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Environmental Health Department

October 23, 1980

TO: Official Members - LIA
LIA Environmental Health Committee

FROM: Jerome F. Cole

Enclosed is a copy of a brief summary of the decision of the U.S. Court of Appeals for the District of Columbia on the OSHA Lead Standard. This decision was announced on August 15, 1980. This summary was prepared by Laura Bartell of Debevoise, Plimpton, Lyons and Gates at our request.

Sincerely,

Jerome F. Cole
Director, Environmental Health

Enclosure

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A Brief Summary of the Background of, and Opinion in, United Steelworkers of America v. Marshall

On October 3, 1975, OSHA commenced rulemaking proceedings for a new occupational lead standard by publishing a proposed regulation that would have lowered the permissible exposure limit ("PEL") for airborne lead from 200 ug/m^3 (micrograms of lead per cubic meter of air) to 100 ug/m^3. The proposal also contained detailed requirements concerning environmental monitoring, medical surveillance, respirator use, employee training, housekeeping and record maintenance.

After the hearings had been concluded but before the Standard was issued, OSHA retained a number of persons outside the agency as "consultants" to perform various functions with respect to the decisional process. Two of these experts--David Burton and Nicholas Ashford--had been retained by OSHA to testify at the earlier hearing and had taken positions with respect to a number of critical factual issues raised by the proposed standard. After the hearings, Burton and Ashford submitted lengthy ex parte reports that discussed and evaluated the record. These post-hearing studies were not included in the record or made available to the parties for review.

OSHA issued the final Standard on November 13, 1978. Although the subject of all of the comments, 39 days of hearings and extensive post-hearing analysis had been the proposed air-lead exposure limit of 100 ug/m^3, the final Standard establishes a PEL of only 50 ug/m^3. Because OSHA recognized that even attempted compliance with the new exposure level would require the major lead industries to rebuild their plants, from the ground up, to accommodate still undeveloped, experimental technology, those industries were given five to ten years within which to attempt compliance.

In addition to the air-lead exposure limit, the final Standard establishes a biological blood-lead criterion of 40 micrograms of lead per 100 grams of whole blood (40 ug/100g). To this end, workers whose blood-lead levels exceed a specified level (which is presently 70 ug/100g but will be reduced down to 50 ug/100g by March 1983) must be removed from exposure and cannot be returned until their blood-lead levels are reduced. Removal can also be effected on the basis of a doctor's determination. As part of OSHA's medical removal protection program, a full job security requirement has been created: the earnings (including overtime) and senicrity of workers removed from lead-exposed jobs must be maintained as if the workers had not been removed.

By a split decision, the Court of Appeals for the District of Columbia Circuit affirmed the Standard on August 15, 1980, as to major sectors of the lead industry, and remanded to OSHA for further consideration with respect to certain other industries.* In the 246-page majority opinion, Chief Judge J. Skelly Wright, joined by Judge Robinson, rejected challenges to the procedures used by the agency, the substantive provisions of the Standard, and the adequacy of the evidence upon which the Standard was based.

Judge MacKinnon, in a dissenting opinion, disagreed sharply with the majority, concluding that OSHA had made serious procedural errors, had exceeded its statutory authority, and had failed to comply with the letter and spirit of the plurality opinion in the recent Supreme Court "benzene" case, Industrial Union Department v. American Petroleum Institute, 100 S.Ct. 2844 (1980).

A. Procedural Claims

While conceding that OSHA was "occasionally careless or inefficient in its procedures" throughout the rulemaking, the majority proceeded to uphold the agency's procedural irregularities against attack.

First, the majority held that the head of OSHA had not displayed sufficient bias to require dis-

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* On September 23, 1980, OSHA issued a public notice stating that supplemental hearings would be conducted on November 5, 6 and 7, 1980, with respect to the issue of whether it was feasible for these other industries to comply with the Standard. Written comments and notices of intention to appear at the hearings must be received by OSHA on or before October 27, 1980.

qualification. The Court examined the content of a speech delivered by Assistant Secretary of Labor Eula Bingham on November 3, 1978, in which she expressed her solidarity with the workers, stated that "it is impossible to have a Lead Standard without [medical reroval protection]," and scoffed at what she termed the "phony issue" of the economic feasibility of safety and health regulations. Although admitting that Dr. Bingham had "served her agency poorly by making statements so susceptible to an inference of bias," the majority concluded that the speech did not sufficiently demonstrate that Dr. Bingham had "an unalterably closed mind on matters critical to the disposition of the proceeding" to warrant vacating the lead Standard on the grounds of improper bias by the agency decision-maker.

Second, the majority rejected industry's contention that the agency's action was improper because of the participation in the decision-making by OSHA staff attorneys who had acted as advocates for the proposed standard during the hearings. The Court concluded that the informal rule-making procedure created by the OSHA Act did not require the agency's prosecuting or investigating employees to be segregated from those involved in the decision-making process.

Third, the majority held that OSHA had not improperly communicated with or relied upon outside consultants. Although the majority conceded that OSHA had made rather broad requests for help from consultants (requests which included the agency's first attempt to obtain expert advice concerning the feasibility of the PEL of 50 ug/m^3 actually adopted), the Court nevertheless upheld OSHA's use of such consultants. The majority concluded that the agency's reliance upon these consultants did not amount to an abdication by the agency decision-maker of her responsibility to determine the final Standard. With respect to the secret, post-hearing reports by Burton and Ashford, the majority held that the consultants had acted as the "functional equivalent" of agency staff, despite the fact that they were experts who had previously testified as witnesses with respect to disputed critical facts concerning the proposed PEL of 100 ug/m^3. In holding that use of their reports in the deliberative process was not improper, the majority further relied on the fact that the industry petitioners had failed to show that the reports, which they were unable to secure from the agency, contain new evidentiary material.

Finally, the majority concluded that OSHA's rulemaking notice was adequate. Characterizing this point as "industry's most serious procedural attack" on the Standard, the Court acknowledged that OSHA had given notice of a proposed PEL of 100 ug/m^3 and had adopted a final Standard of 50 ug/m^3, but this change was excused on the ground that various statements in the notice supposedly "portended" the possibility that the final PEL might not be the same as the one proposed. In also explaining why OSHA was justified in adopting a final Standard which, unlike the proposal, prohibited the use of respirators for compliance purposes, the Court interpreted the new Standard to permit use of respirators for compliance purposes when engineering controls and work practices are not feasible, concluding that the change was intended merely to shift the burden of proof and therefore did not require special notice.

B. Substantive Issues

1. Medical Removal Protection. Noting that OSHA has "almost unlimited discretion to devise means to achieve the congressionally mandated goal" of ensuring worker safety and health, the majority concluded that the agency has ample authority under the OSHA Act to adopt a medical removal protection (MRP) provision which requires earnings protection and job security for workers removed from exposure. The court found no contrary legislative intent, despite the fact that (a) the OSHA Act of 1970, unlike the Federal Coal Mine Health and Safety Act of 1969, did not authorize earnings protection, and (b) Congress during the debate on the OSHA Act rejected an amendment that would have created a form of earnings protection.

When analyzing that Section of the OSHA Act which forbids the agency from adopting rules that "affect" or "supersede" workmen's compensation programs, the majority admitted that the MRP provision in the Standard would have the "practical" effect of preempting workmen's compensation laws for all disabled lead workers. The majority nevertheless rejected industries' arguments on the ground that, whatever the "practical" effect, the Standard left state workmen's compensation programs intact as a "legal" matter. The majority also rejected the claim that the MRP provision impermissibly interferes with federal labor legislation by regulating wages and jobs, items that are mandatory subjects of collective bargaining under federal law. "Remedial welfare and labor laws," the Court concluded, "merit liberal construction."

Having found the MRP program within the statutory power of OSHA, the majority then held that the regulation was a reasonable exercise of OSHA's legitimate authority because MRP encourages cooperation with the medical surveillance program by workers who would otherwise fear economic repercussions if they were found to have an impermissibly high blood-lead level.

2. Multiple Physician Review. The majority similarly upheld a "multiple physician review procedure" established by the Standard. Under that procedure, an employee who for any reason is dissatisfied with any finding or determination by the company physician may (at the company's expense) obtain an opinion from a second physician and, if the two physicians disagree, may have the dispute resolved (again at the company's expense) by a third physician. The Court concluded that the multiple physician review mechanism furthers OSHA's legitimate goals in two ways: first, it decreases the chances of a single erroneous diagnosis becoming the final medical determination and thereby directly enhances worker health; and, second, it increases employee confidence in the physicians who examine them for lead disease and therefore encourages their cooperation in the program. The Court's ruling was based, in part, upon OSHA's conclusion that the record contained evidence of unsound, unethical and even harmful practices (including prophylactic chelation therapy) by company physicians.

3. Access to Medical Records. Under the Standard, medical records compiled on lead-exposed employees must be made available to the employee himself and, without his permission, not only to OSHA and to the Director of the National Institute for Occupational Safety and Health but also to union officials as the employee's "authorized" representatives. The Court, while expressing doubts about the standing of industry petitioners to

LIA03288

raise the issue, concluded that this provision did not violate the employees' constitutional right to privacy because the "medical records" to which union officials have access do not include the intimate results of physicians' examinations. As construed by the majority, the "medical records" that a union may see are limited to impersonal information such as the date of each removal from and return to an exposed work situation, the method by which the removal is accomplished, and the reason for the removal when removal is based upon an elevated blood-lead level.

C. Permissible Exposure Limit

In analyzing whether the Standard set by OSHA was "reasonably necessary or appropriate to provide safe and healthful employment and places of employment" and "most adequately assures . . . that no employee will suffer material impairment of health or functional capacity," the majority began by discussing, and then distinguishing, the benzene case, Industrial Union Department v. American Petroleum Institute, 100 S.Ct. 2844 (1980).

The plurality opinion in the benzene case, the Court acknowledged, requires OSHA to show, by substantial evidence, that workers face a "significant health risk" from current exposure levels and that such risk can be eliminated or reduced by lowering the permissible level. OSHA had failed to carry its burden with regard to this threshold showing in the benzene case, but the majority found no such defect in the lead case. Reviewing the evidence, the Court emphasized that, rather than relying on rigid and categorial assumptions about health risks, the agency had "amassed voluminous evidence of the specific harmful effects of lead at particular blood-lead levels, and [had] correlated these blood-lead levels with air-lead levels." In these circumstances, the Court concluded, OSHA "clearly" met the requirements set forth in the benzene case.

The majority then considered whether the Standard--which, as OSHA conceded, was designed to protect workers from "subclinical effects" of lead--was authorized by the agency's statutory mandate to ensure that workers do not suffer "material impairment of health". In upholding the agency's actions, the Court held that the term "material impairment of health" encompasses subclinical effects "that lie on a continuum shared with overt lead disease," and that OSHA had presented ample evidence both of the existence of such subclinical effects and their relation to clinical lead disease, and of the efficacy of reducing workers' blood-lead concentrations to the 40 ug/100g level which OSHA had selected as the biological criterion.

The Court was similarly deferential in examining the agency's model for correlating blood-lead levels with air-lead levels, a model used by OSHA in satisfying its burden of showing that the new PEL was "reasonably necessary" to prevent subclinical effects of lead. After finding that the scientific testimony on the validity of the model was in conflict, the Court held that, when OSHA presents "scientifically respectable", if controversial, evidence, "the court must not second-guess the particular way the agency chooses to weigh the conflicting evidence or resolve the dispute."

D. Feasibility

Under the OSHA Act, OSHA must establish that its standards are both technologically feasible and economically feasible. The majority began its analysis of the feasibility of the Standard by positing a two-phase approach to the test. During pre-enforcement review of an OSHA standard, a court must determine whether there is substantial evidence to justify a "presumption" that the standard will be feasible; if the standard is upheld initially, a court may test feasibility again at a later date when reviewing orders in temporary variance or enforcement proceedings. In such later proceedings, the Court concluded, the employer bears the burden of proving the standard technologically infeasible for himself, or technologically or economically infeasible for the industry as a whole.

Applying the first part of this approach to the lead Standard, the majority concluded that OSHA had in most instances met its burden of demonstrating that the presumption of feasibility was justified. This burden

LIA03290

does not, the Court held, require a showing that the standard is certainly feasible for all firms at all times in all jobs. Rather, OSHA must merely show (a) as to technological feasibility, that there is a reasonable possibility that the typical firm will be able to meet the PEL in most of its operations, and (b) as to economic feasibility, that the costs of compliance (which, the Court held, need not be estimated in any precise manner or be weighed against worker benefits) will not threaten the existence or competitive structure of the industry as a whole.

The agency is statutorily required to meet this burden on the basis of the "best available evidence". owever, the majority interpreted the legislative directive to require only that OSHA "make reasonable predictions on the basis of 'credible sources of information'" in the record, not that the agency must consider the best scientific evidence reasonably available from all sources.

Applying these precepts to the record in the lead case, the Court found that OSHA had adequately demonstrated the feasibility of the Standard for primary smelters, secondary smelters, gray-iron foundries, printing plants, and battery, can, ink, paint and coatings, wallpaper and electronics manufacturers. As to most other industries--including nonferrous foundries, pigment manufacturers, shipbuilders, auto manufacturers, zinc and copper smelters, and the telecommunications industry--the Court directed that OSHA conduct supplemental hearings within six months to determine whether the Standard is feasible for such industries.

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