Bingham announced the change in OSHA policy on August 10 in a speech to a union convention.

According to Zoltan Bagdy, chief of the OSHA division of the 11 (c) program, no determination has been made in any of the cases to bring legal action against the employer on grounds of discrimination under Section 11(c) of the Occupational Safety and Health Act. OSHA has 90 days to complete its investigation of each case, Bagdy explained, and added that the complaints involving walkaround pay will receive "priority" treatment.

In addition to the complaints filed before August 10, four were filed after the Bingham speech and before a September 20 notice on the new policy in the Federal Register. The remaining cases were filed since September 20, Bagdy said.

The Chamber of Commerce of the U.S. went to court October 25 to try to stop OSHA from requiring employers to pay their workers for time spent in OSHA inspections on the grounds that the requirement went beyond OSHA's authority under the Act.

Chamber Action

Robert T. Thompson, National Chamber Litigation Center (NCLC), said the complaint, filed in the U.S. District Court for the District of Columbia, charges that OSHA is violating current law and judicial precedent with the new policy.

Thompson told participants at an October 26 press conference that OSHA also was intruding on rights of employers and unions to settle questions on walkaround pay in collective bargaining agreements. He criticized the agency for making the change without prior public notice and giving interested parties an opportunity to comment.

The complaint names as defendants OSHA, Bingham, the Labor Department, and Secretary of Labor Ray Marshall. It seeks an injunction to stop OSHA from enforcing the new requirement on employers.

In August Bingham announced in a speech to an Oil, Chemical, and Atomic Workers International Union convention that she was reversing OSHA's past policy and that henceforth employees or employee representatives should be compensated for any time spent accompanying an OSHA inspector on his rounds.

The OSHA administrator said at the time the decision was intended to indicate "our commitment to the fundamental rights of workers" (Current Report, August 18, p. 369).

The Labor Department published a notice in the Federal Register a month later giving the agency's new interpretation of policy on walkaround pay and warning that employers could be guilty of discrimination under Section 11(c) of the Occupational Safety and Health Act if they refuse compensation to workers who go along on inspections (Current Report, September 22, p. 499).

Thompson said the Chamber was not disputing the right of employees to join the inspector and employer representatives on inspections. "The question is whether you (employers) are required to spend your money in support of a federal inspection," the Chamber official said.

Stephen A. Bokat, another attorney representing the chamber, said inspections of large workplaces can last one month or more and involve a dozen employees. "We are not talking about a small amount of money," Bokat said.

Appeals Court Ruling

In the case of *Leone v. Mobil Oil Corporation* (3 OSHC 1715), where a federal appeals court ruled that employers could not be required to compensate employees for time spent on walkaround inspections, the inspection had continued for more than 20 days, Bokat said.

Thompson said the Chamber had no objection to employees taking a few minutes to answer an inspector's questions about safety and health conditions as he toured a plant. "These inspections take place when work is going on, and there are opportunities for questioning by the inspector within reason," he explained.

OSHA has conducted inspections for six years without the walkaround pay provision and is now "trying to solve a problem where no problem exists," Thompson said.

He noted that the agency performs about 100,000 inspections annually but could give no estimate of what it would cost employers to pay workers for their participation in the inspections. At present, there are arrangements where the union pays for the time, unions and employers split the cost evenly, the employer pays the total cost or there is no compensation at all, Thompson said.

The complaint accuses OSHA of arbitrary and capricious conduct in changing the rule without allowing a public hearing or comments. It also alleges that time spent participating in an inspection is not considered "hours worked" under the Fair Labor Standards Act.

This was the finding of the U.S. Court of Appeals for the District of Columbia in *Leone* in 1975, the complaint states. In addition, the Labor Department's own interpretation in 1973 was that an employer's refusal to pay was not per se discriminatory against employees, according to the complaint.

NCLC is a nonprofit, business-oriented public interest law firm, which is representing the Chamber in the action in counsel with W. Scott Railton of the law firm of Reed, Smith, Shaw, and McClay.

HEALTH COMMITTEE FOR YOUR IDEA Say

General Policy

BINGHAM SAYS OSHA IS REVIEWING LIST OF SUSPECTED CARCINOGENS

The Occupational Safety and Health Administration staff already is "going through" the National Institute for Occupational Safety and Health list of suspected carcinogens in preparation for adoption of a final carcinogens policy, Assistant Labor Secretary Eula Bingham said November 1.

Bingham, speaking at the 105th Annual Meeting of the American Public Health Association, said the agency is reviewing the list to determine which substances might be listed as known carcinogens under Category I as outlined in OSHA's proposed carcinogens rule (Current Report, October 6, p. 555; text, Part II).

Adoption of the policy, she told the group, would "vastly speed up" the regulatory process. There is no time for endless, repetitive debate on some issues while workers are playing "Russian roulette" with carcinogens, she declared.

Bingham said discussion on the carcinogens policy will center on the following issues common to many health standards debates:

- The definition of "carcinogen" for regulatory policy.
- The function of animal tests results for policy and regulatory purposes.
- The question of a safe level for carcinogens.
- The determination of feasibility.
- The availability of less hazardous substitutes and the role of these substitutes in regulating carcinogens exposure.

Credibility

In response to audience questions, Bingham and Environmental Protection Agency administrator Douglas Costle noted the problem with credibility of testimony and data submitted by various professionals. OSHA must consider the "biases" of those who are interpreting data, and in some instances, where possible, should make an attempt to examine

PLAINTIFF'S EXHIBIT AL-1041

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