PLAINTIFF'S EXHIBIT

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REGULATORY AND LEGISLATIVE ISSUES

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File: OSHA/asbestos

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Waxman (D-Calif) that would revise EPA's system for setting pesticide residue limits. In particular, the groups said they backed a provision in HR 4739 that would authorize EPA to modify or revoke tolerances to prevent an imminent public health hazard.

The citizen groups also asked for improved inspection of meat by the U.S. Department of Agriculture and better labeling on foods providing consumers with information on saturated fat, cholesterol, sugar, and salt. More funding for research into reduced use of agricultural chemicals in farming also was recommended by the coalition.☐

Job Safety

JUDICIAL DECISION DISRUPTS OSHA TIMETABLE ON CHEMICALS EXPOSURE LIMITS

An Aug. 12 order by an administrative law judge extending post-hearing submission periods for a controversial rule that would reduce exposure limits for hundreds of chemicals has disrupted the Occupational Safety and Health Administration's timetable for the rulemaking and may prevent the agency from completing the rule before the end of the Reagan administration.

But the agency said Aug. 15 it will appeal the ALJ's order and suggest new dates to shorten the post-hearing periods.

Administrative Law Judge Michael H. Schoenfeld ruled that an Aug. 19 date previously suggested by OSHA for post-hearing submissions should be extended 90 days, until Nov. 14, for post-hearing evidence and data, and an additional 30 days, until Dec. 13, for post-hearing briefs.

Despite testimony about the complexity and scope of the rulemaking, OSHA officially announced its intention to reduce the exposure limits as long ago as October 1987, Schoenfeld told the hearing. That fact, combined with the "continuous" gathering of scientific evidence on air contaminants, "lessen any claim of 'surprise' in this rulemaking," he said.

Nevertheless, Schoenfeld held that a "reasonable" post-hearing comment period is necessary given the "minimal" pre-hearing comment period permitted by the agency.

The ALJ said that he "anticipated no requests for further extensions."

The judge's order came as a result of motions made both before and during the hearings for additional time to consider evidence and submit data, including exposure levels and feasibility information. Hearings were held July 28 to Aug. 15 on the agency's June 7 proposal to reduce or change permissible exposure limits for 428 chemicals and other air contaminants.

Hearing Extension Denied

Schoenfeld determined, however, that sufficient time had been provided by the agency for testimony and cross-examination during the public hearings and declined to either extend the hearings or reconvene them at a later date.

In examining OSHA's conduct of the hearings, Schoenfeld found that no participant requesting additional time had demonstrated that their interest in a hearing recess was "greater than the harm engendered by the delay in implementation of improved worker protection, as well as the inconvenience and other practical problems which would be generated by recessing the hearing to be reconvened at a later date."

Nor is there any evidence that any participant was denied the opportunity to fully testify or question other interested parties on their testimony, according to the ALJ.

The hearing judge's order noted that OSHA's use of the term "cross-examination" is "unfortunate" in describing the questioning of witnesses by other interested parties. Moreover, he said, "the term evokes images of an adversarial courtroom proceeding and has a tendency to incite lawyers more accustomed to that arena."

'Reasonable' Timetable

Schoenfeld said that suggestions from participants on "reasonable" time frames for post-hearing submissions ranged from one week to nine months.

In reviewing past OSHA rulemakings for guidance, the hearing judge said the post-hearing comment period should be commensurate with the most expansive one allowed in the hazard communication, cancer policy, benzene, or asbestos rulemakings. Post-hearing submissions were accepted for 120 days in the hazard communication and cancer policy rulemakings, 60 days for benzene, and almost four months for asbestos.

Schoenfeld said he also weighed the high priority assigned by OSHA to this particular rulemaking updating 20-year-old exposure limits. In addition, he said, "I have been reminded daily during the 11 days of testimony of the complexity and scope of the proposed rule, and observed the intensity with which those affected view the subject of modifying [the] exposure limits."

In a statement at the close of official testimony Aug. 15, Labor Department Attorney Charles Gordon told hearing participants that OSHA would appeal Schoenfeld's decision to the senior administrative law judge.

Gordon also thanked participants for their patience during the extended hearing period, and complemented them on their effective testimony and cross examination of witnesses. The agency will be "fully considering" all evidence and information presented to it, Gordon said.☐

Job Safety

COURT CASES SUGGEST 'PRUDENT ADDITIONS' TO OSHA ASBESTOS RULES, ATTORNEY SAYS

TORONTO—(By a BNA Staff Editor)—While the Occupational Safety and Health Administration's asbestos regulations "attempt to provide employees with a safe and healthful work environment," court cases also afford employees rights, an Ohio attorney said Aug. 10, advising that warnings be given to past

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For Your Information
From Penny L Parkin
Washington, DC Office

and current employees, whether office workers or those who actually handle asbestos.

Addressing insurance attorneys at the 1988 annual meeting of the American Bar Association, Cincinnati attorney Robert A. Dimling warned that although the exclusive remedy of worker's compensation has generally withstood the test of asbestos litigation, court cases suggest that prudent employers supplement OSHA requirements.

OSHA requires some monitoring of ambient air in all buildings containing asbestos, Dimling told the attorneys, and if asbestos fiber concentrations exceed an "action level" of 0.1 fibers per cubic centimeter of air as an eight-hour time-weighted average, further monitoring is required. Employers must notify affected employees, in writing, of the results of any monitoring within 15 working days, Dimling explained.

In addition, Dimling continued, employers must notify affected employees when the maximum permissible exposure limit of 0.2 fibers of asbestos per cubic centimeter of air over an eight-hour time-weighted average is exceeded.

Courts have recognized several asbestos-related exceptions to the general bar against employees suing employers, Dimling told the gathering, and in so doing created additional employee rights.

Dimling predicted that the rights of office workers affected by asbestos may emerge as an area of future litigation in light of *Layne v. GAF Corp.*, Ohio CtCommPls, No. 84-074194 (1987), in which a Cleveland jury awarded $360,000 to an office worker whose only known asbestos exposure was from working in a contaminated building.

"In light of *Layne,* it would seem prudent to accord all employees potentially associated with asbestos or working in an asbestos-contaminated area the same notification and medical testing rights and protection, rather than to distinguish between those who actually handle asbestos and those who simply may inhale the airborne particles," he said.

The New Jersey Supreme Court recognized another exception in *Millison v. E.I. duPont de Nemours & Co.*, 501 A2d 505 (1985), Dimling said, where it held that an employer who willfully concealed an employee's asbestos related disease until it had progressed significantly was subject to an "intent-to-injure" exception to the rule.

Third Party Duty

Workers have also circumvented the exclusive remedy rule by suing third parties such as building owners and asbestos manufacturers, Dimling said, citing the Washington Supreme Court's 1987 decision in *Lockwood v. A.C. & S. Inc.*, 744 P2d 605.

In *Lockwood,* the plaintiff was a rigger who worked in Seattle shipyards between 1942 and 1972, Dimling explained. While the worker normally did not work with asbestos containing materials, he shared work space with those who did, and in 1979 he was diagnosed with asbestosis.

According to Dimling, the worker sued an asbestos manufacturer, arguing that if the manufacturer had warned all current and former workers about the dangers of asbestos, he would have quit smoking, thereby postponing the onset of his disease.

The court held that where a person's susceptibility continues even after direct exposure to a product ceases, "the manufacturer still has a duty after exposure to exercise reasonable care to warn the person of known dangers, if the warning could help to prevent or lessen the harm."□

Banking

OCC PROPOSES RAISING SEMIANNUAL ASSESSMENT ON BANKS BY 14 PERCENT

The Office of the Comptroller of the Currency said it is proposing to raise its semiannual assessment schedule for national banks, District of Columbia banks, and federally licensed branches and agencies of foreign banks by 14 percent, "to avoid revenue shortfalls."

In a notice of proposed rulemaking scheduled for publication in the today's *Federal Register*, the OCC said it needs to adopt the increase to ensure "that the OCC can continue to fulfill its statutory, regulatory and supervisory responsibilities."

The OCC will accept comments on the proposed increase for 30 days following publication of the notice in the *Federal Register.*

Under the current assessment schedule, the agency at year-end 1988 will either just break even or will incur a "small deficit," the OCC said.

"Unless the assessment schedule is revised, OCC faces larger deficits and beyond as a result of slower asset growth, the deteriorated condition of the national banking system, and the costs of maintaining OCC's supervisory mission," the agency said in its proposal.

The OCC also cited recent consolidation of the banking industry, the "increased complexity of the financial industry, and the increased responsibilities" placed on the OCC by Congress as factors for the agency's revenue shortfalls.

Since 1984, the number of national banks has declined by 4 percent, due to mergers and failures. Bank profits are at their lowest levels in a decade, and bank failures and the number of problem banks "continue at post-Depression highs," the agency said.

Meanwhile, bank asset growth from December 1986 to December 1987 was less than two percent, and the OCC projects that growth will continue to be low "for the next several years." The OCC said nearly 25 percent of the national banking system's assets and 27 percent of all national banks are "receiving special supervisory attention" from the agency because of their financial troubles.

To deal with its increased responsibilities and workload, the agency has increased its staff from 2,850 to about 3,200. In 1989, the agency will try to beef up its staff to 3,246.

National bank fees will be raised "only to the extent necessary to support OCC's increasing and evolving supervisory responsibilities," the OCC said.

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