COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 02-KOSH-0619

KOSHRC #3765-02

SECRETARY OF LABOR — COMPLAINANT

v.

DECISION AND ORDER
OF THE REVIEW COMMISSION

THE CARBIDE GRAPHITE GROUP, INC. — RESPONDENT

and

NATIONAL CONFERENCE OF FIREMEN AND OILERS UNION, LOCAL UNION NO. 320 — AUTHORIZED EMPLOYEE REPRESENTATIVE

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This case is before us for discretionary review of the hearing officer's recommended order of dismissal. The Secretary of Labor ("Secretary") cited the Carbide Graphite Group, Inc. ("Carbide") under 29 C.F.R. § 1910.132(a) for failing to maintain employees' flame retardant uniforms in a sanitary condition because Carbide did not pay for the laundering of those uniforms. The hearing officer determined that the cited standard, 29 C.F.R. § 1910.132 (a), did not specifically require employers to pay the cost of maintaining the uniforms in a sanitary condition and recommended dismissal of the action.

The Secretary requests that this Commission reinstate the action and in support argues that recent federal decisions interpreting 29 C.F.R. § 1910.132(a) require that employers provide and maintain personal protective equipment at their own expense, if the equipment is of the type that cannot be used for personal purposes outside of the employer's facility.

After considering the arguments presented in the Secretary's petition for review and Carbide's response, we affirm the hearing officer's recommended order of dismissal.

This is a matter of statutory interpretation. The interpretation of a standard by the promulgating agency is controlling unless clearly erroneous or inconsistent with the regulation itself. *See Martin v. OSHRC*, 499 U.S. 158 (1991). The federal Secretary's attempts to interpret the words "provide" or "maintain" in 29 C.F.R. § 1910.132(a) to require that the employer "pay the cost" have been deemed unreasonable by the federal Review Commission and reviewing courts. *See Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-563, 1997).

Under the federal Occupational Safety and Health Act of 1970 ("OSHA"), states may assume the responsibility for ensuring safe workplace environments only if the states adopt standards that are at least as stringent as the federal standards. 29 U.S.C.S. § 667(c); *Kentucky Labor Cabinet v. Graham*, Ky., 43 S.W.3d 247, 252 (2001). Kentucky's Occupational Safety and Health Act ("KOSHA") is patterned after the federal act and must remain at least as effective it; therefore, Kentucky's OSH standards should be interpreted consistently with federal law. *See Kentucky Labor Cabinet v. Graham*, Ky., 43 S.W.3d 247, 253 (2001) (citing *Ammerman v. Bd. of Educ.*, Ky., 30 S.W.3d 793, 797-98 (2000)). According to federal interpretations, 29 C.F.R. § 1910.132(a) does not require that employers pay for the expense of maintaining personal protective equipment in a sanitary condition. In fact, Kentucky adopted in full the federal regulation of 29 C.F.R. § 1910.132, without clarification or expansion. 803 KAR 2:300. Under such circumstances, federal interpretations of 29 C.F.R. § 1910.132(a) are persuasive.

In support of its position, the Secretary cites the "Stanley Memorandum" (issued by federal Secretary of Labor James M. Stanley), referred to and quoted in *Union Tank Car Co.*, 18 BNA 1067 (No. 96-0563, 1997). The "Stanley Memorandum" provided that employers must pay for personal protective equipment that becomes contaminated with toxic substances while at work, and thus unsuitable for wear or use outside of the workplace. Thus, Kentucky's Secretary

argues that the case against Carbide cannot be dismissed without first determining certain issues of fact – mainly whether the flame retardant uniforms were (1) clothing of the type which could be used personally outside of the workplace and (2) contaminated with toxic substances.

However, in *Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997), the federal Commission deemed reliance on the "Stanley Memorandum" *unreasonable* and not entitled to deference because it contradicted over twenty years of prior interpretations of 29 C.F.R. § 1910.132(a); it was issued only four months after a rulemaking proceeding considering regulatory revisions concluded without changing the regulation; and it did not include an explanation for the change in interpretation.

This Commission adopts the holding of *Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997), to the extent that it reaffirms the long-standing federal interpretation of 29 C.F.R. § 1910.132(a) as first set forth in *The Budd Co. v. OSHRC*, 1 BNA OSHC 1548 (No. 199, 1974) (holding that 29 C.F.R. § 1910.132(a) does not require employers to provide and pay for shoes with toe protection).

Of particular persuasive value is the fact that similar standards specifically allocate the cost of personal protective equipment to the employer. For example, 29 C.F.R. § 1910.1027(h) states that "the employer *shall* provide *at no cost to the employee* ... protective work clothing and equipment ..." (Emphasis added). The existence of specific language in certain regulations and neutral language in other regulations implies that the regulations without specific allocation of cost provisions were not intended to allocate costs to one party or the other for the maintenance of personal protective equipment. Moreover, the clear language of the regulation itself does not make any distinction between personal protective equipment that may be used solely at the job site and that which may be used in multiple environments.

This Commission expresses its concern for the health of employees, their families, and others who may be exposed to coal tar pitch residue once it leaves Carbide's facility on the uniforms and agrees that measures should be implemented to confine coal tar pitch residue to the employer's facility. However, it is not the Review Commission's function to modify or adopt rules. KRS 338.071(4) provides that this Commission may hear and rule on appeals from citations, notifications, and variances issued under the KOSHA provisions. Only the Kentucky Occupational Safety and Health Standards Board may adopt and promulgate occupational safety and health regulations. KRS 338.051; KRS 338.061. Until the Kentucky Occupational Safety and Health Standards Board enacts a stricter standard, this Commission is bound to follow the federal interpretation.[1]

Therefore, we order that this action be dismissed this 1st day of April, 2003.

KOSH REVIEW COMMISSION

ROBERT M. WINSTEAD
CHAIRMAN

VICKIE CURD LADT
MEMBER

MIKE MULLINS
MEMBER

[1] 803 KAR 2:010 section 11(2) provides that any interested person including an employer, employee, or employee representative may petition the Department of Workplace Standards, labor Cabinet to modify a standard, after which time the Kentucky Occupational Safety and Health Standards Board may conduct a hearing for the modification of a standard.