



INTERNAL CORRESPONDENCE

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CHEMICALS AND PLASTICS

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To (Name) Mr. J. W. Whittlesey
Division Mr. R. W. Lasher
Location Mr. A. E. Stafford/
Mr. P. Pederson
Mr. K. G. Morlock

Date November 21, 1977

Originating Dept.

Answering letter date

Copy to

Subject United States Appeals
Court Decision

The attached report on a United States Appeals Court decision may cause us some problems on our "fabricated products" status.

By copy of this note I am asking Mr. Whittlesey to give us an opinion regarding the proper stance to take concerning customer use of our latex and solvent vinyl resin products.


R. N. Wheeler, Jr.

RNWJr./pm
Attachment

UCC
036545

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November 18, 1977

RECEIVED
NOV 21 1977
R. N. WHEELER, JR.

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To: SPI-PVC Safety Group
SPI-PVC Manufacturing Technology Committee
SPI-PVC Health Committee

Gentlemen:

The attached report which we think you will find self-explanatory concerns a recent decision of the United States Court of Appeals for the Second Circuit. In that case the Court overruled an Occupational Safety and Health Review Commission holding that the mandatory monitoring in the Emergency Temporary Standard for vinyl chloride did not apply when it would be useless, that is, when it could be reliably predicted that vinyl chloride would not be present above the permitted limits.

The new Second Circuit decision would require mandatory monitoring wherever vinyl chloride might be present.

Since the same mandatory monitoring language is employed in the final Occupational Safety and Health Administration Standard regulating vinyl chloride exposure, this decision would appear to require at least initial monitoring in all areas where vinyl chloride exposure might occur. Accordingly, relative to areas where monitoring for vinyl chloride has not been conducted because it was assumed not present in amounts which would exceed the permissible exposure limits, it would now seem prudent to conduct and compile a record of initial monitoring for vinyl chloride exposure.

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Should you have any questions, comments or suggestions relative to this or any other VCM/PVC matter, please do not hesitate to let us know.

Cordially yours,

Joseph E. Hadley, Jr.

Enclosure

cc: Mr. Frank Jones, Chairman
SPI Vinyl Dispersions Division
Mr. Jerome P. Carroll

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036547



Curr nt Report

11/17/77

Litigation

EMERGENCY STANDARD REQUIRES MONITORING WHEREVER VC IS RELEASED, COURT DECLARES

Monitoring of every operation in which any vinyl chloride was released was required by the emergency temporary standard for vinyl chloride, regardless of an employer's ability reliably to predict the concentration of this gas in the air, a federal appeals court ruled November 4.

This decision of the U.S. Court of Appeals for the Second Circuit in *Marshall v. Western Electric, Inc. and OSAHRC* (No. 77-4076) reversed a ruling of the Occupational Safety and Health Review Commission reported at 4 OSHC 2021. The court specifically rejected the commission's "reliable prediction" exception to the monitoring requirement.

Western Electric was cited for violating 29 CFR 1910.93-q(c) (1) following an inspection of the firm's electrical components producing plant in Lee's Summit, Mo. As a part of the process for insulating these components, heated metal rings are dipped into a compound known as "Hysol," a plastisol containing polyvinyl chloride suspended in a liquid plasticizer. When Hysol is heated to a temperature of 360 degrees Fahrenheit by the metal rings, the polyvinyl chloride fuses with the plasticizer and coats the rings. At the same time, the polyvinyl chloride releases vinyl chloride into the air in the form of a gas.

An industrial hygienist for Western Electric decided that because the Lee's Summit plant used neither vinyl chloride nor polyvinyl chloride resin as a raw material, its operations were not subject to the monitoring requirements of the emergency standard. However, he did monitor the operation which he concluded would release the most vinyl chloride. After determining that the ambient air in the area monitored contained nonhazardous concentrations of vinyl chloride, he assumed that workers in other areas of the plant would be safe and, therefore, did not monitor any other plant operations.

The compliance officer who conducted the inspection of Western Electric's plant took three samples of the air in the Hysol-dipping tank, one of which revealed vinyl chloride in the air at a concentration of 1.7 parts per million.

Review Commission Judge Paul Dixon rejected the company's argument that Hysol was a fabricated product and, therefore, exempt from the standard, concluding that the operation was a form of fabrication to which the standard applied. He also rejected the firm's claim that in order to constitute "release of vinyl chloride," readings of the ambient air must exceed 5 ppm. Relying on the plain language of the standard, which requires physical monitoring of any operation releasing vinyl chloride gas, Dixon held that the employer violated the standard by failing to monitor the ring-coating process.

The commission, setting aside Dixon's decision, held that the employer could reliably predict from the physical circumstances that the concentration of vinyl chloride in the air resulting from the coating operation would be well below the danger level set by the secretary. Formal physical monitoring was not required, the commission said.

Senior Circuit Judge Robert P. Anderson, writing for the court, concluded that the commission's interpretation of the emergency standard was "unreasonable." Anderson noted

that the mandatory language of the standard was clear and there was no indication in the secretary's introductory comments that any covered employers would be exempt from the duty of monitoring for vinyl chloride gas.

In the court's opinion, the secretary's interpretation of the standard as requiring monitoring of every operation in which any vinyl chloride was released was better calculated than the commission's to achieve the congressional goal of accident prevention and protection against potential danger.

"Although Western Electric's efforts to predict the amount of vinyl chloride in the air breathed by its employees were sound and sensible, it should not be permitted to substitute its monitoring method for that prescribed by the secretary," the court declared. The court also described as "unfortunate" the commission's characterization of monitoring as a "useless act" in situations in which it could be reliably predicted from the physical circumstances that vinyl chloride concentrations would be below the permissible maximum. The unequivocal language of the standard does not support a "reliable prediction" limitation on the duty to monitor, the court ruled. Accordingly, the secretary's interpretation of the standard is the only reasonable one, in the court's opinion.

The case was remanded to the commission for the sole purpose of entering a final order enforcing Judge Dixon's decision.

This decision, in which Senior Judge Sterry R. Waterman and Circuit Judge Walter R. Mansfield joined Anderson, will appear in a future Decisions supplement.

Ethylene Dibromide

INSTITUTE RECOMMENDS CEILING LIMIT OF ONE MILLIGRAM, ENGINEERING CONTROLS

Workplace concentrations of ethylene dibromide (EDB) should be limited to a ceiling level of one milligram per cubic meter of air as determined by a sampling period of 15 minutes, according to a criteria document prepared by the National Institute for Occupational Safety and Health.

The NIOSH recommendations for an EDB standard were transmitted to the Occupational Safety and Health Administration, which announced earlier this year that it planned to issue employer guidelines on the substances (Current Report, September 8, p. 443).

EDB, which is used as a gasoline additive and a pesticide, is chemically related to the pesticide dibromochloropropane (DBCP), linked earlier this year to cases of worker sterility at chemical plants in Lathrop, Calif., and Magnolia, Ark. (See related article in this issue.)

According to NIOSH, human and experimental studies indicate that EDB exposure may lead to ocular, dermal, and respiratory irritation, in addition to systemic effects on the liver, kidneys, spleen, cardiovascular system, and nervous system.

Animal data, according to the institute, indicate that EDB exposure may produce in animals sterility, cancer of the reproductive system, and malformations and heritable damage in offspring.

The relevancy of these findings to human exposure "has not yet been established," NIOSH reported. However, it add-