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PLAINTIFF'S EXHIBIT

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OSAHRC AFFIRMS JUDGE: WORKER EXPOSURE
TO AIRBORNE LEAD VIOLATES GENERAL DUTY

Review Commission Judge William E. Brennan's ruling that an employer's exposure of employees to excessive airborne concentrations of lead violated the general duty clause of the Occupational Safety and Health Act was affirmed by the commission, in a split decision.

The opinion, written by Commissioner James F. Van Namee, involved the Omaha, Nebraska, lead refining plant of American Smelting and Refining Company. Commission Chairman Robert D. Moran dissented.

To measure airborne concentrations of inorganic lead in the plant, the Labor Department installed portable air sampling devices on seven employees. The sampling devices used and procedures followed at the plant were in accord with procedures generally recognized and widely used by experienced industrial hygienists, Brennan found. The evidence from these samplings conclusively established that five of the seven employees were subjected to airborne concentrations of lead in excess of the Threshold Limit Values for lead adopted by the American National Standards Institute, in Brennan's opinion. The limit is 0.2 milligrams of lead per cubic meter. The Threshold Limit Value is the maximum airborne concentration of inorganic lead generally recognized and accepted as safe by individuals who are qualified and experienced in the field of industrial safety.

Brennan rejected the employer's argument that the lead in the work atmosphere did not constitute a recognized hazard because of American Smelting's preventive program, consisting of periodic hygiene surveys and inspections of its plant, physical examinations of exposed workers including the taking of biological samples of blood and urine and the reassignment of employees to other jobs when the lead content of their blood exceeds certain levels, and the use of approved respirators by employees in high lead concentration areas. According to Brennan, the employer sought only to minimize the adverse working conditions at its Omaha plant. The employer also waited until some of its employees had absorbed excessive and dangerous amounts of lead to take corrective measures, Brennan found. Brennan assessed a \$600 penalty for the violation.

In affirming the judge's decision, Van Namee, with the concurrence of Commissioner Timothy F. Cleary, rejected American Smelting's argument that Congress intended Section 5 (a)(1) of the Act to apply only to "recognized hazards" that are detectable by the basic human senses. "The Congress by rejecting the readily apparent hazards test and accepting the recognized hazards test in its place intended that the non-obvious hazards be within the scope of the general duty requirement," the majority stated. "There can be no question that non-obvious hazards include those that can

only be detected by instrumentation," Van Namee added.

Also relying on the legislative history of the Act, Chairman Moran stated that the general duty clause was and is, intended to cover only those situations for which no standard has been promulgated or for which it is impractical or unnecessary to promulgate a standard because of the obvious nature of a hazard. It was never intended to apply to the kind of condition involved in this case because, in Moran's opinion, a condition which can be detected only by utilizing technical testing devices cannot constitute a "recognized hazard."

Even if the Act were to permit a violation of Section 5 (a)(1) to be based upon the conditions which could only be revealed by the use of technical testing devices, the record in this case would not support the majority decision, according to Moran. In his opinion, the test results did not represent actual working conditions, the numerical averages did not establish facts, and hazards were presumed to exist from facts that did not show what would constitute an unsafe level of concentrations of lead.

**OSAHRC AFFIRMS RULING ON WORKER
EXPOSURE TO CHLORINE IN PLYWOOD FIRM**

An employer's argument that a standard is vague because it requires the wearing of protective equipment when the hazard warrants was dismissed in a case involving worker exposure to 40 parts per million of chlorine and chlorine dioxide gases, by a split decision of the Occupational Safety and Health Review Commission.

This decision by Commissioners James F. Van Namee and Timothy F. Cleary affirmed the ruling of Review Commission Judge John S. Patton in Georgia-Pacific Corporation, an Arkansas firm.

The employer is engaged in manufacturing plywood, paper, and particle board. In the manufacturing process chlorine dioxide is made in a generator from chlorine gas. In the generator room a relief valve allowed small "puffs" of chlorine gas to escape when excess pressures existed inside the generator. A worker on an eight-hour shift inspecting the generator during his rounds occasionally went near the relief valve for a brief period. The employer was cited for violation of 26 CFR 1910.261(b)(2) which provides that protective equipment and clothing shall be worn by the employee when "the extent of the hazard is such as to warrant the use."

The hazard in this case was exposure to 40 ppm of chlorine and chlorine dioxide gases. The employer's recognition of the dangers was indicated by the availability of portable canister-type respirators for use by workers. The workers, however, did not use them during the periodic inspections, and the majority held that persons of common intelligence in the industry should have known what the hazards were and provided for them.

Even though the exposure of workers to chlorine was difficult to define, the employer was found guilty of violating the standard and was assessed a penalty of \$600.

Moran Dissent

Chairman Robert D. Moran, in a vigorous dissent, held that the standard contained in 29 CFR 1910.261(b)(2) is so vague as to be unenforceable in the present case. The worker exposure was momentary, and there was no evidence to show that the workers were in fact exposed to the 40 ppm of chlorine discharged during the periodic "puffs" because of dispersion of chlorine in the air afterwards.

In the words of the standards it cannot be shown that mandatory wearing of respiratory equipment by inspecting workmen would have complied with the standard. The standard fails to make explicit what the proper clothing or equipment should be under what definite conditions which should necessitate their use.

REFERENCE:

The Bureau of National Affairs, Inc. "Occupational Safety and Health Reporter", pages 347 and 348.