



Bell Laboratories

G.W.V.
File - 301.1

subject: Interpretations of the OSHA Asbestos
Standard's Medical Examination
Requirements for Low Exposures

date July 22, 1977

from: G. K. Preiser, Jr.

Memorandum For File

Section 1910.1001(j) of the OSHA General Standards requires employers to provide certain pre-employment, annual and separation medical examinations to all employees "in an occupation exposed to airborne concentrations of asbestos fibers..." By its express terms, this standard would appear to mandate medical examinations for all employees exposed to airborne asbestos in any measurable concentration, and not just if the asbestos concentrations meet or exceeds the present permissible exposure limit established by Section 1910.1001(b) which is no more than two fibers, longer than five micrometers in length, per cubic centimeter of air, on an 8-hour time-weighted average basis.

On January 19, 1977, in response to an inquiry from Mr. George Wilkening of Bell Laboratories, the outgoing OSHA Assistant Secretary of Labor, Dr. Morton Corn, interpreted the asbestos standard to require medical examinations only when employee exposures exceed 0.1 fibers greater than five microns in length per cubic centimeter (1/cc greater than five microns on an 8-hour time-weighted average basis). His policy in that regard derived support from a recommendation from NIOSH that the permissible exposure limit for airborne asbestos be fixed at this level. This recommendation was made in a NIOSH document titled Reexamination and Update of Information on the Health Effects of Occupational Exposure to Asbestos (December 1976).

On June 28, 1977, the United States Court of Appeals for the District of Columbia handed down its decision in the case of GAF Corporation v. Occupational Safety and Health Review Commission and Dunlop. In that case, the Commission had upheld a citation for violation of the standard requiring the provision of medical examinations to employees even though the exposures were to concentrations of asbestos below the permissible limit. The employer argued that the standard is arbitrary and unsupported by evidence, the standard is inconsistent with the Act, because examinations are medical research which should be paid for by HEW, the Secretary's

PLAINTIFF'S EXHIBIT

ATT-188

LLA 001086

interpretation of the standard is inconsistent with his approval of the California asbestos standard which requires medical exams only if employees may be exposed to concentrations greater than one fiber per cubic centimeter and the standard was not properly promulgated. The Court held that the Secretary correctly based the standard on reasonable scientific knowledge, including NIOSH studies. Although the proposed NIOSH standard contained a triggering level, NIOSH recommendations are merely advising and are not binding on the Secretary. It was ruled that although the Act permits HEW to pay for medical examinations for employees used as research, it is not obligated to pay for the medical examinations for employees required by health standards because they are not medical research. The Court rejected the employer's argument that the standard is inconsistent with the Secretary's approval of the California plan as "at least as effective as" OSHA, because the Secretary's approval was based on an evaluation of the entirety of the state's plan, and California provided a greater number of enforcement personnel; it was found that it was reasonable to expect that the state's enforcement would be "at least as effective as" OSHA's enforcement.

The Court also held that the employer could not raise the issue of whether the Secretary's actions in changing the regulation after the close of the comment period invalidated its promulgation because the employer had not raised the argument before the Commission. The Court further noted that the changing of a proposed rule does not automatically generate a new comment period; if changes in proposed standards without comments are not allowed, the standards promulgation process would never end.

While Circuit Judge MacKinnon concurred in the majority decision of Judge Robb and Justice Clark (now deceased), it was pointed out in the concurring opinion that the Secretary of Labor should clarify the regulation governing medical examinations so as to give other persons subject to the regulation reasonable notice of some measurable quantity of airborne asbestos the Commission intends to trigger the medical examination requirement. Merely to state that all employers must provide medical examinations whenever their employees are exposed to "concentrations" of asbestos fibers does not provide an ascertainable standard for those who wish to comply with the law.

GAF Corporation has petitioned for a rehearing in this case and a copy of their petition is attached. It is felt that, although Judge MacKinnon concurred with the majority, his concurring opinion

LLA 001087

forms a basis for reconsideration by the Court as a whole since it is felt that he should have filed a dissent.

G. K. Preiser, Jr.

G. K. Preiser, Jr.

GKP:msc

Enclosure

Copy to:

Mr. G. M. Wilkening 

LLA 001088