALJ vacated those citations, *id.* at 12a-15a, and they are no longer at issue here.

gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut. These incidents were, all the witnesses agreed, unusual in their experience." *Ibid.* Under 29 C.F.R. 1926.651(k)(1), an inspection was therefore required. The ALJ further found that no inspection was made, even though the "reasonable action" for the acting foreman to have taken was to test the atmosphere with a gas meter he knew was in a truck. Pet. App. 18a.

The ALJ also determined that the violation was serious and that petitioner had constructive knowledge of the violation because it could have known of it with the exercise of reasonable diligence. Pet. App. 20a-21a. The ALJ found that petitioner was not reasonably diligent in training its employees, especially employees who took on supervisory roles, to recognize potential hazards and to take steps to prevent employee exposure to a hazardous atmosphere. *Id.* at 21a. The ALJ also imputed the acting foreman's actual knowledge of the hazardous conditions to petitioner. *Ibid.* The ALJ then assessed a penalty of $6300. *Id.* at 21a-22a.

b. The ALJ's decision became final when the Occupational Safety and Health Review Commission (Commission) denied petitioner's request for discretionary review. See 29 U.S.C. 661(j).

c. The court of appeals affirmed the ALJ's decision. Pet. App. 1a-3a. The court reasoned that Commission decisions "are entitled to considerable deference on appellate review." Under 29 U.S.C. 660(a), the Commission's findings on questions of fact are conclusive if supported by substantial evidence; and 5 U.S.C. 706(2)(A) provides that an agency's decision otherwise can be

overturned only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Pet. App. 2a-3a. The court of appeals stated that this was a "close case," but "given the deference which must be accorded the Commission's decision," the decision should be affirmed. *Id.* at 3a.

ARGUMENT

The unpublished per curiam decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioner first argues that the court of appeals' decision is in conflict with decisions of other circuits on the standard of review governing the Commission's determination that the employees' exposure could be "reasonably anticipated," 29 C.F.R. 1926.651(k)(1), and that petitioner did not exercise "reasonable diligence," 29 U.S.C. 666(k). Pet. 13-15. In fact, there is no conflict among the circuits on this issue.

Several of the cases cited by petitioner stand for the general proposition that agency determinations on mixed questions of fact and law are subject to substantial evidence review when factual questions predominate, 29 U.S.C. 660(a), and to review under the standard of 5 U.S.C. 706(2)(A) when legal questions predominate.[2] See *Atlantic & Gulf Stevedores* v. *OSHRC*, 534 F.2d 541, 547 (3d Cir. 1976) (applying the Section 706(2)(A) standard to a predominantly legal question); *Electric Smith, Inc.* v. *Secretary of Labor*, 666 F.2d 1267, 1271 (9th Cir. 1982) (applying the Section 706(2)(A) standard in case

[2] Section 706(2)(A) provides that a reviewing court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

where "factual findings are of limited importance * * * as compared with the conclusions of law to be drawn from them"); *Puerto Rico Aqueduct & Sewer Auth.* v. *United States EPA*, 35 F.3d 600, 604 (1st Cir. 1994) (review under Section 706(2)(A) not applied to "[m]ixed questions of law and fact * * * that * * * are fact-dominated"), cert. denied, 513 U.S. 1148 (1995).

The only three cases cited by petitioner that deal specifically with the "reasonable diligence" standard in Section 666(k) all treat an employer's actual or constructive knowledge of a violation as a question of fact subject to substantial evidence review. See *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 1013 (5th Cir. 1975) (whether employer exercised "reasonable diligence" is "[e]ssentially * * * a question of fact"), aff'd on other grounds, 430 U.S. 442 (1977); *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1288 (6th Cir. 1976) (same); *Martin* v. *OSHRC*, 947 F.2d 1483, 1485 (11th Cir. 1991) (same). The same is true in the First and Third Circuits. See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984) (applying substantial evidence standard); *Donovan* v. *General Motors Corp.*, 764 F.2d 32, 35 (1st Cir. 1985) (whether employer had constructive knowledge of hazards is a question of fact reviewed for substantial evidence). Petitioner cites no case to the contrary. Nor does petitioner cite any case dealing specifically with the "reasonable anticipation" standard under 29 C.F.R. 1926.651(k)(1).

Moreover, even if there were a circuit split, this case would not be an appropriate vehicle to resolve it, for three reasons. First, the court of appeals was not asked to decide which standard of review should apply to the ALJ's determinations that employee exposure could be "reasonably anticipated" and that petitioner had con-

structive knowledge. Instead, petitioner's brief in the court of appeals merely recited the familiar rule that findings of fact are subject to substantial evidence review, and conclusions of law are subject to review under Section 706(2)(A). Pet. C.A. Br. 16-17. This Court should not consider issues that "are neither raised before nor considered by the Court of Appeals." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (citations omitted).

Second, the court of appeals did not clearly identify what standard of review it used. It too simply recited the rule that questions of fact are reviewed for substantial evidence and that legal determinations are reviewed under the standard of Section 706(2)(A). Pet. App. 2a-3a. It then concluded that the ALJ's decision must be upheld "given the deference which must be accorded" to it. *Id.* at 3a. Petitioner asserts that the court of appeals "presumably" reviewed the ALJ's determinations on the issues of reasonableness in this case as pure questions of fact, Pet. 13, but the court may well have reviewed them as mixed questions of fact and law.

Finally, petitioner nowhere explains why the label affixed to the court of appeals' review would make any difference in this case. Both the substantial evidence standard and the standard of Section 706(2)(A) are highly deferential to the agency. See *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 ("[s]ubstantial evidence * * * means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *USPS* v. *Gregory*, 534 U.S. 1, 6-7 (2001) (describing "arbitrary and capricious" review as "extremely narrow"). The court of appeals here rested upon the deference owed to the Commission in upholding the ALJ's decision. Pet. App. 3a. Whether this deference

was owed under the rubric of substantial evidence or under the banner of Section 706(2)(A) is, in this case, a distinction without a difference.

2. Petitioner also argues that the ALJ misinterpreted 29 C.F.R. 1926.651(k)(1) to require that a competent person be on-site continuously, contrary to the Secretary's interpretation of that standard. Pet. 15-20. This is incorrect.

The ALJ expressly acknowledged that "the standard does not require a competent person's constant presence on site." Pet. App. 18a. However, the ALJ correctly stated that the regulation requires an inspection "as needed throughout the shift," such as after a "hazard increasing occurrence * * * when employee exposure can be reasonably anticipated." 29 C.F.R. 1926.651(k)(1); Pet. App. 15a n.3, 18a. Here, the ALJ reasoned, the cut made into the leachate pipe was a hazard increasing occurrence, and employee exposure to a hazardous atmosphere could be reasonably anticipated due to "three incidents over a span of approximately 20 minutes: the gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut." *Id.* at 18a. At that point, an inspection by a competent person was required to ensure that conditions were safe or to take corrective action to prevent employee exposure to a hazardous atmosphere. If the competent person was not on site, as petitioner claims, work should have stopped until he returned.

3. Finally, petitioner disputes the ALJ's determinations that an atmospheric hazard could reasonably have been anticipated and that petitioner had constructive

knowledge of the hazard. Pet. 15-25. Those are fact-bound questions that do not merit this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, the ALJ's determinations were correct. The ALJ reasonably determined that the toxic atmosphere could reasonably have been anticipated based on a series of events that the workers characterized as "unusual in their experience" (Pet. App. 18a): the release of an odorous gas; the sudden stoppage of the chain saw after cutting the pipe, indicating a lack of oxygen; and the physical discomfort experienced by workers in their repeated aborted attempts to enter the excavation and continue work. *Id.* at 7a-8a, 18a. Petitioner simply prefers the testimony of its supervisor, who was absent from the work site when the hazardous atmosphere developed. Pet. 21.

The ALJ also correctly determined that petitioner could have known of the hazard through the acting foreman had it been reasonably diligent in training its employees, especially those who took on supervisory roles, to identify recognizable hazards and to take steps to prevent employee exposure while awaiting inspection by a competent person. Pet. App. 20a-21a. The ALJ's decision does not amount to a requirement that a competent person be present at all times; rather, the ALJ's decision requires only that employees in supervisory roles receive training sufficient for them to be able to recognize when an inspection by a competent person is "needed [during] the shift," 29 C.F.R. 1926.651(k)(1),

due to a hazard increasing occurrence. Absent such training, the "as needed" inspections required by the standard would not take place unless the competent person happened to be on site when hazardous conditions developed.

Petitioner's claim that the acting foreman was not aware of any potential hazard until "seconds" before he passed out (Pet. 24), and therefore could not have taken any corrective action, is not supported by the evidence. The acting foreman had seen the chainsaw stop, was present when one worker exited the trench because of the bad odor, and exited the trench himself because of the bad odor. Pet. App. 8a. If he had been properly trained, he would have recognized the presence of a hazardous atmosphere and would have prevented other workers from entering the trench until a competent person could conduct an inspection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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