

KELLER AND HECKMAN

SECRETARY OF LABOR vs. AMERICAN CYANAMID COMPANY
OSHRC Docket No. 86-681

**Summary of Oral Argument
Before the
Occupational Safety and Health Review Commission**

On February 21, 1991, the Occupational Safety and Health Review Commission (OSHRC) heard oral arguments from the American Cyanamid Company and the Secretary of Labor in the above-captioned matter. The two primary issues presented during oral argument were: (1) whether the Hazard Communication Standard requires "target organ warnings" on container labels and what constitutes an "appropriate hazard warning under the Standard; and (2) the extent to which the Hazard Communication Standard applies to chemicals to which employees are not exposed to under normal conditions of use or foreseeable emergencies.

American Cyanamid was represented by Kenneth Stark, Esq., Duvin, Cahn & Barnard. OSHA was represented by Orlando Pannochia, Esq., Office of the Solicitor. The Review Commission panel was composed of Chairman Edwin G. Foulke, Jr., and Commissioners Velma Montoya and Donald G. Wiseman.

American Cyanamid's Oral Argument

Target Organ Effects and Labels

Cyanamid began its argument by providing a brief overview of the case. Cyanamid stated that the Hazard Communication Standard (HCS) was issued in 1983 when the Secretary rejected a specification standard that was proposed earlier in 1981. The HCS was intended to be a performance oriented standard that relied upon "a simple container warning" and more detailed information on the material safety data sheet (MSDS). The simple label approach was chosen so that existing, proven labeling practices could continue to be used.

Cyanamid stated that the Secretary relied heavily upon Appendix A of the Standard in this case. The Appendix identifies health hazards that must be evaluated during the hazard determination process. Appendix A, however, does not contain any suggested label language. In accordance with the performance orientation of the standard, no specific label language would be required. Appendix A did list two substances that were regulated by OSHA in substance-specific standards:

asbestos and [dibromochloropropane (dbcp)]^{1/}. Each was listed as having a target organ effect and signs and symptoms of exposure. However, the warning labels that were required for those two substances at the time the HCS was issued, did not contain target organ language, nor did they contain signs and symptoms of exposure but rather, for asbestos, merely contained a general warning that it "could cause serious bodily harm."

Cyanamid emphasized that Appendix A identifies the kinds of hazards that must be evaluated. Cyanamid did evaluate the hazards and specifically the hazards associated with the organic solvents at issue: vinyl toluene, styrene and butanol. Cyanamid's toxicologists performed literature searches to determine what hazards these solvents presented. Once the hazards were identified, Cyanamid's labeling committee applied the principles of the ANSI standard to determine the warning language. The toxicologists found that there were "central nervous system effects", "central nervous system depression" as the hazards. The health hazard determination then went to Cyanamid's labeling committee to determine the label language.

The Hazard Communication program said that the label should be only a simple warning and information concerning the symptoms or effects of over-exposure is to be communicated on the MSDS. Cyanamid's MSDS did include target organ effects. Cyanamid affirmed that it was the duty of its labeling committee to try to communicate (labeling information) simply. Moreover, that was the proven industry practice at the time the HCS was issued. The Secretary specifically stated that proven industry practices could be retained. It was the reason why the prior standard, which required signs and symptoms of exposure on the product label, was rejected."

Cyanamid does not believe that the Standard is ambiguous with respect to how the information on symptoms of over-exposure are to be transmitted; "it is very clear . . . the material safety data sheet." Cyanamid further emphasized that it is a specific requirement in the Standard that the MSDS have signs and symptoms of exposure listed and in devising this Standard, the Secretary said, "we are not going to make signs and symptoms of exposure mandatory on product labels. That was the old scheme and . . . specifically rejected. Rather, the label was supposed to be a simple warning . . . an immediate

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warning and a reminder of the more detailed information that is on the MSDS."

Cyanamid affirmed that the words "harmful if inhaled" convey the hazards of the chemicals in the containers in accordance with the Standard. The hazard is "the hazard of harm". It does advise of the health hazard, "harmful if inhaled" as opposed to physical hazards, which also must be on the label. But it does so in a simple way, understandable to employees. This is Cyanamid's primary contention and the Secretary offered no evidence, whatsoever, that the label "harmful if inhaled," was not effective as an immediate warning and as a reminder of more detailed information. "Harmful if inhaled" says it harms you if you inhale it. The employee says, "what harm?" Look to the MSDS. A simple reminder.

Cyanamid also emphasized that the Secretary specifically advised that he was issuing a performance standard which allows individual employers to decide in each case what the appropriate method of complying with the standard would be.

With regard to the issue of Cyanamid's Glaskyd molding compound,^{2/} Cyanamid contended that while its product labels did contain warnings, no hazard warning is required because there is no possibility that respirable silica or talc could be released under normal conditions of use by downstream users. Cyanamid stated that this represents "voluntary abatement procedures" used by an employer and is not evidence that some standard is violated or a condition exists that would require abatement. "The mere fact that it says "harmful if inhaled" on the label is not evidence that those substances do cause significant risks. Cyanamid explained that this was voluntary abatement and that the company prepares its labels to meet local as well as national labeling standards and product liability concerns. Cyanamid chose to provide the warnings on its labels as liability protection and/or to comply with local right-to-know requirements.

Cyanamid's Molding Compounds

The second issue concerns whether the Secretary must prove, in each case, that the chemical in question is one to which employees may be exposed under normal conditions of use and foreseeable emergencies. Cyanamid argued that the Secretary failed to prove that amorphous silica and talc are

^{2/} A thermoset molding compound containing amorphous silica and talc.

hazardous chemicals within the meaning of the HCS, and yet, § 1910.1200(d)(3) states that chemical manufacturers shall treat chemicals listed in Table Z-1 of 1910.1000 and the ACGIH/TLV booklet as sources in establishing that chemicals are hazardous. Cyanamid stated that these sources are seen as a "red flag" to industry and tell employers that these are chemicals that should be evaluated for their hazards. Cyanamid emphasized that the Standard does not just require identification of hazardous chemicals, but requires that the manufacturer determine what the hazards are and then determine whether those hazards are significant enough to warrant a warning label. Cyanamid clarified that when the company stated "no hazard" what it meant is that there is no hazard that requires a warning label. Moreover, silica and talc were identified on the MSDS as being hazardous components.

Cyanamid affirmed that the chemicals identified in Section 1910.1200(d)(3)(1) and (2) from the Z-Table and from the TLV indices are not per se hazardous. "This is only the starting point for the hazard determination." The chemical manufacturer then has to decide what hazards are present; the listing on the ACGIH/TLV indices and Z-Table does not advise what the hazards are. The hazards are then identified on the MSDS and when significant hazards are present they should be communicated or warned on the label.

Cyanamid argued that OSHA's compliance directive (CPL 2-2.38) totally ignores the performance orientation of the Standard. The CPL attempts to convert what the Secretary said at the time the standard was issued (performance oriented, simple warning label) into the kind of specification warning label, that was specifically rejected by the Secretary when the Standard was issued. "The performance oriented standard was proposed because it would permit existing labeling practices to continue to be used."

Cyanamid also argued that the regulated community had no indication at that point that the Secretary believed that target organ identification must be on a label. In addition, the regulated community was not directly advised of this compliance directive. The directive was only sent to OSHA area offices, it was not published; the only way [employers] would know about the directive is if they subscribed to reporting services. Cyanamid opined that the directive is merely an expression of what OSHA has on its mind . . . the compliance directive really has no more weight. . . ."

Appropriate Hazard Warning

The Commissioners questioned Cyanamid as to why there were no labels on the Fibercore containers. Cyanamid admitted that at the time of the OSHA inspection, the company was in violation for Fibercore containers. The inspection took place twelve (12) days after the Standard became effective and new labels and MSDSs were in the process of being created. The issue that the parties dispute is not the absence of a warning on Fibercore but rather, whether the warning "harmful if inhaled" is appropriate under the HCS.

Cyanamid's revised Fibercore labels did convey "harmful if inhaled" and did have the central nervous system depression warnings that Cyanamid thought was appropriate. Although OSHA insists that "central nervous system depression" would be appropriate, Cyanamid rejected that as an option because language was not simple and more importantly, "central nervous system depression" is a meaningless term. Cyanamid further stated that it would argue whether a warning for a substance that causes kidney damage if labeled "warning, may cause renal disfunction" would be appropriate--again, a meaningless term. Cyanamid emphasized that the Secretary has never explained how you determine whether a particular warning is appropriate.

Cyanamid urged the Commission to look to the language of the Standard for appropriate hazard warnings, to look to the preamble: a simple warning, an immediate warning. . . with a reminder that more detailed information is on the MSDS. Then the Commission should look to industry practice to determine what is appropriate. The Secretary stated that HCS would preserve good industry practice . . . simple warning, understandable to a laymen.

Cyanamid maintained that although the company uses the same warning for both its Glaskyd and Cyglas products, and the average employee may initially believe they are equally hazardous, Cyanamid does not believe one should have more information on the label than another. The MSDS and training are intended to convey that information. The Secretary decided that the label was not going to be the sole source of this information . . . the MSDS and training under the Standard are intended to advise the employee on how to know which of those two substances causes him more harm.

Cyanamid affirmed that its labeling system does provide for different warnings for chemicals that are carcinogens. In addition, where an actual target organ effect does exist, [as defined by the ANSI standard] Cyanamid includes a warning on the label.

With regard to whether the Secretary must prove in each case that a particular chemical is one to which employees may be exposed under normal conditions of use and foreseeable emergencies, i.e., amorphous silica and talc in Cyanamid's molding compounds, Cyanamid stated that at the time the case was litigated, the Secretary's instruction was that it fit within the article exemption: the chemicals cannot be released under normal conditions of use and foreseeable emergencies. During the trial the Secretary stated, "well, we can't anticipate what the normal conditions of use and foreseeable emergencies are and so we can't say what it is." The compliance officer said he doesn't know what happens with the substance when it goes into other plants, so it must be released. Cyanamid stressed, "that presumption, that any chemical is one to which employees may be exposed under normal conditions of use or foreseeable emergencies, is not permitted." The Secretary, must prove that the chemical is released.

Cyanamid stated that the Commission should take notice that in more recent compliance directives, the Secretary has more properly characterized this chemical situation. The Secretary has said that where a hazardous substance is bound up in a product, and cannot be released under normal conditions of use and foreseeable emergencies, that substance is not covered by the Standard. This is no longer referred to as an article exemption. Cyanamid further argued that there is no evidence in the record that there is any circumstances under which the two substances, amorphous silica and talc, may be released from the molding compounds. Cyanamid clarified that they are not claiming that these substances fall under the definition of an article but rather, they are not chemicals covered by the Standard. The only chemicals covered are those to which an employee may be exposed under normal conditions of use and foreseeable emergencies. Cyanamid emphasized that this is the valid basis upon which no warnings are required for those two substances. Moreover, the burden of proof is on the Secretary for proving the release of the chemical.

Secretary of Labor's Oral Argument

Target Organ Effects and Labels

The Secretary of Labor (OSHA) began its oral argument by stating that the term "appropriate hazard warning", as promulgated under the Standard, intended to impose target organ warnings on container labels of hazardous chemicals shipped downstream. This was OSHA's intent even before the Agency

issued its directive. The directive merely clarified what was already in the Standard.

OSHA emphasized that the HCS defines appropriate hazard warning as specifically stating that the health hazards of the chemical must be conveyed on a label. The definition references Appendix A which OSHA believes is where the target organ effects requirement originated. OSHA also stated that the hazard determination provisions also reference Appendix A in that all hazards that have been determined to be health hazards, must be conveyed.

The Commissioners asked OSHA to justify the changes to the '81 and '82 preambles if it was the Agency's intent to require target organ label warnings all along since the '81 preamble suggested this intent but then the proposal was withdrawn and the '82 preamble advocates a performance oriented approach. OSHA responded that the '81 proposal was specifically "a labeling hazard identification proposal. . . [OSHA] abandoned this approach for a more comprehensive approach to Hazard Communication which included labeling, MSDSs, training. . . At no time did OSHA abandon its position that target organ effects should be conveyed on a label."

OSHA further emphasized that at no time did they believe that a simple warning should be confused with the simplest warning or a warning as ineffective as "harmful if inhaled". The intent is to convey signs and symptoms. "All OSHA wants to see is the specific target organ effect mentioned on the label."

The Commissioners concurred that it is clear that OSHA wanted a target organ warning. However, they asked OSHA why didn't the Secretary state, "Appropriate hazard warnings, including target organ warnings?" --Why didn't OSHA tell employers this? OSHA responded that they didn't tell employers this in the definition of hazard warning, but they did in the sense that it relates to Appendix A.

The Commissioners questioned OSHA repeatedly on why it included "sign or symptom of exposure" in the requirements for MSDSs but not for labeling if OSHA did intend for target organ effects to be identified on the label. OSHA stated it was not included in the labeling provisions to give employers some leeway in the kind of language they can transfer onto a label.

OSHA affirmed that Appendix A gives no indication that the target organ warnings must be conveyed on the container labels as opposed to the MSDS or the employer's training program. OSHA clarified this by stating further that it is,

not exclusively a provision that applies to the MSDS--it applies to the Standard as a whole. Moreover, OSHA affirmed that as long as the information conveyed the hazard, OSHA has no qualms with the method the employer chooses to convey this information.

OSHA then attempted to retract this statement by saying that the target organ effects have to be on the label and in support of this position explained that you have to look beyond the definition of hazard warning and look at the health effects referenced in Appendix A. The Appendix lists the categories of target organ effects. The Appendix does not specifically tell employers what to do, but provides examples of viable health effects from the chemicals that should be transferred onto the label.

OSHA added that it does make a difference which method is used to target organ effects because the label is seen by all, training needs to be conducted only once and when new materials are introduced, and the MSDS is only available when requested. The Commissioners questioned OSHA about workplace labeling of "immediate use" containers which are not required to be labeled and whether the label on the 55 gallon chemical container storing the substance that is being transferred to smaller containers is an appropriate warning. The Commission attempted to get OSHA to admit that this type of situation creates a greater dependence on MSDSs and workplace training; however, OSHA did not directly respond to the line of questioning.

Cyanamid's Molding Compounds

OSHA's position is that the molding compounds Cyanamid ships downstream are raw materials. Each of the compounds contains a general precautionary warning. Section 6(b)(7) prescribes the use of labels or other appropriate forms of warning as are necessary to ensure that employees are apprised of all hazards to which they are exposed. Cyanamid's labels should have included the warnings, "May cause dizziness or nauseous, may cause drowsiness, and may cause loss of consciousness." These are effects on the body system as a whole and these are the effects referenced in Appendix A for the target organ effect categorization. Dizziness and drowsiness are very relevant target organ effects.

OSHA stated that Cyanamid's toxicologist admitted during trial testimony that the molding compounds would be ground and polished and release airborne substances. OSHA cites the General Carbon Company decision and said that the Standard presumes a risk--once the chemicals have been found to

be per se hazardous; i.e., butanol, vinyl chloride, toluene, styrene, silica and talc, the Standard presumes they will be released downstream. The only way a chemical manufacturer can defend against this automatic presumption is if they claim their particular substance is an article. However, even in General Carbon the court said, "The Standard does not create [a rebuttable] presumption." . . . so even when silica and talc are somehow bound in a "tacky" substance, that is completely against what the HCS wants promoted --full disclosure.

OSHA emphasized that Cyanamid did not analyze the chemicals in their molding compounds as a whole and under the Standard there is a presumption that the chemical components have the same intrinsic hazard properties of the individual components comprising 1% or more of the mixture.

OSHA added that there have been five cases in addition to General Carbon finding that OSHA's interpretation of the HCS requiring the listing of target organ effects on containers is correct: Hilton Davis Chemical Company, Monsanto, Dow, and Emery Chemicals.

Appropriate Hazard Warning

OSHA concurred that "harmful if inhaled" is a performance oriented statement. However, even if the Commission finds that the 1983 Standard did not require target organ effect warnings on labels, and if the Commission rejects OSHA's compliance directive, Cyanamid's labels are still not appropriate. "Harmful if inhaled" is not an effective hazard warning under any measuring --including industry practice.

OSHA suggested that an employer can determine an appropriate warning by reading the term appropriate to mean "appropriate to the intrinsic properties of the hazardous chemical". The intrinsic properties are in the health effects section of the Standard which also references Appendix A and the target organ categorization. This provides examples of what OSHA finds to be permissible.

The Commission questioned OSHA about the labeling requirements under the 1982 proposal and the 1983 final rule. Specifically, where the '82 proposal states, "the label requirements are very much performance oriented in that most existing labeling systems could be used to satisfy the requirements". . . and the 1983 final rule also stated that the labels are to serve as an immediate warning and as a reminder of the more detailed information under the proposal is sufficient and remains the same under the final standard." OSHA believes that this language communicates that the MSDS is

- 10 -

the central format for conveying the hazards but OSHA does not believe this communicates "do not convey the health effect information for the MSDS on the label."

OSHA argued that Cyanamid chose to selectively ignore the language in the preamble that states that performance orientation means that the labels must meet the minimal information requirements of the Standard, not of ANSI, regardless of format. This meant industry would not have to follow a different label format.

OSHA affirmed that the Agency interpreted the term "appropriate hazard warning" to include target organ effects sometime after promulgation of the Standard and this was conveyed in the directive 2-2.38. The distribution of the directive was to trade associations and OSHA compliance officers. OSHA indicated that Cyanamid is a member of CMA.

OSHA stated that the MSDS should not be the transmittal focus of health hazard effects as claimed by Cyanamid. The Standard contains no suggestion that a health hazard required to be identified on the MSDS can be omitted entirely from the label. "Given the label's function in alerting employees, it would make little sense to insist that a particular chemical be identified on the MSDS while imposing no corresponding label requirement."

The Commission again questioned OSHA repeatedly about why the Agency is attempting to transform a performance oriented labeling requirement into a specification requirement that was considered and rejected by the Secretary in 1981 and why the target organ effects language was not included in subpart (f) [labeling provisions] when it is in fact included in subpart (g) [MSDS provisions]. OSHA responded that the problem with (g) is that it has a reference to health effects, but in a MSDS there are all kinds of formats. . . the particular target organ effects that need to be transferred on to the label may not appear under the MSDS health effects section but rather, appear under the exposure indices or emergency information.

American Cyanamid's Rebuttal

Cyanamid stated that the focus of the 1981 proposed standard was on the label. In 1982, the focus was on the MSDS.

Cyanamid responded to OSHA's reference to the General Carbon case and explained that General Carbon did not deal with a "no exposure" situation; General Carbon admitted there was

VEV-149625

exposure and that is where the presumption of harm comes in. Cyanamid's case centers on evidence of no exposure. OSHA's argument that there is an irrebuttable presumption, or even a rebuttable presumption that there is exposure, goes totally against the Agency's most recent compliance directive which states, "the terminology exposed under normal conditions of use or in a foreseeable emergency excludes products that do not meet this condition", i.e., a chemical that is inextricably bound in a mixture presents no potential for exposure and would not be covered.

With regard to OSHA's statements that "May cause drowsiness" was an appropriate label warning for a substance that causes dizziness, drowsiness, fatigue, nausea, headaches, etc., if the label says "May cause drowsiness" and the employee becomes nauseous, he does not associate the nausea with exposure to the chemical because the label tells him he will experience drowsiness. The employee thinks that he does not need to go to the MSDS because the label tells him everything. Cyanamid believes this is an inadequate warning.

Finally, Cyanamid clarified that it used the example of asbestos because a reading of [asbestos under] Appendix A could be interpreted to require identification of target organ effects on the label. This is the interpretation that Cyanamid relied upon to determine target organ requirements. The label for asbestos, however, does not mention any target organ effects or any signs or symptoms of exposure. The label simply says, "may cause serious bodily harm."

Secretary of Labor's Rebuttal

OSHA responded to Cyanamid's claim that its molding compounds are somehow inextricably bound and stated that Cyanamid did not analyze these chemicals as a mixture. As such, the individual components, comprising 1% or more of the mixture, are assumed to present certain hazards.

In addition, OSHA mentioned certain statements by Cyanamid's toxicologist during the trial to illustrate that the company's position on including target organ effects on labels is that there has to be a irreversible, quantifiable showing of significant risk before these are identified on labels.

OSHA also stated that the main hazard addressed in the central nervous depression issue is "may cause drowsiness." OSHA believes drowsiness is the preeminent hazard and therefore the one to be transferred onto the label.

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Cyanamid stated that the Secretary relied heavily upon Appendix A of the Standard in this case. The Appendix identifies health hazards that must be evaluated during the hazard determination process. Appendix A, however, does not contain any suggested label language. In accordance with the performance orientation of the standard, no specific label language would be required. Appendix A did list two substances that were regulated by OSHA in substance-specific standards:

asbestos and [dibromochloropropane (dbcp)]^{1/}. Each was listed as having a target organ effect and signs and symptoms of exposure. However, the warning labels that were required for those two substances at the time the HCS was issued, did not contain target organ language, nor did they contain signs and symptoms of exposure but rather, for asbestos, merely contained a general warning that it "could cause serious bodily harm."

Cyanamid emphasized that Appendix A identifies the kinds of hazards that must be evaluated. Cyanamid did evaluate the hazards and specifically the hazards associated with the organic solvents at issue: vinyl toluene, styrene and butanol. Cyanamid's toxicologists performed literature searches to determine what hazards these solvents presented. Once the hazards were identified, Cyanamid's labeling committee applied the principles of the ANSI standard to determine the warning language. The toxicologists found that there were "central nervous system effects", "central nervous system depression" as the hazards. The health hazard determination then went to Cyanamid's labeling committee to determine the label language.

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Cyanamid does not believe that the Standard is ambiguous with respect to how the information on symptoms of over-exposure are to be transmitted; "it is very clear . . . the material safety data sheet." Cyanamid further emphasized that it is a specific requirement in the Standard that the MSDS have signs and symptoms of exposure listed and in devising this Standard, the Secretary said, "we are not going to make signs and symptoms of exposure mandatory on product labels. That was the old scheme and . . . specifically rejected. Rather, the label was supposed to be a simple warning . . . an immediate

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Cyanamid affirmed that its labeling system does provide for different warnings for chemicals that are carcinogens. In addition, where an actual target organ effect does exist, [as defined by the ANSI standard] Cyanamid includes a warning on the label.

With regard to whether the Secretary must prove in each case that a particular chemical is one to which employees may be exposed under normal conditions of use and foreseeable emergencies, i.e., amorphous silica and talc in Cyanamid's molding compounds, Cyanamid stated that at the time the case was litigated, the Secretary's instruction was that it fit within the article exemption: the chemicals cannot be released under normal conditions of use and foreseeable emergencies. During the trial the Secretary stated, "well, we can't anticipate what the normal conditions of use and foreseeable emergencies are and so we can't say what it is." The compliance officer said he doesn't know what happens with the substance when it goes into other plants, so it must be released. Cyanamid stressed, "that presumption, that any chemical is one to which employees may be exposed under normal conditions of use or foreseeable emergencies, is not permitted." The Secretary, must prove that the chemical is released.

Cyanamid stated that the Commission should take notice that in more recent compliance directives, the Secretary has more properly characterized this chemical situation. The Secretary has said that where a hazardous substance is bound up in a product, and cannot be released under normal conditions of use and foreseeable emergencies, that substance is not covered by the Standard. This is no longer referred to as an article exemption. Cyanamid further argued that there is no evidence in the record that there is any circumstances under which the two substances, amorphous silica and talc, may be released from the molding compounds. Cyanamid clarified that they are not claiming that these substances fall under the definition of an article but rather, they are not chemicals covered by the Standard. The only chemicals covered are those to which an employee may be exposed under normal conditions of use and foreseeable emergencies. Cyanamid emphasized that this is the valid basis upon which no warnings are required for those two substances. Moreover, the burden of proof is on the Secretary for proving the release of the chemical.

Secretary of Labor's Oral Argument

Target Organ Effects and Labels

The Secretary of Labor (OSHA) began its oral argument by stating that the term "appropriate hazard warning", as promulgated under the Standard, intended to impose target organ warnings on container labels of hazardous chemicals shipped downstream. This was OSHA's intent even before the Agency

issued its directive. The directive merely clarified what was already in the Standard.

OSHA emphasized that the HCS defines appropriate hazard warning as specifically stating that the health hazards of the chemical must be conveyed on a label. The definition references Appendix A which OSHA believes is where the target organ effects requirement originated. OSHA also stated that the hazard determination provisions also reference Appendix A in that all hazards that have been determined to be health hazards, must be conveyed.

The Commissioners asked OSHA to justify the changes to the '81 and '82 preambles if it was the Agency's intent to require target organ label warnings all along since the '81 preamble suggested this intent but then the proposal was withdrawn and the '82 preamble advocates a performance oriented approach. OSHA responded that the '81 proposal was specifically "a labeling hazard identification proposal. . . [OSHA] abandoned this approach for a more comprehensive approach to Hazard Communication which included labeling, MSDSs, training. . . At no time did OSHA abandon its position that target organ effects should be conveyed on a label."

OSHA further emphasized that at no time did they believe that a simple warning should be confused with the simplest warning or a warning as ineffective as "harmful if inhaled". The intent is to convey signs and symptoms. "All OSHA wants to see is the specific target organ effect mentioned on the label."

The Commissioners concurred that it is clear that OSHA wanted a target organ warning. However, they asked OSHA why didn't the Secretary state, "Appropriate hazard warnings, including target organ warnings?" --Why didn't OSHA tell employers this? OSHA responded that they didn't tell employers this in the definition of hazard warning, but they did in the sense that it relates to Appendix A.

The Commissioners questioned OSHA repeatedly on why it included "sign or symptom of exposure" in the requirements for MSDSs but not for labeling if OSHA did intend for target organ effects to be identified on the label. OSHA stated it was not included in the labeling provisions to give employers some leeway in the kind of language they can transfer onto a label.

OSHA affirmed that Appendix A gives no indication that the target organ warnings must be conveyed on the container labels as opposed to the MSDS or the employer's training program. OSHA clarified this by stating further that it is

not exclusively a provision that applies to the MSDS--it applies to the Standard as a whole. Moreover, OSHA affirmed that as long as the information conveys the hazard, OSHA has no qualms with the method the employer chooses to convey this information.

OSHA then attempted to retract this statement by saying that the target organ effects have to be on the label and in support of this position explained that you have to look beyond the definition of hazard warning and look at the health effects referenced in Appendix A. The Appendix lists the categories of target organ effects. The Appendix does not specifically tell employers what to do, but provides examples of viable health effects from the chemicals that should be transferred onto the label.

OSHA added that it does make a difference which method is used to target organ effects because the label is seen by all, training needs to be conducted only once and when new materials are introduced, and the MSDS is only available when requested. The Commissioners questioned OSHA about workplace labeling of "immediate use" containers which are not required to be labeled and whether the label on the 55 gallon chemical container storing the substance that is being transferred to smaller containers is an appropriate warning. The Commission attempted to get OSHA to admit that this type of situation creates a greater dependence on MSDSs and workplace training; however, OSHA did not directly respond to the line of questioning.

Cyanamid's Molding Compounds

OSHA's position is that the molding compounds Cyanamid ships downstream are raw materials. Each of the compounds contains a general precautionary warning. Section 6(b)(7) prescribes the use of labels or other appropriate forms of warning as are necessary to ensure that employees are apprised of all hazards to which they are exposed. Cyanamid's labels should have included the warnings, "May cause dizziness or nauseous, may cause drowsiness, and may cause loss of consciousness." These are effects on the body system as a whole and these are the effects referenced in Appendix A for the target organ effect categorization. Dizziness and drowsiness are very relevant target organ effects.

OSHA stated that Cyanamid's toxicologist admitted during trial testimony that the molding compounds would be ground and polished and release airborne substances. OSHA cites the General Carbon Company decision and said that the Standard presumes a risk--once the chemicals have been found to

VEV-149634

be per se hazardous; i.e., butanol, vinyl chloride, toluene, styrene, silica and talc, the Standard presumes they will be released downstream. The only way a chemical manufacturer can defend against this automatic presumption is if they claim their particular substance is an article. However, even in General Carbon the court said, "The Standard does not create [a rebuttable] presumption." . . . so even when silica and talc are somehow bound in a "tacky" substance, that is completely against what the HCS wants promoted --full disclosure.

OSHA emphasized that Cyanamid did not analyze the chemicals in their molding compounds as a whole and under the Standard there is a presumption that the chemical components have the same intrinsic hazard properties of the individual components comprising 1% or more of the mixture.

OSHA added that there have been five cases in addition to General Carbon finding that OSHA's interpretation of the HCS requiring the listing of target organ effects on containers is correct: Hilton Davis Chemical Company, Monsanto, Dow, and Emery Chemicals.

Appropriate Hazard Warning

OSHA concurred that "harmful if inhaled" is a performance oriented statement. However, even if the Commission finds that the 1983 Standard did not require target organ effect warnings on labels, and if the Commission rejects OSHA's compliance directive, Cyanamid's labels are still not appropriate. "Harmful if inhaled" is not an effective hazard warning under any measuring --including industry practice.

OSHA suggested that an employer can determine an appropriate warning by reading the term appropriate to mean "appropriate to the intrinsic properties of the hazardous chemical". The intrinsic properties are in the health effects section of the Standard which also references Appendix A and the target organ categorization. This provides examples of what OSHA finds to be permissible.

The Commission questioned OSHA about the labeling requirements under the 1982 proposal and the 1983 final rule. Specifically, where the '82 proposal states, "the label requirements are very much performance oriented in that most existing labeling systems could be used to satisfy the requirements". . . and the 1983 final rule also stated that the labels are to serve as an immediate warning and as a reminder of the more detailed information under the proposal is sufficient and remains the same under the final standard." OSHA believes that this language communicates that the MSDS is

- 10 -

the central format for conveying the hazards but OSHA does not believe this communicates "do not convey the health effect information for the MSDS on the label."

OSHA argued that Cyanamid chose to selectively ignore the language in the preamble that states that performance orientation means that the labels must meet the minimal information requirements of the Standard, not of ANSI, regardless of format. This meant industry would not have to follow a different label format.

OSHA affirmed that the Agency interpreted the term "appropriate hazard warning" to include target organ effects sometime after promulgation of the Standard and this was conveyed in the directive 2-2.38. The distribution of the directive was to trade associations and OSHA compliance officers. OSHA indicated that Cyanamid is a member of CMA.

OSHA stated that the MSDS should not be the transmittal focus of health hazard effects as claimed by Cyanamid. The Standard contains no suggestion that a health hazard required to be identified on the MSDS can be omitted entirely from the label. "Given the label's function in alerting employees, it would make little sense to insist that a particular chemical be identified on the MSDS while imposing no corresponding label requirement."

The Commission again questioned OSHA repeatedly about why the Agency is attempting to transform a performance oriented labeling requirement into a specification requirement that was considered and rejected by the Secretary in 1981 and why the target organ effects language was not included in subpart (f) [labeling provisions] when it is in fact included in subpart (g) [MSDS provisions]. OSHA responded that the problem with (g) is that it has a reference to health effects, but in a MSDS there are all kinds of formats. . . the particular target organ effects that need to be transferred on to the label may not appear under the MSDS health effects section but rather, appear under the exposure indices or emergency information.

American Cyanamid's Rebuttal

Cyanamid stated that the focus of the 1981 proposed standard was on the label. In 1982, the focus was on the MSDS.

Cyanamid responded to OSHA's reference to the General Carbon case and explained that General Carbon did not deal with a "no exposure" situation; General Carbon admitted there was

VEU-149636

- 11 -

exposure and that is where the presumption of harm comes in. Cyanamid's case centers on evidence of no exposure. OSHA's argument that there is an irrebuttable presumption, or even a rebuttable presumption that there is exposure, goes totally against the Agency's most recent compliance directive which states, "the terminology exposed under normal conditions of use or in a foreseeable emergency excludes products that do not meet this condition", i.e., a chemical that is inextricably bound in a mixture presents no potential for exposure and would not be covered.

With regard to OSHA's statements that "May cause drowsiness" was an appropriate label warning for a substance that causes dizziness, drowsiness, fatigue, nausea, headaches, etc., if the label says "May cause drowsiness" and the employee becomes nauseous, he does not associate the nausea with exposure to the chemical because the label tells him he will experience drowsiness. The employee thinks that he does not need to go to the MSDS because the label tells him everything. Cyanamid believes this is an inadequate warning.

Finally, Cyanamid clarified that it used the example of asbestos because a reading of [asbestos under] Appendix A could be interpreted to require identification of target organ effects on the label. This is the interpretation that Cyanamid relied upon to determine target organ requirements. The label for asbestos, however, does not mention any target organ effects or any signs or symptoms of exposure. The label simply says, "may cause serious bodily harm."

Secretary of Labor's Rebuttal

OSHA responded to Cyanamid's claim that its molding compounds are somehow inextricably bound and stated that Cyanamid did not analyze these chemicals as a mixture. As such, the individual components, comprising 1% or more of the mixture, are assumed to present certain hazards.

In addition, OSHA mentioned certain statements by Cyanamid's toxicologist during the trial to illustrate that the company's position on including target organ effects on labels is that there has to be a irreversible, quantifiable showing of significant risk before these are identified on labels.

OSHA also stated that the main hazard addressed in the central nervous depression issue is "may cause drowsiness." OSHA believes drowsiness is the preeminent hazard and therefore the one to be transferred onto the label.

VEV-149637