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Memorandum

PLAINTIFF'S
EXHIBIT
AL-1108

August 21, 1980

To: Louis J. Bibri

From: J. W. Miller

Subject: Current Developments in Safety and Health Regulation

There have been many developments in the occupational safety and health regulatory area since the last meeting of the Health and Safety Subcommittee. A number have occurred in litigation. A separate summary of litigation developments has been developed by the ORC Washington office and will be provided to you to supplement this memorandum.

General

- a) Two recent court decisions represented important setbacks for OSHA. The most important was the Supreme Court decision relating to the benzene standard. That decision established that the Secretary of Labor must demonstrate that a significant risk of material health impairment exists and that the proposed standard can be expected to produce significant benefits in addressing that risk. The decision did not reach what had been anticipated to be the major issue, namely, whether a reasonable relationship between costs and benefits must exist. That issue may be addressed in the "coke oven" case that is scheduled to be heard by the Court during the session that begins next October. There is some indication, however, that the case may be withdrawn by industry in the meantime.

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The second major litigation setback for OSHA was the decision of the U.S. Court of Appeals for the District of Columbia reversing a District Court decision that had upheld the OSHA walkaround pay regulation. The reversal was based on largely procedural grounds, which means that OSHA's authority to issue such a regulation remains to be determined.

- b) OSHA's recent regulation on access to exposure and medical records resulted in suits being brought in the U.S. Court of Appeals for the Fifth Circuit and in the U.S. District Court for the Western District of Louisiana by the Louisiana Chemical Association and other plaintiffs. The suits challenge the authority of the Secretary to regulate in that area, as well as other aspects of the action. In addition, a request for an injunction to prohibit enforcement of the regulation has been filed in the same District Court.
- c) Reversals on the litigation front, as well as other factors, appear to have significantly affected general morale and activity within OSHA. The problem is deeper than the normal unsettling effects of an election year. Among examples of the disarray are the summary dismissal of the Deputy Director for Health Standards and the continuing delay in making appointments to such positions as the Director of Field Coordination and the Advisory Committee on Construction Safety and Health.
- d) There is every evidence of continuing interest on the part of the Secretary of Labor, as well as OSHA, in giving strong encouragement to the use of joint labor-management committees to discuss, and perhaps resolve, safety and health issues at individual locations. Several studies are either underway or have been announced by OSHA and DOL relating to the operation of such committees. At least part of the impetus comes from the pressure to reduce the degree of polarization that has inhibited the occupational safety and health regulatory process to date.
- e) Regulatory reform legislation has now been passed by both the Senate and the House, but may not make it beyond the Conference Committee. President Carter has promised to veto any such legislation that includes a "legislative veto" provision, which the House version does.

- f) There appears to be little chance of enactment in this Congress of legislation that would increase the potential criminal liability of employers in matters relating to occupational safety and health. Meanwhile, the Justice Department is continuing to take an aggressive posture in investigating those types of cases.
- g) Many responses were received by EEOC and OFCCP to their jointly-proposed interpretive guidelines on employment discrimination and reproductive hazards. No public hearings have been scheduled thus far, although that continues to be the likely next step. Labor has opposed the guidelines on the basis that the matter is within OSHA's regulatory jurisdiction (where it can be more easily influenced or controlled by labor).
- h) OSHA recently announced an additional \$3.5 million in grants for training and education programs to a variety of organizations, primarily labor unions and various labor or health-care interest groups. Grants ranging from \$30,000 to \$75,000 were also made to various industry and trade association groups, such as the Rubber Manufacturers Association, the National Constructors Association, the American Paper Institute, and the Society of Plastics Industry.
- i) A theme that is beginning to emerge with some frequency from OSHA and other regulatory agencies is that their objectives are not inconsistent with the need for improved productivity levels in U.S. industry, but in fact are supportive of that objective. The essence of the argument is that since good employee safety and health records are frequently found in plants and operations that are above average in terms of efficiency, therefore the regulatory process promotes productivity and efficiency by promoting improved safety and health. The argument conveniently overlooks the fact that sound management may be the cause of both efficiency and good safety and health performance rather than either being the cause of the other.

Health Standards

- a) The U.S. Circuit Court of Appeals for the District of Columbia handed down its decision on the OSHA lead standard on August 15. The decision reported to have largely upheld the standard as promulgated, including the rate retention and job displacement provisions, for operations involving substantial lead usage, such as battery manufacturing and lead smelters. OSHA is directed to review certain aspects of the standard as they apply to less concentrated usage, such as vehicle manufacture and shipbuilding.

- b) With the benzene decision now made, the Supreme Court is also likely to decide later this year whether to review the cotton dust decision of the same Circuit Court of Appeals. In response to the benzene decision, OSHA has suspended enforcement of the new cotton dust standard for cotton classing and cotton warehousing operations.
- c) In another litigation action, the Supreme Court has temporarily stayed the new OSHA chlorine standard that seeks to establish a 1 ppm. ceiling for chlorine.
- d) It is anticipated that OSHA will publish an Advanced Notice of Proposed Rulemaking (ANPR) in the near future covering the labeling of toxic material containers and equipment. This action will have broad implications for industry.
- e) ANPR's are also anticipated by early 1981 on abrasive blasting and the use of respirators. In addition, an ANPR for chromium may be issued later this year, as well as one tightening the existing asbestos standard.
- f) Work continues within OSHA on the development of a noise standard. A proposal may be forthcoming shortly covering work practices and audiometric testing provisions of the noise regulation. The proposal reportedly will continue a 90-decibel limit.
- g) Consideration is being given within OSHA to the issuance of a formaldehyde Health Hazard Alert in the near future.
- h) Finally, a Special Emphasis Program has been instituted for cadmium in order to make provision for collecting data for use in developing a regulatory analysis.

Safety Standards

- a) Promulgation of a revised standard on Fire Protection and Firefighting continues to be delayed for reasons that are not entirely clear. Delay within the Solicitor's Office (at least partly because of the benzene decision) may be one reason, but the recognized opposition of the labor movement to performance standards may be another.

- b) ANPR's on confined spaces and on lockout/tagout are anticipated in the near future. Both are complex areas to regulate and will have broad ramifications for business.
- c) The U.S. Coast Guard is moving ahead with plans to develop horizontal standards applicable to all (1) certified vessels, (2) mobile offshore drilling units, and (3) artificial islands, installations, and other devices on the Outer Continental Shelf. The Coast Guard intends to take jurisdiction over these areas in order to eliminate potential conflicts with OSHA.

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August 15, 1980

Selected Occupational Safety and Health Litigation

1. The Louisiana Chemical Association, along with other plaintiffs, has filed suit in the U.S. Court of Appeals for the Fifth Circuit and the U.S. District Court for the Western District of Louisiana challenging the Secretary of Labor's authority to promulgate OSHA's access to exposure and medical records regulation.

In addition, the Louisiana Chemical Association has filed for an injunction in the same District Court. Oral arguments on this request are scheduled for August 18.

2. United Steelworkers of America v. Marshall

The U.S. Court of Appeals for the District of Columbia upheld the OSHA lead standard including its provisions on medical removal. The Court stated that OSHA had met the requirements of the U.S. Supreme Court as expressed in its recent decision on the OSHA benzene standard (below).

Full application of the standard, however, is limited to high exposure industries such as lead smelters and battery manufacturers. The Court is requiring OSHA to reexamine the standard as it applies to light users of lead such as automobile manufacturers. Those manufacturers will be allowed to meet the exposure requirements by using respirators.

3. American Industrial Health Council v. Marshall

The U.S. District Court for the Southern District of Texas dismissed AIHC's suit against OSHA's cancer policy "for want of subject matter jurisdiction". The Court found that the policy is an enforceable standard and as such must be reviewed by a U.S. Court of Appeals. It is expected that the decision will be appealed.

4. Chamber of Commerce of the U.S. v. OSHA

The U.S. Court of Appeals for the District of Columbia reversed the U.S. District Court for the District of Columbia decision upholding the OSHA "walkaround pay" regulation. In finding the regulation to be invalid, the court did not examine the substantive issues involved but in strong language pointed out that the Secretary did not comply with the time and comment requirements of the Administrative Procedure Act.

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5. Industrial Union Department, AFL-CIO v. American Petroleum Institute; Secretary of Labor v. American Petroleum Institute

The plurality decision in this important review of the U.S. Court of Appeals for the Fifth Circuit decision setting aside the OSHA benzene standard did not address what was expected to be the major issue -- that of the reasonable relationship between costs and benefits. Instead, the decision was based on the threshold requirement that the Secretary must bear the burden of showing that a "significant risk" of material health impairment exists and that the new standard will result in "significant benefits". The economic issue according to the decision did not have to be addressed until the threshold test was passed. It is hoped that the "coke oven" case, which may be considered by the Court during its next session, will address the economic issue.

6. Burkart Randall Division of Textron, Inc. v. Marshall

The U.S. Court of Appeals for the Seventh Circuit held that OSHA can justify a "wall to wall" inspection warrant even when based on employee complaints. In justifying its position, the court stated that section 8(f)(1) of the OSH Act which authorizes complaint inspections is not limiting.

7. In the Matter of C.F. & I. Steel Corp.

The U.S. District Court for Colorado refused to grant a motion staying an "order" setting up a hearing on an OSHA warrant application. The meeting was being set up because of the Labor Department's refusal to allow the judge to question witnesses or to obtain what the judge felt to be basic information needed to justify "a 20-man 60-day ex parte search warrant". The court stated that the "Notice of Setting" was not an "order" and, therefore, the Labor Department had nothing upon which to base the notice of appeal.

8. Marshall v. Sun Petroleum Products Corporation

The U.S. Court of Appeals for the Third Circuit upheld an OSHRC decision allowing OSHA to withdraw from a settlement agreement prior to the time the OSHRC order becomes final. The Court, however, required that the parties be returned to their original position and that a new inspection be made by OSHA.

9. Newport News Shipbuilding and Dry Dock Company v. Marshall

The U.S. District Court for the Eastern District of Virginia held that the Secretary could not wait for an NLRB decision before acting on an OSH Act 11(c) (discrimination) complaint.

10. Illinois Power Company v. OSHRC and Marshall

The U.S. Court of Appeals for the Seventh Circuit using witness testimony and an Illinois Power Company manual held that OSHA could cite Illinois Power Company with a general duty clause violation despite the company's argument that there was no recognized hazard. The Court pointed out that it is not "the likelihood of an injury" but the "probability that, when an accident having occurred, death or serious injury could result" that supports the citation.

11. The Mountain States Telephone and Telegraph v. OSHRC and Marshall

The U.S. Court of Appeals for the Tenth Circuit held that the Secretary has the burden to prove that the employer has knowledge of a violation by a supervisor. In this case, the Court stated that the employer was incorrectly required to prove that "the violation was unpreventable". The Court reversed the OSHRC decision because the Review Commission violated its own rule (73(a)) that "the burden of proof shall rest with the Secretary".

12. Hayes-Albion Corporation v. Marshall

The U.S. District Court for the Northern District of Ohio dismissed action by Hayes-Albion asking to quash an ex parte inspection warrant because the company had not exhausted its remedies. The Court noted that the issue was still before the OSHRC.

13. Marshall v. Chapel Electric Company

The U.S. District Court for the Southern District of Ohio held that the firing of an employee who filed a complaint was an 11(c) violation. The Court reached its decision when factors were taken into account, such as that the employee was fired the next working day after an inspection, and was a union leader. The Court also noted that the plant had just gone back to work after a short strike.

14. Marshall v. Firestone Tire and Rubber Co.

The U.S. District Court for the Central District of Illinois required Firestone to pay backpay to an employee who had refused to work in a situation the employee believed "would expose him to hazardous conditions and a real danger of death or serious injury". The employee had been suspended without pay for one week.