FILE NAME: Celanese (CEL)

DATE: 1976 Jan 8

DOC#: CEL017

DOCUMENT DESCRIPTION: Trade Publication with Cover Letter

FN 55 REV 1-1-62

INTERNAL LETTERHEAD

TO (NAME AND LOCATION)		REFERENCE NO.
See attached		
FROM (NAME AND LOCATION)	REFERENCE NO.	DATE
Mr. Charles S. Laubly - N. Y.	CSL:76-2	1-8-76

1. The attached page 865 of the BNA Occupational Safety and Health Reporter regarding examinations for workers exposed to asbestos is an important precedent setting decision by OSAHRC. Incidentally, the fine imposed was $40.00!

2. The attached paper by Raymond Boggs of NIOSH is submitted for your general information.

3. The Industrial Hygiene Sampling Data Sheet is recommended for all personnel monitoring at Celanese plants.

Charles S. Laubly
Corporate Manager
Industrial Hygiene

CSL:rd
Att.

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.

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

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