IN THE COURT OF APPEALS OF MARYLAND

No. 131

September Term, 1995

COMMISSIONER OF LABOR AND INDUSTRY

v.

BETHLEHEM STEEL CORPORATION

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*Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

Concurring & Dissenting
Opinion by Chasanow, J. in which
Rodowsky & Raker, JJ. join

Filed: November 14, 1996

*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the

Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

I concur with the majority's holding that the Commissioner was correct in finding that the toaster oven that electrocuted Raymond Pritts had "recognized hazards that are likely to cause death or serious physical harm to employees" and that this was a "serious" violation. My dissent is from the portion of the majority's opinion that analyzes the procedure by which a "repeated" violation should be determined and from the failure to affirm the Commissioner's finding that Bethlehem Steel Corporation committed a repeated violation.

I. THE PRIOR VIOLATIONS

At the evidentiary hearing Maryland Occupational Safety and Health Administration (MOSHA) introduced three prior citations for Bethlehem's violation of 29 C.F.R. § 1910.303(b)(1)[1]. That provision is a subsection of § 1910.303 which provides, in relevant part:

General requirements.

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[1]This federal standard is in effect in Maryland. Maryland operates a federally approved State Occupational Safety and Health Plan, and the Commissioner of Labor and Industry has adopted the federal safety standards for enforcement in Maryland. Code of Maryland Regulations (COMAR) 9.12.31. (1977, Supp. 15-20). Hereafter, in citing to the federal Occupational and Health Safety Standards, I shall omit the citation to Title 29 of the Code of Federal Regulations. For example, the standard in the violation charged in this case becomes § 1910.303(b)(1).

> "(a) *Approval*. The conductors and equipment required or permitted by this subpart shall be acceptable only if approved.
>
> (b) *Examination, installation, and use of equipment*--(1) *Examination*. Electrical equipment shall be free from recognized hazards that are likely to cause death or serious physical harm to employees. Safety of equipment shall be determined using the following considerations:
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> (i) Suitability for installation and use in conformity with the provisions of this subpart. Suitability of equipment for an identified purpose may be evidenced by listing or labeling for that identified purpose.
>
> (ii) Mechanical strength and durability, including, for parts designed to enclose and protect other equipment, the adequacy of the protection thus provided.
>
> (iii) Electrical insulation.
>
> (iv) Heating effects under conditions of use.
>
> (v) Arcing effects.
>
> (vi) Classification by type, size, voltage, current capacity, specific use.
>
> (vii) Other factors which contribute to the practical safeguarding of employees using or likely to come in contact with the equipment." (Emphasis added).

Section 1910.303(b)(1) is a standard designed to prevent the hazard of electric shocks that are capable of causing death or serious physical harm. The standard seems to require two related duties of an employer. First, prior to installing electrical equipment, an employer should verify that the equipment is free

from recognized hazards likely to cause death or serious physical harm. Second, electrical equipment with recognized hazards that are capable of causing death or serious physical harm should be made safe; this is the portion of the standard at issue in the instant case as well as in the prior violations. There may also be a third duty under this subsection that may require an employer to conduct reasonable inspections of electrical equipment. In addition to the violations at issue in the instant case, Bethlehem was also charged with failure to inspect the toaster oven. The Commissioner of Labor and Industry found that this violation was not proven. In his written opinion, the Commissioner stated: "There is no other evidence [about inspections]. Accordingly, the Commissioner concludes that MOSH failed to show a failure to inspect." What the instant citation and the prior citations charged, however, was the failure to abate recognized hazards, not the failure to inspect electrical equipment.

Bethlehem had been issued three citations prior to the citation at issue. Each of those prior citations was issued for violating the same standard as the citation in the instant case. Taking the prior citations in inverse chronological order, the third prior citation was for a violation on May 14, 1990. The violation charged:

> "29 CFR 1910.303(b)(1): Electrical equipment was not free from recognized hazards that were likely to cause death or serious physical harm to employees."

The equipment listed in the violations was two overhead bridge cranes and the conditions were "250 volt main hoist panel wiring was found to be dry rotted" and "250 volt power lead wiring in rear of bridge panel box was found to be frayed and dry rotted."

The second prior citation was for a violation occurring on August 4, 1988. The violation charged was:

> "29 CFR 1910.303(b)(1): Electrical equipment was not free from recognized hazards that were likely to cause death or serious physical harm to employees."

The equipment listed was two 440 volt electric motors and the condition was "(2) floor mounted electric motors are exposed to water & chemical solution that may become energized."

The first prior citation was for a violation occurring on October 6, 1987. The violation charged was:

> "29 CFR 1910.303(b)(1): Electrical equipment was not free from recognized hazards that were likely to cause death or serious physical harm to employees."

The equipment involved was three overhead bridge cranes and the conditions were "main hoist panel wiring was found to be dry rotted and corroded," "bridge panel wiring was improperly spliced," and "bridge panel wiring was found to be dry rotted and corroded." Each of these three prior violations was found to be a serious violation and each resulted in a fine, which Bethlehem paid.

At the evidentiary hearing in the instant case, James C. Barry, who had been an Occupational Safety and Health Inspector for 17 years, testified. When asked if the three prior violations were

"substantially similar" to the violation in the instant case, Mr. Barry answered in the affirmative and stated:

> "Certainly dry rotted wiring and corroded wiring could produce pretty much the same situation which would be contact with energized electrical parts and in such produce a serious injury to an employee."

II. REPEATED VIOLATIONS

Under Maryland Code (1957, 1985 Repl. Vol.), Article 89, § 40(a), any employer who "repeatedly violates" any rule, regulation, or standard may be fined up to $10,000.00.[2] "Repeatedly" is not defined in the statute and has been the subject of some controversy. My disagreement with the majority is not in how it defines "repeatedly," but in its rejection of the Commissioner's determination, made in accord with the overwhelming weight of authority, that a prima facie case of a repeat violation was

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[2]Maryland Code (1957, 1985 Repl. Vol.) Article 89, § 40(a) provides in relevant part:

> "(a) *Willful or repeated violations*. — Any employer who willfully or repeatedly violates any provision of this subtitle or any rule, regulation, standard, or order promulgated pursuant to this subtitle may be assessed a civil penalty not to exceed $10,000.00 for each violation."

Since the time of the violations at issue in this case, Art. 89 § 40(a) has been recodified as Md. Code (1991, 1996 Supp.), Labor & Employment, § 5-810(a)(2) and now permits a civil penalty not in excess of $70,000 per violation.

established by Bethlehem's prior violations of the same standard.

The definition of repeated violations adopted by the majority was formulated in the seminal case of *Secretary of Labor v. Potlatch Corp.*, 1979 OSHD (CCH) ¶ 23,294 (R.C. 1979). *Potlatch* synthesized a definition of "repeated violation" which was later adopted by the overwhelming majority of courts. *See Reich v. D.M. Sabia Co.*, 90 F.3d 854, 857 n.8 (3d Cir. 1996)(stating that "[s]ince *Potlatch,* every other court of appeals which has addressed this issue has adopted the *Potlatch* definition"). The *Potlatch* definition of repeated violations is also adopted by the majority in the instant case. *Potlatch* both defined "repeated" violations and, as an integral part of the definition, established the procedure for determining how a repeated violation is established. *Potlatch* stated:

> "Inasmuch as the announcement of authoritative guidelines is an important matter, we have thoroughly re-examined this issue in light of the decisions of the Fourth and Ninth Circuits, and we now announce the following principles.
>
> A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation."

Potlatch ¶ 23,294 at 28,171. Immediately following the definition of repeated violation, the *Potlatch* opinion explained the procedure for proving a substantially similar violation.

"The Secretary may establish substantial similarity in several ways. In cases arising under section 5(a)(2) of the Act, which states that each employer shall comply with occupational safety and health standards, the Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the same standard. It is important to recognize that occupational safety and health standards range from those that designate specific means of preventing a hazard or hazards to those that either do not specify the means of preventing a hazard or apply to a variety of circumstances. Accordingly, in cases where the Secretary shows that the prior and present violations are for an employer's failure to comply with the same specific standard, it may be difficult for an employer to rebut the Secretary's prima facie showing of similarity. This is true simply because in many instances the two violations must be substantially similar in nature in order to be violations of the same standard. However, in cases where both violations are for failure to comply with the same general standard, it may be relatively undemanding for the employer to rebut the Secretary's prima facie showing of similarity. * * *

In the absence of evidence that the antecedent and present violations concern non-compliance with the same standard, the Secretary must present other evidence that the violations are substantially similar in nature. In this regard, we think that evidence that the violations involve similar hazards would be relevant. We assign weight to the similarity of the hazards for two reasons. First, a failure to do so would re-cast the phrase `section 5 of this Act' in section 17(a) to read `section 5(a)(2)' and thus preclude the possibility that an employer could repeatedly violate section 5(a)(1). Second, to hold that characterization as repeated is limited to subsequent violations of the same standard could lead to patently absurd results. For example, if two employees performing construction work such as painting

> were exposed to a 20 foot fall from an unguarded scaffold, the employer would be in violation of 29 C.F.R. § 1926.451(a)(4); a subsequent citation based on exposure of the same employees to a 20 foot fall while using the same unguarded scaffold to replace light bulbs would be a violation of 29 C.F.R. § 1910.28(a)(3). Under the `same standard' restriction, however, the subsequent violation could not be classified as repeated." (Footnotes omitted).

Potlatch ¶ 23,294 at 28,171-72.

As previously noted, federal appellate courts that have confronted the issue have almost uniformly adopted the *Potlatch* definition, and there is no reason to believe that they would reject the *Potlatch* procedure of holding that there is a prima facie repeated violation when there is a second violation of the same standard. *See Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1338 (10th Cir. 1982)(holding that a repeat violation is prima facie established by showing that the prior and present citation are for violation of the same standard).

Federal administrative decisions have uniformly adopted the *Potlatch* definition of repeated violations as well as the *Potlatch* decision holding that there is a prima facie violation when there is a prior violation of the same standard. *See, e.g., Amerisig Southeast, Inc.*, 1996 OSHD (CCH) ¶ 31,081 at 43,362 (R.C. 1996)("The Secretary may establish a prima facie case of substantial similarity by showing that the final order alleged a failure to comply with the same standard. The burden then shifts to

the employer to rebut that showing."); *Mautz & Oren, Inc.*, 1993 OSHD (CCH) ¶ 29,986 at 41,069 (R.C. 1993)("Recently, the Commission reaffirmed the holding in *Potlatch* that the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard, as long as the standard at issue is not a general standard."); *Kulka Construction Management Corp.*, 1992 OSHD (CCH) ¶ 29,829 at 40,687-88 (R.C. 1992)(citation omitted)(stating "Kulka had previously been cited for violations of the same standards at issue here ..., [which] is sufficient to establish a prima facie case that the violations alleged here were repeated"); *Dole v. Consolidated Edison Company of New York, Inc.*, No. 89-3055 at 7 (O.S.H.R.C. Nov. 7, 1990)(available from CCH)(noting "[t]he Secretary establishes a prima facie case by showing that both violations are of the same standard").

The sole authority cited by the majority for rejecting the portion of the *Potlatch* decision pertaining to a prima facie violation is the fifteen-year-old case of *Bunge Corp. v. Secretary of Labor,* 638 F.2d 831 (5th Cir. 1981). The quotation from *Bunge* relied on by the majority is: "Under 5 U.S.C.A. § 556(d), the proponent of a rule or order has the burden of proof, except as otherwise provided by statute. Absent a different allocation of the burden of persuasion by the substantive statute, both the burden of production and persuasion remain with the Secretary." ___ Md. ___, ___, ___ A.2d ___, ___ (Majority Op.

at ___)(quoting *Bunge*, 638 F.2d at 838). That statement, incidently, is dicta because *Bunge* sustained the finding of a repeated violation. 638 F.2d at 837.

There are several reasons why the only case cited by the majority should not be considered persuasive authority in Maryland. It is obvious from the quotation that the statutory authority that is cited and relied on by the *Bunge* Court is 5 U.S.C.A. § 556(d). As the majority acknowledges, there is no Maryland counterpart to that cited federal statute. Further, the majority cites no other court or administrative decision that follows *Bunge*, and as I have indicated, there are many, many decisions that disagree with *Bunge*'s rejection of *Potlatch*'s holding that a prima facie case of a repeated violation is established by a second violation of the same standard.

In addition, *Bunge*'s rejection of *Potlatch* may no longer be good authority as a result of the Supreme Court's decision in *Smiley v. Citibank,* 517 U.S. ___, ___, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). In 1976, the Court of Appeals for the Third Circuit in *Bethlehem Steel Corp. v. O.S. & H.R. Com'n,* 540 F.2d 157, 162 (3d Cir. 1976), adopted a definition of a "repeated" violation that differed from the *Potlatch* definition.

Following the Supreme Court's decision in *Smiley v. Citibank, supra*, the Third Circuit repudiated its prior decision and adopted the *Potlatch* definition. In *Reich, supra*, the Third Circuit Court of Appeals explained why it was no longer following its decision in *Bethlehem Steel* and instead was following *Potlatch* stating:

> "Recently, the Supreme Court reemphasized that courts must defer to an agency's interpretation of statutes that the agency is charged with administering, explaining why such a high degree of deference is owed:
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> > `It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes they are charged with administering.... We accord deference to agencies ... not because of a presumption they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.... [T]he whole point of *Chevron* is to leave the discretion

> provided by the ambiguities of a statute with the implementing agency.'
>
> *Smiley v. Citibank (South Dakota), N.A.,* ___ U.S. ___, ___, 116 S.Ct. 1730, 1733-34, 135 L.Ed.2d 25 (1996)."

Reich, 90 F.3d 859-60. It is conceivable that the Fifth Circuit Court of Appeals may reexamine its prior decision, which differs from *Potlatch*, in the same manner that the Third Circuit reexamined its prior decision that differed from *Potlatch.*

The final reason why *Bunge* should be rejected in Maryland is that, less than three weeks after the Court of Special Appeals handed down its opinion in the instant case, this Court rejected the foundation for the *Bunge* holding in *Bethlehem Steel v. Comm. of Labor,* 339 Md. 323, 662 A.2d 256 (1995)(hereinafter Bethlehem I). The foundation for the *Bunge* opinion is its view that "[a]bsent a different allocation of the burden of persuasion by the substantive statute, both the burden of production and persuasion remain with the Secretary." *Bunge*, 638 F.2d at 838. This is not the law in Maryland. In *Bethlehem I*, an analogous, if not controlling, case involving the same employer, Bethlehem Steel Corp., this Court expressly sanctioned shifting the burden of production and persuasion

from the Secretary to the employer by, in effect, implying a prima facie case.

In *Bethlehem I*, the issue was similar, if not identical, to the issue in the instant case; we held that when an employer is charged with a violation of a MOSHA specific duty safety standard that contains a method by which work hazards could be abated, the burden of proof could be shifted from the Commissioner to the employer to prove the impossibility or infeasibility of compliance with the standard's abatement method. We made it clear that the issue was whether the burden of production could be shifted to the employer, and we stated:

> "The issue is whether, under a citation charging violation of the machine guarding requirements of 29 C.F.R. § 1910.212(a)(1), the burden is on the employer to prove infeasibility of compliance as an affirmative defense."

Bethlehem I, 339 Md. at 325, 662 A.2d at 257. In determining that the burden of persuasion and production could be shifted to the employer, we followed the federal administrative practice, stating:

> "MOSHA and the federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651 through 678, are substantially similar. When interpreting federal regulations enforced under MOSHA, we look to federal cases for guidance.

> *J.I. Hass Co. v. Department of Licensing & Regulation*, 275 Md. 321, 330, 340 A.2d 255, 260 (1975)." (Footnote omitted).

Bethlehem I, 339 Md. at 328, 662 A.2d at 258.

Our holding in Bethlehem I should be our holding in the instant case. In Bethlehem I, our specific holding was: "Applying the weight of authority under the federal precedents, we hold that the Commissioner correctly placed on Bethlehem the burden of proof that is in dispute." 339 Md. at 340-41, 662 A.2d at 264.

Finally, and perhaps most significantly, when an employer has previously been adjudicated guilty of violating a safety standard and is subsequently adjudicated guilty of violating the same safety standard, it makes sense to say that the second violation is at least prima facie evidence of a repeated violation and the burden ought to be on the employer to show, as an affirmative defense, why the second violation should not be found to be a repeated violation. Twice before Bethlehem was adjudicated in violation of the same safety standard for failure to correct <u>recognized</u> hazards in electrical equipment that were capable of electrocuting its employees. When again Bethlehem Steel failed to correct a <u>recognized</u> hazard in a piece of electrical equipment that in fact electrocuted an

employee, it is appropriate to conclude that there is at least a prima facie repeated violation, and the burden ought to be on Bethlehem to establish, as an affirmative defense, that its prior and present violations of the same standard are not substantially similar. These standards are designed to protect employees, and the third instance of ignoring equipment with a recognized risk of causing death or serious physical injury by electrocution ought to at least establish a prima facie case of a repeated violation. There is no reason to reverse the Commissioner's finding of a repeated violation. I respectfully dissent.

Judges Rodowsky and Raker have authorized me to state that they join in the views expressed in this concurring and dissenting opinion.