including about $27 million for capital expenditures. OSHA further estimated that implementing these proposals could save 38 lives and prevent 767 injuries among grain elevator workers each year.

While recommending the application of the grain elevator proposal to mills, OSHA, at the same time, asked for additional information on fire and explosion data involving mills. Doug Clark, special assistant to OSHA Administrator Thorne G. Auchter, said this section is a reference to the grain processing industry, which claimed it did not have the injury/fatality problem of grain elevators. This industry includes flour and other grain mills, rice milling, and cereal breakfast foods.

OSHA's notice referred to a suggestion that "the proposed standard apply only to the elevator portion of a mill because the function, design, equipment, and conditions of other portions of a mill vary significantly from those of an elevator."

In another area, OSHA would forbid the practice of jogging the elevator leg, which involves starting and stopping the conveyor belt to free choked grain.

Industry Says Proposal 'Realistic'

While the health and safety director of the AFL-CIO's Food and Allied Service Trades Department claimed the standards were "gutted" to save a few dollars, the executive vice president of the National Grain and Feed Association said, in a prepared statement, that the proposed standards appear "to be more realistic and achievable." NGFA's Alvin E. Oliver applauded the performance-oriented focus of the standards, claiming that "realistic and achievable standards would do more to enhance safety than rules based on unproven or unscientific data."

Comments or requests for a public hearing on the standard should be sent by March 9 to the Docket Officer, Docket H-117, Department of Labor, Occupational Safety and Health Administration, Room S6212, 200 Constitution Avenue, N.W., Washington, D.C. 20210. For further information contact James F. Foster at Room N3637 at the same address or telephone (202) 523-8151.

The text of the proposed grain handling standard appears in the Full Text section of this issue.

Litigation

ASBESTOS ASSOCIATION, OSHA FILE BRIEFS ON ASBESTOS RULE WITH FIFTH CIRCUIT COURT

The Asbestos Information Association further detailed its objections to the promulgation of an emergency temporary standard (ETS) for asbestos by the Occupational Safety and Health Administration in a supplemental brief filed with the U.S. Court of Appeals for the Fifth Circuit Jan. 3.

An emergency temporary standard of 0.5 fibers was issued by OSHA in November 1983 and was challenged immediately by the asbestos industry (Current Report, Nov. 10, 1983, p. 587). A Nov. 17 request by the AIA for a stay of the ETS was granted by the appeals court pending court review of the standard in *Asbestos Information Association/North America v. OSHA* (Nos. 83-4687, 4688 and 4689) (Current Report, Dec. 1, 1983, p. 691). At that time, the court set a hearing date of Jan. 12, 1984, and ordered the industry petitioners and the government to file simultaneous supplementary briefs by Jan. 3, 1984.

As they had argued in their earlier memorandum in support of the stay, industry petitioners alleged that OSHA had failed to meet the four criteria for issuance of an ETS. Prior to issuing an emergency temporary standard, OSHA must show that the ETS is based on "new scientific data revealing either unanticipated hazards or worker risks far higher than previously believed," that workers face an extraordinary risk at current exposure levels, that prompt action is necessary to control the extraordinary risk, and that the evidence on which the agency acts is sufficiently reliable and compelling to override the public's right to a hearing, according to the petitioners.

The requirement of new scientific data is supported by legislative history showing that ETSs are reserved for "new hazards" recently "discovered by researchers," the petitioners contended. The AIA asserted that it is this requirement, more than anything else, which distinguishes those cases in which ETSs have been upheld from those where such standards were stayed or vacated by the courts. In the case of asbestos, OSHA offers no new data to justify its ETS, the petitioners charged. "By OSHA's own admission, the scientific studies on asbestos tend to be cumulative with even the most recent being more than two years old," according to the AIA.

'Extraordinary Risk' Required

In addition, the petitioners stated that an ETS is warranted only if workers face an extraordinary rather than merely a "significant" risk at current workplace exposure levels, claiming that this "extraordinary risk" requirement flows from the statutory term "grave danger" which the Supreme Court contrasted with the lesser showing of significant risk necessary to tighten an existing permanent health standard in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (8 OSHC 1586). The AIA asserted that OSHA cannot contend that workers experience extraordinary risks at current exposures because the agency is resting its case on three-year old exposure data rather than current exposures. In addition, the association maintained that the risks calculated by OSHA for asbestos are not extraordinary when compared to those for substances where ETSs have been denied, such as ethylene oxide, ethylene dibromide, and formaldehyde.

Further, "OSHA has made no showing whatsoever that prompt emergency action is necessary to control the risks supposedly faced by asbestos workers," the AIA alleged. "OSHA's dawdling since 1975, when it first proposed lowering the standard to 0.5 fibers/cc, is alone sufficient to refute any notion that emergency action is required." The petitioner further asserted that no emergency action is necessary for asbestos because essentially all the benefits OSHA attributes to the ETS could be achieved through the enforcement of the existing two fibers/cc standard.

Disputing that OSHA's evidence is sufficiently compelling to override the public's right to a hearing, the AIA alleged that the agency never relied on any type of peer review and that no "independent" peer review, such as was suggested by a National Academy of Sciences panel, ever took place. "The fact that OSHA secretly had its risk assessment 'peer reviewed' by scientists of the agency's own choosing cannot change the result here," the petitioner said, asserting that the peer reviews currently referred to by OSHA lawyers were not included in the administrative record certified to the court on Dec. 13, 1983.

In conclusion, the petitioner urged the court to uphold the stay until it enters an order vacating the asbestos emergency temporary standard.

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Agency Cites Abundant Data

In its brief, OSHA countered that its estimate of the risks faced by asbestos workers rests on a substantial body of information and is premised on generally accepted assumptions for predicting risks. The agency stated that it had developed its quantitative risk assessment for lung cancer and mesothelioma from an abundance of data, citing its use of eleven epidemiological studies in developing quantitative risk estimates for lung cancer and four studies for risk estimates for mesothelioma. The risk estimates found by OSHA are noticeably consistent with those of other recent risk assessments performed by reputable scientists, the agency said.

Further, independent peer reviewers, while disagreeing with particular aspects of OSHA's analysis, unanimously agreed that the methodology and results of the agency's risk assessment were consistent with other well-conducted risk assessments concerning asbestos.

In addition, OSHA maintained that it has demonstrated substantial record support for employee exposure data underlying 91 percent of the lives estimated to be saved by the ETS. Discussing the exposure and population figures for the drywall removal, renovation, and demolition sector of the construction industry and for the secondary manufacturing industry, the agency asserted that these two groups account for approximately 191 of the 210 lives saved within the six-month life of the ETS and 5,210 of the 5,725 lives saved over a 20-year period at the exposure level set by the ETS.

"In light of the fact that the agency has determined that a saving of 80 lives for six months and 2,410 for 20 years justifies a finding of grave danger, the Secretary submits that the record strongly establishes employee exposures of sufficient magnitude to justify issuance of the ETS in this case," OSHA stated.

Further, OSHA contended that its decisions regarding whether to issue emergency rules are consistent with the evolving decisional authority under the Occupational Safety and Health Act. The agency based its action here upon its quantification of the risks actually faced by the asbestos-exposed worker population, according to OSHA. Rejecting the AIA's argument that the same benefits could be obtained through enforcement of the existing standard, the agency argued that benefits would flow from the issuance of an ETS. "The asbestos ETS is necessary to save worker lives because it requires immediate protection, achievable through improved respirator use, for employees currently exposed to levels above 2 f/cc, as well as protecting employees exposed between 0.5 f/cc and 2 f/cc," the agency maintained.

Finally, OSHA stated that new information and evidence had indeed led to the issuance of the ETS, citing an April 1983 meeting attended by Assistant Labor Secretary Thorne G. Auchter at which Irving Selikoff, a recognized expert in the field of asbestos epidemiology, described the health effects of asbestos exposure as well as a risk assessment draft presented to Auchter in July 1983 which presented reliable evidence demonstrating the existence of a health emergency caused by asbestos.

The delay between issuance of the proposal to amend the asbestos standard and issuance of the ETS does not indicate an absence of emergency, according to OSHA. Noting that it had proposed a revision of the asbestos standard in 1975, the agency explained that asbestos had had to compete with 20 other toxic substance projects, that the agency had changed its plans concerning how to proceed with the proposal as it related to the construction industry, and that the rulemaking process was further slowed by new requirements for preliminary analyses.

OSHA's "rational decision" to proceed first with lesser regulated toxic substances in the absence of evidence of grave danger regarding asbestos exposure "should not prejudice the agency's ability to protect workers now, when the gravity of the danger has become clear," the agency concluded.

Occupational Nursing

NURSING GROUP CRITICIZES OSHA'S REFUSAL TO GIVE NURSES ACCESS TO CHEMICAL INFORMATION

The American Association of Occupational Health Nurses, Inc., claimed that the Occupational Safety and Health Administration should have included nurses in those groups of health professionals that have access to trade secret information pertaining to hazardous chemicals in non-emergency situations.

The hazard communication standard, issued in November 1983, established the individuals who would have access to trade secret information, and the circumstances for releasing confidential trade information on chemicals produced or imported by manufacturers.

The standard established that health care professionals, including physicians, industrial hygienists, toxicologists, and epidemiologists can review trade secret information in non-emergency situations, providing certain criteria are met. Nurses are not included in this list.

However, nurses are qualified to review confidential information if they determine that "a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary" to give first-aid treatment.

In a recent prepared statement, AAOHN President Mary E. Seaver called the exclusion of nurses in non-emergency situations "outrageous." She claimed that "occupational health nurses are the sole providers of occupational health programs in more than 75 percent of the nation's work settings." In most situations, Seaver claimed, there is no physician or other health professional at the worksite.

Ed Baier, OSHA's director of technical support, said OSHA intended to make a clear distinction between those who have access to confidential information in emergency and non-emergency situations. He noted that nurses have access to the general information sheet on the chemical for treatment purposes. He added that the agency felt it unnecessary to include nurses among those having access in non-emergency stituations, since in many situations access would be for the purposes of conducting a study.

Jennifer Silk, OSHA project director for the hazard communications standard, agreed that the agency concluded that in most non-emergency situations nurses would be working under the auspices of a physician with the physician having access to confidential information.

However, Seaver claimed that without access to this confidential information nurses will be unable to perform "vital functions," resulting in increased cost to industry to hire someone to do routine procedures normally done by occupational health nurses. The organization plans to lobby Congress and work with White House advisors to get the standard changed, according to the association.

OSHA's Perception of Nurses

Paul Ryan, a spokesman for AAOHN, said that OSHA's refusal to include nurses in its lists of health professionals is