PLAINTIFF'S EXHIBIT WRG-1171

J. W. Wolter

Current Report

Litigation

HEARING CONSERVATION AMENDMENT UPHELD BY FULL FOURTH CIRCUIT APPEALS COURT PANEL

The hearing conservation rule adopted by the Occupational Safety and Health Administration in 1983 to reduce the dangers of workplace noise was upheld by the U.S. Court of Appeals for the Fourth Circuit Sept. 23.

In a unanimous eight-judge decision in *Forging Industry Association v. Secretary of Labor* (No. 83-1420), the court reversed the Nov. 7, 1984, ruling by a three-judge panel which found the amendment to be invalid (12 OSHC 1041).

The three-judge panel, in a 2-1 decision, had overturned the hearing conservation amendment to the Occupational Safety and Health Administration's workplace noise standard, ruling that the amendment makes no distinction between occupational and non-occupational noise sources. "Airplanes, hunting rifles, loud music, and a myriad of other sources produce noise potentially as damaging as any at the workplace," the two-judge majority said.

However, the full court disagreed with the panel majority, explaining that there is "simply no merit" to the argument that the amendment seeks to regulate non-occupational hearing loss. The amendment "does nothing more than ensure that a hearing-endangered worker is provided with protection *in the workplace* in order to decrease the risk of a hearing impairment," the court said, adding that OSHA relied on "extensive and thorough research of several scientific institutions in defining the problems related to industrially-caused hearing loss and designing its proposal."

Even assuming some hearing loss caused by aging or smaller amounts of noise sustained for shorter periods also aggravates the hearing loss incurred by an individual employed in a high noise-producing industry, "that is scant reason to characterize the primary risk factor as non-occupational," the court said.

The amendment requires employers to monitor workplace noise levels and at least annually to test the hearing of employees exposed to an average time-weighted average noise dose greater than 85 dB. If a worker suffers an average loss of hearing of 10 dB, known as a standard threshold shift, the employer is required to provide hearing protectors, reduce the worker's exposure to noise, institute a training program, and retain records of employee exposure measurements and tests.

The decision, written by James M. Sprouse, and joined by H. Emory Widener Jr., Kenneth K. Hall, James D. Phillips Jr., Francis D. Murnaghan Jr., Sam J. Ervin II, Robert F. Chapman, and J. Harvie Wilkinson III, will appear in a future Decisions issue.

Asbestos

FINAL ASBESTOS STANDARDS NEAR COMPLETION; INTENDED AS 'REAL WORLD ANSWER TO PROBLEM'

Reaction to the final standards for occupational exposure to asbestos in general and construction industries will be moderate, according to Acting Assistant Secretary of Labor for Occupational Safety and Health Patrick Tyson.

"No one will love it and no one will hate it," Tyson told attendees of the 10th Industry-Government Conference of the Asbestos Information Association Sept. 17.

The agency hopes, however, that it will represent "a real world answer to the problem" and reflect feasibility and

RIGHT-TO-KNOW SPECIAL REPORT AND FILM

A 220-page Special Report on state and federal right-to-know requirements and a 30-minute documentary film exploring the hazard communication issue are available from BNA.

The Special Report, "*Right-To-Know: A Regulatory Update on Providing Chemical Hazard Information,*" explains the current status, enforcement goals, and the legal and legislative future of the federal Occupational Safety and Health Administration's Hazard Communication Standard. Each of the 25 state laws that require employers to explain chemical hazards to workers and communities is treated individually.

In addition, detailed compliance guides for each state and for the federal OSHA standard explain regulatory requirements by subject. Included are which chemicals are considered hazardous, which workers and employers are covered, and what types of record-keeping, training, and other actions are necessary to comply with the federal standard and with each of the state laws.

The documentary film, "*Right-To-Know: Chemical Concerns At Work,*" uses case studies to explore the effect and likely outcome of the right-to-know movement in the workplace and in the community.

Interviews with Acting OSHA Director Patrick Tyson, Rep. James Florio (D-NJ), and other government, business, labor, and scientific experts dissect the constantly changing right-to-know issue on both the federal and state levels.

Case studies filmed at Monsanto Co. and American Cyanamid Co. show how large chemical manufacturing facilities deal with hazard communication on a day-to-day basis. In segments on New York and Illinois, the issue of small businesses and state vs. federal requirements is explored. The role of the labor movement and communities is an integral part of each of the segments.

Single copies of the Special Report are $75; quantity discounts are available. A special pre-release offer on the documentary film is available until Nov. 1.

Requests for additional information and orders should be directed to BNA's Response Center, toll-free at (800) 372-1033, or (800) 352-1400 in Maryland or 258-9401 in the Washington, D.C., area. Mail requests should be addressed to The Bureau of National Affairs Inc., Circulation Department, 1231 25th St., N.W., Washington, D.C. 20037.

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current industry practice without unduly burdening employers, Tyson said.

Although a personal timetable set by Tyson for completion of the standards by Sept. 30 will not be met, he anticipated that they would be ready for publication in approximately a month. "We won't miss it by much," he remarked.

In response to some attendees' complaints that the agency does not make an effort to stop "press hype" and "disinformation" about the hazards of asbestos which create unwarranted fears, Tyson insisted that the agency does assure that credible scientific data is circulated. He cited results of 400 air samples collected at a federal building in San Francisco reportedly containing airborne asbestos in which only two samples contained asbestos fibers, both "far below" OSHA's permissible exposure level.

It is up to the association, he suggested, to further its efforts at educating the public so that the latter is better able to adopt a rational approach to the risks it faces.

Noting the difference between known and unknown risk, the acting assistant secretary told the group of industry and government officials that the public's response to an unknown risk is "not to accept it." Tyson contrasted this attitude with the fact that a large portion of the population refuses to wear seat belts despite awareness of the hazards involved in automobile driving.

Tyson declined to reveal details of the upcoming standards, such as permissible exposure levels or reliance on engineering controls as opposed to respiratory protection. He reminded the group that the document to be presented to the Advisory Committee on Occupational Safety and Health Sept. 27 will not represent the final standard, but only the position OSHA has reached at that time. The agency will continue to make revisions until publication, Tyson said.

Burden of Proof

While conceding that mesothelioma is caused exclusively by exposure to asbestos, former Director of the National Institute of Environmental Health Sciences Paul Kotin told the gathering that the burden of proof for ascertaining a causal relationship between asbestos exposure and cancers other than lung cancer and mesothelioma rests on claimants for workers' compensation.

Kotin raised doubts that causal relationships between respiratory distress or disability can be delineated specifically and quantitatively from asbestos, or even smoking, noting that mesothelioma does not have the "confounding factors" involved in lung and other cancers, such as cigarette use. Lung cancer can develop from multiple causations, he asserted.

One open question remaining, he said, is that of the validity of lung cancer in non-smokers exposed to asbestos. Although he was unaware of any evidence that asbestos fibers intitiate lung cancer, Kotin said that asbestos can "enhance already increased risks."

Attribution of cause or risk, quantification of impairment, and apportionment of risk is vital to compensation litigation, he said.

The root of regulatory problems is data, according to Kotin, who described regulations as a "concatenation of social, political, and emotional forces" where judgments are based on "dogma and 'challengeable verities.'"

Nor is the answer to asbestos exposure problems the use of substitute or alternate products, Kotin indicated.

"You can't have it both ways," he said, contending that the properties that render asbestos hazardous are not unique to that fiber and that the human body does not distinguish between types of fibers.

Nevertheless, asbestos-related disease is "unequivocally, unchallengeably, and understandably" on the decline, Kotin stated.

Asbestos

SEPARATE STANDARD FOR CONSTRUCTION WOULD SET 0.2 FIBER LIMIT, MEMORANDUM SAYS

Construction employers would have to achieve a permissible exposure limit for asbestos of 0.2 fibers per cubic centimeter through feasible engineering and work practice controls, under a new proposed standard for the construction industry, according to a memorandum submitted to an Occupational Safety and Health Administration advisory committee.

While the current asbestos standard covers all industry, OSHA decided to develop a separate proposal for the construction industry because of that industry's unique needs (Current Report, March 21, p. 795). The decision has been endorsed by labor and industry representatives.

For example, certain medical requirements will be revised to take into account "the short term and high turnover of some construction employment," OSHA said.

The proposal, to be discussed Sept. 26-27 at a meeting of the Advisory Committee on Construction Safety and Health, "will contain certain provisions which differ from the general industry standard," according to a Sept. 24 memorandum to committee members from John Martonik, deputy director of OSHA's health standards program. The panel also is scheduled to review a proposed formaldehyde standard (see related article in this issue).

OSHA has followed a number of past recommendations made by the committee, Martonik noted. For example, the agency is "setting out specific monitoring protocols in the appendix [to the proposed standard], and we agree with the Committee that it is feasible in many cases to measure asbestos exposure down to the 0.1 f/cc level," the memorandum stated.

Depending on the type of work to be performed, two kinds of regulated areas would be established under the proposal, the memorandum pointed out.

OSHA asserted that it is especially interested in advice from the committee on these matters:

- Establishment of negative pressure enclosures for some asbestos removal, demolition, or renovation operations.
- Use of historic data in certain circumstances to meet the initial monitoring requirement.
- Requiring that all employers on a multi-employer worksite be notified of any work with asbestos and the presence of regulated areas.
- Requiring decontamination areas for employees working in removal, demolition, or renovation operations only when providing such facilities is feasible.
- Requiring medical surveillance when employees have been exposed to asbestos for a minimum number of days or when employees are required to wear respirators.

Trenching

TRENCHING/EXCAVATION OPERATIONS SUBJECT OF INTENSIVE OSHA INSPECTIONS

Compliance officers from the Occupational Safety and Health Administration have been instructed to report any trenching or excavation operations they may hear of, so that any site not recently inspected can be checked for safety

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