

PREPARED TEXT -
ORAL PRESENTATION BEFORE THE
CALIFORNIA STATE OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD
AUGUST 30, 1979

TITLE 8: GENERAL INDUSTRY SAFETY ORDERS
(Asbestos)

Held in San Diego, California
on
August 30, 1979

Union Carbide Corporation
Metals Division
Niagara Falls, NY 14302

Introduction

My name is John L. Myers and I am employed by Union Carbide Corporation as Marketing Manager for its "Calidria" asbestos products. Union Carbide produces about 30,000 tons per year of asbestos fiber from a mine and mill located in the King City area of California. The operation employs approximately 70 people with an annual payroll of nearly \$2,000,000 and is the largest industrial employer in a radius of about 50 miles.

We produce and market raw asbestos fibers for industrial use but do not manufacture finished asbestos-containing products. Our plant has had complete air monitoring and medical surveillance programs since operations were initiated in 1963. Our interest in the proposals to change the "action level" for monitoring and medical examinations is because these changes can have a massive impact on the users of asbestos-containing products with, we believe, little or no gain in worker protection.

Changes in Section (8) - Monitoring and Recordkeeping

The staff proposes to reduce the level in paragraph (g)(1)(A) at which monitoring is required from 1 fiber/cc $>5\mu$ to 0.1 fiber/cc $>5\mu$. The question of the appropriate "action level" to trigger monitoring and also medical examinations was discussed at the standards Board hearing on April 26, 1979. At that time, there was general agreement among labor, industry, and even state governmental representatives that a level of 0.5 fibers/cc longer than 5μ was reasonable. This level was based on considerations of worker protection, ability to measure, and an efficient allocation of professional resources. This level was adopted unanimously by the Board.

Subsequent to this action, on May 10, 1979, the Federal OSHA Regional Administrator, Mr. Gabe Gillotti, informed Mr. Don Vial by letter that this action by the Board was "unacceptable . . . Your asbestos exposure language will need to be identical to Federal OSHA" and quoted OSHA Program Directive #300-16 as the basis for this requirement.

Mr. Gillotti's letter was a surprise since California has a state plan which has been fully approved "as effective as" the Federal regulation in accordance with Section 18(e) of the OSHA Act and under Part 1902 of the implementation regulations. There has been no change in the Federal Regulations, 19CFR 1910.100 1 (j)(2), (3) or (4) which would require their incorporation into the State Regulations in accordance with Section 18 of the OSHA Act.

We discussed this with John W. Whittlesey, Esq. a Union Carbide Counsel specializing in OSHA matters. He has authorized the following opinion and will be glad to provide a written confirmation if the Board desires one.

1. Program Directive #300-16 is an administrative interpretation only. As such it does not have any regulatory or statutory authority.
2. California may elect to modify their regulations to conform but are under no statutory requirement to do so.
3. Failure to conform to such an Administrative interpretation does not provide the "substantial evidence" required under Section 18(g) of the OSHA Act to sustain a withdrawal of certification.
4. The authority delegated to the Regional Administrator under paragraph 1953.4 (a)(2) relates to inconsistent interpretations of standards as they exist. It does not require standards which have been certified "as effective as" to be modified to conform identically.

California is not required to change their present regulations to conform to the Federal wording. The choice is up to the Standards Board.

There are at least two reasons why the Board should retain the present action level of 1 fiber/cc or at most lower it to 0.5 fibers/cc.

1. The very large burden on resources to comply with (and enforce) a 0.1 fiber/cc level.
2. The inability to measure the airborne concentration at this very low level.

Significant releases of asbestos fiber must take place before the 1 fiber/cc $>5\mu$ current action level is exceeded. It is fairly easy to ascertain where initial monitoring does not need to be conducted and unnecessary action can be minimized. If, on the other hand, the California Asbestos Standard is changed to require monitoring at a level of 0.1 fiber/cc, virtually every place of employment where asbestos is present in any form must be monitored at least once.

Brake repair shops provide a specific example of the scope of the problem. Molded brake linings contain asbestos. Airborne fibers can be released when they are sanded, machined, or when the drum is blown out with compressed air. It has been shown that airborne asbestos concentrations can be controlled to low levels by careful handling, proper work practices and the use of vacuum cleaners to remove dust.

There are over 20,000 brake repair shops in California, the majority of which are service stations. A survey of 100 shops was made by CAL/OSHA some months ago and it is our understanding that it was found that a low level of airborne fiber is common but exposures above one fiber per cc are rare. Generally, the higher levels occurred at the large truck repair shops where such things as blowing and sanding have been practiced without proper dust control. If the proposed action level is adopted, all of these shops, which are generally small businesses, would be required to monitor at least once.

We recently asked two industrial hygiene consulting laboratories the cost to conduct a basic "initial monitoring" for a relatively simple operation like a brake shop. Both gave a range of \$300-\$500 per test. These figures do not include travel and living expenses or provide for any significant extra technician travel time to the test site which can occur frequently.

Applying a representative value of \$400 to the approximately 20,000 registered brake shops gives a cost of \$8,000,000 added to the operating expense of this industry to comply with the new regulation. Each inspection would also use up about two man-days of the time of trained personnel. If we assume 200 man-days as equivalent to a working year, it would take the full-time activity of 200 trained technicians to carry out the monitoring in a year. We doubt if this quantity of people and equipment is available. The main information obtained from such a massive test program would be that exposures are generally above zero, and below one fiber/cc, which is already quite well established.

This discussion has emphasized brake shops because they are a well defined entity, already registered and identifiable. The same problem exists for the widespread low exposure in the less well defined construction industry. There is also an additional compounding factor in construction in that the "place of employment" changes a number of times a year so that continuous monitoring at frequent intervals would be required. The brake shops may really be only the tip of a very large iceberg.

Changing the initial monitoring action level to 0.1 fiber/cc would place a very heavy cost burden on the employer, require a massive use of limited technical resources in an area of low exposure and consequently low risk, and give a very questionable return in terms of worker protection. We recommend that your present standard be retained.

The second reason not to change to a 0.1 fiber/cc action level regards the ability to measure this concentration and I would like to ask my colleague, Dr. Rhodes, to discuss this aspect.

(j) Medical Examinations

The staff has proposed that the requirements for medical examinations be changed from the present one fiber/cc TWA "action level" to 0.1 fibers/cc >5μ as an eight-hour time-weighted average. It is instructive to continue with the brake shops as an example of the potential impact of the proposed regulations on this small-business oriented industry. It has been our observation that a local filling station is likely to have a couple of young mechanics who handle the brake repairs along with other general repair work. The larger franchise type shops may have a dozen or more people who repair brakes with some frequency.

For estimating purposes, it will be assumed that there will be two persons per shop for a total of 40,000 persons requiring pre-employment and annual medical examinations under the new proposed regulations. This does not allow for employee turnover.

Dr. Clark Cooper, who supervises the joint union-employer medical surveillance program for Western Department of the Asbestos Workers Union, has provided an estimate of \$60-75 per man for a minimum physical examination to satisfy OSHA requirements. This is on a large-scale contract basis conducted by well qualified personnel. Examinations of an individual or small groups, as would probably be the case for brake repair shops, would increase the costs to approximately \$100 each. These costs do not include time spent away from the job to obtain the examination.

At a conservative \$50 each, the medical examinations could cost \$2,000,000 annually and, obviously, double this to \$4,000,000 annually at the

higher unit cost. This discussion, as with monitoring, emphasizes the brake shops. The less well defined construction industry is faced with the additional complications of a transient workforce and moving workplaces.

Although this is clearly a very large cost burden, the fundamental question is not the cost per se, but what is accomplished in terms of worker protection. Although it is admittedly controversial as to what exposure level is "significant", we believe that the present California level of one fiber/cc TWA, or some level in that general vicinity, such as 0.5 fibers/cc is reasonable and meets the California objective of a standard which is enforceable and makes a positive contribution to worker health. The lowering of this level to 0.1 fiber/cc would require a large new investment in time, money, and people by both the employer and the state compliance operation for which we see little if any return in terms of worker protection. We urge you not to make this change.

General Comments

1. Why are the proposed changes a unique problem in California?

It has been noted several times that the proposed changes would make the California standard the same as the Federal standard which is administered by the Federal Government in 26 states. The very legitimate question has been asked as to why a standard which has been in effect for seven years will present a serious problem if it is now adopted in California. The answer is basically very simple; although the Standard has been in effect for seven years there has been almost no Federal enforcement in the asbestos product user areas that would be most seriously impacted by the 0.1 fiber/cc

action level. This would no longer be the case in the more comprehensive California state industrial health activities, so we believe that the compliance and enforcement problems described earlier would soon become clearly evident.

The statement on Federal enforcement is based on a computer printout of all Federal asbestos inspections over a 30 month period from October 1976 through January 1979 that was supplied by OSHA to the Asbestos Information Association/North America. Details are included in Attachment I. In this 30-month time period there was a total of 17 inspections, of brake repair operations basically on large auto dealerships, relative to asbestos. There are about 250,000 brake shops in the country with roughly half estimated to be in states where Federal OSHA is the primary compliance enforcement.

The construction industry has also been mentioned in connection with enforcement and potential impact. The U.S. Department of Commerce published a census of the construction industry for 1972 which showed a total of about 430,000 construction establishments with an employment of about 3,500,000 construction workers.

It is not well defined how many of these establishments use asbestos-containing materials and at how many locations per year they work. Considering that over 60% of the asbestos used in the U.S. is in construction products, the number of both people and work locations could be substantial. The printout mentioned earlier shows a total of 173 asbestos-related inspections in the construction industry in the 30-month period. Considerably more time has been spent in the construction industry than in brake shops to make general inspections but it is clear that only a minute fraction of possible asbestos containing locations has been inspected.

It should be emphasized that the information presented is not intended to be a criticism of the Federal activities or the allocation of the resources

that have been made available to them. OSHA has statutory priorities to consider. It is provided to document the fact that regardless of the reason, the brake repair industry has been subject to virtually no enforcement of the 0.1 fiber/cc action level requirement for monitoring and medical examinations, and the situation is little different in the construction industry. There is no evidence that these provisions are reasonable and workable in the states under Federal administration since they have not been actively enforced on a wide basis.

In contrast to this, the State of California has supplemented their OSHA activities with the Carcinogenic Substances Control Act, a registration provision, a Carcinogens Control Unit, an active consultation program and an experimental voluntary labor-industry joint program. We believe that the incorporation of a 0.1 fiber/cc triggering level into this comprehensive compliance program would soon reveal the gross impracticality of such a level and urge that it not be done.

Concluding Statement

In conclusion, we wish to make certain that the Board has not been left with the impression that Union Carbide is opposed to monitoring and medical surveillance. Union Carbide strongly supports the need for both of these activities where significant asbestos exposures occur. Our plant employees have been provided with regular medical examinations since the plant opened in 1963.

Although it is admittedly controversial as to what exposure is "significant" we believe that the present California level of one fiber/cc TWA, or some level in that general vicinity, such as the 0.5 fiber/cc level adopted by the Board at the April 26, 1979 hearing, is reasonable and meets the California objective of a standard which is enforceable and makes a positive contribution to employee health. To lower this level to the extreme of 0.1 fiber/cc TWA will

extend monitoring and medical examination requirements to about 20,000 brake shops and quite probably an even larger number of construction sites where exposures are generally low. The return, in terms of worker health, on the large new investment of time, money and people by both the employer and the state compliance operation is very questionable and limited technical resources are diverted from more urgent higher risk situations. We urge you to retain your present well written standards for asbestos and not to make the proposed changes that would return them to an outdated Federal requirement.

Thank you for the opportunity to express our concerns..

/dal 8/27/79

BAKER BOTTS LLP

ONE SHELL PLAZA
910 LOUISIANA
HOUSTON, TEXAS
77002-4995
713.229.1234
FAX 713.229.1522

AUSTIN
BAKU
DALLAS
HOUSTON
LONDON
NEW YORK
RIYADH
WASHINGTON

November 21, 2002

002696.A048

Mr. Scott L. Frost
Baron & Budd
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219-4281

Cynthia Crawford
713.229.1458
FAX 713.229.2758
cynthia.crawford@bakerbotts.com

Re: All Baron & Budd asbestos cases in Texas

Dear Scott:

We have conducted a search for the documents requested in your October 8, 2002 letter and attach the following documents which may be responsive to your request:

UCASB00658612 - 21

UCASB00889028 - 32

UCASB00113389 - 96

UCASB01287463 - 70

UCASB00521247 - 49

UCASB00704422 - 29

If you have any questions, please do not hesitate to contact me.

Sincerely,



Cynthia Crawford

:3089

Enclosures

cc: Siobhan Handley
Gary Elliston
Tina Stamps