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USA

COURT BATTLES LOOM OVER
OSHA'S ASBESTOS STANDARDS

By Richard M. Kendall

OSHA will be in Federal court this fall trying to fight off challenges from labor and industry to its recently revised asbestos standard for general industry and its new asbestos standard for the construction industry.

Under the two final standards, which were announced in June and became effective July 21, the permissible exposure limit (PEL) for asbestos is 0.2 fiber per cubic centimeter over an eight-hour time-weighted average, a tenfold reduction from the 2.0 fiber/cc PEL which had been in effect since 1976. OSHA had proposed either a 0.2 or 0.5 fiber/cc PEL in 1984.

The standards also establish a 0.1 fiber/cc "action level" which triggers a series of medical monitoring, employee training, and other requirements. The standards do not include short-term exposure limits.

OSHA's old asbestos standard applied to all industries. The new general industry standard applies to all industries except construction. The new construction standard for asbestos, the first health standard issued strictly for the construction industry, covers new construction, general building renovation, asbestos abatement, demolition, and contracted maintenance operations.

Both standards generally require that employers use engineering controls, where feasible, and work practices to reach the PEL. In some sanding and grinding operations in general industry, respirators may be used if feasible engineering controls fail to reduce exposures to below 0.5 fiber/cc. Employers are no longer permitted to rotate workers in and out of asbestos-exposed areas as a means of achieving compliance with the PEL. Both standards require employers to provide respirators to employees where feasible engineering controls are insufficient to reduce exposure levels to the PEL, to maintenance workers, and in emergencies. Where respiratory protection is necessary, the level of exposure determines the type of respirator that must be provided.

Under the new asbestos standards, "regulated areas" must be established where exposures are above the PEL. Only authorized persons wearing respirators are permitted in regulated areas. Eating, smoking, drinking, chewing gum or tobacco, and applying cosmetics are prohibited in regulated areas. In general industry and construction, signs must be posted to demark regulated areas. If asbestos removal, demolition, or renovation is being performed in a regulated area in construction, enclosures with negative pressure must be employed to assure that asbestos cannot escape to unregulated areas. The construction standard also requires that a "competent person," one capable of identifying asbestos hazards and with authority to take prompt corrective action to abate such hazards, be named to monitor compliance with the regulated area requirements. The construction standard provides exemptions from the regulated area requirements for small-scale, short-duration operations.

Both the general industry and construction standards require employers to provide workers exposed above the PEL with protective clothing and ensure that it is used, replaced, stored, disposed, and laundered properly. Change rooms, showers, and lunchrooms must also be provided when exposures exceed the PEL.

In general industry, employers must perform initial monitoring of employees who are, or may be expected to be, exposed to asbestos above the action level; no initial monitoring is required if the employer, using objective data, has determined that there are no asbestos exposures at or above the action level. Subsequent monitoring must be done with a frequency tied to the exposure level, and in no case may monitoring intervals be longer than six months for employees whose exposure can be foreseen to be above the action level. In construction, monitoring of asbestos levels must be done daily when exposures are above the PEL, but monitoring can be dispensed with in regulated areas where workers wear supplied air, positive pressure respirators.

Annual medical surveillance is required in general industry where employees' exposure exceeds the action level. In construction, surveillance is required when workers are exposed above the action level for 30 or more days per



Nash: OSHA failed to establish a significant risk of injury from asbestos at 0.2 fiber/cc.



**AFL-CIO's Seminario
said the union supports
EPA's proposal to
phase out asbestos use
because OSHA's new
standards leave workers
at risk.**

year, or if they wear negative-pressure respirators.

The new asbestos standards also require detailed annual training and education programs for workers exposed above the action level to warn them of asbestos hazards and inform them about safe work practices. Material safety data sheets, as prescribed in OSHA's hazard communication program, are to be used in the training and education programs under the asbestos standard. Warning signs are required in regulated areas, and warning labels must be affixed to raw materials, containers, scrap, debris, and products containing asbestos. Employers performing asbestos work on multi-employer construction sites are also required to inform other employers of the nature of the work, the existence of regulated areas, and work rules that pertain to them.

Legal challenges

OSHA's two new asbestos standards were immediately challenged in the Federal courts by organized labor groups, asbestos trade organizations, and two manufacturers affected by the standards.

The AFL-CIO's Industrial Union Department filed a petition for review of the general industry standard before the U.S. Court of Appeals for the District of Columbia Circuit, and the AFL-CIO Building and Construction Trades Department filed a petition for review of the construction standard before the same court.

The AFL-CIO said that after waiting for a decade for a revision of the asbestos standard, "asbestos-exposed workers deserve a stronger standard." The union pointed out that, even with the tenfold reduction in the PEL, seven of every 1,000

workers exposed to asbestos over a working lifetime will die of chronic exposure-related diseases (OSHA, in its preamble to the new standards, had stated that the 0.2 fiber/cc PEL left exposed workers at a significant risk of incurring asbestos-related disease, but the agency said that a lower PEL was infeasible.). The union had sought a 0.1 fiber/cc PEL during rulemaking.

The union also criticized OSHA's failure to include short-term exposure limits (STEL) in the standards. "This means workers who are involved with asbestos removal and maintenance operations can be exposed to high levels of asbestos in jobs of short duration with no protection required," the union complained. Sheldon Samuels, the Industrial Union Department's director, health, safety, and environment, in decrying the exclusion of a STEL, argued that peak asbestos exposures permitted under the standards can overwhelm the body's natural defense mechanisms, putting workers at extreme risk.

Samuels did, however, express gratitude to Secretary of Labor William Brock for moving the asbestos standards out of the Office of Management and Budget (OMB) where it had been lodged for some time. The budget office is accused by some critics of trying to delay release of the standards and to unduly influence their content in the course of its regulatory review. OMB has denied these allegations. Rep. John D. Dingell (D-MI), chairman of the House Subcommittee on Oversight and Investigations is investigating OMB involvement in asbestos rulemaking. (Dingell was also a party in a recently-decided case challenging OMB's authority in agency rulemaking; he is also trying to eliminate funding for OMB's regulatory review office. See "OSHA Communique" elsewhere in this issue.)

In another challenge to the OSHA standards, the Asbestos Information Association (AIA), a U.S. trade group, sought review of the standards before the U.S. Court of Appeals for the Fifth Circuit in New Orleans. Government Affairs Counsel Kenneth Nyquist said AIA believes accurate monitoring of asbestos exposures at the 0.2 fiber/cc level is not technically feasible and, therefore, will pose compliance difficulties.

The Asbestos Institute (AI), a Canadian non-profit organization funded in part by Canada's asbestos mining industry, petitioned to intervene in the AIA case. AI President Gary Nash contends that in formulating the standards, OSHA did not meet its court mandate of establishing a significant risk of injury from asbestos at 0.2 fiber/cc. He also criticized OSHA's standards for failing to require different controls for different types of asbestos, depending on their varying health effects in humans, as he maintains asbestos standards in other countries do.

Another suit, filed in the U.S. Court of Appeals for the Second Circuit in New York by R.T. Vanderbilt Co., a maker of industrial talcs, sought a stay of the asbestos standards as they apply to

**Secretary of Labor
William Brock is
credited with dislodging
the asbestos standards
from OMB.**



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tremolite, anthophyllite, and actinolite, three minerals which are regulated as asbestos under the new standards. Allan Harvey, Vanderbilt's director of environmental affairs, said the OSHA standards fail to differentiate between the fibrous, asbestos forms and the non-asbestos forms of the minerals. Because the three minerals are so common in rocks mined in the U.S., many mining operations would fall under the standards and many rock products would have to be labeled as containing asbestos, even if the asbestos forms of the minerals were not present, Harvey said. OSHA, on July 24, issued a temporary administrative stay (effective until April 21, 1987) of the asbestos standards as they apply to the non-asbestos forms of the minerals; the old 2.0 fiber/cc standard will apply to these forms of the minerals while OSHA reviews comments by NIOSH, Vanderbilt, and others concerning their regulation.

All petitions for review of the asbestos standards, except for a challenge filed at presstime, have been transferred to the U.S. Court of Appeals for the D.C. Circuit. The most recent action, filed by 3M Co. in the U.S. Court of Appeals for the Eighth Circuit in St. Louis, seeks a stay of the portions of the standards which limit the selection of negative pressure, half mask respirators to those with high efficiency filters only. A 3M spokesman said the company believes that, in writing respiratory protection selection portions of the standards which prohibit the use of an entire class of NIOSH-approved disposable respirators of the type made by 3M, OSHA failed to consider research data that proves the efficacy of such respirators in protecting workers from asbestos. It's expected that the 3M Co. suit will also be transferred to the D.C. Circuit court.

EPA hearings

Meanwhile, at presstime, EPA was holding two weeks of administrative hearings on its January proposal to ban asbestos in certain products and to phase out other uses of asbestos over a 10-year period. At a hearing, AFL-CIO Associate Director of Occupational Safety, Health, and Social Security Margaret Seminario said OSHA's new standards will leave exposed workers at risk of disease, and that the AFL-CIO therefore generally supports the EPA proposal where feasible and where substitute materials that are known to be less harmful than asbestos are available. She also recommended testing and control of substitute products as part of an asbestos phase-out plan. Asbestos industry spokesmen from AIA and AI, on the other hand, said their organizations would testify that the ban is unnecessary because asbestos is primarily an occupational concern that is being adequately addressed by the OSHA standards.

In upcoming issues, we'll keep you posted on developments as the legal and regulatory maneuvering continues.

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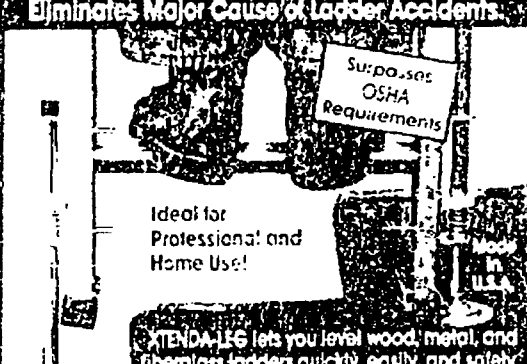
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