6-19-75 Sent to D.K. Rennie, C. Mallory and P. Milner

O.S.H.A. EXCERPTS - June 18, 1975

Litigation

THIRD CIRCUIT HEARS CHALLENGE TO CONSTITUTIONALITY OF PENALTY SCHEME

Oral argument on the question of the constitutionality of the Occupational Safety and Health Act's provision for administrative enforcement of civil penalties was heard en banc by the U.S. Court of Appeals for the Third Circuit on May 8 in Philadelphia, Pa.

The court's nine active judges and one senior judge who participated in the court's initial decision in *Frank Irey, Jr., Inc. v. OSAHRC and Brennan* (OSHC 1283) heard the case as the result of their granting Irey's petition for reconsideration (Current Report, January 9, p. 929).

McNeill Stokes of the Atlanta, Ga., law firm of Stokes, Boyd & Shapiro urged the court to adopt the minority opinion expressed by Circuit Judge John J. Gibbons in the original decision. Gibbons dissented on the ground that the administrative civil penalty scheme violates the right to a jury trial guaranteed by the Seventh Amendment to the U.S. Constitution. The fact that the Act permits the determination of a civil penalty, without jury trial, which can be reduced to an *in personam* judgment renders the law unconstitutional, Stokes contended on behalf of Irey. Any statute that includes administrative enforcement of civil penalties without trial de novo is unconstitutional, according to Stokes. In fact, the attorney for Irey stressed that the petitioner's case rises or falls on this issue.

The Government's defense of the statute was presented by Michael H. Stein, attorney, U.S. Department of Justice, Washington, D.C. Stein argued that the Act's penalty scheme makes a good deal of practical sense since it provides uniformity and efficiency in enforcement of the law. Stokes sees the employer who must defend himself against penalties and citations as the "forgotten man" in this argument. Stein also contended that a jury would be at a disadvantage because of its lack of expertise in the area of occupational safety and health.

Two other Courts of Appeals have heard argument on the identical issue of the constitutionality of the Act's civil penalty provision. *Atlas Roofing Company, Inc.* (No. 73-2269) is pending before the U.S. Court of Appeals for the Fifth Circuit and *Dorey Electric Company* (No. 74-2181) is awaiting a determination by the Fourth Circuit (Current Report, January 2, p. 912.)

If the Government prevails in its defense of the Act's constitutionality, the U.S. Supreme Court has discretion to review the case should the employer decide to appeal. On the other hand, if the disputed section of the Occupational Safety and Health Act is declared unconstitutional, the High Court is obligated to hear the case on its merits.

The Third Circuit will take the arguments in Irey under advisement. Chief Judge Seitz, Senior Judge Staley, and Circuit Judges Van Dusen, Aldisert, Adams, Gibbons, Rosen, Hunter, Weis, and Garth heard the case.

Litigation

163 FORMER RAYBESTOS-MANHATTAN WORKERS SEEK DAMAGES IN SUIT; OTHER SUITS FILED

A class action suit charging Johns-Manville Corporation, Denver, Colo., and four other asbestos firms with negligence in exposing employees to dangerous health hazards was filed in the U.S. District Court for the District of New Jersey.

The plaintiffs include 163 former employees of Raybestos-Manhattan, Inc., who, according to the Paterson, N.J., law firm of Gelman and Gelman, are seeking $1 million each for compensatory damages and $1 million each in punitive damages. Most of these workers have filed workers' compensation claims against Raybestos.

The suit charges that J-M as well as the Asbestos Corporation of America, Garwood, N.J., and three Canadian concerns, Bell's Asbestos Ltd., Asbestos Corporation, and Cassiar Asbestos Ltd., ignored scientific data and medical evidence that should have prompted them to take more stringent safety measures. The Raybestos plant, which made brake shoes, was closed in 1973.

Sunshine Mining Suit

A suit seeking $8.9 million for property damage, and $5 million for punitive damages was filed in Boise, Idaho, by the Sunshine Mining Company of Kellogg, Idaho, relating to the May 2, 1972, underground fire that killed 91 miners.

The suit names Mine Safety Appliances Company, the Callery Chemical Company, and PPG Industries, Inc., as conspiring to fail to inform the mines of dangers in the use of polyurethane foam.

Nerve Disorder Suit

A former employee of Columbus Coated Fabrics plant filed suit in Ohio's Franklin County Common Pleas Court for $1.5 million in damages against Borden, Inc., Eastman Kodak, and nine chemical company suppliers in connection with total disability from peripheral neuropathy.

The suit claims the defendants should have known that the chemicals to which the workers were exposed in the plant, including the plaintiff in this suit, were dangerous and hazardous to the health of the workers.

Some 56 former employees filed suit last September 4, and five others filed suit January 24.

Crane Accident Suit

Suit was filed in an Arkansas federal court asking $750,000 in damages following a crane accident in which one employee was electrocuted and the plaintiff was injured severely.

Grove Manufacturing Company, Philadelphia, Pa., was charged with negligence in the design of the crane, which had no protective device. The suit said Grove had a legal obligation to post conspicuously a warning to persons who would be using the crane that there was a hazard of electrocution in operating the crane without safety devices.

Bailey's Crossroads

A U.S. grand jury in Alexandria, Va., asked U.S. Attorney General Edward H. Levi to appoint a special prosecutor to investigate an alleged coverup conspiracy by government officials in the collapse of a high rise construction at Bailey's Crossroads, Va., that killed 14 workers in March 1973.

General Policy

STEIGER OBJECTS TO NIOSH CONTRACT TO DEVELOP ACCREDITATION PROGRAM

Objections to a contract for more than a half million dollars awarded by the National Institute for Occupational Safety and Health were voiced by Congressman William A. Steiger (R-Wis) in a series of letters and meetings with NIOSH officials.

The $543,790 amount was awarded the Joint Commission on Accreditation of Hospitals, Chicago, Ill., to develop a

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