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Title 41—PUBLIC CONTRACTS

Chapter 50—Division of Public Contracts, Department of Labor

PART 50-204—SAFETY AND HEALTH STANDARDS FOR FEDERAL SUPPLY CONTRACTS

The Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 35 et seq.) requires that contracts entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000 must contain, among other provisions, a stipulation that no "part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract".

A single standard of safety and health conditions is thus required for all work subject to the Act. An objective description of the working conditions encountered, established by a preponderance of the reliable, probative, and substantial evidence, is, of course, essential to the administrative application of this standard. A second question which must be resolved is whether conditions of the type described are "unsanitary or hazardous or dangerous to the health or safety of employees". This is a question of fact. For assistance in its resolution, the act provides a special rule of evidence: "Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection."

The statutory provision concerning "prima-facie evidence" does not purport to take the place of the uniform national standard. It has application only to issues which require evidence. In the absence of opposing evidence, it authorizes resolution of such issues compatibly with the prima-facie evidence. Also, rules concerning prima-facie evidence obviously have no application in situa-

tions where evidence is not required. Where, therefore, the common experience of men is all that is needed to lead a rational and prudent person to the conclusion that certain conditions of employment are incompatible with the safety and health of employees, no defense is provided by the statutory "prima-facie evidence" rule merely because such conditions may not be specifically prohibited in the State safety, sanitary, and factory inspection laws, or the regulations hereby proposed. Neither is it necessary to call a witness to testify concerning the hazardous nature of such conditions.

The statutory rule of "prima-facie evidence" was not designed to deter the Secretary of Labor from diligent inquiry even beyond the safety, sanitary, and factory inspection laws of the several states to discover more directly what are the "working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees." This is demonstrated by the provisions in sections 4 and 5 of the Act, directing the Secretary to administer it and authorizing him to appoint experts, make investigations, hold hearings, compel the production of evidence, and make findings of fact. Accordingly, following enactment of the Act, experts were appointed and their testimony used in the administrative enforcement proceedings conducted under section 5 of the Act. Differences of opinion over what conditions of employment fail to meet the statutory standard have thus been resolved with the assistance of expert testimony on a case-by-case basis in nearly a quarter of a century of hearings and findings under the Act. These have been conducted in accordance with sections 5, 7, and 8 of the Administrative Procedure Act since its enactment.

The hazardous characteristic of a particular working condition, is, of course, the likelihood that it will cause illness, or injury in the employment situation. This characteristic is not always immediately apparent. Causative analysis of injury frequency rates in industry has shed much light on the importance of certain precautions not fully appreciated by those responsible for the operation of industrial establishments. The Department's discovery and evaluation of these hazards and the development of

the regulations herein promulgated has relied quite extensively on the outstanding contributions of the private and public organizations which are generally accepted as preeminent in this field. Among these are the publications of American Standards Association, Inc., American Society of Mechanical Engineers, National Fire Protection Association, National Board of Fire Underwriters, the Public Health Service of the United States Department of Health, Education, and Welfare, the Bureau of Mines of the United States Department of the Interior, and the Atomic Energy Commission.

Section 7(d) of the Administrative Procedure Act recognizes that, even in the most formal type of administrative adjudications, agency decision may rest on "official notice of a material fact not appearing in the evidence in the record," but it requires that "any party shall on timely request be afforded an opportunity to show the contrary". The Attorney General's Manual on the Administrative Procedure Act points out (p. 80) that this authority "extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge. Cf. H.R. Rep. p. 38 (Sen. Doc. p. 272). . . . The matters thus noticed become a part of the record and, unless successfully controverted, furnish the same basis for findings of fact as does 'evidence' in the usual sense."

The hazardous characteristics of many working conditions, thus being facts of a "technical or scientific" nature, and having come within the Department's "specialized knowledge" by reason of its experience, proof of them in administrative adjudications by official notice is appropriate. The facts declared in these regulations are soundly based in the experience of the Department and in the experience of outstanding public and private experts in their specialized divisions of the field of health and safety engineering. The regulations herewith promulgated extend, however, into areas in which reasonable men may differ. Any party to an administrative adjudication who is adversely affected by them will, therefore, have the opportunity to contest them by presenting the issue in