during the NIOSH evaluation since the work establishment is in compliance with OSHA's hearing conservation standard."

Obey claimed that noise levels at Coors were documented to be as high as 250 percent above acceptable federal limits. He said the agreement between Coors and OSHA does not require Coors to reduce noise levels; therefore, he said, there is no way the agreement could "speed up" the abatement of hazardous noise. Further, referring to a letter written by NIOSH Director J. Donald Millar to Obey which the congressman also inserted in the *Congressional Record*, Obey claimed the OSHA draft statement is wrong in saying that NIOSH is conducting the study.

Millar told Obey that, at the request of OSHA, NIOSH sent a bioacoustics expert to a Coors plant, "to consult on the adequacy of the Coors hearing protection program." Millar said NIOSH "recommended that OSHA contract with a recognized expert" when it was discovered that Coors "was using a non-accredited audiometric method to acquire the audiometric data on their employees." Millar stressed that the contract will not be funded by NIOSH. He said, "NIOSH was not party to the arrangement resulting in a court order" to do a research study at Coors, did not conduct a research study at Coors, and does not plan to conduct one.

Litigation

FOIA EXCEPTIONS APPLICABLE TO OSHA, WITNESS IDENTITY PROTECTED, COURT RULES

The identities of employees who give statements to the Occupational Safety and Health Administration during an OSHA investigation of an accident are protected from disclosure under the Freedom of Information Act's exceptions for unwarranted invasion of privacy and protection of the identity of confidential sources, the U.S. Court of Appeals for the Eleventh Circuit ruled Sept. 4.

This decision in *L & C Marine Transport, Ltd. v. United States of America* (No. 83-8328) reversed a lower court's ruling ordering OSHA to provide the requested information.

In May 1981, a longshoreman was seriously injured aboard a ship. During a subsequent OSHA investigation of the accident the agency advised employee-witnesses that the information they supplied about the accident would be kept confidential. The injured longshoreman brought suit against L & C Marine Transport, and L & C then sought access through FOIA to OSHA's accident file in order to obtain complete written statements to be used as evidence in the longshoreman's lawsuit.

OSHA refused to release the names and other identifying information, arguing that to do so would constitute an invasion of privacy and disclose the identity of confidential sources, which are protected under Exemptions 7(C) and 7(D) of FOIA. L & C then sued in federal district court to compel disclosure of the requested information. The district court ruled that the information was not exempt under those two exceptions and ordered its disclosure. OSHA then filed this appeal.

On appeal, the court noted that the district court refused to balance the witnesses' privacy interest with the public interest in disclosure because L & C already knew the names of the employees who worked that day, and through the use of discovery could obtain the names of those employees who were working directly with the injured longshoreman and thereby match the workers with their statements. According to the appellate court, the district court reasoned that since the individuals could not remain anonymous, the employees did not have a privacy interest protected under Exemption 7(C).

'Privacy Interest' Not Lost

In rejecting the district court's reasoning, the appeals court held that an individual "does not lose his privacy interest" under 7(C) because his identity could be discovered through other means. Instead, the court found that the employee-witnesses in this case have a substantial privacy interest because disclosure would lead to the "type of harm, embarrassment and possible retaliation that 7(C) was created to prevent."

The court then found that an employee would be more likely to talk freely with federal officials if the employee did not think his name was likely to be attached to that statement. Since the employee does have a privacy interest and L & C failed to show how disclosure of the requested information would serve the public interest, the appellate court held that the requested information fell within the 7(C) exemption.

Again, according to the appeals court, the district court reasoned that since the names of the witnesses could be obtained through discovery techniques, the witnesses were not protected under the confidential source exemption found in 7(D). In rejecting the district court's rationale, the appellate court noted that the lower court did not conduct the usual inquiry to ascertain whether OSHA gave either an express or implied assurance to the witnesses that their identities would not be disclosed. According to the court, that determination is the proper test in determining whether 7(D) applies.

In this case, the appeals court found the record showed that the employees were given "an express assurance of confidentiality." Therefore, the appellate court held that the employee-witness identity was protected by 7(D).

Even if the use of civil discovery techniques would provide L & C with sufficient information to match the employee-witnesses with their statements and that failure to disclose the requested information would only delay, but not prevent, L & C from matching the workers with their statements, a court "must not release the information" if the witnesses are protected from disclosure under FOIA, the appeals court stated. "[T]he disclosure provisions of FOIA were not created as substitutes for discovery," the court concluded.

The full text of this opinion, which was written by Circuit Judge Thomas A. Clark, who was joined by Circuit Judges Paul H. Roney and Peter T. Fay, will appear in a future Decisions issue.

Asbestos

MIT STUDY ANALYZES EFFECTS OF CONTROLS ON ASBESTOS EXPOSURES IN CONSTRUCTION

Adopting a "workable, reasonably universal reporting system" for construction work involving appreciable asbestos exposure is the key to effective control of asbestos exposures in the construction industry, according to a report compiled by the Massachusetts Institute of Technology and supported by the Building and Construction Trades Department, AFL-CIO.

"Health Benefits and Costs of Supplemental Measures to Improve Compliance with Workplace Exposure Limits for

PLAINTIFF'S
EXHIBIT
AL-1276

Asbestos in the Construction Industry," written by Dale Hattis and Tom DiMauro of MIT's Center for Policy Alternatives, noted that the dispersed and non-fixed nature of worksites in the construction industry poses special challenges for the implementation of Occupational Safety and Health Administration limits on worker exposure to airborne asbestos fibers.

Further, numerous measures have been proposed to improve the likelihood of achieving in practice in the construction industry, the asbestos exposure reductions to be contained in the forthcoming OSHA standard — a hazard categorization system for asbestos products and processes based on a special pre-testing program, monitoring, specific work practices, respiratory protection, employer and worker training and certification, OSHA notification requirements, medical examinations, and medical removal protection requirements.

The report attempted to define a graded series of measures selected from these broad types of policy tools, and made approximate projections of their likely incremental health benefits, costs, and overall feasibility.

The packages of measures were tailored differently for three broad types of operations in the construction industry that involve appreciable exposure to asbestos: installation of new asbestos-containing products (represented in the analysis by the installation of asbestos-cement pipe); removal of asbestos-containing materials in the normal course of building renovation and demolition (represented by pipe insulation removal and an aggregate of drywall removal/demolition operations); and specific asbestos abatement projects, where the main purpose of the work is to remove asbestos-containing material from structures that are otherwise to be left essentially intact.

Exposures and costs per full-time exposed worker were assessed for each of the packages of control measures for each of the asbestos-exposing operations under a "real world case" based on the researchers' best judgments of the likely degree of compliance with different packages of requirements in actual practice.

Costs of Approaches

The results of these analyses are as follows:

▸ Asbestos-cement pipe installation — Simply requiring that appropriate equipment for cutting pipe be available on site and that cartridge respirators be worn while cutting appears likely to yield some progress toward control at relatively modest costs, although it is expected to give somewhat less than a 30 percent reduction from average baseline exposures. If additional control measures were implemented, however, a 90 percent reduction from baseline exposures would be expected at an annual control cost of about $1,000 to $2,600 per full-time exposed worker. The additional control packages include specific advance notice to OSHA of the times and locations where asbestos/cement products are to be installed and the cutting equipment which is to be available on site, the use of supplied air respirators, required air monitoring during randomly selected cutting operations, and advance employer/worker competency certification to ensure proper training in the use of equipment, the knowledge of asbestos hazards, and a medical examination for workers to ensure their fitness to wear respirators.

▸ Removal of asbestos insulation from pipe and drywall removal — Pre-work surveying for asbestos and specific advance reporting to OSHA should lead to about a 40 percent reduction in baseline exposures at an annual control cost of about $1,000 to $2,000 per full-time exposed worker. An additional control package consisting of the use of wet methods wherever feasible, the designation of regulated areas, and the utilization of a negative pressure system with HEPA exhaust filters for drywall removal should yield a similar-sized benefit in terms of absolute exposure reduction at an incremental cost of $2,000 per worker. In contrast, another control option, requiring the use of supplied air respirators and air-fed hoods, would be relatively cost-effective due to the modest additional costs of these respirators over the negative pressure type. The degree of overall exposure reduction expected after implementation of the supplied air respirator package is over 90 percent from the base case.

The entire package of controls is expected to lead to costs approaching $5,000 per worker, or nearly $7,000 per worker if full compliance is assumed. "These are clearly substantial costs, but they are not overwhelming in relation to the approximately $50,000 of total revenue per worker in most segments of the construction industry," according to the report.

▸ Specific asbestos abatement projects — An initial control package consisting of specific advance reporting to OSHA of times and locations of operations involving the removal of asbestos-containing material, the use of wet methods of removal, the utilization of negative pressure systems and cartridge respirators, and the submission of air monitoring results to OSHA is expected to produce about an 85 percent reduction in baseline exposures at a total annual control cost per full-time exposed worker of about $4,000 to $5,000. "As before, costs at this level are not insubstantial, but do not represent an overwhelming addition to overall labor costs if the reporting/detection/enforcement system is good enough to prevent wholesale violation of the requirements," the report stated.

Right-to-Know

HAZARD COMMUNICATION RULE SHOULD EXTEND BEYOND MANUFACTURING SECTOR, PROPOSAL SAYS

All potentially hazardous chemicals and all occupations involving exposure to such hazards should be covered by right-to-know laws, according to a proposed resolution scheduled for consideration by the governing council of the American Public Health Association Nov. 14 at the group's annual meeting.

The proposed resolution criticized the pre-emptive impact of the Occupational Safety and Health Administration's hazard communication standard on existing state and local laws relating to right-to-know, noting that it may operate to pre-empt such laws commencing on the date the standard was published rather than in 1985 when the standard is to take effect.

"Such preemption, if sustained by the courts, would remove all existing statutory protections for workers and communities in over 30 state and municipal jurisdictions which presently have right-to-know laws," the proposal stated.

In addition, the position paper said that the current hazard communication standard excludes well over half of the workers in the U.S., covers a floor of only about 600 substances, permits employers to withhold the identity of any chemical which they assert to be a part of a "trade secret," and is unduly restrictive in that it excludes all nurses from the definition of "health professional."

A federal right-to-know law or standard should not pre-empt state law, except to the extent that state law requires

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