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**ELEVENTH CIRCUIT APPEALS COURT VACATES OSHA'S 1989 STANDARD, REMANDS TO AGENCY**

The U.S. Court of Appeals for the Eleventh Circuit July 7 vacated the Occupational Safety and Health Administration's 1989 air contaminants standard, which established new permissible exposure limits for about 400 chemicals and other air contaminants in general industry. The court ruled that OSHA failed to establish that a significant risk of material health impairment existed for each regulated substance, and that the new exposure limit for each substance was feasible for the affected industry.

The court stated that OSHA's attempt at "generic" rulemaking in this case was inappropriate. The court found the substances involved had little in common and that the standard was, in fact, a set of 428 specific and individual exposure limits. OSHA promulgated the 1989 rule to update exposure limits adopted in 1971 from consensus standards that analysts concede are out of date. The rulemaking also created new exposure limits for substances not previously regulated.

While finding nothing in the Occupational Safety and Health Act preventing OSHA from addressing multiple substances in a single rulemaking, the court ruled that the exposure limit for each substance must be able to stand independently. Each limit must be supported by substantial evidence in the record as a whole and accompanied by adequate explanation, the court said. The act requires that in promulgating a health standard, OSHA must determine there is a significant risk of material health impairment, the court said. Next, the agency must adopt a standard that prevents material impairment of health to the extent possible, the court added.

Reacting to the court ruling, AFL-CIO spokeswoman Colleen O'Neil said the labor federation agreed with the court that OSHA did not do an adequate job in drafting and explaining the standard. "But having said that, we're dismayed that the court threw out the entire standard. We wanted the court to direct OSHA to improve the standard," she said. "The effect now is that we return to the 1971 limits, and workers are not adequately protected." OSHA spokesman Douglas Fuller said the agency had just received the decision and was still reviewing it. Asked whether OSHA would appeal the ruling, Fuller said "it's far too early" to determine.

In examining the record, the court ruled that OSHA adequately established material health impairment. The agency had grouped 428 substances into 18 categories by the primary health effects of those substances. However, the court found lacking OSHA's determination that significant risks existed. While noting that the discussion of individual substances contained summaries of various studies of the substances and the health effects at various exposure levels, the court found OSHA failed to estimate the risk of developing those health effects. OSHA also failed to determine that the new standard was "reasonably necessary or appropriate," the court said. The court stated that but for a few exceptions, the standard was "virtually devoid of reasons for setting those individual standards."

The court rejected OSHA's argument that no models existed for performing quantitative risk analysis using mathematical models for non-carcinogenic substances. The court noted that in the past OSHA has been able to determine how many workers are exposed to a particular substance or how much risk would be alleviated by the new standard. As examples, the court pointed to OSHA's lead, asbestos, and cotton dust standards.

The court also rejected OSHA's argument that no quantification was required because the agency's final standards fell within a "zone of reasonableness." Without an explanation, it is impossible to determine what that zone is or whether the standard fell within it, the court said. The court also expressed its concern about OSHA's apparent use of "uncertainty" or "safety: factors in reaching the exposure limits. These factors allow OSHA to set an exposure limit below the level recommended in a study due to characteristics of the study such as its small size. While questioning whether the use of such factors was permissible under the act, the court ruled that OSHA failed to explain its use of safety factors in each instance it was used. The court stated that it was not "appropriate for those given such serious tasks to adopt an attitude of' trust us, we are working for the government.'" Next, the court critized OSHA's failure to prove that the new exposure levels were technically and economically feasible for each substance. While accepting the arguments made by industry petitioners, the court did address some of the concerns raised by the AFL-CIO.

The court found nothing wrong with OSHA's decision to consider only those substances where the American Conference of Governmental Industrial Hygienists recommendation was higher that the existing PEL or where there was not existing PEL. Noting that OSHA never claimed that the standard was the total universe of substances in need of regulation, the court found OSHA's reliance on ACGIH's list for determining which set of substances to examine to be reasonable.

The court also refused to accept the union's argument that OSHA's adoption of ACGIH's recommendations without performing its own independent study was improper. While not directly ruling on the union's objection, the court stated that

OSHA was allowed to rely on expert consultants. On remand, the court instructed OSHA to carefully review the evidence supporting each of the 428 exposure limits. The court did reject the union's argument that Section 6(b)(7) of the act required OSHA to include monitoring and medical surveillance provisions in the standard. Instead, the court agreed with OSHA "that this is purely a matter of regulatory priority." Finally, the court concurred with the union's argument that OSHA's decision to allow four years for the implementation of engineering and work practice controls to bring employers in compliance with the standard was not supported by the record. Any economic or technological concerns that the agency had with industries complying with the standard needed to be specifically addressed for that particular industry, the court said.

The challenges to the standard involved 11 consolidated cases filed by labor and industry groups. The 1989 standards affected 428 hazardous substances. The final standard lowered the PELs for 212 substances, set new PELs for 164 previously unregulated substances, and left unchanged PELs for 52 substances for which lower limits had previously been proposed.

**RULE TO PROTECT PUBLIC BUILDING WORKERS TO BE PROPOSED BY EPA IN 1993, OFFICIAL SAYS**

The U.S. Environmental Protection Agency could begin a rulemaking to protect public building workers from asbestos exposure by mid-1993. The rule would complement a regulation the U.S. Occupational Safety and Health Administration is working on now that would protect private sector workers from exposure to asbestos. EPA would adopt the provisions of the OSHA rule for a standard to protect state and local government employees in public buildings who would not be covered under the OSHA regulation. OSHA anticipates completing its rule in Dec. or early 1993.

EPA's rule would be designed to fill in the gaps where OSHA does not have jurisdiction, according to Christine Augustyniak, a special assistant to the EPA associate administrator for toxic substances. OSHA and EPA officials met with representatives from labor organizations on July 6 to inform them that OSHA intends to reopen the comment period on the worker protection rule to include recent asbestos-related studies and consider whether to require commercial buildings to be inspected for asbestos-containing materials.

Current environmental rules require public and private schools to be inspected under the Asbestos Hazard Emergency Response Act and the Asbestos School Hazard Abatement Act, implemented by EPA. But there are no requirements for generalized inspections of commercial or non-school public buildings. Orrin Baird, an attorney with the Service Employees International Union, said that the labor organization will not oppose the reopening of the OSHA comment period. The union had fought with EPA in court to expedite a rulemaking on protecting workers from asbestos exposure in public buildings. In November 1991, EPA and OSHA agreed that OSHA would take the lead on the inspection issue since it had already begun a rulemaking.

OSHA forecasts that the rule will be issued by the end of 1992, and that reopening the comment period will not delay the rulemaking significantly, according to Baird. The meeting participants discussed options for what types of protective measures should be implemented, Augustyniak said. Those options include training maintenance workers on how to handle suspect asbestos-containing materials, requiring building owners to sample all suspect asbestos-containing materials, and to develop building records on suspect asbestos-containing materials but would not require owners to sample all the materials, Augustyniak explained. EPA and OSHA officials also indicated the rule could regulate only key materials that are likely to release asbestos fibers when disturbed. Insulation and friable asbestos products are likely to get the most attention, Augustyniak said. The rulemaking cannot encompass all types of suspect asbestos-containing materials. "If you worry about everything, you lose your edge," she said. "We're interested in focusing on materials that are likely to contain fibers and release" them into the environment, Augustyniak said.

The comment period for the OSHA rules is likely to last between 30 days and 45 days. The same amount of time will be needed by OSHA to review the comments. After OSHA issues its final rule, EPA will begin drafting a proposal, which should be be ready by mid-1993, Augustyniak said.

## BILL WOULD ALLOW PRIVATE CITIZENS TO SUE FEDERAL GOVERNMENT FOR JOB SAFETY NEGLIGENCE

Private citizens could sue the federal government for violating its occupational safety and health standards or for negligence at any government-owned or controlled workplaces under legislation introduced July 9 in the House. HR 5586 would amend the Federal Tort Claims Act to remove the U.S. government's immunity from suit under the discretionary function clause, which allows federal officials wide latitude in carrying out government policy.

Rep. Willis Gradison Jr. (R-Ohio), who has introduced the bill in three successive Congresses, said the legislation is designed to correct "a serious inequity" in the 1946 tort law. According to Gradison, the bill would promote safer workplaces under federal government control because of the government would be liable for violating safety and health standards or for negligent actions. In that sense, Gradison said, the government would be subject to the same incentives for running a safe workplace as are private employers.