FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLAINTIFF'S EXHIBIT
ATT-181

No. 76-1028 September Term, 19 76

AF Corporation,
Petitioner

v.

Occupational Safety and Health Review Commission and John T. Dunlop, Secretary of Labor,
Respondents

United Paperworkers Int'l Union, Local 691,
Intervenor

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 13 1977

GEORGE A. FISHER
CLERK

efore: MacKinnon, Circuit Judge

O R D E R

It is ORDERED that the separate opinion filed by Circuit Judge MacKinnon, concurring specially, in the above entitled case filed June 28, 1977 is hereby amended as follows:

Page 1, lines 8-9, change "Occupational Safety and Health Review Commission" to "Secretary of Labor".

Page 1, line 10, italicize: "measurable quantity".

Page 1, line 26, delete: "by the Commission".

Page 3, line 3, change: "Commission" to "Secretary".

Page 8, amend first partial paragraph to read:

> ded. It would be helpful if the Secretary would state what that "standard" is. That is not a difficult task if he has one in mind. If he does not have one in mind he should have. Maybe the Secretary does not have substantial evidence to prove that the "standard" of "concentration" the Commission is applying constitutes a "hazard," and that may be the reason the Secretary chose to leave it in an ambiguous state. As it is now both the Secretary and the Commission are home free leaving the public in the dark as to what degree of "concentration" is more than "negligible" according to some unstated "standard" of "concentration."

Page 8, line 31, change: "Commission" to "Secretary".

For the Court:
GEORGE A. FISHER, Clerk

By: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

LLA 001040

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1028

GAF CORPORATION,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, and WILLIAM J. USERY, Secretary of Labor, United States Department of Labor,

Respondents,

UNITED PAPER WORKERS INTERNATIONAL UNION LOCAL NO. 691, AFL-CIO

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITION FOR REHEARING AND SUGGESTION OF HEARING EN BANC

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 76-1028

GAF CORPORATION,

Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION and
WILLIAM J. USERY,
Secretary of Labor, United States Department of Labor

Respondents,

and

UNITED PAPERWORKERS INTERNATIONAL UNION,
LOCAL NO. 691, AFL-CIO

Intervenor.

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CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

This case arose when the Secretary of Labor issued a citation to the Petitioner GAF under the authority of the Occupational Safety and Health Act, 29 U.S.C. §§ 651, et seq., charging GAF with a violation of a standard, 29 C.F.R. § 1910.93a(j), which requires employers to provide certain pre-employment, annual, and separation medical examinations to all workers "in an occupation exposed to airborne concentrations of asbestos fibers...." GAF contested this

LLA 001042

citation throughout the administrative review procedures provided for by the Act, and before this Court, on its contention that the standard, and particularly the language quoted, is ambiguous, void for vagueness, and the Secretary's interpretation is arbitrary and unreasonable. The Secretary contended that the meaning of the standard was that medical examinations should be afforded to employees exposed to any amount of airborne asbestos fibers. Consequently, even though the levels measured in GAF's plants were below 1 fiber per cubic centimeter of air, the Secretary contended that GAF had violated the standard by failing to afford medical examinations to its employees in these plants.

It is respectfully submitted that the issue of whether every employee in any place of employment exposed to any amount of airborne asbestos fibers should be accorded a medical examination is of exceptional importance and should be heard by this Court sitting en banc, because of the great numbers of places of employment and employees which would be affected. As a point of beginning, GAF showed in its Motion for Stay of Order of Commission, and supporting affidavit, filed in this case, that it alone had approximately 4,200 employees in its plants which handle asbestos or asbestos containing products, although less than 10% of such employees are directly involved in handling asbestos or asbestos containing products. Therefore, to GAF alone, the issue in this case is whether it must afford regular medical examinations to almost 4,000 employees who in the normal course of their duties would be only briefly and infrequently exposed to any asbestos fibers.

In addition, it was noted in the Occupational Safety and Health Review Commission decision which is under review in this case that Congress, when it was debating the passage of the Act, noted that there were an estimated three and one-half million workers "exposed to some extent to asbestos fibers, as are many more in the general population." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 2 (1970)(emphasis added), quoted at page 9 of the Commission decision (App. 87).

LLA 001043

Judge MacKinnon, concurring specially, points out that it has been reported that there are high background levels of asbestos fibers in many geographic areas, which could add to the "concentrations" of airborne asbestos fibers in workplaces even though the workplaces involved no handling of asbestos or asbestos products. (Slip opinion, page 5 n.3).

Thus, the resolution of the issue in this case affects a large percentage of the total working population of the United States, as well as an unknown, and perhaps even greater, segment which is exposed "to some extent" because of environmental background levels, which segment may be more accurately defined in the future and subject to the standard and enforcement policy in question in this case. Despite this wide ranging effect of the Court's decision, we respectfully suggest that because none of the questions involved in this case are of such novelty in the field of constitutional law or involve splits between the Circuits, it is unlikely that the Supreme Court would grant a Petition for Certiorari should GAF pursue that option available to it. Therefore, the judgment and opinion of the panel would be the final judicial word on the validity and interpretation of this wide ranging regulation. We respectfully submit that such circumstances merit a rehearing en banc by this Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 76-1028

GAF CORPORATION,

Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION and
WILLIAM J. USERY,
Secretary of Labor, United States Department of Labor

Respondents,

and

UNITED PAPERWORKERS INTERNATIONAL UNION,
LOCAL NO. 691, AFL-CIO

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITION FOR REHEARING AND
SUGGESTION OF HEARING EN BANC

Petitioner GAF Corporation petitions this Court for a rehearing of its Order entered on June 28, 1977, pursuant to Federal Rule of Appellate Procedure 40, and respectfully suggests a rehearing en banc, pursuant to Local Rule 14 and Federal Rule of Appellate Procedure 35. In its Order and opinion entered on June 28, 1977, the Court, in an opinion filed by Judge Robb, denied the Petition for Review filed by GAF Corporation from the Order below of the Occupational Safety and Health Review Commission, upholding the citation for

LLA 001045

violation of the Occupational Safety and Health Act of 1970 issued by the Secretary of Labor to the Petitioner GAF. Judge MacKinnon filed an opinion, specially concurring in the judgment of the Court. We respectfully show that the issue decided by the panel of this Court (including Mr. Justice Tom Clark, now deceased) is of exceptional importance and should be reheard en banc, and that the Court in its opinion, and Judge MacKinnon, in his special concurrence, overlooked crucial issues and points of law and misapprehended arguments and points of law cited by Petitioner GAF.

The majority and special concurring opinions overlooked vital points and authorities, and misapprehended other arguments and points of law raised by Petitioner.

A. Interpretation of the Regulation.

GAF first argued that the term "concentrations" of airborne asbestos fibers clearly implied a quantity of fibers, and that a quantitative limit must be interpreted in the term "concentrations" in order for the term to be reasonably applied and enforced in a particular case. The Secretary argued, on the other hand, that the term meant any amount of airborne asbestos fibers, because no quantity was mentioned. The majority opinion of the panel of this Court also reasoned that this term could not be interpreted to impose a quantitative limitation because it mentioned no quantitative limitation. We submit that this reasoning merely begs the question. The vice of the regulation urged by GAF is that the regulation unaccountably leaves out a quantitative limitation which is necessitated by the context of the term in order to make the term understandable.

As Judge MacKinnon pointed out in his specially concurring opinion, "no person can discern from this language what degree of 'concentration[]' must exist before medical examinations are required." (Slip opinion, page 1) (emphasis added). Dictionaries in use by "men of common intelligence", Connally v. General Construction Co., 269 U.S. 385, 391 (1926), define the noun "concentration" as follows "1. The act or process of concentrating or the condition of being concentrated...4. Chemistry. The amount of a specified substance in a unit amount of another substance", The American Heritage Dictionary of the English Language 275 (1973) (emphasis added); "1. The act or action of concentrating: as a: the bringing to a common center... c: an increasing of strength...2. a result of concentrating: a concentrated mass or thing...3. of a solution, mixture, or dispersion: the relative content of a component (as disolved or dispersed material) that may be expressed in percentage by weight or by volume in parts per million, or in grams per liter...." Webster's New International Dictionary, 469 (Unabr. Ed. 1971)(emphasis added).

Thus, any person of common intelligence relying upon the dictionary definition of concentration would expect a concentration of things to involve a coming together of a certain amount of the particular thing. Moreover, in the context of the chemical expression of a concentration of mat. .s, a man of common intelligence relying upon a dictionary would expect the amount of the material in question to be expressed in terms of a unit amount, a percentage, or part, i.e., a measure of the amount of the substance in question. In fact, the Secretary in his Reply Brief to the Administrative Law Judge below in OSHRC Docket No. 4008, conceded that "the standard necessarily implies that employment situations exist in which medical examinations for asbestos

diseases are not required." Clearly, the Secretary concedes that there are some exposures to asbestos fibers which trigger the requirement for medical examinations, and others which do not. If that is true, there must be one quantitative dividing line, yet the Secretary inconsistently denies this premise, and the panel's opinion upholds this point of view. Thus, we submit that this initial premise of the panel's opinion is clearly incorrect.

The panel's opinion indicated further that it was convinced that the Secretary clearly meant to include no quantitative limit in the term concentrations, because the standard as originally proposed had included a quantitative limitation, which did not appear in the final version of the standard. First of all, we submit that the panel's interpretation of this set of circumstances is clearly not the only interpretation which could be made. Rather, we submit that, if anything, the deletion of the quantitative limit from the proposed standard (which we note was not accompanied by any explanation whatsoever in the preamble to the standard as adopted) supports only the proposition that the quantitative limit in the proposed standard was rejected, not that the concept of a quantitative limit was rejected, since the quantitative term "concentrations" was left in. If the Seceretary meant to withdraw any connotation of a quantitative limit from the standard, it would have been very simple to delete the term "concentration" as well as the expressed quantitative limit, without changing the meaning of the section (MacKinnon, specially concurring, at page 6). As Judge MacKinnon also points out, it would have been very simple and practical for the Secretary to state "objective criteria" for medical examinations, whatever they might be, rather than using the ambiguous term "concentration". (Slip opinion, page 4).

Further, we assume that Part A of the panel's majority opinion is also intended to address GAF's void-for-vagueness argument against the term "concentration", even though the opinion does not expressly do so. The use of the "legislative history" of the development of the standard is improper in determining whether a statutory or regulatory term is too vague on its face to be enforceable. See United States v. Harriss, 347 U.S. 612, 617 (1954); Pleuti v. Rosenberg, 302 F.2d 652, 655 (9th Cir. 1962). In using the history of the regulation to arrive at an interpretation which would cure the vagueness of the term concentration, the panel clearly erred.

Under the void-for-vagueness doctrine, the test is whether the statute or regulation in question "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application...." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). GAF contended that since the term "concentrations" required a quantitative limit in order to make the term understandable to men of common intelligence, either the Court must supply by interpretation such quantitative limitation, if such appears from the face of the regulation and in the context of surrounding regulations, or the regulation is void on its face for vagueness. Judge MacKinnon, specially concurring, agreed that the term "concentrations" of asbestos fibers "does not provide an ascertainable standard for those who wish to comply with the law." (Slip opinion, page 1). His opinion reasoned, as GAF argued, that the regulation on its face did not explain in any way what was meant by "concentration", and that the majority opinion "leaves the matter completely to conjecture." (Slip opinion, page 2). Nevertheless, Judge MacKinnon felt obliged to concur because he reasoned that the

"concentrations" of asbestos fibers found in the Petitioner's plants were "not insignificant", and because the record indicated that GAF "had adequate notice that the Commission would construe its regulation to require physical examinations at these 'concentrations' ". (Slip opinion, page 1) (emphasis added).

We respectfully submit that Judge MacKinnon, and the majority in its opinion, misapprehended the state of the record in this case, and further misapprehended the reach of the void-for-vagueness doctrine on the record in this case. First, the regulation was not adopted, nor is it amendable by, the Commission which issued the Order under review in this case. Rather, the rulemaking and interpretative powers lie solely with the Secretary of Labor, while the Commission's role is solely to adjudicate disputes arising out of contested citations issued by the Secretary. Therefore, we submit that there is nothing of record to indicate any knowledge by GAF of how the Commission might construe the regulation, once it had come before the Commission in an adjudicatory proceeding. Further, to the extent that Judge MacKinnon intended this comment to reflect GAF's knowledge of the Secretary's rulemaking process earlier discussed, in which the proposed regulation was changed in its final form, we again urge that such rationale is improper in considering a void-for-vagueness challenge. Third, we submit that there is nothing of record, either as a part of the Secretary's rulemaking, or as an evidentiary matter in this case, to indicate what amounts of asbestos fibers are "significant" and what are "insignificant." Indeed, as Judge MacKinnon pointed out in his opinion, the very vice of the Secretary's interpretation of the regulation to apply to any amount of airborne asbestos fibers is that it allows the Secretary, in his discretionary enforcement role, and the Commission, in its adjudicatory role, to apply in the future, on an ad hoc basis, whatever interpretation of "significant",

"insignificant", or "negligible" that it desires, with no guidance from the regulation.

More importantly, however, if the regulatory term is on its face deemed vague and not capable of clearly being understood by men of common intelligence, this is not the type of case where the vagueness of the regulation can be cured by reference to the facts concerning the particular party to whom the regulation is applied. As this Court once put it, "the statutes that might have been plainer [could be] applied to the infringing conduct of those who should have known better," Ricks v. United States, 414 F.2d 1111, 1118 (D. C. Cir. 1968), but "this is not to say that a bead-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage." United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963), quoted in Ricks v. United States, supra, at 1118.

This is not a case like the case where it was held that one should know that "unreasonably low prices" intends to ban sales below costs, United States v. National Dairy Products, supra at 34, or where one should know that "near" a courthouse includes a proscription of "a demonstration within the sight and hearing of those in the courthouse", Cox v. Louisiana, 379 U.S. 559, 568-569 (1965). Rather, in this case an employer, faced with a quantitative standard, with no quantity named, is clearly at a loss to determine what conditions constitute a concentration, to which the regulatory proscriptions apply. As the United States Supreme Court recently expressed it, there can be no "hard-core violator" of a vague statute, where there is no "core" to the statute. Smith v. Goguen, 415 U.S. 566, 578 (1974). Where a stature is vague, "not in the sense

that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all ...." Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971), no violation of the statute can be found, because there is no ascertainable standard of conduct by the person accused, nor for application by law enforcement officials and triers of fact. "Until [the vagueness] is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language." Smith v. Goguen, supra at 578.

In the Smith case, the statutory term which the Supreme Court found completely devoid of an ascertainable standard was "treats contemptuously" the United States flag. The Court found that no matter what the treatment of the flag, the statute was so vague on its face that it could not be upheld under any state of facts. We submit that the term "concentrations" is similarly defective. There is simply no "core" which is obviously in violation of the proscription of the regulation in question. Whether or not GAF plants contained a "significant" or "negligible" level of "concentrations" of asbestos fibers is simply impossible to determine from the face of the statute and common understanding of the terms used. Yet, the standard clearly could be made precise, unlike the cases earlier mentioned where precision is impossible. Therefore, GAF could not be prosecuted as a "hard core violator" clearly upon notice that it fell within the ambit of the proscription of the regulation. We submit that both the panel majority and Judge MacKinnon, in his specially concurring opinion, overlooked this critical point of law in concluding that while "concentrations" might be ambiguous, it was not vague as applied to GAF.

B. Validity of the Regulation.

Under the subsection of its opinion corresponding to this subsection of this Petition, the panel majority rejected GAF's argument that the Secretary's interpretation of the regulation was arbitrary because it was inconsistent with his approval of a different, and less restrictive, regulation adopted by the State of California. We submit that the panel misapprehended the statutory language relied upon by GAF, and consequently failed to address the issue raised by GAF.

Briefly, the Occupational Safety and Health Act provides for enforcement of state standards by state authorities, where the Secretary of Labor has approved the state plan and permitted the state to take over enforcement functions. As the panel majority points out, however, the state plan may be approved only if it "provides for the development and enforcement of safety and health standards ... which standards (and the enforcement of which standards) ... will be at least as effective in providing safe and healthful employment ... as the standards promulgated under § 655 of this Title ...." 29 U.S.C. § 667(c) (1970). The Secretary has approved the California plan which includes asbestos standards corresponding to the standards in question in this case (majority opinion, page 10).

However, the California medical examination standard, like that recommended by the National Institute for Occupational Safety and Health (see majority opinion, pages 6, 7), requires medical examinations only if the employees may be exposed to concentrations of asbestos fibers greater than 1 fiber per cubic centimeter. General Industry Safety Orders, 8 CAL. ADMIN. CODE, Ch. 4, Subch. 7 § 5208(j). We submit, as we argued to the panel, that the Secretary's approval of the California standard as "at least as effective as" the federal standard rendered his more restrictive interpretation of the federal

LLA 001053

standard arbitrary and unreasonable-if the California standard of 1 fiber per cubic centimeter is at least as effective as the federal standard triggered by "concentrations", then "concentrations" must envision a measure of 1 fiber per cubic centimeter or greater.

The Secretary argued, and the panel majority concluded, that the statutory measurement of "at least as effective" applied only to the overall California plan. Therefore, they concluded that since there were certain elements of the California plan which were better than elements of the federal enforcement scheme, it was reasonable to conclude that overall the California standards as enforced would be at least as effective as the federal standards, notwithstanding a difference in degree in the medical examination standard. As Judge MacKinnon pointed out in his opinion, and GAF argued, other elements of the California plan, and the number of investigators, specifically, are not germane to the issue. The statute very clearly provides that the plan must provide for state standards which will be at least as effective as corresponding federal standards. If the federal medical examination standard is triggered by any amount of airborne asbestos fibers, than the California medical examination requirement clearly is not as effective as the federal standard in its requirements for medical examinations for the protection of employees. As a corollary, the Secretary's approval of the California standards as "at least as effective" the federal standards must be read to mean that the federal standard was no more restrictive than the corresponding California standard.

Therefore, we submit that but for their misapprehension and misapplication of the statutory measure, the panel majority would have agreed with Judge MacKinnon that it is improper for the Secretary to be allowed to take an inconsistent position with regard to his own medical examination

standard, when he has approved a different, less restrictive, standard to be applied and enforced in the State of California. The only reasonable course for a Court, in viewing the Secretary's conduct, in order to remove the inconsistency, is to interpret the Secretary's standard no more restrictively than the California standard which he has expressly approved as sufficient under the Act.

CONCLUSION

In view of the importance of the resolution of the issue before the Court to employers throughout the United States and millions of employees across the country, GAF respectfully requests that the instant case be reheard en banc by this Court. Because the panel misapprehended arguments of the Petitioner concerning the interpretation and constitutional validity of the regulation at issue, and because the panel apparently overlooked certain aspects of the body of law underlying the void-for-vagueness doctrine, it is respectfully urged that this case merits reconsideration by this Court sitting en banc, and that this Court should vacate the judgment and opinion of the panel and reverse and vacate the decision below by the Occupational Safety and Health Review Commission.

Respectfully submitted,

STOKES & SHAPIRO

By McNeill Stokes
McNeill Stokes

By Ira J. Shotherman, Jr.
Ira J. Shotherman, Jr.

Attorneys for Petitioner

cording to the report, OSHA, under Section 1960 31, nor- should not be expected to process a complaint if the in- complaint procedures of the agency in question have een pursued first. However, where OSHA determines an agency's procedures fail to meet the spirit or in- of the Act, "final disposition" of the complaint by the cy is not required before the employee can take the laint to OSHA. The report also noted that agencies e the proper safeguards to prevent recriminations nployees making complaints

eport by an ad hoc committee responding to a House on federal workplace safety and health also was ap- d by the council. The report, submitted to the council in mber (Current Report, November 11, p. 719), was ted at the last FACOSH meeting with the provision that ents from interested parties be solicited and incor- ed into the final version. John M. Kanak, chairman of d hoc group, noted that comments had been reviewed d into the report, though the document remained ly unchanged" except for minor rephrasing

ka

RRANTLESS INSPECTIONS INVALID TE SUPREME COURT UNANIMOUSLY RULES

rrantless inspections under the Alaska Occupational y and Health Act are unconstitutional, the Alaska me Court unanimously ruled on June 2

s ruling by the five-member court came in *Woods & e, Inc. d b a Alaska Truss & Millwork v. State of ka, Department of Labor* No 2[illegible]

e case arose when the employer's owners and agents ed to permit a state Department of Labor inspector to its Anchorage workplace. Without showing probable to believe that a violation of law existed, the agency ned a court order compelling the employer to submit to ction. The order was stayed by a justice of the state me court pending review by the court

lead opinion by Justice Jay A. Rabinowitz surveyed Supreme Court and lower federal court decisions on ntless administrative searches, but rested its holding e Alaska constitution. Noting that Article I, Section 14 e state constitution protects against unreasonable hes and seizures "other property" in addition to the ons, houses, papers, and effects mentioned in the n Amendment to the U. S. Constitution, Justice tz concluded that the state constitution's guarantee r than that of the federal Constitution. This inter- tion is reinforced by the explicit recognition of the right acy in Article I, Section 22 of the state constitution, owitz added. Finding that the employer had a able expectation of privacy, the court determined that ally sanctioned warrants must be obtained before the er may be compelled to submit to inspection

ever the court adopted an "attenuated" standard of le cause based on the U. S. Supreme Court's 1967 in *Camara v. Municipal Court of San Fran-* 7 US 523). In *Camara*, the Court required only reasonable administrative standards for inspection been established and are met in the inspection in n" rather than a showing of probable cause to e that a violation of law existed

Concurring Opinion

Justice Robert Boochever concurred in the result n the basis of the U. S. Supreme Court's ruling in *See v. City of Seattle* (387 US 541), the companion case of *Camara*. If he were free of the federal restraint, Boochever said, he would uphold the warrantless inspections under the Alaska statute and case law. Such inspections of workplaces are not unreasonable, he argued, because "owners of commercial premises should be aware that the OSHA law requires inspections," and therefore would not have a reasonable expectation of privacy

Enforcement

ASBESTOS MONITORING NOT REQUIRED UNTIL FIBER RELEASE SHOWN, OSAHRC RULES

The Secretary of Labor must prove that asbestos fibers are being released into the air and not just that a "genuine possibility" of release exists in order to establish that an employer must monitor asbestos levels, the Occupational Safety and Health Review Commission ruled May 12

The 2 to 1 decision in *Goodyear Tire and Rubber Company* (No 13442) affirmed the order of Review Commission Judge J. Paul Brenton dismissing the secretary's complaint that the company had failed to monitor asbestos levels

The judge ruled that an inference that asbestos fibers are released during the removal of asbestos pipe insulation and its replacement with nonasbestos insulation was not supported by the evidence. The judge concluded that monitoring is not required just because asbestos is present and in use

In affirming the dismissal, Review Commission Chairman Frank R. Barnako rejected the argument that the secretary only has to show a "genuine possibility" of release of asbestos fibers before monitoring is required. Commissioner Robert D. Moran concurred.

The commission added that where release of the fibers cannot be inferred from the nature of the employer's work practices, the employer's failure to monitor is not in violation of the monitoring requirement. The Review Commission affirmed the judge's finding that the evidence did not support an inference that asbestos fibers are released.

In dissent, Commissioner Timothy F. Cleary said that the occupational safety standards require an employer to monitor asbestos fiber levels in the air before steps are taken to prevent employee exposure to the hazard. "It is plain error to attach any significance to estimates of low concentrations in determining whether the duty to monitor attaches. Monitoring standards are intended to supplant such estimates, no matter how reliable they may be," he added.

This decision is reported at 5 OSHC 1473.

Cotton Dust

EXEMPTION FOR PROCESSED COTTON URGED BY KIMBERLY-CLARK CORPORATION

The Kimberly-Clark corporation, writing in a post-hearing comment June 6, urged an exemption of processed cotton from the Occupational Safety and Health Administration's proposed new cotton dust standard

The agency currently is reviewing the record of public hearings on the proposal which concluded May 17 (Current Report, May 19, p. 1564)

Robert E. Freer, Jr., staff vice president of Kimberly-Clark, referred to testimony given during the hearing by an official of Health Industry Manufacturers Association, G. Briggs Phillips

LLA 001056