5H-1

PLAINTIFF'S EXHIBIT RM-243



**Union Viewpoint**

The urethane process involves more than exposure to isocyanates, according to Louis C. Belieczky, director of industrial hygiene, United Rubber, Cork, Linoleum and Plastic Workers of America, Akron, Ohio.

Belieczsky said severe skin problems, not necessarily from TDI, may occur from isocyanate use as well as fire hazards when spray guns are used without being properly grounded.

He briefly outlined union efforts to educate workers in the urethane industry through workshops on the hazards of using isocyanates, and noted that workers are urged to cooperate with medical testing. He urged medical directors to inform employees of sensitivity testing results.

Short duration techniques for air sampling are ineffective considering peak situations and excursions 10 to 20 times acceptable TWA levels, he added.

Temperatures of isocyanates must be taken into account for any calculation of partial vapor pressure of TDI, according to H. Karl Frensdorff, research chemist, elastomer chemicals department, E.I. DuPont de Nemours and Company, Wilmington, Del.

As the polymerization process proceeds, diffusion of molecules that must react is slow, leaving free TDI present for a finite time, he added.

Pfs 14
11-1-84 mtg
Merrill

**Litigation**

## CA-DC DENIES PETITION FOR REVIEW OF ASBESTOS STANDARD; REMANDS TWO ISSUES

A petition for review of the Secretary of Labor's standard for exposure to asbestos dust, filed by the Industrial Union Department, AFL-CIO, was denied, with the exception of two issues, by the U.S. Court of Appeals for the District of Columbia.

The opinion in *Industrial Union Department, AFL-CIO v. Hodgson* (No. 72-1713), filed April 15, was written by Circuit Judge Carl McGowan. The Environmental Defense fund, Inc., was an intervenor in the suit.

The standards in question regulate the atmospheric concentrations of asbestos dust in industrial workplaces. The petitioners, unions whose members are affected by the health hazards of asbestos dust, challenged the timetable established by the standards for the achievement of permissible levels of concentration, and objected to portions of the standards concerning methods of compliance, monitoring intervals and techniques, cautionary labels and notices, and medical examinations and records. Two of the issues raised by the petitioners, the uniform application of the 1976 effective date for the Secretary's two fiber asbestos standard and the three year retention period for records of exposure levels detected by monitoring, were remanded to the Secretary for further consideration. In all other respects, the petition was denied.

Before considering the specific challenges made to the Secretary's action, the court addressed the subject of the reach of the substantial evidence test in the course of judicial review. When the Secretary's proposed standards are challenged, the court is entitled to a careful identification by the Secretary of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must find those facts from evidence in the record, the court said. By the same token, the court added, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found to be persuasive.

The court addressed itself to two further problems raised by the petitioners involving statutory construction. The IUD contended the determinations of the National Institute for Occupational Safety and Health (NIOSH) are meant to be conclusive on the question of what exposure levels adequately protect health. The court disagreed, stating that the NIOSH recommendation was undoubtedly important in the eyes of Congress, but was intended as no more than that. The second problem raised by the IUD related to whether the Secretary may take economic considerations into account in promulgating a standard. The Secretary explained his decision to delay, two years longer than the period suggested by NIOSH, a tougher standard as "necessary to allow employers to make the needed changes for coming into compliance." According to the court, the factors entering into the Secretary's conclusion could properly include problems of economic feasibility.

In remanding the issue of uniform application of the 1976 effective date for the two fiber standard, the court suggested that the task of devising categories and classifying employers by industry may be unmanageable in view of the many diverse uses of asbestos. However, the court pointed out, there was no evidence to that effect in the record, and it is not for the court to guess at the Secretary's reasoning or to supply justification for his action. Accordingly, this aspect of the standards was remanded to the Secretary for clarification or reconsideration.

With regard to the three-year retention period for monitoring records, the court objected to the Secretary's failure to explain his decision to require such a short period. In addition, the court found no adequate assurance in the record that the requirement as promulgated will provide the data needed for research into the causes and prevention of asbestos related disease. Therefore, the court remanded the recordkeeping requirements to the Secretary for such modification or clarification as may be necessary to insure that the statutory objectives will be fulfilled.

In the court's view, what differentiates the two remanded provisions from those left untouched is that the record, examined closely in relation to the relevant concerns of the Act, leaves nagging questions as to the reason and rationale for the Secretary's particular choices.

Portions of the standards concerning methods of compliance, monitoring intervals and techniques, cautionary labels and notices, and medical examinations and records, all of which were challenged by the IUD, were left intact by the court.

KMX 01833