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AIA ASBESTOS INFORMATION ASSOCIATION

# NEWS & NOTES

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## ASBESTOS WORKER COMPENSATION BILL INTRODUCED

Terming his legislative proposal "a bold, independent, and unprecedented first step toward developing a system that quickly distributes compensation benefits to asbestos disease victims and fairly apportions costs for such benefits among all responsible parties," U.S. Senator Gary W. Hart (D-CO) introduced "Asbestos Health Hazards Compensation Act of 1980" (S.2847). Hart referred to current law as inadequate, leaving workers disabled from exposure to asbestos unsatisfied whether attempting to obtain workers' compensation or whether bringing product liability lawsuits in hopes of receiving compensation through courts.

This bill establishes voluntary minimum standards for state worker compensation for occupational disease or death resulting from exposure to asbestos. Such standards are similar in many ways to those proposed by Senators Williams and Javits in their workers compensation reform bill introduced in 1979, S.420. Minimum standards include, among others, provisions for benefits to be paid for duration of disability or for life of claimant without limitation to dollar amount or period of payment. Such standards for state compensation programs are to be voluntary. However, should award not be at least equivalent to compensation prescribed by Hart's bill, claimant would be able to apply for review to the Benefits Review Board established by Longshoremen's and Harbor Workers Compensation Act which would have power to order employer to meet bill's minimum standards.

In addition to the minimum standards, bill includes provisions which will allow for employer who pays worker compensation award to bring other responsible parties, including the asbestos industry and federal government, into state worker compensation proceeding to determine amount they should contribute to compensation. An Apportionment Criteria Commission composed of government, health, labor and industry experts will develop criteria to be used by state worker compensation boards in determining appropriate contributions of various responsible parties. The Commission shall have the power to hold hearings and obtain all relevant information. Congress will have opportunity to approve criteria. "The single strongest feature of this legislation," Hart said in floor remarks introducing the legislation, "is based on the principle that responsible parties will pay their responsible share, no more and no less."

By provision designed to put an end to massive litigation of the last 5 years (over 3000 lawsuits currently pending regarding asbestos related disease), bill provides that workers' compensation scheme established therein shall constitute sole and exclusive remedy for those seeking compensation for asbestos related disease.

Hart stated in his remarks that S.2847 has support of general president of International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and "portions of the asbestos industry." Bill was referred to Committee on Labor and Human Resources. Hart staffer indicated possibility that testimony on bill will be included in general workers' compensation hearings expected later this session. Copy of bill enclosed this mailing for members.

## CPSC General Order Encounters Problems in GAO Review

A general order to industry which facilitates CPSC investigation of selected household appliances and other products containing asbestos was returned to Consumer Product Safety Commission June 20 by General Accounting Office (GAO) due to incompleteness of submission. The general order, which would require responses from approximately 1200 U.S. corporations that manufacture, import or label certain consumer products containing asbestos, was approved by CPSC in May. It was then sent to GAO for review and clearance pursuant to that agency's regulations applicable to independent federal regulatory agencies seeking to collect information.

In June 20 letter to CPSC, GAO regulatory reports review officer in charge indicated submission failed to comply with all of regulatory requirements. For example, letter stated CPSC had not included figures estimating average number of man-hours which would be required for respondents to answer questions posed by general order.

GAO also referred to joint letter it received from AIA/NA, the Association of Home Appliance Manufacturers, the Business Advisory Council on Federal Reports, Chamber of Commerce of the United States and National Association of Manufacturers. The letter raised several additional issues relative to the completness of the CPSC package which could result in the Commission being required to provide additional documentation and/or revision of its supporting statement justifying general order. Included among issues emphasized was CPSC's failure to indicate how, by whom and for what purpose requested data will be used. Such information is required by GAO regulations.

A source within CPSC indicated June 30 that Commission is currently working with GAO on general order package with view toward resubmission.

Once submission passes initial screening, GAO will note its reception by publication for comment in Federal Register. Following GAO clearance process, normally in 45 days, CPSC may issue order with industry response required in 60 days.

General order is expected to require respondents to furnish information on identity of products manufactured, imported, or labeled since January 1, 1977 by brand and model; type, location and function of asbestos in products identified; marketing and use patterns of products identified; and if available, data on testing of products for asbestos fiber emission. Information is also sought on identity of possible substitutes for asbestos in products identified.

## HOUSE PANEL INVESTIGATES RISK ASSESSMENT ISSUE

Various members of the House Science, Research and Technology Subcommittee registered their support recently for a measure to use scientific risk assessment to write federal regulations. However, the Administration's position was much less enthusiastic to the plan. H.R. 4939, introduced by Rep. Don Ritter (R-PA), would set up a federal mechanism in the Office of Science and Technology Policy for determining the risks involved in federal regulatory actions.

Denis J. Prager, Acting Associate Director of the Office of Science and Technology Policy, told the panel that "the primary need is not for new legislated regulatory programs," but rather for a more workable structure in terms of existing regulatory authorities and agency responsibilities. Prager's testimony listed President Carter's efforts at regulatory reform, such as the Interagency Regulatory Liaison Group and the National Toxicology Program, as efforts in the direction of improving risk assessment.

Since EPA already does comparative risk assessments on its own under various agency statutes, Dr. Richard Dowd of EPA's Science Advisory Board questioned usefulness of a law which would go beyond the context of one statute to several laws or from one risk situation to a different one. His testimony was taken one step further by Dr. Nicholas A. Ashford of MIT who warned that H.R.4939 will improve nothing and that "the unintended consequences of the proposed effort may actually worsen the situation." He cited the primitive status, shortage of data and various other uncertainties of risk assessment.

Focusing on government estimates of 20% of cancers being caused by workplace hazards, Harvard University's Richard Wilson charged that "I know of no scientist who is willing to support the document in its entirety; some of the 'contributors' are highly embarrassed by it." He said that the study, announced by former Health, Education and Welfare Deparment Secretary Joseph Califano in Sept. 1978, has been refuted by most of the scientific community , with one scientist claiming that the study is an example of how "a group of eminently reasonable men can generate an unreasonable report."

Industry witnesses indicated support for the House bill, including Monsanto's Dr. William J. McCarville, who praised the committee efforts and said that "the bill and the hearings being held underscore the Congress' intent to provide a sound and scientific perspective" for federal rules.

## BILL ON ASBESTOS IN SCHOOLS ENACTED

A bill to address asbestos-containing materials in school buildings was signed into law by President Carter on June 14. The "Asbestos School Hazard Detection and Control Act of 1980" (H.R. 3282/S.1658) was introduced last year in the House by Rep. George Miller (D-CA) and in Senate by Sen. Jacob Javits (R-NY) (N&N Mar. and Aug. '79).

The bill provides for two-tiered program of federal assistance to schools - first, through grants to local educational agencies, state educational agencies, and non-public schools to detect potential hazards in schools and second, through loans to school districts and non-public schools to control detected hazards. The Department of Education will administer both components of the program.

The legislation authorizes total of $22.5 million for 2-year period of fiscal years 1981 and 1982, for asbestos detection grant program. Newly enacted law also authorizes $75 million per year for fiscal years 1981 and 1982 for asbestos hazards control loan program. These totals represent cut from legislation originally proposed which would have provided $330 million over 3 years.

Enactment provides for appointment of a 10-member task force by Secretary of Education. Members are required to have expertise in medical problems or asbestos abatement activities and will consist of representatives of federal agencies involved in education, health and safety and of representatives of organizations concerned with health and education. Task force will serve two purposes: (1) to aid state and local educational agencies by compiling and distributing medical, scientific and technical information dealing with hazards of asbestos and means of identifying, sampling and testing such materials; and (2) to assist federal administrators of program by reviewing applications for grants and loans, reviewing guidelines established by EPA to determine whether any modifications should be recommended and providing input to Secretary of Education regarding formulation of safety and quality control standards.

Although an industry funding provision which appeared in original Miller bill has been deleted, the law, as enacted, directs Attorney General to conduct investigation to determine whether the United States should or could recover expenditures under this bill from any person determined by Attorney General to be liable. Within one year of effective date, Attorney General must submit report to Congress on results of investigation.

Meanwhile, EPA continues to develop its proposal for regulation of asbestos-containing materials in school buildings (N&N Aug. '79 & May '80). The EPA regulations, a proposal for the first phase of which is expected in mid-August, will not include any provision for funding.

## Industry Official Comments On OSHA's Inattention To Hazard Of Smoking In Workplace

In June issue of American Journal of Public Health, an editorial co-authored by Dr. Paul Kotin and Lois Ann Gaul, Johns-Manville Corporation, the issue of smoking in the workplace is reviewed. Following comments on historical development of data regarding health effects of tobacco smoking, Dr. Kotin concludes, "From all the data now available, there can be no doubt that elimination of smoking in certain occupational settings would significantly reduce disease occurrence in the workplace."

Pertinent excerpts from the editorial are quoted below:

"OSHA cannot fulfill its mandate without addressing the issue of the adverse effects of smoking.

"Resistance to the control of smoking in the workplace is based in part on the fact that smoking has been an accepted element in Western culture for centuries, and in part on hesitation to interfere with what is considered to be a personal freedom. Objections by OSHA are that the burden of prevention is shifted to the worker, that concentration on the smoking issue is an attempt by management to avoid compliance with workplace standards, and that refusing to hire smokers may be a violation of equal employment opportunity. There may also be some reluctance on OSHA's part to challenge labor. Labor too is concerned that smoking control is a 'dodge,' but it also sees smoking cessation programs as a possible threat to employment, seniority, established grievance procedures, etc.

"The first fallacy in such reasoning is the concept that occupational disease prevention is a unilateral responsibility: either of management totally or of the individual worker. Workplace health and safety is a joint effort, and unless there is a full partnership between labor and management the mutual goal of a healthy workplace will be difficult to achieve. Smoking cessation programs do not 'shift the burden' to the worker; rather, they are part of the cooperative and collaborative effort necessary in occupational environmental control.

"The second fallacy is that smoking control is a means of avoiding compliance in other areas of workplace health and safety. Employers are still required to meet all applicable workplace standards and are still subject to surveillance and monitoring by OSHA. While there are many who criticize OSHA effectiveness, it is ludicrous to think that by banning smoking an employer can escape meeting his obligations under the Occupational Safety and Health Act or that workplace regulations will not be enforced by OSHA. What must be recognized is that smoking control is but one more method of maintaining a healthy workplace, and in certain occupational situations it is as necessary as every other method. For example, the synergistic effect of cigarette smoking and asbestos exposure is well known. In fact, Selikoff and Lee have stated:

> 'It would seem that control of cigarette smoking would have a much greater impact on the incidence of bronchogenic cancer in asbestos workers than further reduction of dust levels.'

Thus the control of smoking must be part of the overall control of hazards in the workplace."

As related matter, at news conference on Apr. 17 upon release of joint NIOSH-OSHA report on workplace exposure to asbestos, Assistant Secretary of Labor (OSHA) Eula Bingham was questioned about relationship between smoking and asbestos exposure. Dr. Bingham responded by stating that this issue will be addressed in future hearings on a new standard.

## Regulatory Reform Is Urged by President Carter

On June 13, the White House announced eight alternatives to traditionally rigid government regulations and urged federal agencies to adopt them. In addition, the Congressional Joint Economic Committee called for adoption of a regulatory budget.

A regulatory budget would set a limit on amount of money private businesses would have to spend to comply with federal regulations.

Market-oriented methods as proposed by President Carter would replace or supplement present "command-and-control" form of regulation. New methods would promote private sector's participation in designing more cost-effective and less cumbersome standards.

Concurrently, Joint Economic Committee Chairman Lloyd Bentsen (D-TX) urged action on a regulatory budget. Idea behind regulatory budget is to force regulatory agencies to consider costs of compliance so more cost effective standards will be implemented and unnecessary ones weeded out. Reportedly, Bentsen plans to propose regulatory budget amendment to first regulatory reform bill reaching the Senate floor. Such a bill is currently being reviewed by House Judiciary Committee.

## Upcoming Association Meetings And Industry-Government Conference

AIA/NA Executive Committee will hold a special meeting in the Association office on July 17.

Next regular meeting of the Executive Committee is scheduled for Aug. 12 in the Association office.

Third quarter meeting of board of directors and annual meeting of members are scheduled for Sept. 17 at Twin Bridges Marriott Hotel, Washington, D.C. In conjunction with these meetings, the Association will sponsor an industry-government conference on Sept. 17-18. A broad range of topics is planned to include presentations by senior industry, government, labor and scientific spokesmen. Details regarding this important event in the Association's work year will be published in the near future.

## *Health Issue*

# How Johns-Manville Mounts Counterattack In Asbestos Dispute

## Chairman of Much-Sued Firm Assails Press Treatment, Regulators and Lawyers

## 'We Had to Turn Aggressive'

By Neil Maxwell

*Staff Reporter of* The Wall Street Journal

DENVER – Hidden in the stark foothills west of here, the dull-silver and glass headquarters of Johns-Manville Corp. has a fortress-like look – and nothing could be more fitting, for seldom has a corporation found itself more under siege.

In the cavernous, window-walled office of Chairman John A. McKinney, a telescope stands vigil. It is trained on an eagle's nest across the valley, but it doesn't take much imagination to see it trained on invading lawyers out to raid the corporate coffers in behalf of several thousand clients. Or on advancing federal forces bent on making the company change its ways.

The reason for the animosity toward the giant company (1979 sales, $2.3 billion; net income, $114.6 million) is that Johns-Manville is the world's largest producer of asbestos outside the Soviet Union. Because of its insulating, fireproofing and friction-producing qualities, asbestos is widely used in such products as construction materials, automotive brake linings and various consumer items. But it is highly controversial because inhalation of too many asbestos fibers can kill or maim. And in the view of vocal critics, this makes Johns-Manville and other asbestos makers killers, whose executives should be punished.

*John McKinney*

### Jail Terms Urged

"Morally, they have more than a civil liability," says Barry I. Castleman, an environmental consultant who is active on the plaintiffs' side in asbestos litigation. Mr. Castleman believes that jail terms should be imposed "on the top corporate people responsible."

A 1978 study by three federal agencies projected that over the next 30 to 35 years, 13% to 18% of cancer deaths would be asbestos-related. Also in 1978 came a federal estimate that up to 2¼ million workers breathed "significant amounts" of asbestos fibers every day.

Manufacturers insist that asbestos isn't dangerous to workers or consumers if used properly. But so many people believe themselves damaged by asbestos that they have made Johns-Manville, by its own calculation, one of history's most sued companies, with more than 3,000 suits pending and more pouring in. In California alone, an attorney says, "it's like a range war signing up clients." Many of the suits have been filed by present and former workers in shipyards, where asbestos has long been used to insulate such things as pipes and boilers. (Workers in the asbestos factories themselves are covered only by workmen's compensation.)

Johns-Manville says that the cost of the more than 600 cases already disposed of has averaged only about $15,000 each – or a total of $9 million, plus about the same amount in legal costs. But some recent individual awards have topped $1 million.

### Turning Aggressive

When Johns-Manville's troubles started mounting, it did what many companies do when adversity strikes: It let its insurers handle the legal battles and ignored hostile press treatment. But it has since started fighting back ferociously on every front. "We had no alternative but to become quite aggressive," Mr. McKinney says. "It was one of the best things we ever did."

The counterassault has been marshaled by Mr. McKinney. Until not long ago – although Johns-Manville also makes other insulation and roofing materials, pipes, and paper and wood products – he was spending 90% of his working time on asbestos troubles.

Mr. McKinney doesn't pull his punches. Of the scores of lawyers who have filed suits against Johns-Manville, he says: "This is the modern version of ambulance-chasing. The biggest scandal in our legal system is contingent fees, and that's what all these cases are."

Of government environmentalists and safety regulators, he says, "They are charlatans and pipsqueaks who have to go up on the Hill for their budgets and show they've slain some dragons." And he warns, "If you carry this to the extreme – and that's what the government idiots are doing – no industry is immune."

The press also takes its lumps from Mr. McKinney. At a California seminar last year on media-business relations, the white-haired executive startled participants by bluntly questioning the integrity of reporters, a position he doesn't recant: "I considered them to be incompetent and dishonest," he says.

### Quarrel With Fortune

And when he doesn't like an article, he takes direct action. "We've had instances where people have a preconceived story line and we give them the facts and they still pursue the preconceived story line," Mr. McKinney says. "That's what Fortune did (in an article last year about the departure of Mr. McKinney's predecessor), and that's why we don't advertise in Fortune." At Fortune, Allan Demaree, assistant managing editor, says: "We stand behind that story 1000%. After they wrote a letter to the editor about it, we checked it and could find absolutely nothing wrong."

Johns-Manville doesn't dispute clear medical evidence that asbestos can kill. There is no denying asbestosis, a scarring of the lungs similar to emphysema; mesothelioma, an invariably fatal cancer attacking the cells lining the lungs; and lung cancer.

The National Cancer Institute says that there aren't any figures available on the number of asbestosis cases and that figures for mesothelioma and lung cancer aren't broken down to indicate how many cases might be attributable directly or indirectly to asbestos. Johns-Manville says that asbestos' sole role in lung cancer is to compound the danger among those who smoke.

Thanks to greater care these days in the handling and preparation of the mineral, asbestos workers face little danger, the company says. As for consumers, Johns-Manville says that asbestos fibers in today's consumer products are so sealed in that they can't be released in significant amounts. The company contends, in short, that regulators are flogging a dead horse.

Experts say, however, that dangers remain, from both current uses and old installations. The mineral is used in clothes washers and dryers, dishwashers, refrigerators, portable heaters, potholders, popcorn poppers, and pipe and air-duct insulation.

Still considered culprits are the many high-rise office buildings whose ceilings contain work spaces with asbestos insulation. "The exposure of the future is from what's in place now," says Dr. William J. Nicholson, an asbestos expert at Mt. Sinai School of Medicine in New York. "Simply stringing a phone line can pose a problem," he says, "because the asbestos dust (in work spaces) gets stirred up and distributed through the air-duct system."

### "Nobody Quotes Paul"

Johns-Manville says it stands ready to dispense the truth about asbestos through a team of Johns-Mansville medical experts headed by Dr. Paul Kotin, but "nobody quotes Paul," Mr. McKinney laments. "Instead, they'll go out and quote some pipsqueak from the government."

What Dr. Kotin says is, "Sure, there can be danger, like everything in the environment, but if it is used appropriately, so that there is low airborne fiber content, there is no danger." He says that the mortality rate among asbestos workers today is average and that the government is basing its anti-asbestos campaign on the way things were 35 years ago.

Unquestionably, things were far from ideal back then. In fact, some lawsuits assert that Johns-Manville was guilty of a corporate cover-up. In the files of another asbestos maker, Raybestos-Manhattan Inc., investigators turned up a note from a Johns-Manville doctor about a 1949 survey at a Johns-Manville mine in Canada. The note, from Dr. Kenneth Smith, later Johns-Manville's medical director, said the survey of 708 workers had found seven with asbestosis. It added: "They have not been told of this diagnosis, for it is felt that as long as the man feels well, is happy at home and at work and his physical condition remains good, nothing should be said."

The company denies a cover-up. "Think about it," says attorney D.H. Markusson. "How many times have you known cases in your own experience who developed cance-

– over –

or heart disease and they weren't told? Based on the mores of 1980, Ken Smith should have told those seven people." But given the tenor of the times, he adds, "I don't know if he should have or not."

Several government agencies are adding to Johns-Manville's troubles by attacking asbestos dangers both in mining and manufacturing and in consumer products. Current regulations allow two fibers of asbestos per cubic centimeter of air, and Johns-Manville argues there isn't any reason to lower that. "We have no question that standard is completely safe," Mr. McKinney declares. He says that it has been used in a California plant for more than two decades with no evidence of asbestos-related disease.

Yet the government is talking about lowering that standard to one fiber per cubic centimeter or even lower. "Nobody can meet that standard because you can't even measure it," Mr. McKinney says. "Tony Robbins and those charlatans at NIOSH are implying that there is no safe level, but that's just nonsense for headline-getting purposes."

NIOSH is the National Institute of Occupational Safety and Health, which does research and makes recommendations to OSHA, the Occupational Safety and Health Administration. Dr. Anthony Robbins is OSHA's director, and he agrees in part with Mr. McKinney. "In effect," Dr. Robbins says, "we want to say there is no acceptable exposure level to asbestos. The ideal would be to not add any more asbestos to the atmosphere, except for essential uses."

### Such As What?

What are essential uses? "We are prepared to be convinced there are some," he says, "but we aren't aware at the present time of any where substitutes couldn't be developed." He says the "essential" use most mentioned is brake linings; but a spokesman for Bendix Corp., which makes such linings, says, "By decree of the chairman, we will be out of the use of asbestos at the earliest possible date in this decade."

Johns-Manville's asbestos sales are already suffering because of the recession, the housing slump and scary headlines. Sales overseas have been good, but Susan King, head of the Consumer Product Safety Commission, was in Paris recently on a mission that could hurt. She was helping to set up an international agency to warn consumers of product dangers.

"If consumer products are banned in the U.S., we at least want importing countries to know about it," a spokesman for the U.S. agency says.

Johns-Manville says it will emerge from the legal wars unscathed because of its insurance coverage, which it puts at $400 million. But most of the insurers say they should have to pay only claims filed during their policies' terms, while the company says they should also have to pay workers who were exposed during the policy period but became ill after the policy expired; that would spread the risk for each period over more insurers. Johns-Manville has sued over this, and a ruling against it, Mr. McKinney concedes, would mean "significantly less" coverage.

THE WALL STREET JOURNAL,
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# Can we regulate better?

*The following is an excerpt from a lecture by Irving S. Shapiro, Du Pont chairman, at Columbia University early this month as part of a series sponsored by Columbia and McGraw-Hill.*

Regulation is pervasive, often duplicative, inefficient and archaic. But it is pointless to talk about scrapping the system *in toto*. The mission is to make the system work better. Many guiding principles that work well in private business apply at least in a general way to the direction of the public's business.

The notion of accountability comes high on any list of management principles, and with that goes the requirement for performance reviews. There should always be someone looking over the shoulder of the agency administrators. Their performance and that of their subordinates ought to be monitored as a routine matter, and where good results are not forthcoming, there should be provisions for changes.

It is sometimes protested that basic management principles are difficult or impossible to apply in the public sector, because the government's goals are diffuse, and the performance evaluations are necessarily subjective.

Government doesn't have the celebrated "bottom line" of the business organization. Let's not trip over that hurdle, however. The two institutions, government and business, are not dissimilar in every respect. All of the management practices of the private sector do not fit for the public agencies, but that's no excuse for failing to use the ones that do fit.

Don't buy the argument that the performance of people in government cannot be measured because the yardsticks are subjective. Other kinds of organizations face exactly that problem. They find ways to handle it. Universities manage somehow to decide which professors should be offered tenure and which will not, and a committee somehow decides that one journalist will win a Pulitzer Prize and another will not. It is hard to see why it is more difficult to decide, for example, whether the Federal Communications Commission is doing its job, or whether one or more of its commissions is miscast.

Going to the fundamentals in accountability raises an immediate challenge to the legitimacy of the so-called independent regulatory agencies. Many regulatory agencies report into the executive departments. The Antitrust Division is part of the Justice Dept., the Occupational Safety and Health Administration is subordinate to the Dept. of Labor, the National Institute for Occupational Safety and Health is part of Health and Human Services, and so on. Some agencies have a separate status—the Environmental Protection Agency, for example, or the Federal Trade Commission.

On principle, this is more than a little troublesome. The President can replace his antitrust head, or any of his department heads and White House advisors, and this occurs with some regularity. But Presidents live with appointees to independent agencies until their terms expire even when experience clearly demonstrates that a replacement should be made. Who can remember the last time a regulator in an independent agency was terminated by a President?

In most cases this was meant to be the case. That philosophy of independence had a logic in its time, but you have to ask whether its time has passed and whether it is reasonable to continue with a system that places authority beyond the reach of the President.

Given the data-reporting systems that exist today, given the oversight functions that have been created within the government, and given the attention of the public media to the governmental process today, the rationale for the independence of regulatory agencies no longer exists. There are good reasons to eliminate that structure and bring the functions of those agencies under the wing of the executive departments. Only by doing this can the Administration exercise the needed leadership and be held accountable for the results.

With the "fourth branch" of government brought under an orderly management process, several desirable consequences might follow. For one, there might be a less adversarial climate between the regulators and those they regulate. With performance on test and largely on public view, there could be the desirable arms-length relationship with much less of the mood of hostility that we now see. The example of some other countries, including some whose economies are outperforming ours, suggests that a more respectful and productive atmosphere can exist without either the public or private sector being co-opted. □

June 25, 1980/Chemical Week

# No Punitive Damages in Asbestos Case

## Ex-Shipyard Worker Retains $1.2 Million Awarded Earlier

By MYRNA OLIVER
Times Staff Writer

Former Long Beach Naval Shipyard worker Richard J. Hogard, who last week won $1.2 million in a precedent-setting case which could affect thousands of asbestos workers, cannot collect additional punitive damages from two asbestos manufacturers, a Los Angeles Superior Court judge ruled Wednesday.

In a 10-minute court session, Judge Earl E. Riley announced his ruling and dismissed the jury he had ordered to return to court to weigh punitive damages.

His decision ended the six-week trial and cleared the way for determined and lengthy appeals on both sides—Hogard's challenge of the punitive damages ruling, and the manufacturers' protest of the jury award.

That jury voted May 27 to award Hogard $1,229,491 compensatory damages because asbestos manufacturers Johns-Manville and Raybestos-Manhattan failed to warn of the hazards of working with their products.

Hogard, 40, of St. James, Mo., claims his 10 years of using asbestos insulation materials caused him to get asbestosis, an irreversible scarring that causes the lungs to shrink and inhibits breathing.

Riley told jurors Wednesday he decided punitive damages were unwarrented because of three major reasons:

—Hogard's lawyer, Robert B. Steinberg, planned to base much of his case for punitive damages on manufacturers' memos from the 1940s indicating they knew of asbestos hazards and did nothing to protect workers. Since California's product liability law, under which the case was tried, was established in 1963, and Hogard began working at the shipyard only in 1965, Riley said, using earlier evidence was "illogical, improper and simply unfair."

—Second, the manufacturers simply sold asbestos-containing products to the U.S. Navy designed to meet Navy specifications, and to equate meeting those specifications with the fraud, malice, willful misconduct or concealment necessary to award punitive damages would be "totally inequitable."

—Third, any purported fraud, malice, willful misconduct or concealment must be directed specifically at the plaintiff. It would be improper to award punitive damages to Hogard, first exposed to asbestos in 1965, he said, because of any wrongdoing that occurred against other asbestos workers in the 1930s and 1940s.

"The purpose of punitive damages is to punish," Riley said, "so the defendant won't do it again."

The manufacturers phased asbestos completely out of their insulating products by 1972, and established during the trial that they voluntarily placed warning labels on their products in 1964.

Hogard left the shipyard on a disability pension in 1975 after a doctor advised him to get away from asbestos.

Still elated and a little dazed by his huge verdict last week, Hogard seemed unperturbed Wednesday by the ruling against him. He said he did not fully understand what had happened but was not upset by it.

Steinberg said the $1.2 million award was the highest so far in the country among asbestos cases that have been tried for a single injured worker, although higher awards have been granted to families of workers who died.

More than 1,000 cases are pending in the local court, and Steinberg said Hogard's case could set guidelines for out-of-court settlements.

"It has to make the industry think about the true value of these cases," he said.

Steinberg said Riley's ruling against punitive damages was not unexpected, but added he is "inclined" to appeal the decision, and fully plans to seek punitive damages in the more than 100 similar cases he is handling for other asbestos workers.

On the other side of the counsel table, Johns-Manville attorney Fulton Haight and Raybestos lawyer John Norby said they felt partially vindicated by Riley's ruling that punitive damages were improper.

They said they will seek a new trial and ask Riley to alter the jury's verdict within a month.

"It appears, from the jurors I talked to," Haight said, "they couldn't disassociate emotion from fact. Their sole deliberation was on whether he had it (asbestosis) or not."

The manufacturers had claimed that Hogard suffered from bronchitis caused by smoking, and did not have asbestosis.

A judge can set aside a jury's verdict if he feels it was based on emotion and unsupported by evidence.

Norby said the request for a new trial will be based on grounds the manufacturers were not liable, and that the damages awarded were excessive.



# *More Chemicals-Controls Strongly Urged By Panel, Citing Rise of Cancer Incidence*

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON—A White House committee, reasserting its contention that cancer incidence is on the rise, issued a strong call for more regulation to control chemicals.

The group, the Toxic Substances Strategy Committee, found that "man-made toxic chemicals are a significant source of death and disease in the U.S. today," said Gus Speth, its chairman. Of the health hazards arising from chemicals, "cancer is a leading cause of concern," the committee reported.

Mr. Speth acknowledged recent public sentiment against increasing government regulation but said that in the area of toxic substances "we must strengthen government action, not weaken it, if we are going to provide the protection the public demands."

Among other things, the committee specifically recommended:

—Passage of proposed legislation creating a federal "superfund" to use in cleaning up toxic spills and abandoned waste sites.

—Removal of barriers that prevent transferring trade secrets and confidential information on toxic substances among government agencies, as well as increased public access to such data.

—Legislation to strengthen regulation of the cosmetic industry, over which, the committee said, the government has less authority to check for hazardous ingredients than other industries.

The committee estimated that occupational exposure to cancer-causing agents is a factor in more than 20% of all cancer cases.

It also repeated its assertion, first made in a draft report last year, that cancer incidence rates are rising. The committee bases the finding on data from the National Cancer Institute showing that cancer incidence increased about 10% between 1970 and 1976 after having remained relatively constant for the previous 30 years.

Industry groups charge that the finding is based on unrepresentative and incomparable surveys. After the final report was released, the American Industrial Health Council, a trade group, accused the committee of trying to "unnecessarily alarm the public with indiscriminate charges and allegations based on this nonconclusive data."

Mr. Speth conceded that the committee isn't exactly sure of the role toxic chemicals play in increasing cancer rates. But he argued that higher cancer rates strongly suggest "some new or intensified causal factors" in the environment.

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# Asbestos, cancer link debunked

By Anne Murphy
Sarnia Bureau

POINT EDWARD — It's poor diet and smoking rather than exposure to asbestos and air and water pollution that lead to cancer, a noted American pathologist said here today.

Dr. Harry Demopoulos of New York City University termed reported links between enivronmental pollution and cancer "pure fabrication."

There are no links — only myth," he told the annual meeting of the Lambton Industrial Society. It's more likely personal rather than environmental factors that predispose a person to cancer.

About 45 per cent of the 1,000 patients who die daily from cancer in the United States have their disease linked to poor nutrition and another 35 per cent linked to high tar cigarettes. Included under poor nutrition are excess calories, a high fat and low fibre content.

Cancer which can be linked to occuptional exposures that occurred in the past when dangers weren't known is less than five per cent, Demopoulos said. There have been no reports of cancer induced by exposure to nuclear power plants, he said.

The myths that surround environmental factors have been fanned by uncontrolled scientific studies released by the government to the public.

A recent study indicates cancer rates among construction workers exposed to asbestos are higher than average but it does not take into consideration about 80 per cent of construction workers smoke, and often more heavily than the average male population, he said.

Similarly, a study which linked cancer in New York City to exposure to air pollution from New Jersey did not take into consideration pockets of population in New York City exposed to the same air did not have a higher cancer rate. Another study showed lower cancer rates in industrialized cities such as Detroit than in other large urban non-industrial areas, debunking the myth of industrial cancer.

Demopoulos urged more controlled experiments be done by scientists and greater factual reporting of their findings.

By diverting attention from the diet and smoking causes of cancer, the media is "leading people down the primrose path. And it's killing them." he said.

# Suit Filed Against Makers of Asbestos By School Board

By LEWIS BRIGHAM
Journal of Commerce Special

CINNAMINSON, N.J. — The local school board has just brought suit in Trenton's superior court in a case which could be as threatening to the chemical industry as the class action brought in Indiana last year against Ford and its Pinto was to the automobile manufacturers.

The litigation revolves around the hazards of asbestos used in school buildings in this Camden suburb. The defendants named by the board are United States Gypsum Co. of Chicago and National Gypsum Co. of Houston. Yet to be named in the case are local distributors of both chemical firms' products.

**Case Seen 'a First'**

Court observers in Trenton said this case is most likely the first such legal action ever taken in the nation. Never before, one court clerk said, has a school district sued the manufacturer of construction materials without pegging the litigation to the death or illness of someone which could be linked to the manufacturer's materials.

But in the case of the Cinnaminson school district no one has died, been injured or become ill in a situation attributable to asbestos in the ceilings of the three district schools involved.

Asbestos has been found as a potential cause of cancer and respiratory ailments, and the local school board contends that someone still may die or become ill after exposure to the asbestos used in the construction of its three schools.

This is where the asbestos suit departs sharply from the Ford Pinto case. In the latter case, two young women died, with the class action suit contending that their deaths were because of faulty fuel tanks used by Ford in the manufacture of its Pinto autos. A federal court jury in Gary, Ind., after a lengthy trial found Ford not guilty in this case.

In the asbestos case, however, economics affecting local taxpayers is what spurred the litigation. Given the threat to health posed by asbestos, the local school board decided to remove the asbestos from the ceilings in the three affected schools. To finance the asbestos removal, the school board was forced to hike local school taxes, since it lacked any governmental assistance from state or federal agencies.

Even though the school-tax base was increased, the asbestos has been removed from ceilings in only one of the three schools so far. Public irritation over being taxed to finance this project then began to surface. At the same time, school board members began to realize that removal costs were going to be much higher than initially anticipated.

It was at this point that the board members started to contemplate the idea of getting the asbestos manufacturers to pay for its removal on the grounds that they knew in advance it represented a hazard to human life.

According to the board's attorney, Michael Vassalotti, "there will be as very long and intense period of pre-trial discovery."

If the school district were to win its case in superior court in Trenton — a victory which no doubt would be appealed by the two chemical company defendants — it still would represent a landmark legal precedent. A new legal view of product-liability law would be established. The onus for health responsibility would be transferred back to the materials manufacturer, even without a death or injury upon which litigation was based. This reverse responsibility concept could wind up being applicable in similar cases against chemical manufacturers throughout the nation. And it would not necessarily be just school boards or other public sector units moving into court — it could be private companies and individuals as well.

In general terms, the basis for the Cinnaminson school board's suit is its contention that both United Gypsum and National Gypsum should be held liable for the asbestos purchased by the school board because, at the time of purchase, both companies knew, or at least should have known, about the health risks associated with the material.