

Asbestos: Legal battles escalate – Will Congress act?

by Stephen G. Crapnell

WHO is responsible for diseases suffered by thousands, perhaps millions, of workers in shipyards, construction, textiles, asbestos mining and processing, and other industries which have been heavy users of asbestos? The stakes are millions, perhaps billions, of dollars sought by the workers in product liability lawsuits, and further millions in lost income for asbestos manufacturers, as many American businesses shun products containing asbestos.

Obviously the asbestos problem is not just a staggeringly complex legal one. It's a human problem, involving disease, disability, suffering, and death. A controversial 1978 report by the Department of Health, Education and Welfare estimated that 8 to 11 million workers have been exposed to asbestos since the beginning of World War II; 4 million workers have had heavy exposures; and an excess of 2 million asbestos-related cancer deaths could be expected in the next 30 years — roughly 13-18 percent of the total cancer deaths expected. Several industry analyses have denounced that estimate as "grossly overestimated," and one analyst instead estimated that no more than 80,000 asbestos-related cancer deaths could be expected in the next 30 years. Even that more conservative figure represents a grave occupational health problem.

Perhaps the group most acutely affected by asbestos exposure is the International Association of Heat and Frost Insulators and Asbestos Workers, an AFL-CIO union with approximately 20,000 members. Fifty percent of union members' deaths are asbestos-related. Twen-



An occupational physician discusses chest X-rays with an asbestos worker.

Photos courtesy of Johns-Manville Corp.

ty percent are due to lung cancer, and 7-10 percent are due to mesothelioma, a rare type of cancer associated with asbestos exposure.

Roy Steinfurth, administrator of the Insulators Health Hazard Program, grimly noted: "Our members over the age of 60 suffer about 2 to 3 times the suicide rate of the general population." He added that the problem has extended beyond the worksite. "We're getting a big surge now of housewives and children who have contracted asbestos-related cancer. I'm seeing sons and daughters of pipe coverers who are dying at the age of 35 from mesothelioma."

Asbestos is the common name for a family of fibrous minerals that break easily into a fine dust. Once inhaled, up to half the asbestos fibers may remain trapped in the lungs, and they cannot be removed.

Inhaling excessive amounts of asbestos fibers can cause asbestosis, an emphysema-like condition characterized by scarring of the lung tissue. Early symptoms may include coughing, shortness of

breath, and broadening of the fingertips. Crackling sounds in the lungs, chest pain, and fatigue after slight exertion may occur later. Asbestosis makes breathing difficult and increases the risk of infection, pneumonia, and heart attacks.

Asbestos exposure may also lead to lung cancer, which has a latency of 15 to 30 years or more. It is estimated that up to 25 percent of workers heavily exposed to asbestos die of lung cancer. Asbestos workers who smoke run a greatly increased risk of contracting lung cancer.

The third major disease associated with asbestos exposure is mesothelioma, a cancer that affects the lining of the chest or abdomen and is invariably fatal. Asbestos has also been associated with cancers of the stomach, colon, rectum, and esophagus.

In court

Why do so many workers who are disabled by asbestos-related diseases end up in court? Workers' compensation benefits and re-

quirements vary widely from State to State. Statutes may limit compensation to narrowly defined categories of diseases; claim filing time limitations may be impractical for diseases with long latency periods, and long delays frequently occur before workers receive hearings on their claims. These factors and others discourage or prevent workers from receiving workers' comp benefits.

Product liability lawsuits have been filed primarily by shipyard workers and insulators who used asbestos-containing products, not by employees of asbestos producers who normally would be entitled to workers' compensation as an exclusive remedy. Typically, the worker bringing a product liability suit seeks to prove that asbestos companies knew that asbestos was a dangerous product, but failed to take responsible steps to warn workers of the danger.

The numbers of such lawsuits grow daily. Dennis Markusson, associate general counsel of Johns-Manville Corp., the nation's largest producer of asbestos-fiber products, reported that 5,700 lawsuits are pending against the company. Approximately 900 have been disposed of to date. Against Raybestos-Manhattan, Inc., another asbestos manufacturer, 2,240 suits had been filed against the company by the end of 1979. Approximately 280 cases had either been settled or dismissed. Asbestos lawsuits often involve multiple defendants, because it is difficult for plaintiff's lawyers to determine which manufacturer's product was responsible for a worker's asbestos exposure.

Product liability lawsuits have proved to be no panacea for plaintiffs. For instance, Johns-Manville has won 19 of the 28 cases it has been involved in which resulted in a verdict. The average cost per case was \$23,000 in 1980. For all cases, the average cost of disposition was \$80,000. Moreover, attorneys in such damage suits commonly receive up to a third of the money award.

That is not to say that lawsuits have not resulted in large awards. In May 1980, Richard Hogard, a former shipyard worker who devel-



Asbestos bag opening operations are designed to minimize the release of airborne dust.

oped asbestosis, won a \$1.2 million award from Johns-Manville and Raybestos-Manhattan, Inc. Previously, Hogard had received \$50,000 in pretrial settlements. However, the jury did not award Hogard any additional punitive damages, and the judge later directed Hogard to accept a \$250,000 award. Both parties are now appealing the award.

Awards such as Hogard received are exceptional. Most cases are settled out of court for considerably less money, and some experts estimate that half of the suits brought by workers result in no award. For the asbestos producers, though insurance has paid for the vast majority of expenses, the litigation is a nettlesome and unpredictable drain on their resources and has adversely affected stock values.

For most parties, the answer to the flood-tide of litigation is legislation designed to compensate asbestos disease victims. Since 1977, the House has been considering a bill introduced by Rep. Millicent Fenwick (R. - N.J.), which would have authorized the Federal government to pay compensation claims initially. After a specified period, the government, asbestos producers

and distributors, and the tobacco industry would contribute to a joint compensation fund administered by an independent board which would determine the validity of claims. If the fund should run dry, the responsibility for paying claims would revert to the Federal government. The bill barred future third-party litigation.

Despite the support of the International Association of Heat and Frost Insulators and Asbestos Workers and Johns-Manville, the bill has remained bottled up in committee. Opponents called the bill an industry bailout and an inappropriate use of government funds.

Last year, attention shifted to the Senate, where Sen. Gary Hart (D. - Col.) introduced S. 2847, the Asbestos Health Hazards Compensation Act of 1980. S. 2847 would establish voluntary Federal minimum standards for asbestos-related disease claims. Compensation for either partial or total disability and death due to an asbestos-related disease would be no less than two-thirds of the claimant's average weekly wage. If a compensation award was not at least equivalent to the compensation prescribed by the bill, a claimant could seek review before

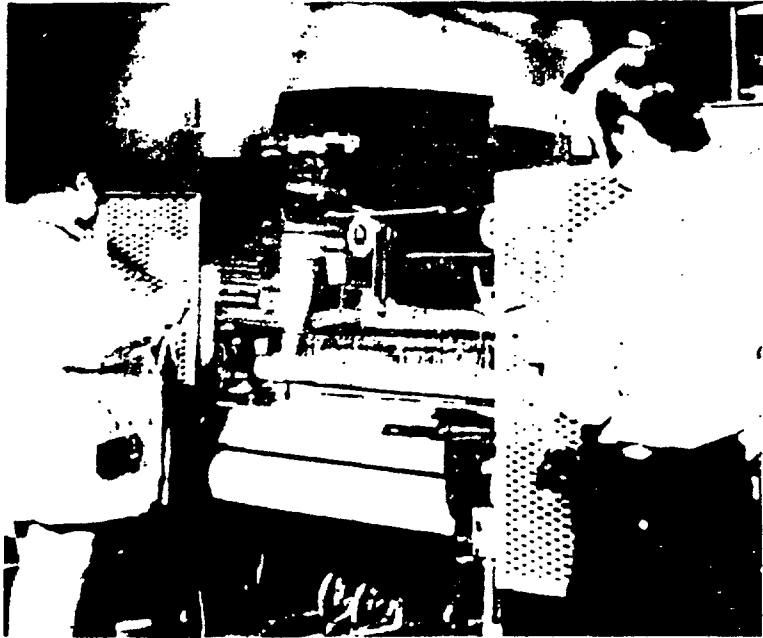
the Benefits Review Board established by the Longshoremen's and Harbor Workers' Compensation Act. The board would have the power to order an employer to pay compensation in accord with the bill's standards.

The Hart bill would allow employers who pay a workers' compensation award to bring other "responsible parties," such as the asbestos industry and the Federal government, into the State workers' comp proceeding to determine the amount they should contribute to the compensation. A commission of government, health, labor, and industry experts would develop criteria by which State compensation boards would determine the appropriate share of each responsible party.

The Hart bill would provide the "sole and exclusive remedy" for those seeking compensation for asbestos-related disease. "This will put an end to the massive litigation that has served neither plaintiff nor defendant well over the last 5 years," Hart told the Senate in introducing the bill.

Both Johns-Manville and the Asbestos Workers union have endorsed the Hart bill. William Shore, a Hart aide, said the bill, which failed to get out of committee last session, would be reintroduced this spring. Shore said Hart would seek to broaden support for the bill among labor, especially the building trades. In the past, they have adhered to the AFL-CIO's position that Congress should pass comprehensive Federal workers' compensation standards, not bills dealing with specific substances.

Meanwhile, at the State level, on January 1, a California law became effective which provides compensation for victims of asbestosis, even if liability for injuries has not been determined. The law, Chapter 1041, established a \$2.6 million Asbestos Workers' Account. To receive benefits, a worker must show that he was exposed to asbestos, contracted asbestosis resulting from the employment, and is entitled to compensation. A worker meeting those criteria may apply for benefits from the account, if the responsible employer cannot be found or fails to pay within 30 days after a claim is



An industrial hygienist checks asbestos levels. The worker at left wears a sampling pump.

filed. The account will be reimbursed by liens authorized against employers.

Testing exclusivity

Until recently, employees of asbestos companies who developed asbestos-related diseases had workers' compensation as their exclusive remedy against their employer. They could not sue for damages.

Last July, the California Supreme Court ruled that that was no longer true in every case. In *Johns-Manville Products Corp. v. Contra Costa Superior Court*, the court held that "while the workers' compensation law bars the employee's action at law for his initial injury, a cause of action may exist for aggravation of the disease because of the employer's fraudulent concealment of the condition and its causes."

Reba Rudkin, a former employee at Johns-Manville's Pittsburgh, Calif. plant, had filed suit against the company on the grounds he had developed lung cancer and other asbestos-related diseases during his 29 years at the plant. Rudkin charged that J-M knowingly "ordered him to work in an unsafe envi-

ronment, concealed the risk of asbestos exposure from him, and, after he contracted lung disease, deliberately failed to notify him, the State, or the physicians treating him of the disease and its connection with the plant. These actions, he argued, aggravated his disease.

Rudkin sought compensatory and punitive damages in Contra Costa Superior Court in the State of California. In rebuttal, J-M opined that Rudkin's exclusive remedy was workers' comp and that at most he was entitled only to a one-half increase in his compensation award, as provided by the State's workers' compensation law for "serious and willful misconduct" by employers. The Superior Court ruled in Rudkin's favor, and J-M appealed the case.

The California Supreme Court found that Rudkin's exclusive remedy would have been workers' comp, if he only had "contracted the disease because . . . (J-M) knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant . . ."

The Supreme Court continued that "in some exceptional circumstances the employer is not free from liability at law for his intentional acts, even if the resulting injuries to his employees are compensable under workers' compensation." However, the court noted a "trend" toward allowing a liability action "for injuries suffered in the employment, if the employer acts deliberately for the purpose of injuring the employee, or if the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury."

Despite its action, the court held that the precept of workers' comp as an exclusive remedy for workplace injuries "would not be seriously undermined" by holding J-M liable for the aggravation of Rudkin's disease. "... We cannot believe that many employers will aggravate the effects of an industrial injury by not only deliberately concealing its existence but also its connection with the employment," the court concluded.

J-M's Markusson said the company views the opinion as "very narrow" and unlikely to signifi-

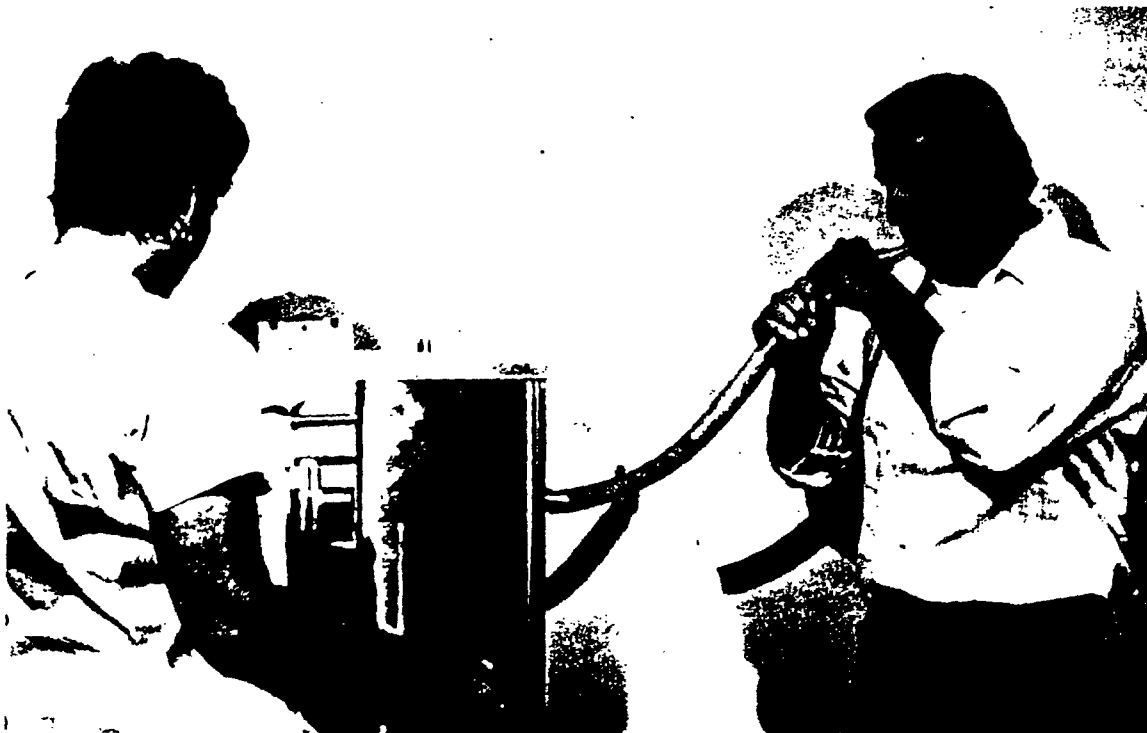
cantly change the asbestos litigation scene. He said similar challenges to the exclusivity of workers' comp were under way in New Jersey, Illinois, and Texas.

J-M is normally on the receiving end of lawsuits these days, but, along with nine other asbestos manufacturers, the company turned the tables recently and sued the Federal government. The manufacturers are seeking reimbursement of \$69,000 paid in an out-of-court settlement to William B. Glover, a former Norfolk Naval Shipyard pipe coverer who developed asbestosis. They claimed that the Federal government knew about the hazards of asbestos-containing insulation, failed to maintain good work practices at the shipyard, and must bear the responsibility for injuries resulting from its failure to properly use asbestos-containing products.

The manufacturers lost the first round in Federal District Court in Norfolk, Virginia, when Judge John A. MacKenzie ruled in favor of the government. MacKenzie found that "the government did negligently fail to fully carry out and implement the range of safety devices that the gov-

ernment knew were essential," but held that "the government's conduct was not so egregious as to prompt this court to impose upon the United States the entire burden of loss occasioned by Mr. Glover's asbestosis." The case is now on appeal before the U.S. Court of Appeals for the Fourth Circuit.

In keeping with its stance that the Federal government has been a major user of asbestos products and should be held responsible for its share of problems developing from the use of asbestos in government-controlled facilities, J-M is backing H.R. 1504, the Government Contractor's Product Liability Act of 1981, introduced January 29 by Rep. Robert McClory (R. - Ill.) and presently before the House Administrative Law Subcommittee. The bill seeks to provide indemnification from the Federal government for losses suffered in product liability suits by any supplier of products or services to the government. This would not hold if a court had determined that the supplier's liability resulted from the "primary and active negligence of the supplier." ■



Asbestos medical surveillance programs include lung function tests.