July 2015

State Regulation of Worker Safety in the Nuclear Industry: The Impact of Goodyear Atomic Corp. v. Miller

Donald A. Mihokovich

STATE REGULATION OF WORKER SAFETY IN THE NUCLEAR INDUSTRY:
The Impact of *Goodyear Atomic Corp. v. Miller*[1]

INTRODUCTION

In modern times, little has spawned more public debate than the vast amount of energy created by the splitting of atoms. The debate has centered not only on issues involving nuclear weapons, but has extended to the use of nuclear power for the production of electricity. All those involved in the debate agree that nuclear energy has changed the face of the world.[2] Although it offers a great potential for human benefit, it also presents a monumental threat of human disaster.[3]

The amount of litigation involving the regulation of the nuclear industry continues to rise. Much of this litigation has centered on how regulatory power should be apportioned between the federal government and the state,[4] and more particularly, to what extent the Atomic Energy Act of 1954[5] preempts state regulation in this field.

The Supreme Court of the United States recently responded to the preemption issue in *Goodyear Atomic Corp. v. Miller*.[6] In its decision, the court has effectively ratified state regulation of workers' safety in the nuclear industry. If the state's workers' compensation laws so provide, an employee will be allowed additional compensation when a federally owned and regulated nuclear power plant violates specific state safety regulations.

This casenote will discuss the effect of *Goodyear Atomic Corp.* on federal preemption in the nuclear industry. This decision does not mark federal preemption's demise. Preemption will continue in areas involving protection of the public from the dangers of radioactivity. Nevertheless, this decision may have an adverse effect on the private sector's continuing involvement in the nuclear industry, an involvement that is essential for both national energy policy and national defense.

---

[1] 108 S. Ct. 1704 (1988).

[2] The nuclear "revolution alone is probably farther-reaching than any previous one in history. It affects all important segments of man's endeavor to manage his physical environment: agriculture and medicine, industry and transportation, generation of power and defense." ATOMIC ENERGY AND LAW INTERAMERICAN SYMPOSIUM (J. MAYDA, ed. 1960).

[3] NUCLEAR ENERGY, PUBLIC POLICY AND THE LAW iii (E. Bloustein ed. 1964).

[4] *See generally*, Annotation, State Regulation of Nuclear Power Plants, 82 A.L.R.3d 751 (1978).

[5] 42 U.S.C. §§ 2011-2296 (1982).

[6] *Goodyear*, 108 S. Ct. 1704 (1988).

FACTS

Esto Miller (Miller) was employed as a maintenance mechanic at the Portsmouth Gaseous Diffusion Plant, a nuclear production facility located near Piketon, Ohio.[7] The United States owned the plant, but Goodyear Atomic Corporation (Goodyear) operated it pursuant to a contract with the United States Department of Energy (DOE).[8]

On July 30, 1980, Miller was working on a manually propelled scaffold, removing old piping hangers.[9] While Miller was lowering a section of the upper guardrail, his glove caught on a bolt protruding from the surface of the scaffold.[10]The bolt pulled him off of the platform, and he fell approximately six and one-half feet to a concrete floor, fracturing his left ankle.[11] Miller applied to the Ohio Industrial Commission for an award under the state's workers' compensation program,[12] to which Goodyear pays premiums to cover its employees at the Portsmouth Plant.[13] Miller was paid a total of $9,000 in workers' compensation.[14]

In December 1980, Miller filed an amended application for an additional award[15] based upon an alleged violation of a specific state safety requirement.[16] The Ohio Constitution provides that when an injury is caused by an employer's failure to comply with a specific state safety requirement, the Industrial Commission shall provide an additional award of 15% to 50% of the benefits already received.[17] The

---

[7] *Id.* at 1707.

[8] *Id.*

[9] Miller v. Industrial Comm'n, 26 Ohio St. 3d 110, 497 N.E.2d 76 (1986); *aff'd* Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988).

[10] *Id.*

[11] *Id.*

[12] OHIO REV. CODE ANN. § 4123.01-4123.99 (Anderson 1980).

[13] *Goodyear*, 108 S. Ct. at 1707. Under Ohio's laws, employers can participate in the state workers' compensation insurance found by paying premiums. Then, when workers' compensation claims are recognized, the workers' benefits are paid from the state insurance fund. OHIO REV. CODE ANN. § 4123.35(A) (Anderson, 1980).

[14] *Id.*

[15] The Industrial Commission is required "to determine claims for additional awards under section 35 of Article II of the Ohio Constitution . . . ." OHIO REV. CODE ANN. § 4123.35(A) (Anderson, 1980).

[16] *Goodyear*, 108 S. Ct. at 1707. Miller alleged that his fall was caused by a violation of OHIO ADMIN. CODE § 4121:1-5-03(D)(2) (1987), which provides that "[e]xposed surfaces [on scaffolds] shall be free from sharp edges, burrs or other projecting parts."

[17] OHIO CONST. art. II, § 35. This provision reads in part:

> [The Industrial Commission] shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by [The Industrial Commission] . . . When it is found, upon hearing that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such

Industrial Commission (Commission) held a hearing and denied Miller's claim for the additional award.[18] Because of the doctrine of federal preemption the Commission held that it did not have jurisdiction to apply the Code of Specific Safety Requirements to the atomic plant.[19]

After rehearing was denied, Miller filed a mandamus action in the Ohio Court of Appeals,[20] seeking an order directing the Commission to consider his application.[21] The referee recommended that the writ be issued; the Commission and Goodyear objected.[22] The Court of Appeals issued the writ of mandamus, ordering the Commission to consider Miller's additional award claim.[23]

A divided Ohio Supreme Court affirmed the decision of the court of appeals.[24] The court ruled that because the *entire* field of safety at nuclear production facilities was *not* regulated by the Atomic Energy Act, the Commission was not preempted from applying Ohio's specific safety requirements.[25]

Justice Wright dissented, arguing that a federally owned facility like the Portsmouth plant is under the exclusive control of the Department of Energy, and "the imposition of any state-promulgated regulations on that operation, including Ohio Specific safety requirements, is constitutionally and statutorily impermissible" without "clearly expressed authorization" from Congress.[26] Justice Wright argued that Congress had not provided such clear authorization.[27] The United States Supreme Court noted jurisdiction of Goodyear's appeal,[28] and affirmed the judgment of the Ohio Supreme Court, but on different grounds.[29]

> compensation is paid from the state fund, the premium of such employer shall be increased in such amount . . . as will recoup the state fund in the amount of such additional awards . . . .

[18] Claim No. 80-19975 (Mar. 8, 1983).

[19] *Id.*

[20] Miller v. Industrial Comm'n, No. 84AP-208, unreported, 10th Circ. July 25, 1985.

[21] When there is a violation of a specific safety requirement, a writ of mandamus may be issued ordering the Industrial Commission to make the award. Alcorn v. Industrial Comm'n of Ohio, 178 Ohio St. 2d 164, 248 N.E.2d 193 (1969).

[22] *Miller*, No. 84AP-208, at 2.

[23] *Id.* The court held:

> Until it is clear that the federal government has preempted the field of safety regulation for safety hazards unrelated to radiation, or the nuclear aspects of energy generation, it is held that state specific safety regulations that give rise to an award for violation thereof are equally applicable to an entity that contracts with the federal government for operation of a nuclear facility owned exclusively by the federal government. Otherwise, employees in the Goodyear Atomic plant would not have the protection against safety hazards unrelated to radiation that other employees in Ohio enjoy.

[24] *Miller*, 26 Ohio St. 3d. at 112, 497 N.E.2d at 78.

[25] *Id.*

[26] *Id.* at 114, 497 N.E.2d at 80.

[27] *Id.*

[28] Goodyear Atomic Corp. v. Miller, 107 S. Ct. 3226 (1987).

[29] *Goodyear*, 108 S. Ct. 1704, 1712 (1988).

The issue presented to the Supreme Court was whether the supremacy clause[30] "bars the State of Ohio from subjecting a private contractor operating a federally owned nuclear production facility to a state-law workers' compensation provision that provides an increased award for injuries resulting from an employer's violation of a state safety regulation."[31]

Justice Marshall delivered the majority opinion for the court.[32] The court first noted well-established precedent that the supremacy clause shields the activities of federal installations from direct state regulation unless Congress provides "clear and unambiguous" authorization for such regulation.[33] This rule holds true even when the federal installation in question is operated by a private party under contract with the United States.[34] As such, the facility in question was free of direct state regulation except in areas where Congress had provided "clear congressional authorization."[35]

Having laid this legal foundation, the Court then addressed two sub-issues:

> (1) Whether or not application of the additional award provision to the Portsmouth facility was sufficiently akin to direct state regulation, and
>
> (2) Whether or not Congress had provided the requisite clear congressional authorization for the application of the provision to workers at the Portsmouth facility.[36]

The Majority ruled that *Goodyear Atomic Corp.* did not present a direct state regulation of the operation of the Portsmouth facility.[37] The majority reasoned that: "[t]he effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation."[38]

---

[30] The supremacy clause is located at U.S. CONST. art. VI, cl. 2, wherein it states: "This Constitution, and the Laws of the United States which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

[31] *Goodyear*, 108 S. Ct. at 1707.

[32] Chief Justice Rehnquist and Justices Brennan, Blackmun, Stevens and Scalia joined Justice Marshall's majority opinion. Justice White filed a dissenting opinion in which Justice O'Connor joined. Justice Kennedy took no part in the consideration or decision of the case.

[33] EPA v. State Water Resources Control Board, 426 U.S. 200, 211 (1976); Hancock v. Train, 426 U.S. 167, 178-79 (1976); Mayo v. United States, 319 U.S. 441, 445 (1943).

[34] *Hancock*, 426 U.S. at 168.

[35] *Goodyear*, 108 S. Ct. at 1710.

[36] *Id.*

[37] *Id.* at 1710, 1712.

[38] *Id.* at 1712.

The dissent argued that this impact was sufficiently akin to direct state regulation to preempt the enforcement of the state law pursuant to the supremacy clause.[39]

The majority reasoned that the direct regulation issue was not determinative.[40] It argued that Congress had provided the requisite "clear congressional authorization" for the application of Ohio's additional award provision to workers at the Portsmouth facility.[41] The majority relied on 40 U.S.C. § 290[42] to provide this authorization.[43] Section 290 empowers states to apply "workmen's compensation laws" to federal facilities to the same extent as such laws are applied to private facilities.[44]

The dissenting justices conceded that the initial workers' compensation award received by the respondent was authorized by section 290.[45] However, they did not view section 290 as providing the kind of clear authorization necessary for Ohio to apply its supplemental award provision.[46] The dissent argued that in authorizing the states to apply "state workmen's compensation laws" to federal instrumentalities, Congress did not have any intention of exposing federal establishments to such supplemental award provisions.[47]

The majority pointed out that when section 290 was passed in 1936, eight states, including Ohio, provided supplemental awards when the employer violated a specific safety regulation.[48] The majority presumed that Congress is knowledgeable about existing law pertinent to the legislation it enacts.[49] Therefore, the majority argued "it is clear that Congress intended Ohio's statute and others of its ilk, which were solidly entrenched at the time of the enactment of section 290, to apply to

---

[39] *Id.* at 1716.

[40] *Id.* at 1710.

[41] *Id.*

[42] 40 U.S.C. § 290 (1982). This section of the United States Code states in relevant part: "Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States . . . hereafter shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America . . . which is within the exterior boundaries of any State . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be . . . ."

[43] *Goodyear*, 108 S. Ct. at 1710.

[44] *See supra* note 42.

[45] *Goodyear*, 108 S. Ct. at 1716.

[46] *Id.* The dissent apparently agreed with the argument of the appellant and the Solicitor General that the phrase "workmen's compensation laws" in § 290, which is not defined, was not intended to include such supplemental award provisions.

[47] *Id.*

[48] *Id.* at 1711; *See*, 1916 KY. ACTS, ch. 33, § 29; 1925 MO. LAWS § 3; 1929 N.M. LAWS, ch. 113, § 7; 1929 N.C. SESS. ch. 120, § 13; OHIO CONST., art. II, § 35; 1936 S.C. ACTS, no. 610, § 13; 1921 UTAH LAWS, ch. 67, § 1; 1915 WIS. LAWS, ch. 378, § 1(h).

[49] *Goodyear*, 108 S. Ct. at 1711-12 (citing, Director, OWPC v. Perini North River Assoc. 459 U.S. 297, 319-20 (1983)).

federal facilities 'to the same extent' that they apply to private facilities within the State.''[50]

The dissent was not impressed by the fact that ''a small fraction of the States'' permitted such additional awards at the time section 290 was passed. [51] According to the dissent, if the ''clear congressional mandate'' approving such state regulations cannot be found in the statute itself, then ''the obscure practices of a few States at the time of enactment will not suffice'' to create such a mandate.[52]

Both the majority and the dissent examined the legislative history of section 290, but reached different conclusions. In enacting the bill, Congress rejected a provision which would have subjected federal property to state safety and insurance regulations, and would have authorized state officers to enter upon federal premises in furtherance of these aims.[53] The dissent interpreted Congress's rejection to indicate that it did not intend to expose federal instrumentalities to the kind of detailed and mandatory regulation provided by O.A.C. § 4121, the Ohio law at issue in *Goodyear Atomic Corp.*.[54] The majority disagreed, arguing that the rejected provision would have amounted to *direct regulation* which would be preempted, while the enforcement of a workers' compensation law like Ohio's, that provides an additional award when the injury is caused by the breach of a safety regulation, merely has ''incidental regulatory effects.''[55] Therefore, the majority concluded that the additional award provision of Ohio's workers' compensation statute is ''unambiguously authorized'' by section 290 and therefore ''does not run afoul of the supremacy clause.''[56]

BACKGROUND

Federal Preemption

The doctrine of federal preemption[57] of state law arises from the supremacy clause of the United States Constitution.[58] Tension often results between the supremacy clause and the tenth amendment,[59] which reserves powers not delegated

---

[50] *Id.* at 1712.
[51] Id. at 1716.
[52] *Id.*
[53] *See* S. REP. No. 2294, 74th Cong., 2d Sess., 2 (1936).
[54] 108 S. Ct. at 1717.
[55] *Id.* at 1712.
[56] *Id.*
[57] Black's Law Dictionary defines preemption as follows: ''Doctrine adopted by U.S. Supreme Court holding that certain matters are of such a national . . . character that federal laws pre-empt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.'' BLACK'S LAW DICTIONARY 1060 (5th ed. 1979).
[58] U.S. CONST. art. VI, cl. 2.
[59] U.S. CONST. amend X provides: ''[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.''

to the United States to the individual states or to the people.[60] The federal preemption doctrine requires an examination of congressional intent.[61] Preemption may be either express or implied, and is "compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[62]

Obviously, Congress may explicitly define the extent to which its enactments preempt state law.[63] Additionally, Congress's intent to supersede state law may be implied for either of two reasons. First, "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[64] Second, "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."[65]

If Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.[66] If a clear-cut conflict between congressional and state regulation exists, the state statute is invalid.[67] For instance, it may be impossible to obey the state and federal regulations simultaneously.[68] State law is also preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[69]

It is an important principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."[70] From this principal is deduced the corollary that " it is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."[71]

---

[60] *Id.*

[61] Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152 (1982).

[62] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

[63] *Id.*

[64] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[65] *Id.*

[66] Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204 (1983); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

[67] McDermott v. Wisconsin, 228 U.S. 115 (1913).

[68] *Id.* Thus, in McDermott, Wisconsin's syrup-labeling rules were such that if out-of-state syrup was labeled in compliance with the federal Food and Drugs Act, the syrup would be mislabeled under Wisconsin law. Thus, the Court barred enforcement of the Wisconsin regulations.

[69] Hines v. Davidowitz, 312 U.S. 52, 67-69 (1941). Therefore, where the federal government had enacted an Alien Registration Act which provided a complete scheme for the registration of aliens, the state of Pennsylvania was preempted from interfering with, curtailing, or complementing the federal law, or enforcing additional or auxiliary regulations.

[70] McCulloch v. Maryland, 17 U.S. 316, 426 (1819).

[71] *Id.* at 427.

This corollary derives from the supremacy clause[72] and is exemplified in the plenary power clause.[73] Its effect is "that the activities of the Federal Government are free from regulation by any state."[74] Therefore, if "congress does not affirmatively declare its instrumentalities or property subject to regulation," then "the federal function must be left free" of regulation.[75] Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when, and to the extent, there is a "clear congressional mandate"[76] making this authorization of state regulation "clear and unambiguous."[77]

Regulation of the Nuclear Industry

The first comprehensive legislation involving nuclear power as a source of energy was the Atomic Energy Act of 1946 (AEA).[78] The AEA established the Atomic Energy Commission (AEC) which, until passage of the Energy Reorganization Act of 1974,[79] remained as the single federal agency overseeing both the development and the regulation of peacetime atomic energy.[80] In 1974, the AEC was abolished.[81] Today, the functions once performed by the AEC are performed by two distinct agencies. The Energy Research and Development Administration (ERDA) is responsible for the development of nuclear, as well as alternate, sources of energy.[82] The Nuclear Regulatory Commission (NRC) is responsible for all of the defunct AEC's regulatory functions.[83] Until 1954, the regulation and control of nuclear power resided exclusively in the hands of the federal government which owned and operated such nuclear facilities as were in existence at that time.[84] Through the AEA,[85] Congress authorized private involvement in nuclear energy for the first time. The AEA of 1954 reflected the view that "the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes . . . ."[86] The Joint

[72] U.S. CONST. art. VI, cl. 2.

[73] U.S. CONST. art. I, § 8, cl. 17 reads in pertinent part: "[The Congress shall have Power to] exercise exclusive Legislat[ive] . . . Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings . . . ."

[74] Mayo v. United States, 319 U.S. 441, 445 (1943).

[75] *Id.* at 448.

[76] Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954).

[77] EPA v. California *ex rel.* State Water Resources Control Board, 426 U.S. 200, 211 (1976); Hancock v. Train, 426 U.S. 167, 179 (1976).

[78] 42 U.S.C. §§ 1801-1819 (1952). Pursuant to section 1801 the avowed purpose of the Act was to foster the research and development of atomic energy under a program of federal control and ownership.

[79] 42 U.S.C. §§ 5801-5891 (1982).

[80] *Id.*

[81] *Id.* at 5814.

[82] *Id.*

[83] 42 U.S.C. § 5841 (1982).

[84] 82 A.L.R.3d at 752.

[85] 42 U.S.C. §§ 2011-2296 (1982).

[86] H.R. REP. No. 2181, 83d Cong., 2d Sess., 6, 9 (1954). That report reads in pertinent part: "It is out of deep conviction, however, that this legislation will speed atomic progress and will promote the security and well

Committee's 1954 report documented the great strides made in developing nuclear power, and proclaimed that "the goal of atomic power at competitive prices will be reached more quickly if private enterprise . . . is now encouraged to [help develop nuclear power] . . . ."[87]

In 1959, the AEA was amended to include a section which specifically addressed the issue of cooperation between the federal and state governments, and which specified limited instances in which state regulation of nuclear materials was proper under the Act.[88] The correct interpretation of this provision is the key issue which courts face when determining the actual extent of state authority to regulate nuclear power.[89]

After the enactment of the AEA, private companies contemplating entry into the nuclear industry were concerned about potential tort liability.[90] A single nuclear accident could lead to civil litigation that could bankrupt these companies.[91] Therefore, in 1957, Congress again acted to promote the private development of nuclear energy with passage of the Price-Anderson Act.[92] The Price-Anderson Act protects private investors in nuclear power by establishing an indemnification scheme. [93] The scheme's purpose was to assure the public that funds would be available to pay claims arising from a "nuclear incident" and to protect the nuclear industry from "unlimited liability."[94]

Extension of State Workmen's Compensation Laws to Buildings and Works of the United States

40 U.S.C. § 290 empowers states to apply "workmen's compensation laws"

being of the Nation . . . It is our firmly held conviction that increased private participation in atomic power development, under the terms stipulated in this proposed legislation, will measurably accelerate our progress toward the day when atomic power will be a fact."

[87] S. REP. No. 1699, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. CODE CONG. & ADMIN. NEWS 3456, 3459.

[88] 42 U.S.C. § 2021 (1982). This provision reads in pertinent part:

> (c) [T]he Commission shall retain authority and responsibility with respect to regulation of - (1) the construction and operation of any production or utilization facility; (2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility; (3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission; (4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereon, not be so disposed of without a license from the Commission . . . (k) State regulation of activities for purposes other than protection against radiation hazards. Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

[89] 82 A.L.R.3d at 754.

[90] Silkwood v. Kerr McGee Corp., 464 U.S. 238, 251 (1984).

[91] *Id.*

[92] 42 U.S.C. § 2210 (1982).

[93] *Id.*

[94] S. REP. No. 1605, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3201, 3206.

to federal facilities to the same extent as such laws are applied to private facilities.[95] The phrase "workmen's compensation laws" is not defined in section 290. The purpose of 40 U.S.C. § 290 is to assure privately-employed workers on federal projects that they will receive the same treatment as other industrial laborers in the state.[96] This provision also serves to protect federal projects because the remedy of workers' compensation is exclusive.[97]

Ohio's Additional Award Provision

If an employee's injury, disease, or death resulted from the employer's failure to comply with a "specific requirement" for the protection of the lives, health, or safety of employees, the Commission shall add an amount not greater than fifty nor less than fifteen percent of the maximum award established by law to the amount of the compensation that is otherwise awarded under the workers' compensation statutes.[98] The term "specific requirement" in the constitutional provision does not include general course of conduct, or general duties or obligations flowing from employer-employee relations.[99] However, it does embrace all lawful, specific, and definite requirements proscribed by statute (or by the Commission's orders), which plainly apprise an employer of his legal obligation toward his employees.[100] An employer's failure to comply with a requirement does not justify an additional award unless: (1) the requirement was enacted by the General Assembly or by the Commission; (2) the requirement is specific rather than general; (3) the requirement is for the protection of the lives, health, or safety of employees.[101]

ANALYSIS

Consistency With Precedent

The majority's holding in *Goodyear Atomic Corp.* is consistent with prior case law. The most important of these precedential cases are *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n. (Pacific Gas),*[102] and *Silkwood v. Kerr-McGee Corp. (Silkwood).*[103]

---

[95] 40 U.S.C. § 290 (1982).

[96] Roelofs v. United States, 501 F.2d 87, 92 (5th Cir. 1974), *reh'g denied*, 511 F.2d 1402 (5th Cir. 1975), *cert den.*, 423 U.S. 830 (1975).

[97] Capetola v. Barclay White Co., 139 F.2d 556 (3d Cir. 1943), *cert denied*, 321 U.S. 799 (1944); Stacey v. United States, 270 F. Supp. 71 (LA, 1967); Young v. G.L. Tarlton, Contractor, Inc., 204 Ark. 283, 162 S.W.2d 477 (1942).

[98] OHIO CONST. art. II, § 35.

[99] State *ex rel.* Holdosh v. Industrial Comm'n, 149 Ohio St. 179, 78 N.E.2d 165 (1948).

[100] *Id.*

[101] State *ex rel.* Trydle v. Industrial Comm'n, 32 Ohio St.2d 257, 291 N.E.2d 748, 751-52 (1972).

[102] 461 U.S. 190 (1983).

[103] 464 U.S. 238 (1984).

1) Pacific Gas

In *Pacific Gas*,[104] the Supreme Court considered the issue of federal preemption in the nuclear industry. *Pacific Gas* involved a constitutional challenge of California statutory provisions[105] which conditioned approval for the construction of nuclear power plants on a state commission's findings that adequate storage facilities and means of disposal for high-level nuclear wastes were available.[106] Electric utilities filed an action in the federal courts seeking a declaration that these provisions were invalid under the supremacy clause[107] because they were preempted by the AEA.[108] Relying upon *Northern States Power Co. v. Minnesota*,[109] the Court ruled that in passing and amending the 1954 Act Congress intended the federal government to regulate the radiological safety aspects involved in the construction and operation of nuclear power plants.[110] However, the states would retain their "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns."[111]

The Court noted that the federal government has occupied the entire field of nuclear safety concerns, except for the limited powers expressly ceded to the states.[112] Accordingly, if the state regulations were intended to prohibit nuclear construction *for safety reasons*, they would be preempted.[113] Despite its obvious effect on the safety of nuclear plant operations, the statute was upheld because its purpose was economic rather than safety related.[114] As such, the statute was outside the occupied field of nuclear safety regulation.[115]

The Supreme Court's holding in *Goodyear Atomic Corp.* is consistent with its holding in *Pacific Gas*. *Pacific Gas* only compels preemption if the purpose of the state action is to regulate radiological safety.[116] *Pacific Gas* does not compel preemption if the impact on safety is incidental to some other permissible purpose such as economic regulation.[117] At first glance it may appear that the specific safety

---

[104] *Pacific Gas*, 461 U.S. at 190.
[105] CAL. PUB. RES. CODE §§ 25524.1(b) and 25524.2 (West 1977).
[106] *Pacific Gas*, 461 U.S. at 190.
[107] U.S. CONST. art VI, cl. 2.
[108] 42 U.S.C. §§ 2011-2296 (1982).
[109] Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Circ. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). In this case, the court examined the legislative history of the AEA, and the language of the act itself, particularly section 2021(k). The court held that under the doctrine of preemption, the federal government has exclusive authority to regulate the construction and operation of nuclear power plants, including regulation of the level of radioactive effluents discharged from the plants.
[110] *Pacific Gas*, 461 U.S. at 205.
[111] *Id.*
[112] *Id.* at 212.
[113] *Id.* at 213; *see supra* notes 57-77 for a discussion of preemption.
[114] *Id.* at 213-216.
[115] *Id.* at 216.
[116] *Id.*
[117] *Id.*

requirements in question would be preempted because the federal government has occupied the field of nuclear "safety" concerns. However, the "specific safety requirements" at issue in *Goodyear Atomic Corp.* are not the type of safety concerns to which the Court referred in *Pacific Gas*. These specific safety requirements are not related to nuclear or radiological safety, but rather are related to non-radiological worker safety - an area traditionally governed by the states. [118] Courts are reluctant to find preemption when the state regulation involves a matter of traditional state concern, particularly in areas relating to health and safety. [119] There is a presumption that state regulation of matters related to health and safety is not invalidated under the supremacy clause. [120] This presumption is only rebutted by evidence of Congress' clear and manifest purpose" to supersede the states' historic police powers. [121]

In *Goodyear Atomic Corp.*, the court examined the text and legislative history of 42 U.S.C. § 290 and found that Congress gave "clear and unambiguous" authorization for such regulation. [122] As such, Congress did not have a "clear and manifest purpose" for superseding the state's historic police powers. Therefore, the Supreme Court's holding in *Goodyear Atomic Corp.* is consistent with its holding in *Pacific Gas*.

2) Silkwood

The Supreme Court's holding in *Goodyear Atomic Corp.* is also consistent with its holding in *Silkwood*. [123] In *Silkwood*, the appellant, Kerr-McGee, contended that the AEA [124] as amended, and the Price-Anderson Act [125] operated to preempt a state court award of punitive damages. [126] The Supreme Court held that awards of punitive damages are not preempted by the AEA or the Price-Anderson Act. [127] Therefore, federal preemption of safety aspects of nuclear energy, as pronounced in *Pacific Gas*, [128] does not extend to state-authorized awards of punitive damages for conduct related to radiation hazards. [129] According to the Court, the legislative history of the Price-Anderson Act indicates that Congress assumed that persons were free to utilize existing state tort law remedies. [130] When the Price-Anderson Act was drafted and enacted, every state allowed for punitive damages in tort actions. [131]

---

[118] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[119] *Id.*
[120] Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985).
[121] *Id.* (*quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
[122] *Goodyear*, 108 S. Ct. at 1712.
[123] *Silkwood*, 464 U.S. at 238.
[124] 42 U.S.C. §§ 2011-2296 (1982).
[125] 42 U.S.C. § 2210 (1982); *see supra* notes 88, 89, and accompanying text.
[126] *Silkwood*, 464 U.S. at 249.
[127] *Id.* at 258. *Silkwood* was a five-to-four decision. *Id.* at 239.
[128] *Pacific Gas*, 461 U.S. at 212-13.
[129] *Silkwood*, 464 U.S. at 257-58.
[130] *Id.* at 251-52.
[131] *Id.*

Therefore, the Court assumed that punitive damages were included in the bank of remedies available to a plaintiff in an action against a nuclear power plant.[132] Kerr-McGee contended that Congress made no reference to punitive damages, and therefore did not provide that the requisite "clear congressional authorization" for awards of punitive damages.[133] Because punitive damages were a part of state tort law, the burden was on Kerr-McGee to show a specific reference demonstrating Congress's intent to preempt that remedy.[134] The Court found no clear indication that Congress intended to do so.[135] The Court recognized that an award of punitive damages based on the state law of negligence or strict liability is "regulatory" because a nuclear plant will be threatened with damages liability if it does not conform to state standards.[136] However, that regulatory consequence was something that Congress, and therefore the Court, was willing to accept.[137]

The Supreme Court's holding in *Goodyear Atomic Corp.* is consistent with its holding in *Silkwood.* In *Goodyear Atomic Corp.*, the regulation allegedly in conflict with federal law is similar to the punitive damages award upheld in *Silkwood* because penalties result when the employer's conduct falls below a state established acceptable level.[138] Furthermore, the injury in *Silkwood* was caused by radiation, which is more closely related to the risks which Congress intended to regulate in the AEA.[139] In addition, *Goodyear Atomic Corp.* is consistent with *Silkwood* because both involved "incidental regulatory pressure"[140] rather than direct regulation which would have been preempted.

Policy Problems

Despite its consistency with precedent, there are some policy problems with the holding in *Goodyear Atomic Corp.* Congress enacted the AEA[141] after determining that the national interest would be best served if the government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing.[142] Also, the Price-Anderson Act was passed as an incentive for private industry to enter the nuclear field without the of massive tort liability.[143] However, the holding in *Goodyear Atomic Corp.* together with the holding in *Silkwood* threatens to lessen private industry's incentive to invest large sums of money in the nuclear power industry. This is obviously in conflict with the

---

[132] *Id.*
[133] *Id.* at 255.
[134] *Id.*
[135] *Id.* at 225-56.
[136] Id. at 256.
[137] *Id.*
[138] *Miller*, Case No. 84AP-208, at 4.
[139] *Id.*
[140] *Silkwood*, 464 U.S. at 256; Goodyear, 108 S. Ct. at 1712.
[141] 42 U.S.C. § 2011-2296 (1976).
[142] *See* H.R. REP. No. 2181, 83d Cong., 2d Sess. 1-11 (1954).
[143] *Silkwood*, 464 U.S. at 251.

congressional intent evidenced by the legislative history of the AEA and the Price-Anderson Act.

The application of Ohio's additional award provision to nuclear plants exposes the facilities to penalties if they do not comply with specific state requirements for the protection of employees' lives, health or safety. [144] Furthermore, the specific safety requirements which the Supreme Court has imposed upon the nuclear facility go far beyond mere regulation of scaffolding. The Commission's specific safety requirements relating to all workshops and factories[145] are hundreds of pages in length and relate to tools, equipment, machinery, trucks, personal protective equipment, ventilation and exhaust equipment and many other things.[146] Clearly, Ohio's system of additional awards for violation of specific safety requirements is intended to have, and does have, the direct effect of altering, if not controlling, employer behavior in a number of areas.

If the management of these nuclear facilities chooses to comply with the specific safety requirements, it will cost money and perhaps lessen their profits and incentive to invest. If they choose not to comply, their workers' compensation premiums may rise, and further decrease their profits and incentive to invest. In *Goodyear Atomic Corp.* the potential monetary penalty was not very large.[147] However, if the amount had been larger, or if a combination of penalties in the future become large, there would be apparent direct compulsion "brought to bear upon the federal facility to knuckle under and scrutinize its operations for compliance with every jot and title of the state administrative rules."[148] As such, the decisions in both *Goodyear Atomic Corp.* and *Silkwood* may be against public policy which favors private investment and involvement in the nuclear industry.

While these decisions may be considered harsh by the industry, they must also be applauded for their attempt to make the industry safer for the thousands of workers who are subjected daily to its dangers. Furthermore, more stringent safety requirements may prove costly at the onset, but will result in a safer enviornment for workers and the communities surrounding nuclear facilities.

CONCLUSION

In *Goodyear Atomic Corp.*, the Supreme Court has effectively ratified state regulation of worker safety in the nuclear industry. States may now constitutionally fine an employer in the nuclear industry for not complying with specific safety

---

[144] *See* State *ex rel.* Kroger Co. v. Industrial Comm'n, 62 Ohio St. 2d 4, 5, 402 N.E.2d 528, 530 (1980).

[145] OHIO ADMIN. CODE § 4121: 1-5.

[146] *Id.*

[147] Under the additional safety award, the maximum (50%) he could receive was $4,429.00. The minimum (15%) would be $1,328.00. Brief of Appellee.

[148] *Goodyear*, 108 S. Ct. at 1714-15 (White, J. dissenting).

requirements if the state's workers' compensation statutes so provide.

Goodyear Atomic Corp. may lead to more states adopting additional award provisions in an effort to gain more state control over the nuclear industry. It may also lead to more injured employees receiving additional awards from employers in the nuclear industry. As such suits increase in number, employers will be financially compelled to follow the thousands of specific safety requirements imposed on them by the states, or to pay higher workers' compensation premiums to provide for additional awards. Finally the decision may have an adverse effect on the private sector's continuing involvement in the nuclear industry, an involvement that has been recognized as essential to national defense and energy policies. Despite this "negative" impact to the industry, the benefits of regulation will flow to those who need protection most -- the employees of nuclear facilities.

Goodyear Atomic Corp. is consistent with prior case law which has established that state regulation in the nuclear industry is generally preempted only in areas involving construction and radiological safety. Furthermore, it is consistent with Congress's apparently clear direction that states may apply "workmen's compensation laws" to federal facilities to the same extent as such laws are applied to private facilities. The phrase "workmen's compensation laws" in 42 U.S.C. § 290 was not defined. Therefore, when read in light of Congress' intent to assure privately employed federal workers that they will receive the same treatment as other industrial laborers in the states,[149] the plain meaning attached to the phrase by the Court is reasonable and proper.

DONALD A. MIHOKOVICH

[149] *Roelofs*, 501 F.2d at 92.