The court then rejected RSR's greater hazard defense on the ground that the employer failed to adequately raise that issue before OSAHRC because it did not show that alternative means of protecting its employees were unavailable and that a variance application under Section 6(d) of the Act was inappropriate. In addition, the court affirmed the finding that the violation of the Act was serious because employees were exposed to lead in amounts posing a substantial probability of "at least serious physical harm."

The full text of this decision, which was written by Circuit Judge Patrick E. Higginbotham, who was joined by Circuit Judges John R. Brown and Albert Tate Jr., will appear in a future Decisions issue.

Asbestos

ACTWU CHARGES RAYBESTOS WITH PRESENTING INACCURATE, MISLEADING PICTURE OF HAZARD

In comments submitted to the Occupational Safety and Health Administration, the Amalgamated Clothing and Textile Workers Union, AFL-CIO, charged that Raybestos Manhattan has presented "an inaccurate and misleading picture" of the nature of the asbestos hazard and the company's industrial hygiene and medical programs.

OSHA issued its proposed asbestos standard in April (Current Report, April 12, p. 1195), and hearings were held from June 19 through July 12 (Current Report, July 19, pp. 171, 172). Raybestos Manhattan had asserted that the ACTWU was attempting to convince OSHA to release "unrealistic and unenforceable asbestos standards" and that the union's testimony at the rulemaking hearings had been inaccurate (Current Report, Oct. 4, p. 363).

RM had stated that the South Carolina Department of Labor had conducted an exhaustive inspection based on the union's charge that the company had withheld asbestos monitoring results and had refused to issue a citation on this charge for lack of evidence to support it. Eric Frumin, director of ACTWU's department of occupational safety and health, refuted this, stating that on July 24 the department had cited RM for failure to provide exposure records as required by OSHA. He noted that the citation was later amended, but not changed in substance. "In short, RMIPCO's statement of August 21, 1984, is incorrect and presents a false picture of the company's refusal to inform employees of their past exposure to asbestos."

Frumin stressed the need for continued exposure monitoring in the RM plant since "conventional asbestos is still processed there, though by no means on the same scale as in the past." He quoted the company as telling the union in May 1984 that there were no asbestos fiber count surveys for RM for 1983 and 1984. During his verbal testimony, however, RM Chairman Jerry Zucker described the company's exposure monitoring frequency as "numerous times, regularly," and "... once a week ... a one to two month cycle to complete each time."

Frumin noted that RM had told OSHA in August that there were no areas in the plant requiring testing as prior survey readings were below one fiber per cubic centimeter. Earlier during the hearings, Zucker had contradicted himself on the existence of conventional asbestos operations at the N. Charleston, S.C., plant, according to Frumin. "In view of the asbestos exposure hazard, both in the Novatex operation as well as in the less frequent conventional asbestos operation, continued exposure monitoring is obviously essential," Frumin emphasized. "The company's failure to do so is evidence of the need to impose stringent monitoring requirements."

Employee Training

In addition, Frumin noted that RM had denied the union's charges that it had failed to conduct proper employee training programs on asbestos hazards. Although the company offered evidence of its training activities, Frumin stated that none of the evidence was conclusive and that it does not necessarily contradict ACTWU statements.

Charging that the only evidence that employees have been provided any training at all since 1979 was a supervisor's affidavit, he asserted that the last company documents indicating that written materials were actually distributed to employees were dated Feb. 21, 1975. More recent statements signed by RM employees James Drye and Shirley Thomas, indicating receipt of the results of the company's medical examination, do not specify any discussion of asbestos hazards.

"The company's failure to conduct frequent training programs on asbestos hazards is entirely consistent with its anachronistic position generally on the risks of asbestos exposure," according to Frumin. "In other words, RMIPCO would have us wait another several generations when the high risks of death from cancer and lung disease due to low-level asbestos exposure are precisely defined — before imposing an exposure limit to *prevent* those deaths."

In addition, RM had disputed testimony concerning asbestos-related disease which had been offered by Thomas. The company submitted reports prepared by two physicians, following her testimony, indicating that her lung disorders are not related to asbestos exposure. Frumin restated that Thomas was informed by the company in 1981 that she had asbestos-related health problems, adding that medical records provided to Thomas from that period indicate this. "The fact that different physicians disagree about her health status — particularly regarding asbestos disease — does not at all detract from her credibility as a witness in this."

Frumin further criticized the company's attempts to discredit ACTWU testimony concerning asbestos exposure at RM. Drye had testified about various aspects of the asbestos exposure question at RM, and Frumin stated that it was "amply clear" that Drye's testimony covered operations other than the one in which he presently works. In RM's comments submitted to OSHA, Zucker had repeatedly sought to discredit the union testimony on the grounds that Drye testified that asbestos is still used in the expansion joint department. "In fact, Mr. Drye testified repeatedly that the asbestos exposure in that department was 'very little, very little' and 'we don't use asbestos [in my department]'," according to Frumin. "This description by Mr. Drye is consistent with the company's statement that asbestos is used in Expansion Joint, but only in encapsulated form," he added.

In conclusion, Frumin denied having testified that "asbestos is now used as a raw material" in the expansion joint department. He stated that his testimony should read: "In the expansion joint department, asbestos is *not* used as a raw material" and attributed the discrepancy to a transcription error.

Right-to-Know

NEW JERSEY OFFICIALS URGE MAJOR EFFORT TO IDENTIFY ILLNESSES UNDER STATE MEASURE

SECAUCUS, N.J. — (By a BNA Staff Correspondent) — New Jersey medical officials told approximately 200 health care professionals at a conference Nov. 28 that the state's

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new Worker and Community Right To Know Act will make it easier to track down the causes of occupational diseases.

Conference participants were urged to look for job-related illnesses among patients and to report cases to state authorities.

"The Right To Know Act is the most significant environmental and occupational health program in state history," state Sen. Thomas F. Cowan (D-Hudson County) said in an opening address to the meeting on medical, ethical, and legal implications of the Right To Know Act. The conference was sponsored by the Hudson Health Systems Agency, co-sponsored by 18 other state and local health organizations and hospitals, and endorsed by 19 additional health groups.

"New Jersey has a reputation as a state of chemical garbage dumps ... the home of cancer alley," Cowan remarked. "I can't say these labels are totally undeserved." He noted that the act was passed and became effective Aug. 29, 1984, "after some of the most bitter legislative battles in memory," and that it still faces opposition from "legal battles that will be waged by industries" seeking to have the pending federal hazard communication standard pre-empt the state law.

"The federal guidelines do not go far enough as a watchdog over the chemical hazardous waste industry," Cowan contended. He added that he agreed with industry opponents that the law will be expensive to implement, but "there will be greater expense if these measures are not taken to reduce personal injury and possible death." There are at least 3,420 deaths due to occupational causes and 13,338 new cases of occupational injury in the state each year, he said, a "substantial percentage" of which could be prevented by the new rules.

Asbestosis 'Mismanagement'

Rep. James Florio (D-NJ) cited asbestosis as a prime example of "head-in-the-sand" mismanagement and "misguided governmental policy." He called for a reassessment of the role that government should play in a "multi-disciplinary approach to occupational and environmental disease."

Florio said government officials adopted a "reactive posture" to asbestosis. "To avoid a repetition of an asbestosis situation, we must assure that governmental action is triggered as soon as a scientific jury comes in with a guilty verdict," he asserted.

Kenneth Rosenman, director of occupational health and environmental health services for the New Jersey Department of Health, told the meeting, "We are very concerned that physicians do not include occupational health problems" in their diagnoses and medical histories of patients. "We are hoping to bring many more physicians and other health care professionals into ... being aware of occupational disease ... We are going to expand physicians' awareness" through fact sheets distributed by county health departments, assistance through the state's Occupational and Environmental Disease Clinic in Trenton, and conducting grand rounds of hospitals to observe patients with occupational illnesses. He said 25 hospitals have signed up so far for the grand rounds program.

Physicians and nurses need to ask such questions as, "What do you do at work? What are you exposed to? Are there adequate controls?" Rosenman stated. He said the new right-to-know measure will make it easier for physicians to obtain information from companies on chemical exposures of workers and the public but that "I don't wish to imply that the right-to-know law is a panacea ... Hopefully, it will bring information to the physician but you've got to make him think about it." He added, "The physician should be calling on the state health department, the county health department, and the state Occupational and Environmental Disease Clinic. We encourage physicians and other health care professionals to make use of these resources."

Noting that the state health, labor, and environmental protection departments have enforcement responsibilities under the law, Rosenman said a state task force is in the process of working out a procedure in which one inspector from one of the three agencies can represent all three in a particular workplace inspection. Asked if the law is expected to precipitate lawsuits against companies, Rosenman said, "A responsible employer does not want to make employees ill. This law will help them prevent that."

Diana Crowder, industrial hygienist for the Hudson County Occupational Program, cited the case of a dry cleaner who installed equipment that not only reduced hazardous fumes but recovered expensive chemicals for the owner. "It didn't end in a costly lawsuit," she commented. "We tend to get turned off because we are afraid of the ramifications. It doesn't have to end in a costly lawsuit."

Asked by another conference participant if the law covers all dangerous substances, Rosenman said, "The answer is, no way." He said the total of approximately 2,000 substances covered by the law is "small potatoes" in a universe of 40,000 to 50,000 chemicals. "There is not sufficient reason to do toxicity tests on all of these ... Not all chemicals are on the hazardous list. It depends on how they are used."

Despite several pending lawsuits on the issue of whether the forthcoming federal standard will take precedence over state laws, Rosenman reported, "We are actively implementing our law and intend to continue doing so." State officials have already mailed out information to companies on labeling requirements which go into effect in March 1985, he said.

Eric Scherzer, a representative of the Oil, Chemical and Atomic Workers International Union and member of the executive board of the state Right To Know Coalition, told the conference that an industry lawsuit to block implementation of the state law is "a threat to the existence of right-to-know" (Current Report, Sept. 27, p. 356). He maintained that the state was "not doing everything" it could to oppose the litigation in New Jersey Superior Court, and called on conference participants to urge state officials to mount a stronger legal defense against the suit. An initial hearing in the case is scheduled for later this month.

Company Responsibilities

Lindy Gelber, safety and health director for Hills Brothers Coffee, said obligations of industrial nurses under the Right To Know Act include compiling a workplace survey of hazardous substances, maintaining employee health and exposure records, keeping hazardous substance fact sheets in a central file, making sure chemical containers are completely labeled, and documenting annual employee training programs on safe handling procedures.

"Occupational health nurses should do their own physical surveys and cross-check them with the industrial manager," she recommended. "The nurse should be visible and should note specifically who is exposed [and] who is at risk," she said. "The nurse should insure that employees follow the rules," maintain communications with employees, seek to head off false rumors or unnecessary alarm about exposure, and learn how to control the exposure of employees with a pre-disposition to disease, she added.

"The employee has specific rights, including access to ... the workplace survey, competent training, and protection from punishment for exercising these rights," she said. Gelber also urged occupational health nurses to develop a network to exchange information about their experiences under the law.

Linda Glazner, a faculty member of the Occupational Health Nursing Department at Hunter College in New York City, said nurses need to be alert to illnesses that show up in the home but can be traced to the workplace. She told of a case in which children in a housing project showed elevated lead levels. "The parents worked at a company using lead with poor hygiene practices. They were bringing the lead home in sufficient quantities to poison the children," she said.

"Because the law is a Worker and Community Right To Know Act, we as members of the community should be concerned with what's going on in the company. We need to ask questions," Glazner contended. For instance, the absence of children in a particular worker population may indicate exposure to substances affecting human reproduction, she said.

Diseases Said Preventable

Michael Gochfeld, clinical associate professor in the Rutgers University Medical School's Department of Environmental and Community Medicine, told the conference that while occupational disease is often difficult to establish, "it is highly preventable once recognized." The Right To Know Act will protect workers in small companies as well as large firms because 78 percent of all manufacturing establishments in the state have fewer than 100 employees, he said.

He recommended that medical professionals ask patients what they do at work, what is manufactured or handled there, how long the patient has worked there, what substances he or she works with, whether the patient becomes ill at work, what causes the illness, whether anyone else gets sick on the job, and what the warning symptoms are, such as skin reactions or breathing difficulties. Patients should also be asked about hobbies or moonlighting work, he said, mentioning one patient who did furniture-stripping at home on weekends and was thus exposed to a hazardous substance.

Under the Right To Know Act, "people are going to feel more confident that they have access to information" which affects their health, he said. In the past, many physicians did not want to ask about exposures on the job because the information often was not available. "Now it is and physicians can inform themselves ... There are experts who can help the individual practitioner interpret the information," he added.

Stephen Levin, director of the residency program in occupational medicine at Mt. Sinai Hospital, said there are many difficulties for physicians in diagnosing job-related diseases. Industrial bronchitis from noxious dust and gases is the most common occupational disease, but is not always recognized, Levin added.

Similarly, early symptoms of asbestosis "are not so readily recognized" but become progressively worse even though exposure has long since ceased, he added. "A benign pleural effusion may not be picked up as an occupational disease," Levin said. Exposure to nitrogen oxides is also difficult to detect because the chemical is less soluble in water and symptoms may not show up for several hours after workers have gone home for the day.

Reproductive Hazards

PROTOCOL FOR SEMEN STUDY CRITICIZED BY PARTICIPANTS AT NIOSH REVIEW SESSION

CINCINNATI — (By a BNA Staff Correspondent) — A study to document semen characteristics proposed by the National Institute for Occupational Safety and Health met with sharp criticism from peer reviewers Nov. 29, who said the project's design was inadequate to accomplish its goal.

Steven Schrader, NIOSH project officer for the planned longitudinal study of human semen characteristics, told the 13-person peer review panel that this study should establish baseline values for semen characteristics assessed in NIOSH field studies. These semen profiles would be "a reliable tool" in determining adverse reproductive effects, he said, and should enhance the design, conduct, and evaluation of field studies.

The project addresses three of the six NIOSH Division of Biomedical and Behavioral Science objectives for reproductive problems, Schrader continued: to improve the sensitivity and accuracy with which shifts in human fertility can be detected, to link the reproductive disorders program to other NIOSH activities that identify working populations at increased risk, and to disseminate information on the identification and evaluation of occupational reproductive risk factors.

Ultimately, a "well described standard" should come out of the study, Bryan Hardin, another member of the project team, also commented. This standard would help NIOSH in its legal obligation to interpret testing results for individuals, he said, by providing indexes of functional detriment. Although no hypothesis would be tested by the study, Hardin said "it will be a strong hypothesis generating process."

The specific semen parameters to be studied would be sperm motility, concentration, and morphology, plus the viscosity, velocity, and pH of semen, Schrader elaborated, noting that while a great deal of research has been done on sperm count, there is "very little," and in some cases no, investigative data on the other characteristics. NIOSH also wants information on an individual's sperm variation and fluctuation over time, he said, to help determine where any given worker stands in regard to the general population for his age group.

The study would encompass a 200-member sample, ranging in age from 18 to 65, Schrader reported, from which monthly semen samples would be analyzed over a two-year period. Quarterly blood samples would also be taken for an endocrin profile by a NIOSH contractor, who would provide an occupational profile of each man. Recruiting the sample and insuring even age distribution would be the contractor's responsibility, Schrader added.

Representativeness Questioned

Placing so much responsibility with the contractor was an overall concern of the peer reviewers, who expressed doubt that the sample would be representative of the work population at large. The panel urged Schrader to determine the type of worker group desired, taking into account exposures he would and would not want, rather than leaving selection vulnerable to a contractor's prejudice.

Sample size was also criticized, with most of the panel agreeing that a 200-man base is too small to determine any type of semen standard. Generally, the panel recommended more people and less emphasis upon time. Another recommendation was some testing to gauge the impact of smoking and alcohol upon the various semen characteristics.

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