

PLAINTIFF'S EXHIBIT

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EXXON COMPANY, U.S.A.

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JERRY W. MOORE
COUNSEL

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July 26, 1978

Re: OSHA Asbestos Standard Medical Examination Policy

Mr. Robert Diakun

I apologize for not responding earlier, but as you know I have not had an opportunity to consider the question posed in your letter of June 26.

Whether a medical examination policy issued by Exxon along the same lines as the OSHA policy expressed in former Assistant Secretary of Labor Morton Corn's letter of January 19, 1977 would be defensible.

In his letter concerning OSHA's standard for asbestos, Morton Corn stated with respect to the medical examination provision of 29 CFR 1910.1001(j) that "it is current OSHA policy to require medical examination only when employee exposures exceed 0.1 fibers greater than 5 microns in length per cubic centimeter (f/cc greater than 5 microns) on an 8-hour time weighted average (TWA) basis."

Considering the holding in the case of GAF Corp. v. OSHRC and John T. Dunlop, Sect. of Labor, 561 F.2d 913 (1977), it is my opinion that adoption of a comparable medical examination policy by Exxon would not be defensible. In the GAF Corp case the U. S. Court of Appeals for the District of Columbia Circuit held that 29 CFR 1910.1001(j) required employers to provide medical examinations to all employees exposed to airborne asbestos in any measurable concentration. This means (as the Secretary of Labor argued in the case) that the presence of any airborne asbestos at all in the workplace triggers the requirement for medical examinations.

Directly on point, however, is the subsequent OSHRC Administrative Law Judge's decision in the case of GAF Corp. (1977-1978 OSHD 122,391). This decision resolves specifically the issue raised by Morton Corn's letter advising of OSHA's policy not to "cite asbestos violations unless exposure levels exceed 0.10 fibers per cubic centimeter". On the basis of the D. C. Circuit Court of Appeals case, the Administrative Law Judge rejected the employer's argument that the standard does not require examinations when exposure does not exceed permissible limits. And in response to the

Mr. Diakun

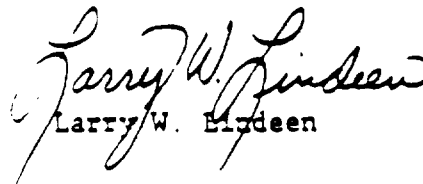
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July 26, 1973

employer's contention that it was not in violation because Morton Corn's letter was written prior to receiving the citation for violating of 29 CFR 1910.1001(j), the Judge stated that "a standard may not be amended under the guise of interpretation and can be modified only by use of procedures under §6(b) of the Act." Consequently, no immunity from violation of the standard is gained if an employer establishes a medical examination policy which comports with the OSHA policy contained in Morton Corn's letter.

In the more recent case of Wagner Electric Sales Corp. (1978-1979 OSHD 122,502), another OSHRC Judge ruled that the "standard makes no exceptions from the requirement for medical examinations if any asbestos is released in the workplace." It so happened in this case that two employees in a brake lining grinding shop were exposed to asbestos at levels on either side of the exposure level set forth in Morton Corn's letter: one at 0.1 fiber per cubic centimeter, and the other at 0.2 fiber per cubic centimeter.

I have attached copies of the foregoing cases in the event you wish to review the facts and discussions in greater detail.


Larry W. Lindeen

LWL:ris
Attachments

c: H. B. Snyder, M.D. (w/attachments)

LLA 000559

supplement to EPA's defense. Many of these decisions, after all, turn on questions of very technical detail and data.⁴⁵ On the basis of their experience and expertise in their relevant fields, appellants can reasonably be expected to contribute to the informed resolutions of these questions when, and if, they arise before the District Court.

(5) Finally, the District Court concluded that the other industry parties, granted intervention earlier,⁴⁶ would adequately represent the point of view of appellants. Once again, the problem with this disposition is that while the overall point of view might be shared, appellants' interest in the regulation of particular industries may not be represented by existing parties. For instance, none of the existing parties represents the interests of rubber manufacturers.⁴⁷ And the one chemical company that is currently a party, American Cyanamid Co., may not have interests that bear upon all of the industrial categories of concern to Union Carbide.⁴⁸ The District Court made no such particularistic inquiry as to interest here. We are thus not second-guessing a judgment of the District Court as to the exact range of interest of the applicants and parties before it, nor do we mean to limit the discretion of the District Court to decide when more representation would be redundant. But in exercising its discretion, the District Court must make a "discriminating appraisal of the circumstances of the particular case"⁴⁹ as to whether interests sufficiently overlap before denying intervention. In light of the "minimal burden" upon applicants to show that representation "may be" inadequate, *Trbovich, supra*, we find that the special and distinct interests

of appellants, even as to the existing industry parties, justify their admission under Rule 24(a)(2).

The order of the District Court, denying the motions for intervention, is reversed, and the case is remanded for the intervention by appellants to be allowed.



GAF CORPORATION, Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and John T. Dunlop, Secretary of Labor, Respondents.

United Paperworkers Int'l Union,
Local 691, Intervenor.

No. 76-1023.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 25, 1977.

Decided June 28, 1977.

As Amended July 13, 1977.

Rehearing Denied Sept. 22, 1977.

Employer petitioned for review of an order of the Occupational Safety and Health Review Commission finding it in violation of a regulation requiring employ-

ants contend that American Cyanamid may choose to guard its other interests more diligently than its interests in chemical manufacturing, thus making it an inadequate representative of appellants' interests. Moreover, appellants contend that the chemical operations of American Cyanamid are limited to certain product lines and do not reach all the chemical industry categories of concern to appellants.

49. 7A Wright & Miller, *Federal Practice and Procedure*, § 1309 at §33.

45. See n. 24 *supra*.

46. See n. 7 *supra*.

47. Category number sixteen is "Rubber Processing," with eight subcategories.

48. The categories of interest to Union Carbide involve the manufacture of a broad range of chemicals and chemical products, including organic and inorganic chemicals, plastics, and synthetic materials. American Cyanamid Co. is a diversified manufacturing company with interests in many fields, including the manufacture of pharmaceuticals and chemicals. Appellants

ers to provide medical examinations to workers exposed to airborne concentrations of asbestos. The Court of Appeals, Robb, Circuit Judge, held that: (1) the regulation required medical examinations for all those in occupations exposed to airborne asbestos in any measurable concentrations, and (2) the regulation was not invalid.

Petition denied.

MacKinnon, Circuit Judge, filed a specially concurring opinion.

1. Labor Relations — 7

Occupational safety and health regulation requiring employers to provide medical examinations to workers exposed to airborne concentrations of asbestos was applicable to employees exposed to airborne asbestos in any measurable concentration.

2. Labor Relations — 7

Occupational safety and health regulations must be construed to protect employees.

3. Labor Relations — 8

Occupational safety and health regulation requiring employers to provide medical examinations to workers exposed to airborne concentrations of asbestos was not invalid.

4. Labor Relations — 27

Occupational Safety and Health Act vests Secretary of Health, Education and Welfare with discretion to determine whether medical examinations of employees are in nature of medical research and, if so, whether to pay for them; and his discretion in this regard may be reversed only for abuse of discretion. Occupational Safety and Health Act of 1970, § 6(b)(7), 29 U.S.C.A. § 655(b)(7).

5. Labor Relations — 27

Objection not considered by Occupational Safety and Health Review Commission could not be considered on petition for review. Occupational Safety and Health Act of 1970, § 11(a), 29 U.S.C.A. § 660(a).

6. Labor Relations — 7

Occupational Safety and Health Act requirement that proposed rule be submitted for comment does not automatically generate new opportunity for comment merely because rule promulgated by agency differed from rule as proposed, partly at least in response to submissions. Occupational Safety and Health Act of 1970, § 6(b), 29 U.S.C.A. § 655(b).

Petition for Review of an Order of the Occupational Safety and Health Review Commission.

Ira J. Smotherman, Jr., Atlanta, Ga., with whom McNeill Stokes, Atlanta, Ga., was on the brief, for petitioner.

Nancy L. Southard, Atty., U. S. Dept. of Labor, Washington, D. C., with whom Michael H. Levin, Counsel for Appellate Litigation, and Allen H. Feldman, Asst. Counsel for Appellate Litigation, U. S. Dept. of Labor, Washington, D. C., were on the brief, for respondents.

Miriam L. Gafni, Philadelphia, Pa., with whom Richard H. Markowitz, Philadelphia, Pa., and George M. Cohen, New York City, were on the brief, for intervenor.

Before TOM CLARK,* Retired Associate Justice of the Supreme Court of the United States, and MacKINNON and ROBB, Circuit Judges.

Opinion for the Court filed by ROBB, Circuit Judge.

Special concurring opinion filed by MacKINNON, Circuit Judge.

Mr. Justice CLARK concurred in the opinion of the Court but died before it was entered.

ROBB, Circuit Judge:

GAF Corporation (GAF) petitions for review of an order of the Occupational Safety and Health Review Commission (the Commission). The challenged order found GAF in violation of a regulation requiring em-

* Sitting by designation pursuant to 28 U.S.C. § 294(a).

employers to provide medical examinations to workers exposed to airborne concentrations of asbestos. GAF employees are exposed to asbestos dust during the manufacture of floor coverings and fiber building products. GAF contends that the Commission misinterpreted the regulation and that in any event the regulation is void. We conclude that neither of these contentions is correct and accordingly we affirm.

I. BACKGROUND

This dispute began in 1973 when the Secretary of Labor (the Secretary) issued citations charging GAF with violations of 29 C.F.R. § 1910.93a(j), subsequently renumbered to § 1910.1001(j).¹ The cited regulation requires employers to provide certain pre-employment, annual, and separation medical examinations to all workers "in an occupation exposed to airborne concentrations of asbestos fibers."

GAF does not provide the specified examinations, but argues that the regulation does not require them, given the low levels of airborne asbestos at GAF's plants. At the time of the citation, which involved two of GAF's plants, the level at both plants was below the maximum permissible level. The maximum permissible level at that time was 5 fibers of more than 5 micrometers in length per cubic centimeter of air. See 29 C.F.R. § 1910.93a(b). GAF contends that the regulations require medical examinations only if the concentration of airborne asbestos exceeds this maximum level or some other level higher than that found in GAF's plants. The Secretary argues that the presence of any airborne asbestos at all triggers the requirement for medical examinations.

GAF challenged the citations throughout the levels of administrative review provided by the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 659 (1970). In due course the Commission upheld the citations. *Secretary of Labor v. GAF Corp.*, 75 OSAHRC Rep. 3442 (microfilm). GAF

then petitioned this court seeking review of the Commission's order as provided by the Act. See 29 U.S.C. § 660 (1970).

GAF contends that the Commission erred in interpreting the regulation to require medical examinations for employees exposed to the relatively low concentrations of airborne asbestos found in GAF's plants. GAF also contends that the regulation is void because it was improperly promulgated, is inconsistent with the Act, and is arbitrary, irrational, and unsupported by the evidence. We shall consider each of these contentions in turn.

A. Interpretation of the Regulation

[1, 2] We turn first to GAF's contention that the Commission erred in upholding the Secretary's interpretation of the disputed regulation. GAF is supported by neither the language nor the history of the regulation.

We note at the outset that the Secretary is charged by law with administering the Act and the regulations supporting it. 29 U.S.C. §§ 655 et seq. (1970). Hence, his interpretation of the regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Idell v. Tailman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). The Secretary's interpretation remains controlling "even though the chosen exegesis may not appear quite as reasonable as some other construction." [citation omitted] *Budd Co. v. Occupational Safety and Health Review Commission*, 513 F.2d 201, 206 (3rd Cir. 1975), accord, *Clarkson Const'n Co. v. Occupational Safety and Health Review Commission*, 531 F.2d 451, 457 (10th Cir. 1976). Furthermore, the standards must be construed, as they were construed by the Secretary, to protect the employees. See *Brennan v. Occupational Safety and Health Review Commission*, 491 F.2d 1340, 1344, 2d Cir. 1973.

1. 29 C.F.R. § 1910.93a was recodified as 29 C.F.R. § 1910.1001 on May 28, 1975, 40 Fed. Reg. 23072 (1975). The regulation will be cited

throughout this opinion as § 1910.93a, to reflect the codification in effect at the time of the alleged violations.

The Secretary's interpretation of the regulations not only satisfies the standards discussed above, it is far more reasonable than the interpretation urged by GAF.

GAF bases its argument upon the language of the regulation, which requires medical examinations for those "in an occupation exposed to airborne concentrations of asbestos fibers." 29 C.F.R. § 1910.93a(j). The Secretary interprets this language as requiring examinations for those in occupations exposed to any level of asbestos. GAF, in contrast, argues that the word "concentration" implies a quantitative amount. Because the disputed section does not specify any quantity of asbestos, GAF reasons that the section should be read to include the 5-fiber limit of 29 C.F.R. § 1910.93a(b), or at least some other quantitative limit greater than the level found in GAF's plants.

GAF's argument flies in the face of the language of the regulation. It would be a unique regulation indeed which managed to impose a quantitative limitation by not mentioning any quantity at all. Furthermore, a detailed examination of the regulation reveals that the omission of the quantitative limit was deliberate.

As originally proposed, the requirement of examinations was triggered by the presence of a specific quantity of asbestos:

Medical Examinations. The employer shall provide, or make available at his cost, appropriate medical examinations on a periodic basis to any employee who is exposed to asbestos dust in excess of the limits specified in paragraph (a) of this section (5 fibers per cubic centimeter).

37 Fed.Reg. 468 (1972).

The final standard, however, deletes the reference to a specific concentration. The preamble to the final standard notes that several changes have been made to the proposed regulation, and then states that medi-

cal examinations are now required for "every employee exposed to airborne concentrations of asbestos." (emphasis supplied) 37 Fed.Reg. 11319 (1972). The preamble makes no mention of any specific quantity of asbestos. Nor does the final regulation itself. Instead, the final regulation requires examinations for those "in occupations exposed to airborne concentrations of asbestos fibers." The regulation states this requirement not once, but three times, in almost identical language: once each in the paragraphs requiring preplacement, annual, and termination examinations. See 29 C.F.R. §§ 1910.93a(j)(2)-(4). In contrast, 29 C.F.R. § 1910.93a(g)(1)(i) requires posting of caution signs "where airborne concentrations of asbestos fibers may be in excess of the exposure limits prescribed in paragraph (b) of this section." (emphasis added)

We think these considerations leave room for only one conclusion: the disputed regulations require medical examinations for all those in occupations exposed to airborne asbestos in any measurable concentration.²

B. Validity of the Regulation

[3] GAF contends that, even if the Secretary correctly interpreted the regulation, it is void on a number of grounds. We find this contention to be without merit.

Although we have carefully considered all GAF's arguments concerning the validity of the regulation, only four merit discussion here. These are GAF's contentions that the regulation is arbitrary and unsupported by evidence; that the regulation is inconsistent with the Act; that the Secretary's interpretation is inconsistent with his approval of a California occupational safety plan; and that the federal regulation was improperly promulgated.

GAF argues first that the regulation is arbitrary and unsupported by evidence. GAF bases this argument partly upon the

tion of Allied Thermal Corp., Docket No. 76-315, December 3, 1976. Nevertheless we feel that the deference due the Secretary's interpretation, along with the plain language and history of the federal regulation, compel the conclusion we reach here.

recommendations for OSHA and NIOSH for the public safety standard to the Secretary. NIOSH has medical and airborne asbestos fibers per cubic centimeter. Institute of Health and Safety. Asbestos and NIOSH. In this recommendation, medical examination of any concentration.

GAF has Secretary by the fact because it is mandated by the Act.

We have Secretary's notations. In Hodgson, 500 F.2d 457, the Secretary's recommendation noted that asbestos fibers per cubic centimeter would cause NIOSH to recommend that no one work in areas with a class 1 NIOSH standard. Secretary's standard is based on the fact that the standard is a health hazard.

GAF is arguing that the standard is not a health hazard. The standard is based on the fact that the standard is a health hazard.

2. We are aware that the Occupational Safety and Health Review Commission of the state of Connecticut reached a contrary conclusion in interpreting a state regulation virtually identical to the federal regulation before this court. *Commissioner of Labor v. Tuttle & Bailey Divi-*

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recommendation of the National Institute for Occupational Safety and Health (NIOSH). NIOSH was created by the Act for the purpose of developing health and safety standards and recommending them to the Secretary. 29 U.S.C. § 671 (1970). NIOSH recommended to the Secretary that medical examinations be required where airborne asbestos concentrations exceed 1 fiber per cubic centimeter of air. *National Institute for Occupational Safety and Health, criteria for a recommended standard*

Occupational Exposure to Asbestos at 1-3 (1972) (cited hereafter as "NIOSH criteria"). The Secretary rejected this recommendation and instead required medical examinations for those exposed to any concentration of airborne asbestos.

GAF contends that this rejection by the Secretary was arbitrary and unsupported by the evidence, and especially arbitrary because NIOSH stated that its recommended standard included a "Safety factor" NIOSH criteria at II-2.

We have previously held that the Secretary is not bound by NIOSH recommendations. *Industrial Union Department v. Hodgson*, 162 U.S.App.D.C. 331, 340-41, 499 F.2d 467, 476-77 (1974). And in this case the Secretary's departure from the NIOSH recommendation is reasonable. NIOSH noted that concentrations as low as 1.2 fibers per cubic centimeter have been known to cause serious diseases. Furthermore, NIOSH noted, the state of knowledge concerning asbestos-related diseases is such that no exposure standard other than zero would assure freedom from such diseases. NIOSH criteria at III-23, III-9. Hence the Secretary acted reasonably and on substantial evidence in requiring medical examinations for those exposed to any concentration of airborne asbestos rather than limiting examinations to those exposed to more than 1 fiber per cubic centimeter.

GAF argues next that even if the challenged regulation is supported by evidence, the regulation is invalid because it is inconsistent with the Act. GAF contends that the examinations are in effect being used as a form of medical research, because some

useful knowledge will probably be gained from them. Under the Act, GAF contends, the Secretary of Health, Education, and Welfare (HEW) must pay for medical examinations used as research. Hence the challenged regulation, by requiring GAF to supply medical examinations at its own expense, contravenes the statute.

[4] GAF misconstrues the Act and its effect upon the challenged regulation. The Act does not require the Secretary of HEW to pay for medical examinations used as research; it merely *permits* him to do so. The Act provides:

In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. [emphasis supplied]

29 U.S.C. § 655(b)(7) (1970). Thus, the Act clearly vests the Secretary of HEW with discretion to determine whether the examinations are in the nature of medical research and if so, whether to pay for them. His determination in this regard may be reversed only for an abuse of discretion.

We note initially that no decision of the Secretary of HEW in this matter is before the court. In any event, a review of the challenged regulation convinces us that the examinations in issue are not "in the nature of medical research" and are thus properly chargeable to GAF. GAF cannot seriously contend that the examinations are primarily designed to further medical research rather than to protect employees exposed to asbestos dust. As we have noted above, NIOSH found that non-zero exposure limits alone could not guarantee the prevention of asbestos-induced disease. NIOSH criteria at III-9. Consequently, NIOSH recommended periodic medical examinations for the protection of the workers, noting:

The major objective of such surveillance will be to ensure proper medical management of individuals who show evidence of reaction to past dust exposures, either due to excessive exposures or unusual susceptibility. Medical management may

range from recommendations as to job placement, improved work practices, cessation of smoking, to specific therapy for asbestos-related disease or its complications.

NIOSH criteria at 1-3. And in promulgating the final regulation, the Secretary of Labor noted the hazards connected with long-term exposure to asbestos dust and concluded, "the conflict in the medical evidence is resolved in favor of the health of employees." 37 Fed.Reg. 11318 (1972). Finally, the Secretary specified in the regulation that records of the medical examinations in question would be kept by the employer, whereas the Act requires that records of examinations used as medical research be forwarded to the Secretary of HEW. 29 C.F.R. § 1910.93a(x)(6). 29 U.S.C. § 655(b)(7) (1970).

These factors considered together clearly indicate that the examinations at issue are to be provided primarily for the protection of GAF's employees rather than for the purposes of medical research. Consequently, the challenged regulation does not contravene the section of the Act permitting the Secretary of HEW to pay for medical examinations conducted as medical research.

GAF argues that even if the challenged regulation is supported by evidence and consistent with the Act, the Secretary of Labor's interpretation of the regulation is inconsistent with his approval of a California occupational health and safety plan.

The alleged inconsistency arises because the California plan, like the NIOSH recommendation for a federal standard, requires medical examinations only if the employees may be exposed to concentrations of asbestos greater than 1 fiber per cubic centimeter. General Industry Safety Orders § Cal. Admin. Code Ch. 4, Subch. 7 § 5208(j). The Secretary may approve of a state plan and permit the state to take over some enforcement functions of the federal government, but only if the state plan "provides for the development and enforcement of safety and health standards . . . which standards (and the enforcement of which stan-

dards) will be at least as effective in providing safe and healthful employment as the standards promulgated under section 655 of this title." [emphasis supplied] 29 U.S.C. § 667(c) (1970).

The Secretary has approved the California plan. 38 Fed.Reg. 10717-20 (1973); 41 Fed.Reg. 1904-06 (1976). This approval, GAF argues, indicates that the California plan is "at least as effective" as the federal scheme. Consequently, GAF contends, the Secretary's approval of the California plan is a tacit admission that the federal regulation does not require medical examinations when asbestos concentrations are less than 1 fiber per cubic centimeter.

We cannot agree with GAF's reasoning. In approving the California plan, the Secretary clearly evaluated the plan as a whole, discussing not only limits for various toxins, but enforcement, notice, record-keeping, and sanction requirements as well. 38 Fed.Reg. 10717-20 (1973); 41 Fed.Reg. 1904-06 (1976). The Secretary noted that California would provide more enforcement personnel than the federal program. 38 Fed.Reg. 10718 (1973). Hence, it was reasonable for the Secretary to conclude that the California standards as enforced would be "at least as effective" as the federal standards despite differences in the triggering concentrations of asbestos.

GAF argues finally that, even if the Secretary correctly interpreted the federal regulation, and even if the regulation is consistent with the Act, supported by the evidence and consistent with the California plan, the federal regulation is void because it was improperly promulgated. GAF's argument is as follows: the Act requires that each proposed regulation be published in the Federal Register to permit public comment. 29 U.S.C. § 655(b) (1970). In this case the Secretary published a proposed regulation but then made changes in it before publishing it in final form. GAF argues that the amended rule should first have been published as a new proposed rule, with opportunity for public comment before being promulgated as a final regulation.

Cite as 561 F.2d 913 (1977)

[5, 6] The short answer to this contention is that GAF never raised this objection before the Commission and is therefore precluded from raising it here. The judicial review provision of the Act provides that "no objection that has not been urged before the Commission shall be considered by the court." 29 U.S.C. § 660(a) (1970). Furthermore, as this court has previously noted,

The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.³¹

³¹ A contrary rule would lead to the absurdity that in rulemaking under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary. (footnote in original)

International Harvester Co. v. Ruckelshaus, 155 U.S.App.D.C. 411, 428, 473 F.2d 615, 632, n. 51 and accompanying text (1973); accord, *South Terminal Corp. v. E.P.A.*, 504 F.2d 546, 559 (1st Cir. 1974). We think the same principle governs GAF's contention in this case, and accordingly we reject GAF's argument.

In conclusion, we hold that the Secretary's interpretation of the disputed regulation is reasonable, and that the regulation is supported by the evidence, consistent with the California plan, and was properly promulgated. GAF's petition to review and reverse the decision of the Occupational Safety and Health Review Commission is denied.

So Ordered.

MacKINNON, Circuit Judge, concurring specially

Because the "concentrations" of asbestos fibers found in the GAF plants in this case were not insignificant, and because the record shows that petitioner had adequate notice that the Commission would construe its regulation to require physical examinations at these "concentrations," I reluctantly concur in the result reached by the panel. I

believe, however, that the Secretary of Labor should clarify the regulation governing medical examinations so as to give other persons subject to the regulation reasonable notice of some measurable quantity of airborne asbestos the Commission intends to trigger the medical examination requirement. Merely to state that all employers must provide medical examinations whenever their employees are exposed to "concentrations" of asbestos fibers does not provide an ascertainable standard for those who wish to comply with the law.

The regulation provides that employers must provide medical examinations to each employee "in an occupation exposed to airborne concentrations of asbestos fibers." 29 C.F.R. § 1910.1001(j)(2) and (3) (1976) (emphasis added). No person can discern from this language what degree of "concentration[]" must exist before medical examinations are required. Other asbestos exposure regulations which do set ascertainable exposure limits provide:

(b) *Permissible exposure to airborne concentrations of asbestos fibers.* (1) *Standard effective July 7, 1972.* The 8-hour time-weighted average airborne concentrations of asbestos fibers to which any employee may be exposed shall not exceed five fibers, longer than 5 micrometers, per cubic centimeter of air, as determined by the method prescribed in paragraph (e) of this section.

(2) *Standard effective July 1, 1976.* The 8-hour time-weighted average airborne concentrations of asbestos fibers to which any employee may be exposed shall not exceed two fibers, longer than 5 micrometers, per cubic centimeter of air, as determined by the method prescribed in paragraph (e) of this section.

29 C.F.R. § 1910.1001(b)(1) and (2) (1976). The prescribed standards in these regulations were: "five fibers, longer than 5 micrometers, per cubic centimeter of air," and after July 7, 1976, "two fibers." These standards inform the nation's employers precisely what degree of exposure is permitted and what exposure is excessive, but the regulation requiring medical examina-

tions is almost completely deficient in this respect.

What number of fibers, of what length, per what volume of air will constitute a "concentration" is nowhere stated or even hinted at—and like the regulation, the court's opinion leaves the matter completely to conjecture. This is particularly unsettling to law abiding citizens when the agency is dealing with tremendously minute quantities of infinitesimally small particles. It makes compulsory law enforcement difficult and it lessens the likelihood of voluntary compliance with the law, a result devoutly to be wished. The first requirement for uniform and voluntary compliance with the law is a clear understandable statement of what conduct is required and this regulation falls woefully short of that minimal requirement.

Regulations that have the great importance that this regulation has to human life should be written in more precise terms—so people of ordinary understanding can determine what course of conduct is being required of them. What one person might consider to constitute a "concentration" will differ greatly from the interpretation that another would give to that term; and what one person today might regard *not* to constitute a "concentration" might be considered tomorrow, on the basis of hindsight as medical knowledge increases, to come within that term.¹

The statute requires the Secretary to "set [a] standard":

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible,

1. A current textbook tells us:

The toxic concentration of asbestos in the air has not been established. However, the threshold limit values for its concentration in air with eight hours exposure daily has been accepted as 5 million particles per cubic foot of air, based on unpinger samples counted by the light field technique.

4 R. Gray, Attorney's Textbook of Medicine 132-71 (3d ed. 1977). The evidence in this record does not indicate how this sampling method might vary from the Commission's two fibers per cubic centimeter in 29 C.F.R. § 1910-

on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

29 U.S.C. § 655(b)(5) (1970) (emphasis added). The agency has promulgated standards that state "objective criteria and the performance desired" for employee exposure on the job but it has not done as much for medical examinations. It is practical to state "objective criteria" for medical examinations and I believe the agency should do so. Merely requiring medical examinations whenever there is some indefinite, ambiguous, nonspecific degree of "concentration" does not meet the requirement for a feasible standard with objective criteria that Congress imposed on the agency.² This is a serious dereliction because, if in the future medical knowledge progresses to the point where more minute quantities of asbestos fibers are found to be harmful than are presently so considered,

1001, b)(2) (1975), however, this standard permits less than with the number of fibers Gray finds acceptable. The Commission's interpretation of § 1910.1001(g)(2) and (3) establishes an even lower indeterminate figure for the medical examination requirement.

2. It is conceded that the regulation requiring medical examinations is imposed under the Secretary's authority to promulgate standards dealing with harmful physical agents

29 U.S.C. § 655(b)(5), *supra*.

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then employers in the distant future may be held liable to the extent of millions of dollars in tort suits based on their alleged failure to provide the required medical examinations that would have prevented, or discovered at a preventable stage, what eventually turned out to be a fatal disease.

In such lawsuits for damages the present ambiguous regulation would have the status of a statute and failure to conform to some more strict *post hoc* interpretation of its provisions might constitute negligence *per se*. As Professor Prosser states the law

Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and "jurors have no dispensing power by which to relax it," except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law. This usually is expressed by saying that the unexcused violation is negligence "*per se*," or in itself.

W. Prosser, *Torts* 200 (4th ed. 1971). When it can be avoided, a statute or regulation should not by its mere indefiniteness expose employers to such great hazards.¹ The agency should state in clear, understandable objective terms specifically what degree of "concentration" triggers the requirement for medical examinations—be it one fiber per cubic foot of air or one fiber per 100

cubic feet of air, or some other unambiguous, quantitative standard. Imposing a non-specific ambiguous standard is completely unsatisfactory. "Concentration" is a noun, the meaning of which varies greatly depending upon the context in which it is used. Concentration can be high, low, medium, dangerous, hazardous, insignificant, "negligible," etc.—standing alone its meaning is highly indefinite. It would not be difficult to state a standard with precision.

A recent case before the Connecticut Occupational Safety and Health Review Commission, *Tuttle & Bailey Div. of Allied Thermal Corp.*, No. 76-315 (Conn. OS-AHRC, Dec. 3, 1976), involved a state medical examination requirement in language practically identical to that present here, and a similar factual situation. In that case the State Commission decided that the word "concentration" in the standard must have been intended to have some meaning, because if no threshold of exposure were intended, the word "concentration" could be omitted without changing the meaning of the section. It would then address itself to "airborne asbestos fibers." The State Commission reasoned:

If this Commission were to adopt the interpretation as proposed by the Labor Commissioner, the effect would be to establish a requirement "that whenever employees are exposed to any trace of asbestos—no matter how temporary or insignificant—their employer must furnish (and employees must undergo)—annual physical examination and tests as prescribed in [the regulation]."

This Review Commission cannot conclude that the intent of this regulation is to require such examination for the occasional "messenger" or "visitor" entering

2. The potential problem of tort liability is particularly serious because of a high background level of asbestos fibers in many geographic areas. Some medical studies are currently reported to have "found [that] people who have never been exposed to asbestos in the workplace show a scarring of tissues around their lungs that looks exactly like scarring found in asbestos workers." *Area Dust Found High in Asbestos Fibers*, *Washington Post*, Dec. 19,

1975, at A8, col. 1. The high incidence of asbestos fibers in the air of cities may be traceable to the use of asbestos brake linings in automobiles, and to the use of rock aggregates containing asbestos fibers. The extent of air pollution by asbestos from these sources has not yet been accurately assessed. See EPA *Cities Asbestos Hazard, Montgomery Parks Closure Urged*, *Washington Post*, June 8, 1977, at A1, col. 4 & A10, col. 1.

the exposure area, nor the employee far removed from the source whose exposure is in fact minimis concentration of airborne asbestos fibers. The Review Commission concludes that the word "concentration" has a meaning as used within the regulation.

Id. at 5-6.

The Commission also noted:

One can conceive of very different circumstances wherein employees would be exposed to airborne concentration of asbestos fiber, to varying degrees and for varying periods of time. For an employer to try to determine whether or not medical examination[s] as required by [the regulation] should be provided or not provided under a "reasonable man" theory would be most difficult. To attempt to apply a "reasonable person" standard in recognizing a hazard of microscopic concentration of asbestos fiber in the air, is not in itself reasonable. *Reasonable laymen cannot conceive a rule of conduct in an area where reasonable experts cannot agree.*

Id. at 6-7 (emphasis added). The Commission therefore concluded that it was

unable to determine what [the] threshold [of concentration] is or should be, nor does this Commission accept that a reasonable employer could so determine.

Id. at 7. Finally, it held that until the regulation was redrafted to state its intended meaning in clear understandable terms, the Commission would assume that the 5 fiber standard applied as well to the physical examination provision. The State Commission appeared to recognize that this interpretation was not directly supported by the language of the regulation, but based its holding on the necessity for some understandable meaning. If the instant case were disposed of on a similar rationale, the two-fiber limit presently in force in 29 C.F.R. § 1910.1001(b)(2) would also govern the medical examination requirement.

Recently, the Federal Commissioners attempted to distinguish their decision presently under review on the ground that "GAF did not involve the situation

where the concentration of the air contaminant is negligible compared to the limit established by the standard." *Western Electric, Inc.*, No. 8902, at 7 (OSHR, Jan. 24, 1977) (emphasis added). What "standard" the Commission had in contemplation was not disclosed, nor was there any reference to what "limit" they were applying. But the reference of the Commission to a "negligible" amount indicates some quantitative standard was intended. It would be helpful if the Secretary would state what that "standard" is. That is not a difficult task if he has one in mind. If he does not have one in mind he should have. Maybe the Secretary does not have substantial evidence to prove that the "standard" of "concentration" the Commission applying constitutes a "hazard," and that may be the reason the Secretary chose to leave it in an ambiguous state. As it is now, both the Secretary and the Commission are home free leaving the public in the dark as to what degree of "concentration" is more than "negligible" according to some unstated "standard" of "concentration."

Such imprecision should not be countenanced in such an important matter. Nothing would be lost by requiring the agency to state a specific objective standard—and everybody would benefit. It could be done quickly and there would not be any delay in enforcement.

It is also my opinion that permitting the entire state of California to have a specific standard that is different, and more liberal, from that applied to appellants in this case, and throughout the rest of the nation, is highly questionable. The mere availability of more investigators in California is not a permissible basis for allowing employees to be exposed to more asbestos fibers before a medical examination is required. The number of investigators is not germane to the hazard produced by the added contamination of more asbestos fibers.

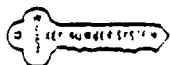
The evidentiary record in this case does not in my opinion present a case of sufficient strength to justify setting aside the regulation, but there is every indication that a proper case can be made to achieve

such result. I accordingly strongly suggest that the Secretary should amend the regulation to establish the definite workable and understandable "standard" with "objective criteria" that the statute requires.

demonstrated "unreasonable risk of accidents" stemming from conceded defect.

Reversed and remanded.

Leventhal, Circuit Judge, filed opinion dissenting in part.



UNITED STATES of America,
Appellant.

v.

GENERAL MOTORS CORPORATION,
a corporation.

GENERAL MOTORS CORPORATION, a
Delaware Corporation

v.

Brock ADAMS et al., Appellants.
Nos. 75-1751, 75-1752

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 23, 1976.

Decided June 28, 1977.

Rehearing Denied Aug. 18, 1977.

Actions by automobile manufacturer to set aside order directing manufacturer to notify automobile owners of defect in steering system component and by Government to enforce notification order and for imposition of civil penalty were consolidated. The United States District Court for the District of Columbia, Oliver Gasch, J., denied summary judgment to Government and, after trial, held for manufacturer, and Government appealed. The Court of Appeals held that uncontradicted facts that manufacturer sold six times as many pitman arm replacements for models in question as for adjacent model years, that steering pitman arm failures had occurred when models were being driven, and that when steering pitman arm fails driver loses control of car

Automobiles — 16

Uncontradicted facts that automobile manufacturer sold six times as many pitman arm replacements for models in question as for adjacent model years, that steering pitman arm failures had occurred while models were being driven, and that when steering pitman arm fails driver loses control of automobile demonstrated "unreasonable risk of accidents" stemming from conceded defect in steering system components within meaning of the National Traffic and Motor Vehicle Safety Act, thus entitling Government to relief in its action to enforce notification order and seeking imposition of civil penalty. National Traffic and Motor Vehicle Safety Act of 1966, §§ 102(1), 109(a), 15 U.S.C.A. §§ 1391(1), 1398(a).

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the District of Columbia (D. C. Civil Actions Nos. 74-277 & 74-1053).

Neil H. Kosiowe, Atty., Dept. of Justice, Washington, D. C., with whom Rex E. Lee, Asst. Atty. Gen., Earl J. Silbert, U. S. Atty., and William Kanter, Atty., Dept. of Justice, Washington, D. C., were on the brief, for appellants. Morton Hollander, Atty., Dept. of Justice, Washington, D. C., also entered an appearance for appellants.

James Robertson, Washington, D. C., with whom Michael L. Burack and Cornelius J. Golden, Jr., Washington, D. C., and Frazer F. Hilder, Detroit, Mich., were on the brief, for appellee.

Before WRIGHT, LEVENTHAL and ROSS, Circuit Judges.

Opinion for the court per curiam.

Opinion dissenting in part filed by LEVENTHAL, Circuit Judge.

OSHRC Judge's decisions become final if review not directed within 30 days of filing. For further action, if any, see Case Table at § 1995.

s of filing.

Royster's decision is a precedential decision.

Union

Judge's conclusion of the act of 1970, after "the" before a in Georgia 2, 5 BNA 10 21, 513

to docketed, 1977), the do, super- ill unaware violations because of the hazard es in prox- id his care. Here, an the hazard s may be so installed been inform.

oreman and are of spe- guardrails, there is no he Judge's made con- s with his Inc. 12931 on remanded ges of fact, concerning the

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In addition, I note that the makeshift platform consisted of nine wooden pallets placed on the forks of a forklift raised to a height of approximately 18 feet. I also note the Judge's findings that the makeshift platform was "obviously hazardous" and that "the falling hazard presented by such rig [was] obvious." Royster's indifference to the obvious falling hazard should be compared with *Williams Enterprises, Inc.*, 4 BNA OSHC 166J, 1976-77 CCH OSHD ¶ 21,371 (No. 4533, 1976). In *Williams*, the Commission found that the existence of a recognized hazard at an employer's worksite was not a willful violation of the Act because

Respondent, on the facts before us, was not indifferent to the hazard. It did not choose to ignore completely the precarious situation. Instead, respondent made an attempt, albeit inadequate, to steady the large counterweight on the inclined street surface. We conclude that this effort removes respondent's action from the pale of willful activity.

Here, the extent to which Landers discussed the hazard with his supervisors may be determinative as to whether respondent willfully disregarded the hazard.

— [122,390] H. B. Zachry Co. (International)

Digest of Judge's Decision filed with the Commission October 20, 1977. OSHRC Docket No. 77-0470. Garvin Lee Oliver, Judge.

Employer Defenses—Isolated Occurrence—Construction Standards—Personal Protective Equipment—Safety Belt—Guardrails. Serious violations of § 1926.28(a), safety belts, and § 1926.451(c)(13), guardrails on tube and coupler scaffolds, were affirmed over the employer's argument that they were isolated instances of employee misconduct. It was found that a safety consultant had issued four reports to the company indicating some employees were not wearing safety belts and some scaffolds did not have guardrails. A painter who worked without a safety belt from a cable tray 12 feet above the ground said he seldom wore a safety belt, and two workers on an open-sided scaffold 14 feet above concrete said they had asked for belts but were told by a supervisor to get to work because there weren't enough to go around. Belts were purchased and distributed when the compliance officer pointed out the violations. Because the employer had a good safety program, had fired employees for safety violations and was cooperative with OSHA, the two proposed \$1,000 penalties were reduced to \$600 each. Back references: § 4637, 77015; 77255.

Rafael Rodriguez-Lebron for the employer. Luis A. Micheli, Edwin A. Tyler and Freddie Franco-Garcia for the Secretary.

[122,391] GAF Corp.

Digest of Judge's Decision filed with the Commission October 31, 1977. OSHRC Docket No. 77-0616. Edward V. Alfieri, Judge.

Asbestos Exposure—Medical Examinations—When Required—Exposure Level—Effect of OSHA Letter Interpretation. A manufacturer of asbestos siding was held in nonserious violation of § 1910.1001(j)(3) and (j)(4), failure to provide workers exposed to airborne asbestos fibers with annual medical examinations and to provide examinations at termination of employment, even though the workers were exposed only to concentrations below permissible limits set by § 1910.1001(b). No penalty was assessed. The employer argued that the standard does not require examinations when exposure does not exceed permissible limits. This was rejected based on the Court of Appeals ruling in *GAF Corp.* (1977-1978 OSHD ¶ 21,916), in which it was held under identical circumstances that the standard mandates medical examinations for all employees exposed to airborne asbestos in any measurable concentration.

The employer submitted letters from former Assistant Secretary of Labor Morton Corn informing two other firms that OSHA would not cite asbestos violations unless exposure levels exceed 0.10 fibers per cubic centimeter, and argued that it was not in violation since the letters were written before it received the citations. A standard may not

Under section 5(a)(1) of the Act, the general duty clause, an employer has a duty to furnish his employees a place of employment free from recognized hazards likely to cause death or serious physical harm. An employer is

subject to this duty when no promulgated standards apply. See *National Realty & Construction Co. Inc. v. OSHRC*, 480 F.2d 1257, 1261 (D.C. Cir. 1973).

26,994

Decisions

OSHRC Judge's decisions become final if review not directed within 10 days of filing. For further action, if any, see Case Table at ¶ 7995.

be amended under the guise of interpretation and can be modified only by use of procedures under § 6(b) of the Act, the court ruled in rejecting the argument.

Back references: ¶ 1029; 7602.1.

Ira J. Smotherman, Jr. for the employer. Francis V. LaRuffa and Manuel del Valle for the Secretary.

¶ 22,392 Republic Steel Corp.

Digest of Judge's Decision filed with the Commission October 27, 1977. OSHRC Docket No. 76-2012. Louis J. Rubin, Judge.

General Duty Clause—Recognized Hazard—Safety Belts—Replacement of Hatch covers Over Open Tank. Failure to provide safety belts for two employees lifting and positioning two 250 to 300-pound metal hatch cover plates over a 12 to 14-foot deep opening on a tank containing steaming hot water and tar was a general duty clause violation for which a citation and \$500 penalty were affirmed. One employee slipped and fell into the tank and later died from burns and injuries sustained in the fall. Working without fall protection was a recognized hazard exposing employees to the likelihood of serious injury or death. The employer failed to exercise reasonable prudence in that no job safety instructions were written for the work assignments, and employees were not given safety instructions before the work began. The assigning foreman, who had never seen a hatch cover replaced and erroneously assumed it to be a routine task, failed to ascertain whether employees could manage the task and did not supervise them. The employer could have protected employees by providing safety belts on a short line attached to a cable running from guardrail to guardrail on the tank surface.

A \$700 penalty and citation for failure to lock out the tank while paddles operated on a continuous chain drive to skim tar was vacated because the operation posed no hazard while employees worked on top of the tank. Movement of the paddles was barely discernible—at the rate of one foot an hour—and was only a hazard in the event of a fall.

Back reference: ¶ 1005.

Gerald F. Penca for the employer. Mark D. Katz for the Secretary.

¶ 22,393 General Electric Co.

Digest of Judge's Decision filed with the Commission October 3, 1977. OSHRC Docket No. 76-2654. Robert P. Weil, Judge.

Protection from Arc Welding Rays—Untinted Safety Glasses with Wire Mesh Side Shields—Adjacent Workers. A nonserious violation of § 1910.52(e)(2)(iii), protection of adjacent workers from arc welding rays, was vacated along with a proposed \$250 penalty because the untinted safety glasses with wire mesh side shields that the employer required its non-welding workers to wear were found to be sufficient welding glare protection. The employer used an arc air process, a submerged arc process, and a stick-electrode process.

The stick-electrode process was the only one which was considered to be "welding" within the meaning of the standard and it was used only 20% of the time as a back-up method when the other two methods could not be used. The compliance officer incorrectly assumed that most of the operation was done with stick-electrodes and that 50-70 people were exposed to the hazard of weld flash. It was determined that three adjacent workers were exposed to the rays but that their goggles provided protection within threshold limit values derived by dividing into three millijoules (the permissible exposure per square centimeter at 170 nanometers) the number of microwatts per square centimeter observed at the worker's eye.

Back reference: ¶ 7236.5.

Edward J. Cummings, Jr. for the employer. James A. Magenheimer for the Secretary.

OSHRC Judge's decisions become final if review not directed within 30 days of filing. For further action, if any, see Case Table at § 1993.

standard at § 1926.105(a) was affirmed because none of the enumerated devices were provided. A foreman ordered a worker to sew protective plastic from an I-beam 28 feet above the ground without a lanyard long enough to tie to the beam. The worker refused and was fired. Other workers received the proper lanyards from a distant tool room. A primary obligation of a foreman is to check on the adequacy of a worker's protective equipment. An \$800 penalty was affirmed.

A serious violation of § 1926.500(c)(1)(i), wall opening guarding, was affirmed along with a \$400 penalty because workers were cutting metal decking three feet from a wall opening sixty feet above the ground. The employer argued that installation of a guardrail would interfere with handling material and machinery and would increase the hazards. It was found that work had progressed to a point where a guardrail could have been safely installed.

Violations of § 1926.500(b)(1) and (b)(8), guarding of floor openings, were affirmed without penalties because openings at the 200-foot level were not covered or barricaded. Because a stairway had a cable guardrail only on one side, a nonserious violation of § 1926.500(d)(1), guardrails on stairways, was affirmed without penalty. It was found that employees had access to general construction debris that presented a tripping hazard on a level where they weren't working and a nonserious violation of § 1926.25(a) was affirmed without penalty.

The employer unsuccessfully argued that the Act is unconstitutional, the construction standards were invalidly promulgated, and an inspection without a search warrant violated its Fourth Amendment rights. It also argued that the Act, penal in nature, does not provide constitutional safeguards available in criminal proceedings. The arguments were denied on the basis of previous appellate court and Commission rulings.

Review was granted on whether the feasibility of safety belt use must be proven, whether metal decking was an alternative safety device to safety nets, and whether deck work had proceeded far enough away from the wall opening so that a guardrail could be safely installed.

Back references: § 7703.6; 7708.6; 7731.3; 7742.2.

H. Lane Dennard, Jr., and J. Taylor Greer for the employer. Thomas E. Kortson, Jamison Ann Poindexter and T. A. Housh, Jr., for the Secretary.

[§ 22,502] **Wagner Electric Sales Corp.**

Digest of Judge's Decision filed with the Commission December 12, 1977. OSHRC Docket No. 77-0605. Vernon Riehl, Judge.

Asbestos—Medical Examination Requirement—When Applicable—Employer's Responsibility for Providing Examination—Brake Lining Grinding Shop. An employer whose workers, grinding brake linings, were exposed to airborne concentrations of asbestos below permissible limits nonetheless violated the provision requiring the employer to provide medical examinations, § 1910.1001(j), because examinations are required for workers exposed to any airborne asbestos. No penalty was assessed. One employee at the brake lining grinding shop was exposed to 1 fiber/cc, and another to 2 fiber/cc, during an 8-hour period, which did not exceed the 2 fiber/cc permissible level; however, the standard makes no exemptions from the requirement for medical examinations if any asbestos is released in the workplace. An intention to provide all exposed workers with examinations was shown by the fact that NIOSH had recommended that medical surveillance begin at an "exposure level" of 1 fiber/cc, but this recommendation had been omitted from the OSHA standard.

Back reference: § 7602.3.

Frank L. Pellegrini for the employer. Eugene F. DeShazo for the Secretary.

[§ 22,503] **Western Electric, Inc.**

Text of Review Commission's Decision dated January 17, 1978. OSHRC Docket No. 8902. The Judge's Decision appears at § 19,348, 1975-1976 OSHD; Review Commission's Decision at § 21,538, 1976-1977 OSHD, and Court of Appeals Decision at § 22,282, 1977-1978 OSHD.

Employment Safety and Health Guide

§ 22,503

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