Ninth Circuit Breathes Life into OSHA's Respiratory Protection Standard

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On September 11, 2019, the Ninth Circuit issued its opinion in *Seward Ship's Drydock, Inc*., holding that §1910.134(d)(1)(iii) of the OSHA Respiratory Protection Standard requires employers to evaluate what, if any, respiratory hazards exist in a workplace where there is a potential for overexposure to employees.

This case stems from OSHA citations to Seward Ship's Drydock, Inc. ("Seward") in 2009 for working conditions on the *Paula Lee*, a deck barge. Seward's business was repairing and performing welding work on marine vessels. Two welders made a complaint to OSHA regarding the welding smoke and lack of effective ventilation. OSHA issued a citation alleging violations of the OSH Act and §1910.134(d)(1)(iii). The Administrative Law Judge ("ALJ") vacated the citation because the level of iron oxide was below the threshold required to provide respirators. The Secretary of Labor ("Secretary") petitioned the Occupational Safety and Health Review Commission ("Commission") for review of the ALJ's decision. After several years of supplemental briefing requested by the Commission, the Commission held that 1910.134(d)(1)(iii) was unambiguous and required an evaluation of respiratory hazards only when respirators are necessary to protect the health of employees.

The Secretary petitioned for review to the Ninth Circuit. The issue before the Ninth Circuit was whether §1910.134(d)(1)(iii) required evaluation of respiratory hazards only *after* a determination was made that respirators were necessary or whether an evaluation of respiratory hazards was initially required to determine whether a respirator was necessary and then to select the appropriate respirator. The Ninth Circuit reversed the holding of the Commission and held that OSHA's Respiratory Protection Standard requires employers to evaluate potentially harmful atmospheres to determine whether respirators are required and in selecting the respirator, rather than performing this evaluation after a determination has been made that respirators are necessary. The Court found that the standard was not "genuinely ambiguous" after using "all traditional tools of construction," looking at the standard's text, structure, purpose and regulatory history, as prescribed in the Supreme Court's recent opinion in *Kisor v. Wilkie*. Therefore, the Court adopted the Secretary's interpretation of §1910.134(d)(1)(iii) without resorting to *Auer* deference, which requires Courts to give deference to an administrative agency's reasonable interpretation of its own ambiguous rules.

In practice, this decision puts employers on notice that (at least in the Ninth Circuit) they should be conducting an initial evaluation of workplace respiratory hazards and the effectiveness of their control measures - *i.e.*, proper ventilation - to determine whether respirators are required. It is yet to be seen how OSHA will use this new interpretation when issuing citations involving potentially harmful airborne contaminants.

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