

CURRENT REPORT

those involving injuries induced by exposure to Agent Orange, or arising from airplane crashes, according to an American Bar Association proposal.

The proposed judicial panel is key to the report of the ABA Commission on Mass Torts, which is to be considered by the ABA House of Delegates during the 1989 ABA Annual Meeting Aug. 2-9 in Honolulu. If adopted by the House, the proposal will become association policy and a federal bill could be presented to Congress.

Leaving each individual claim resulting from these situations to be resolved separately "is inefficient and wasteful, and contributes to unreasonable delays in justice that are fundamentally unfair to all parties," according to Robert F. Hanley of Denver, chairman of the commission.

Other Proposals

The 76-page report also proposes:

- The panel would be authorized to declare "mass tort litigation" and consider consolidation of all claims in federal court whenever at least 100 civil tort claims arise from a single accident or from use of or exposure to the same product or substance, and each claim seeks more than \$50,000 in damages for wrongful death, personal injury, or property damage.

- The panel would have authority to consolidate some or all claims in mass tort litigation before a single federal court, whether they were filed first in federal or state court.

- When state law ordinarily would govern a decision, the federal court presiding would select the appropriate state law to apply.

- Where punitive damages are claimed, all such claims would be consolidated, and the court would enter one judgment, in favor of or against the defendant.

- Punitive damages would be awarded only where the defendant's conduct showed substantially greater indifference to safety than ordinary negligence, and was established under a "clear and convincing evidence" standard.

- The court could require parties to engage in alternative dispute resolution procedures as long as that did not impair a right to jury trial.

- The court also could approve settlements that barred additional claims, including those of persons who did not become eligible to file suit until after the settlement.

- Courts and lawyers should develop guidelines to determine reasonable fees and expenses for all lawyers involved in a mass tort case, including the reasonableness of contingent fees when there are multiple clients, or when liability is not seriously disputed.

Lone Dissenter To Report

Paul D. Rheingold of New York City, the only one of the 12-member commission to dissent from the report, objected to inclusion of what he characterized as "run-of-the-mill mass personal injury cases" in the definition of mass tort litigation. Existing procedures deal successfully with such cases, he said.

There have been only three examples of genuine mass torts—*asbestos claims*, *Dalkon Shield intrauterine birth control device cases*, and *Agent Orange claims*—and these have "wreaked havoc on the judicial system," he said, contending that the commission proposals are inadequate to handle these situations.

He suggested that all such cases be transferred to one judge in mandatory, no-option suits, in which the rights of all litigants, even those as yet unborn, would be resolved.

He also proposed that all sources of payment in case of liability should be brought into the suit; that one-time com-

prehensive discovery should be held; that the judge could apply any law he or she chose, or even create what might be called "consensus" law; that damages should be awarded according to a schedule to reflect jury expectancies; and that a fund should be created to provide for future plaintiffs.

Massachusetts

STATE ASBESTOS LAW NOT PRE-EMPTED BY OSH ACT, DISTRICT COURT JUDGE RULES

BOSTON—(By a BNA Staff Correspondent)—A federal judge July 12 upheld training and work practice requirements of a state asbestos law that took effect in Massachusetts April 1 (*Associated Industries of Massachusetts v. Snow*, USDC Mass, CA No. 88-2143-T, 7/12/89).

Rejecting a challenge by the state's largest employer group, Judge Joseph Tauro found that the state law is intended to protect the public as well as asbestos workers and therefore is not pre-empted by the federal Occupational Safety and Health Act.

However, the judge struck down a worker protection provision of the law covering use of respirators, use of protective clothing, and medical monitoring of workers. Public health rationales for those sections "are at best incidental to the true worker protection purposes behind these regulations," he said.

State training regulations require that workers complete a four-day course to obtain certification to perform asbestos abatement work. Work practice provisions set out standards for worksite preparation, decontamination, work procedures, and cleanup.

Associated Industries of Massachusetts sued to overturn the law, arguing that the state was required to submit its plan to OSHA for approval and that the state did not have the capacity to train all of the employees covered by the law. A request for a preliminary injunction to halt implementation of the law was denied by Judge Tauro in March (18 OSHR 1869).

Broad Definition

Patrick W. Hanifin, attorney for AIM, said that "what concerned us most initially" was that asbestos-related workers were defined broadly to include every carpenter, janitor, electrician, and mason. However, an agreement was reached with the state Department of Labor and Industries to define the group "much more narrowly," he said.

"They call it a clarification, but it appears to us they redefined [those covered] without wanting to say so," according to Hanifin. The original regulations would have covered 100,000-125,000 workers; they now cover "a few thousand," he estimated.

Nevertheless, AIM still contends that the state training requirements are "duplicative of OSHA" and "entirely unnecessary." The group is considering an appeal, Hanifin said, adding that he was "pleased the court knocked down part of the regulation."

In reaching his decision, Judge Tauro said he was guided by "the wisdom of the Second Circuit," which decided last year in *Environmental Encapsulating Corp. v. New York City* (13 OSHC 1849) that a local ordinance was not pre-empted if it had "a legitimate and substantial purpose apart from protecting asbestos workers." The Third Circuit has a more restrictive approach allowing pre-emption when the "primary purpose" of a state regulation is worker health and safety, he noted, while the First Circuit has not addressed the issue.

Training Focus

Examining the Massachusetts law, Judge Tauro found that the focus of training requirements was on protecting the public from environmental dangers by "minimiz[ing] the agitation and escape of otherwise dormant asbestos particles by ill-trained workers." Similarly, the work practice requirements are aimed at minimizing public exposure and limiting public access to contaminated areas, he found.

The state's argument that use of respirators allows higher concentration of asbestos in contained areas and thus lower levels in public areas is "somewhat far-fetched," Tauro observed, in striking down that part of the law. He said the argument is also contradicted by conflicting on-site ventilator regulations, which he upheld. Medical monitoring and protective clothing concerns are covered by "overlapping" state regulations, he added.

Shelly B. Kroll, an attorney for groups submitting amicus briefs, called the decision a "big victory for public health and worker safety on the job." Kroll added she was disappointed that part of the law was struck down, contending that the overlapping state regulations "don't go as far as [Judge Tauro] thinks."

Ergonomics

U S WEST/CWA SPOTLIGHT ERGONOMICS; COMMITTEE ESTABLISHED, NIOSH URGED TO DO STUDY

The Communications Workers of America and U S WEST Communications have joined forces to prevent and combat ergonomically-related injuries and illnesses among the 41,000 workers employed at U S WEST facilities.

The two groups not only created a joint committee to address ergonomic problems affecting telecommunications workers at U S WEST, but also urged the National Institute for Occupational Safety and Health to study health hazards posed to the company's directory assistance operators.

According to a June 23 "mission statement," the joint CWA/USWC Ergonomics Support Committee aims to ensure "appropriate and timely review, analysis, and implementation of sound ergonomic principles throughout USWC."

U S WEST—formerly Mountain Bell, Pacific West Bell, and North Western Bell—employs 41,000 workers in 14 states.

Although joint labor/industry ergonomics committees have been formed at the local level, this is the first that is district- and corporate-wide, according to David E. LeGrande, CWA's occupational safety and health coordinator.

The committee will address "relevant ergonomic parameters," including empirical studies related to potential adverse health effects, work station and equipment design, and other environmental factors, the mission statement said.

Operator Services Targeted

The committee is expected to look first at operator services at U S WEST's Denver and Phoenix operations where there have been numerous cases of carpal tunnel syndrome reported, Walter F. Maulis, international vice president, CWA District 7, told BNA.

Maulis is jointly heading the advisory committee with Arnold E. Manseth, executive director of employee relations for U S WEST.

The advisory committee's first meeting is tentatively scheduled for Aug. 17, when the committee expects to meet with NIOSH officials to discuss the scope, conditions, and time frame of the health hazard evaluation that NIOSH has agreed to do, Maulis said.

In a June 23 letter to Larry Fine, director of NIOSH's division of health evaluations and field studies in Cincinnati, Maulis and Manseth called on NIOSH to "examine how the work may impact the health of [directory assistance] operators."

All directory assistance facilities within USWC will be available for the study, according to the letter.

Indoor Air Pollution

GOVERNMENT, LABOR REPRESENTATIVES TO TESTIFY BEFORE HOUSE PANEL JULY 20

A hearing on the "Indoor Air Quality Act of 1989," introduced by Rep. Joseph Kennedy (D-Mass.), is scheduled for July 20 by the House Science, Space and Technology Subcommittee on Natural Resources, Agricultural Research and Environment.

Kennedy introduced his measure, HR 1530, on March 21. As introduced, the legislation is designed to reduce risks posed by exposure to indoor air contaminants in workplaces, schools, and other buildings (18 OSHR 1797).

In general, the measure would mandate a comprehensive assessment of "sick buildings" and would fund a program to mitigate air pollution in buildings that are identified as posing serious health risks to their occupants.

The measure also would require that construction funds be allotted to help federal agencies pay for innovative clean air technology in their new buildings.

The subcommittee hearing is scheduled for 1 p.m. in Room 2325 in the Rayburn House Office Building. Three panels of witnesses are scheduled to testify, including representatives of state and federal government health agencies, labor, and private citizens who suffer from adverse health effects that may stem from indoor air sources.

Expected to testify are David Schlein, co-chairman of the Safe Workplace Air Coalition of the American Federation of Government Employees; New Jersey Deputy Commissioner of Health Dr. Thomas Burke; Dr. John McCarthy from Environmental Health and Engineering Inc.; and Dr. Rebecca Bascom from the University of Maryland at Baltimore's Department of Medicine.

Also expected to appear are Barbara Katz from the Consumer Federation of America; Dr. Ellen Silbergeld from the Environmental Defense Fund; and Dr. Philip Bromberg from the American Lung Association.

Senate Action

On the Senate side, the Senate Environment and Public Works Subcommittee on Superfund, Oceans and Water Protection held a hearing May 3 on similar legislation introduced March 17 by Sen. George Mitchell (D-Maine).

Mitchell's bill, S 657, aims to improve research on indoor air contaminants and establish a "national response plan" to combat those contaminants (18 OSHR 1772).

During the hearing, Sen. Frank Lautenberg (D-NJ) released a draft Environmental Protection Agency report that concluded indoor air pollution is a serious health threat, that mitigation efforts should be expanded, that medical expenses and lost productivity from indoor air pollution have cost U.S. society tens of billions of dollars, and that research on the issue should be expanded to the level proposed in S 657—about \$100 million for a five-year period (18 OSHR 2006).

An aide with the Senate subcommittee told BNA July 17 that a markup of Mitchell's bill has not yet been scheduled.