

Litigation**GOVERNMENT ASKS COURT CLARIFICATION
IN VC ORDER TO CONTINUE EMERGENCY RULE**

The emergency temporary standard for vinyl chloride should be continued until the Second Circuit Court of Appeals reaches its decision on the merits of the cases challenging the permanent standard, the Government maintained in a motion for clarification filed December 24.

The motion seeks clarification of the court's December 13 order granting the various stay motions in *The Society of the Plastics Industry, Inc. v. Occupational Safety and Health Administration* and other consolidated cases (Current Report, December 19, p. 843).

It is the Government's understanding that the court's order leaves in force all provisions of the emergency temporary standard including its 50 ppm ceiling on worker exposure to vinyl chloride pending disposition of the merits of the petitions for review, and that the emergency temporary standard is to be continued in effect until the court reaches its decision on the merits.

The stay motions filed by The Society of Plastics Industry, Inc., Tenneco Chemicals, Inc., Air Products and Chemicals Inc., and Hooker Chemicals & Plastics Corporation, specifically provided for continuation of the emergency temporary standard, but those of Firestone Plastics Company and Union Carbide Corporation, did not address that question. Since the court granted all four motions, clarification is appropriate, the Government said.

The stay motions of SPI, Tenneco, Air Products, and Hooker chemicals also requested that the court establish a "lead-time" for the application of the permanent standard should it be upheld on the merits. Since the court's December 13 order does not address this aspect of the stay motions it is the Government's understanding that the court has not acted upon that request, and that the court will either deal with that issue when rendering its decision on the merits or remit the petitioners to their remedies under the Occupational Safety and Health Act.

Plastics Industry Reply

The Society of the Plastics Industry's reply noted that there is no need for the court to clarify its order regarding the continuation of the emergency temporary standard since SPT agrees with the Government.

But SPI does not share the Government's view that the court did not address the request for "lead-time". SPI said it expressly sought relief which would provide that, following the court's decision, a period of 90 days would be allowed as lead-time for the petitioners to make preparations to comply with any portion of the standard that might be upheld.

Since this type of relief was specifically requested, SPI said, and it was unopposed in the Secretary of Labor's responses to the stay requests, "it seems clear to us that the terms of the court's order granting a stay and 'other and further relief' includes the granting of all of the interim relief requested.

The court should issue only a clarifying amendment stating that the emergency temporary standard shall remain in effect and that, upon issuance of an opinion upholding any portion of the standard, the petitioners shall have a reasonable period of 90 days before compliance will be required," SPI said.

Neither the clarification of the court's order, nor the final decision in the case has been issued. The Occupational Safety and Health Administration is enforcing the 50 ppm level at present.

CAW Suit

The Oil, Chemical, and Atomic Workers International Union (OCAW) filed suit in the Court of Appeals for the District of Columbia on the vinyl chloride standard also. Reportedly, the Government is trying to persuade the OCAW to drop the suit, since it has been heard already in the Second Circuit. If the suit is not dropped, the Government will move to have it consolidated and moved to the Second Circuit. The Government must file a certified copy of the record by January 13 if the case is to proceed in a normal fashion.

Vinyl Chloride**MESA-NIOSH ADOPT REGULATIONS
FOR APPROVAL OF VC RESPIRATORS**

Regulations for testing vinyl chloride respirators were adopted jointly by the Mining Enforcement and Safety Administration and the National Institute for Occupational Safety and Health on December 30.

The Occupational Safety and Health Administration adopted a standard for occupational exposure to vinyl chloride on October 4 (Current Report, October 3, p. 491). The standard provides that respiratory protection shall be provided at the request of employees exposed to 25 parts per million or less of vinyl chloride and requires that respirators shall be selected from those approved under Part 11 of Title 30, Code of Federal Regulations.

Specifically, the standard requires, among other things, that where the atmosphere concentration of vinyl chloride is not over 25 ppm, any gas mask with front or back-mounted canister or powered air-purifying respirator with canister which provides a service life of at least four hours may be used, and where the concentration is not over 10 ppm, any chemical cartridge respirator with an organic vapor cartridge which provides a service life of at least one hour may be used. The standard further requires a program to assure timely replacement of canisters or cartridges.

Purpose of Rules

The purpose of the amendments adopted by MESA and NIOSH is to establish special procedures for testing vinyl chloride respirators and to adopt a requirement that any canister or cartridge used to protect employees against exposure to vinyl chloride, have an end-of-service life indicator. Unlike many other gases, vinyl chloride has no inherent warning properties. Where a gas has an odor and where a canister or cartridge is nearing or is at the end of its useful life, the worker is aware because he can smell the gas.

Vinyl chloride is colorless and odorless. Consequently, with due regard for the wearer's health, any cartridge or canister should possess an end-of-service-life indicator. Section 11.205 provides that after June 30, 1975, each canister or cartridge submitted for approval must have an end-of-service-life indicator. The delay in this requirement is to give NIOSH an opportunity to test the effectiveness of the indicators. Section 11.205 further provides that after December 31, 1975, when respiratory protection at 25 ppm or less becomes mandatory, respirators without an end-of-service-life indicator will not be considered approved for use by employees exposed to vinyl chloride.

There is no delay in the effective date for the special tests adopted for vinyl chloride respirators. Since it is essential that there are available approved respiratory devices for protection against exposure to vinyl chloride, MESA and

NIOSH found that good cause existed for omitting notice of proposed rulemaking.

The amendments add a new Subpart N to Part II, Title 30, CFR, with sections 11.200-11.209 applicable to vinyl chloride respirators.

The amendments will appear in a future supplement to the OSHA Reference File.

Approved Respirators

The testing and certification laboratories of NIOSH at Morgantown, W. Va., approved two respirators for use in exposure to vinyl chloride.

Approval was granted Mine Safety Appliances Company, Pittsburgh, Pa., (approval number TC 14G 84) for 25 ppm VC for not more than four hours or until the end of the workshift, whichever occurs first. The second approval was granted to Scott Aviation, Plant Four, South Haven, Mich., (TC 14G 85), with the same restrictions as MSA's approval. More respirators are expected to be approved sometime in the future.

Enforcement

JUDGE'S REJECTION OF STIPULATION, PENALTY INCREASE AFFIRMED BY OSAHRC

A Review Commission judge's decision to reject a stipulated penalty that contained a 50 percent abatement credit, thereby increasing the penalty, was affirmed by a 2-1 ruling of the full Commission, which rejected use of a rigid 50 percent abatement credit as "repugnant to the purposes of the Act."

The case resulted from a Labor Department inspection of the New Berlin, Wis., roofing construction project of the J.M. Roofing Company (No. 1759).

At the hearing before Review Commission Judge Paul L. Brady, the parties stipulated that a penalty for a crane violation was not contested and that they only wished to try the issue of whether the company violated 29 CFR 1926.550 (a) (15) (i) by failing to have a crane operated at a minimum clearance of 10 feet from an electrical power line.

In the process of lowering equipment between the building and the power line the crane cable struck the power line and an employee of the company was electrocuted. The judge observed that the company's foreman made no reasonable effort to eliminate the dangerous condition in spite of his knowledge that the crane had to operate very close to the electrical power line.

In his lead opinion, Commissioner Timothy F. Cleary stated that the critical issue was whether the stipulation should be pierced. He pointed out that the Secretary's proposed penalty of \$225 was increased at after consideration of the statutory factors listed in Section 17 (j) of the Occupational Safety and Health Act. There was an allowance of a 50 percent abatement credit even though the company had corrected the situation because the rented crane was no longer at the worksite. Although an appropriate credit for timely abatement is consonant with the remedial nature of a civil penalty, according to Cleary "... it is something to be applied when it bears a real and substantial relationship to the facts of the case." In this case an abatement credit was not necessary for inducing present compliance. "Therefore, the penalty reflecting the abatement credit and contained in the stipulation can hardly be said to be consistent with the application of the statutory penalty factors," Cleary stated. He affirmed the judge's increase of the penalty from \$225 to \$500.

In a concurring opinion, Commissioner James F. Van Namee said that he did not feel that the question of whether to pierce the stipulation was critical because the parties superseded the stipulation by presenting evidence on the penalty issue.

Chairman Robert D. Moran, concurring in part and dissenting in part, found the commission's affirmation of an increased penalty in this case "particularly repugnant." In Moran's opinion, the parties had a right to assume that their stipulation would preclude any further consideration of the appropriateness of the penalty. The result ordered by the judge caught the parties by surprise and was patently unfair, according to the chairman. Moran believes that the Commission has no authority to disturb a settlement reached between the Secretary and the employer and feels that the Secretary can and should enforce no penalty in excess of that specified in the agreement.

This ruling will appear in a future Decisions supplement.

Enforcement

OSAHRC UPHOLDS VACATION OF COTTON DUST CITATION; CITES SAMPLING PROCESS

The Secretary of Labor's failure to distinguish ordinary dirt from raw cotton dust contained in air samples taken by an industrial hygienist properly resulted in vacation of a citation for exposure of employees to excessive amounts of raw cotton dust.

This 2-1 ruling by the Occupational Safety and Health Review Commission, issued December 19, affirmed Judge John J. Morris' decision in *Spring Air Mattress Company of Colorado* (No. 1422).

The Secretary's industrial hygienist visited Spring Air's cotton mattress manufacturing plant for the purpose of sampling the air in the plant's garnetting room. In this room one employee removes burlap sacks from bales of cotton lint, pulls the bales apart and places the cotton on a conveyor. The cotton is then moved through a garnetting machine that cleans and layers the cotton into batting. A second worker removes the batting from the conveyor.

Air samples were taken by means of an MSA Model G personal sampling pump that was attached to each employee. The pump was attached to a cassette placed approximately three inches from the employee's breathing zones. The sampling process lasted approximately three and one half hours. At no time throughout the entire process did the industrial hygienist attempt to distinguish the types of dust components collected on the filters. While assuming that they were cotton she admitted that other kinds of dust, such as dirt, would have been present in the room air if there was "other dirt besides the raw cotton."

Since the sampled air contained ordinary dirt as well as cotton and since no attempt was made to distinguish them the commission majority of Commissioner James F. Van Namee and Chairman Robert D. Moran said that they could only speculate as to the amount of raw cotton dust that was in the air. Accordingly, the Secretary did not sustain his burden of proof and the judge's decision was affirmed.

Commissioner Timothy F. Cleary, dissenting, would find that the employer violated 29 CFR 1910.93, which proscribes a time weighted limit value of one milligram per cubic meter of air. In his opinion, the obvious presence of cotton dust in the room combined with the heavy concentrations of dust that were measured constitute strong circumstantial evidence that the level of cotton dust exposure was ex-