



Litigation

COURT UPHOLDS ASBESTOS LIMIT, REMANDS CASE FOR RECONSIDERATION OF MAJOR INDUSTRIES, STEEL

A federal appellate court upheld the Occupational Safety and Health Administration's permissible exposure limit for asbestos Feb. 2, but ordered the agency to reconsider its decisions not to adopt a lower permissible exposure limit for major industrial subgroups and a short term exposure limit. The agency also was ordered to reconsider its ban on asbestos spraying and to reconsider its decision not to adopt tougher smoking-related regulations.

The U.S. Court of Appeals for the District of Columbia Circuit held in *Building and Construction Trades Dept., AFL-CIO v. Brock* (No. 86-1359) that the secretary's findings that the prior PEL of 2 fibers per cubic centimeter caused significant risk, and that the revised PEL of 0.2 f/cc was technologically feasible, were supported by the evidence.

OSHA issued the revised standards in June 1986, effective July 1986, in response to its finding that the old PEL generated a lifetime excess risk per 1,000 workers of 64 deaths from asbestos-related cancers, and an excess of 50 cases of asbestosis.

The revised standard set a PEL of 0.2 f/cc for general industry and construction, and an action level of 0.1 f/cc that triggered worker training and medical monitoring requirements. No STEL was established (Current Report, June 26, 1986, p. 75).

The full text of the ruling will be published in a future Decisions issue.

More Stringent PEL Achievable?

Two departments of the AFL-CIO challenged the revised standard, arguing that where a significant health risk exists, the agency must adopt the most stringent standard feasible.

The unions argued that the evidence demonstrated that a 0.1 level was achievable in operations affecting over 97 percent of workers exposed to asbestos in general industry, and that the exposure data for the automotive brake and repair industry, which employs 541,998 workers, or 93 percent of exposed employees, had an estimated average exposure level of 0.06 f/cc.

The court rejected OSHA's defense that it had discretion to decide what industries should be grouped together for regulatory purposes, finding that "where the subcategory consists of 93 percent of affected workers, numbering over 500,000, this justification seems to disappear."

OSHA "must provide a little more enlightenment" for its decision not to "disaggregat[e] the general industry standard to afford workers the benefits of more stringent standards in areas where they are feasible," the court held.

An attorney who represented the AFL-CIO in the case said the labor federation is very pleased that the court reaffirmed the legal standard of feasibility it set out in *United Steelworkers v. Marshall* (8 OSHC 1810): "OSHA can impose a standard which only the most technologically advanced plants in an industry have been able to achieve—even if only in some of their operations some of the time."

Spraying Ban Not Supported By Evidence

Washington, D.C. attorney Tim Hardy, who represented the Asbestos Information Association, said his client is disappointed that the court upheld the technologically feasible finding, but is pleased with several other parts of the decision.

Notably, Hardy said, the court found that the standard's ban on the spraying of asbestos products was not supported by substantial evidence.

OSHA's reason for adopting the ban was not to protect workers actually spraying the material, the court found, but rather a perception of potential danger to bystanders supported by the observation that both the Environmental Protection Agency and California have banned such spraying.

The court rejected this rationale, finding that modern techniques of encapsulating spray-on asbestos products ensures that asbestos fibers are not released, and that both EPA and California specifically exempt such products from spraying prohibitions, "so their bans provide no support at all for OSHA's far more sweeping one."

The AIA also said it is pleased with the court's decision to require OSHA to justify not requiring more vigorous measures to reduce smoking-related asbestos risks.

The revised standard banned smoking where airborne asbestos levels exceed the PEL, and required employers to inform employees about the relationship between smoking and asbestos exposure. The industry argued that uncontested evidence showing that the lung cancer risk posed by asbestos exposure is 10 times greater for smokers than for nonsmokers required a more stringent standard.

The court agreed, finding that OSHA regulations have not infrequently mandated special treatment of workers at higher risk, and that "glib references to possible intrusion on matters of personal taste will not support rejection of smoking control measures."

Both industry and labor challenged the omission of a STEL from the standard, and the court gave OSHA 60 days to reconsider its decision. OSHA had already decided to reconsider the omission, and earlier told the court that it could complete its deliberation, on the existing record, by November 1987.

An OSHA attorney said the agency is studying the decision.

Right-To-Know**OMB-ORDERED HAZARD STANDARD REVISIONS READIED BY OSHA FOR IMMINENT PROPOSAL**

A draft proposal amending the Occupational Safety and Health Administration's expansion of the hazard communication standard in response to a three-month-old order from the Office of Management and Budget is likely to clear Department of Labor review in early February and be on its way to OMB for approval, sources told BNA.

A review of the new proposal Jan. 28 by DOL's coordinating Policy Review Board uncovered no serious problems, with "minor" fine-tuning, the proposal will be sent to OMB early this month for approval under the Paperwork Reduc-