

*PL 11 JTH/ILK
JOHN RIVARD
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February 24, 1976



J. D. Ratje

Reference: Disposal of Asbestos Products (including insulation)
from Deer Park Manufacturing Complex

Mr. Joe Smith, General Manager, Western Refuge Company, visited with me today to discuss asbestos disposal. We have apparently been mixing these items with trash, and Western Refuge is disposing of the material at their landfills. Mr. Smith advised me that after our contact last week they checked with Environmental Authorities (apparently for the first time) and determined that the Western Refuge fill permits do not include asbestos material. He is to check further to determine if they can obtain the necessary approval, but my guess is that he will be unsuccessful.

Subsequent to my meeting with Western Refuge, I called Texas Ecologist at Robstown, Texas; and Mr. James May assured me their Class I permit includes asbestos products. He indicated the price would probably be \$11.00 per fiber drum or \$2.00 per cubic foot if we use a metal container (lugs tray, ect.). He is to forward me a letter quoting firm prices, and I will forward it to you when received.

One question that may become important is whether the asbestos will be contaminated in any way. This, of course, brings up the question of asbestos from CA Plant. We should also determine quantity and frequency of disposal required by CA Plant as this information will be needed before we can make any final arrangements for disposal.

Please call me at 3116 if you have any comments or questions.

L. C. Garrett
L. C. Garrett

LCG/skn

cc: Messrs. W. V. Jacks
J. A. Exter
Crouch/Annerino
R. P. Fritige
L. C. Garrett

LAM 016939

DPMC-10682

Transfer of MESA

The AFL-CIO has been told there is a "good chance" that legislation to transfer the Mining Enforcement and Safety Administration from the Interior Department to the Labor Department will be approved. However, the unions want to make sure the resources of the mine safety agency are not dissipated. The Labor Department may find itself under temptation to reprogram money from MESA into other programs.

The AFL-CIO would want to see the sense of Congress in any legislative action to transfer MESA prohibiting any such reprogramming of funds, Taylor said. The inspectors who work under the Federal Metal and Nonmetallic Mine Safety Act are some of the best, he said, but they have no punitive power. The Labor Department would give these inspectors the same power as OSHA inspectors.

The unions have "very good" communications with the new Assistant Secretary of Labor for Occupational Safety and Health, Morton Corn, Taylor said. Corn has correctly assessed OSHA's main problem as a lack of credibility with Congress. He will work to change that image, Taylor added.

Corn will run an "open administration" but will still make his own decisions, Taylor said. Corn has promised to review the OSHA policies on state plans, he added.

The AFL-CIO still is actively seeking the disapproval of inadequate state plans for job safety and health enforcement, Taylor said.

Enforcement**OSAHRC SAYS MEDICAL EXAMINATIONS REQUIRED FOR WORKERS EXPOSED TO ASBESTOS**

An employer whose employees are engaged in occupations which require exposure to concentrations of airborne asbestos is required to provide, or make available at his cost, medical examinations for the employees regardless of the levels of exposure.

This 2-1 ruling of the Occupational Safety and Health Review Commission was issued November 14 in a decision written by Commissioner Timothy Cleary and joined by Commission Chairman Frank R. Barnako. Commissioner Robert D. Moran dissented. The decision involved three cases, *GAF Corporation* (Nos. 3203 and 4008) and *United Engineers and Constructors, Inc.* (No. 7355), which were consolidated because they involved the identical issue.

In none of the three cases did the level of exposure exceed the permissible levels set forth in 29 CFR 1910.93a(b)(1) (subsequently renumbered 29 CFR 1910.1001(b)(1)). In addition, the employers did not provide medical examinations for their employees engaged in the cited occupations. Accordingly, the sole issue for determination was the interpretation of the phrase "exposed to airborne concentrations of asbestos fibers" as it appears in 1910.93a (j) (2), (3), and (4).

The employers' primary argument was that the aforementioned phrase is ambiguous. They contended that the term "concentration" implies a quantitative limitation and urged that, in absence of a specific quantitative limitation within 1910.93a(j), the term refers back to the permissible level of exposure set forth in 1910.93a(b)(1). The commission majority rejected this argument, noting that the term "concentration" does not necessarily imply a quantitative limitation. Reviewing the asbestos standard as a whole, the commission concluded that "concentration" in 1910.93a(j) does not refer back to 1910.93a(b)(1).

The commission also rejected the employers' argument

that the National Institute for Occupational Safety and Health (NIOSH) intended the medical examination requirements to be triggered only when a threshold level exposure was reached in a particular occupation. The fact that NIOSH recommended any threshold level of exposure does not necessarily mean that the standard as adopted by the Secretary of Labor incorporates a threshold value, the majority stated, pointing out that NIOSH recommendations have only advisory force. In the case of the medical examination requirements the secretary obviously chose not to follow the recommendation regarding threshold levels of exposure, the commission noted, since the recommended levels are absent from the text of 1910.93a (j).

The commission acknowledged that there is substantial uncertainty among scientific authorities as to exactly what levels of prolonged exposure are detrimental to human life. This uncertainty, in the commission majority's opinion, lends force to the conclusion that the secretary promulgated 1910.93a(j) without reference to any threshold levels so as "to most effectively determine whether the health of such employees is adversely affected by such exposure," as provided in section 6(b) (7) of the Occupational Safety and Health Act.

The employers' contention that if the secretary's interpretation of the standard is adopted, the medical examinations are in the nature of research and, therefore, must be furnished at the expense of the Secretary of Health Education and Welfare pursuant to section 6(b)(7) of the Act was also rejected. The majority considers 1910.93a(j) as a provision to monitor continually the health of employees who are exposed to asbestos fibers to determine if such employees show signs of asbestos related diseases.

Finally, the employers' argument that the secretary's approval of the California State Plan provides a binding interpretation of the asbestos standard was rejected because at the time of the approval the plan did not contain any asbestos standard corresponding to Subpart G (now Z) of Part 1910.

Commissioner Robert D. Moran, dissenting, characterized the majority's construction of the standard as "utopian and clearly unreasonable." Moran is also of the opinion that the asbestos standard was not subjected to public scrutiny and is, as a result, void because of improper promulgation.

The decision will appear in a future Decisions supplement.

LAM 016940**General Policy****OSAHRC DISCONTINUES OFFICIAL REPORTS; MORAN OBJECTS, CALLS 40 CASES FOR REVIEW**

The Occupational Safety and Health Review Commission is discontinuing its official "OSAHRC Reports" over the strong protest of Commissioner Robert D. Moran, who as chairman of the commission was responsible for their initiation.

The series of bound volumes, which include the full text of all commission judges' decisions other than settlements, as well as decisions of the full commission, will end with the current Volume 20. Commission Chairman Frank R. Barnako told OSHR. The official reports were a wasteful duplication of commercial reporting services, according to Barnako. Commissioner Timothy F. Cleary concurred in the decision to terminate the reports.

Commissioner Moran, in protest of the majority's action, has called for review 40 judges' decisions, most of which would

According to the report, OSHA, under Section 1960.31, normally should not be expected to process a complaint if the internal complaint procedures of the agency in question have not been pursued first. However, where OSHA determines that an agency's procedures fail to meet "the spirit or intent" of the Act, "final disposition" of the complaint by the agency is not required before the employee can take the complaint to OSHA. The report also noted that agencies should have the proper safeguards to prevent recriminations against employees making complaints.

A report by an ad hoc committee responding to a House study on federal workplace safety and health also was approved by the council. The report, submitted to the council in November (Current Report, November 11, p. 719), was accepted at the last FACOSH meeting with the provision that comments from interested parties be solicited and incorporated into the final version. John M. Kanak, chairman of the ad hoc group, noted that comments had been reviewed and worked into the report, though the document remained "essentially unchanged" except for minor rephrasing.

Alaska

WARRANTLESS INSPECTIONS INVALID, STATE SUPREME COURT UNANIMOUSLY RULES

Warrantless inspections under the Alaska Occupational Safety and Health Act are unconstitutional, the Alaska Supreme Court unanimously ruled on June 2.

This ruling by the five-member court came in *Woods & Rohde, Inc. d/b/a Alaska Truss & Millwork v. State of Alaska, Department of Labor* (No. 2903).

The case arose when the employer's owners and agents refused to permit a state Department of Labor inspector to enter its Anchorage workplace. Without showing probable cause to believe that a violation of law existed, the agency obtained a court order compelling the employer to submit to inspection. The order was stayed by a justice of the state supreme court pending review by the court.

The lead opinion by Justice Jay A. Rabinowitz surveyed U.S. Supreme Court and lower federal court decisions on warrantless administrative searches, but rested its holding on the Alaska constitution. Noting that Article I, Section 14 of the state constitution protects against unreasonable searches and seizures "other property" in addition to the "persons, houses, papers, and effects" mentioned in the Fourth Amendment to the U. S. Constitution, Justice Rabinowitz concluded that the state constitution's guarantee is broader than that of the federal Constitution. This interpretation is reinforced by the explicit recognition of the right of privacy in Article I, Section 22 of the state constitution, Rabinowitz added. Finding that the employer had a reasonable expectation of privacy, the court determined that judicially sanctioned warrants must be obtained before the employer may be compelled to submit to inspection.

However, the court adopted an "attenuated" standard of probable cause based on the U. S. Supreme Court's 1967 decision in *Camara v. Municipal Court of San Francisco* (387 US 523). In *Camara*, the Court required only "that reasonable administrative standards for inspection have been established and are met in the inspection in question," rather than a showing of probable cause to believe that a violation of law existed.

Concurring Opinion

Chief Justice Robert Boochever concurred in the result solely on the basis of the U. S. Supreme Court's ruling in *See*

City of Seattle (387 US 541), the companion case of *Camara*. If he were free of the federal restraint, Boochever said, he would uphold the warrantless inspections under the Alaska statute and case law. Such inspections of workplaces are not unreasonable, he argued, because "owners of commercial premises . . . should be aware that the OSHA law requires inspections," and therefore would not have a reasonable expectation of privacy.

Enforcement

ASBESTOS MONITORING NOT REQUIRED UNTIL FIBER RELEASE SHOWN, OSAHRC RULES

The Secretary of Labor must prove that asbestos fibers are being released into the air and not just that a "genuine possibility" of release exists in order to establish that an employer must monitor asbestos levels, the Occupational Safety and Health Review Commission ruled May 12.

The 2 to 1 decision in *Goodyear Tire and Rubber Company* (No. 13442) affirmed the order of Review Commission Judge J. Paul Brenton dismissing the secretary's complaint that the company had failed to monitor asbestos levels.

The judge ruled that an inference that asbestos fibers are released during the removal of asbestos pipe insulation and its replacement with nonasbestos insulation was not supported by the evidence. The judge concluded that monitoring is not required just because asbestos is present and in use.

In affirming the dismissal, Review Commission Chairman Frank R. Barnako rejected the argument that the secretary only has to show a "genuine possibility" of release of asbestos fibers before monitoring is required. Commissioner Robert D. Moran concurred.

The commission added that where release of the fibers cannot be inferred from the nature of the employer's work practices, the employer's failure to monitor is not in violation of the monitoring requirement. The Review Commission affirmed the judge's finding that the evidence did not support an inference that asbestos fibers are released.

In dissent, Commissioner Timothy F. Cleary said that the occupational safety standards require an employer to monitor asbestos fiber levels in the air before steps are taken to prevent employee exposure to the hazard. "It is plain error to attach any significance to estimates of low concentrations in determining whether the duty to monitor attaches. Monitoring standards are intended to supplant such estimates, no matter how reliable they may be," he added.

This decision is reported at 5 OSHC 1473.

LAM 016941

Cotton Dust

EXEMPTION FOR PROCESSED COTTON URGED BY KIMBERLY-CLARK CORPORATION

The Kimberly-Clark corporation, writing in a post-hearing comment June 6, urged an exemption of processed cotton from the Occupational Safety and Health Administration's proposed new cotton dust standard.

The agency currently is reviewing the record of public hearings on the proposal which concluded May 17 (Current Report, May 19, p. 1564).

Robert E. Freer, Jr., staff vice president of Kimberly-Clark, referred to testimony given during the hearing by an official of Health Industry Manufacturers Association, G. Briggs Phillips.