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Memorandum

PLAINTIFF'S EXHIBIT AL-977

July 19, 1989

To: ORC Occupational Safety and Health Group
ORC Western Occupational Safety and Health Group
ORC Asbestos Task Force

From: Darrell K. Mattheis

Subject: Building and Construction Trades Department, AFL-CIO Request to the Court for an order of enforcement for the February 1988 Asbestos Remand

Attached for your interest is a copy of the Petition to the United States Court of Appeals for the District of Columbia Circuit for an order to force OSHA to respond expeditiously to the Courts February, 1988 Remand.

Attachment

Darrell K Mattheis

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

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, Petitioner, v. ELIZABETH DOLE, SECRETARY OF LABOR, Respondent.	No. 86-1359 Consolidated with Nos. 86-1360, 86-1410, and 86-1411.

PETITIONER'S MOTION TO
ENFORCE THE COURT'S JUDGMENT

Petitioner Building and Construction Trades Department, AFL-CIO ("BCTD") respectfully moves for enforcement of the Court's Judgment entered on February 28, 1988. An order of enforcement is necessary because the respondent Secretary of Labor has failed to comply with the Court's decision. That decision upheld BCTD's challenges to several aspects of the Occupational Safety and Health Administration's ("OSHA") asbestos standard for the construction industry and remanded the matter to the Secretary for agency action consistent with the Court's opinion. The Court's opinion is reported at BCTD v. Brock, 838 F.2d 1258 (D.C. Cir. 1988) and is attached hereto as Appendix A. The mandate issued on July 6, 1988 and is attached as Appendix B.[1]

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[1]Prior proceedings in this case listed William E. Brock, the former Secretary of Labor, as respondent. The current Secretary of Labor, Elizabeth Dole, has been substituted as respondent for purposes of this motion pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure.

Insofar as is pertinent to this motion, the Court ordered OSHA to address on remand the following aspects of the asbestos standard for the construction industry:

1. Permissible Exposure Limit ("PEL");
2. Respirator classification;
3. Exposure monitoring;
4. Warnings and labels;
5. Reporting and record transfer;
6. Scope of "Competent Person" requirement; and
7. "Small-scale short-duration" exemptions.

Following repeated efforts by the BCTD to ascertain the steps being taken to comply with the Court's Judgment, the Acting Assistant Secretary for Occupational Safety and Health finally responded by letter dated May 10, 1989[2], stating in pertinent part:

> With respect to those issues remanded for further consideration or fuller statement of reasons, OSHA

[2] OSHA's May 10, 1989 letter (Appendix G) responded to a letter of inquiry from the BCTD on October 5, 1988. Prior to that inquiry, in June, 1988, Robert A. Georgine, President of the BCTD, wrote to the Secretary of Labor summarizing the issues to be addressed on remand and urging the Secretary to act expeditiously to comply with the Court's remand order. (Appendix C.) By letter dated September 6, 1988, the Secretary of Labor responded, but, aside from the "short term exposure limit issue" (see infra n. 3), provided no specific details as to steps the agency was planning to take or a timetable for compliance with the Court's order. (Appendix D.) By its attorneys, the BCTD then contacted the Solicitor of Labor, again inquiring as to what specific steps OSHA would be taking to comply with the Court's order and to urge OSHA to proceed as expeditiously as possible. (Appendix E.) By letter dated October 17, 1988, the Solicitor of Labor informed the BCTD that he had forwarded the letter to the OSHA Assistant Secretary and requested that he respond directly. (Appendix F.) OSHA's May 10, 1989 letter followed seven months later.

undertook review of the record to determine which issues may be resolved on the present record and which require supplemental fact-gathering. Based on this review OSHA concluded that the remaining remand issues cannot be effectively resolved on the present record, and OSHA will, therefore, initiate the appropriate rulemaking.

The remand issues present a complex mix of technical and policy questions. We anticipate that the proposal to deal with these issues will be published in January 1990.

(Appendix G.)[3]

ARGUMENT

I. Introduction

The Secretary's lengthy and continuing delay in taking the steps specified in the Court's opinion, her vague statement regarding the "review" undertaken by OSHA, and her "anticipat[ion]" that "appropriate rulemaking" will be "initiate[d]" in January 1990 by the publication of a proposal, are wholly unreasonable and in disregard of this Court's order. Furthermore, OSHA's expressed intent to engage in "supplemental fact-gathering" is misguided at

[3]On one issue, not listed above, the Secretary has acted, although not within the time frame directed by this Court. That issue involved the absence from the standard of a short term exposure limit ("STEL"). At oral argument in this case, in April, 1987, the Secretary advised the Court of "its belief that it could complete its reconsideration of this issue, on the existing record, by November, 1987". BCTD v. Brock, 838 F.2d at 1273. At the time of the issuance of this Court's decision, in February, 1988, OSHA had yet to act. The Court ordered OSHA to complete its reconsideration of a STEL within sixty days of the issuance of the mandate. The mandate issued July 6, 1988. On September 14, 1988, OSHA promulgated an "excursion limit" for asbestos exposure and added it to the standard. OSHA's action on the STEL is not an issue addressed by the instant motion.

best. The issues remanded by this Court are not, in the main, fact-bound issues requiring further development of the record. Moreover, the record that was developed in the original rulemaking[4] is sufficient for the agency to address those issues remanded by the Court. Accordingly, and as is discussed further below, the BCTD requests this Court to grant further and more specific relief that is necessary to compel the Secretary to comply with the Court's Judgment.

II. Discussion

This Court has stated, "[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake." Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1157 (D.C. Cir. 1983). "Speed in achieving protection for workers was of paramount importance to Congress . . . . [W]e do not look upon delays as favorably 'where human health is at stake'." Farmworkers Justice Fund v. Brock, 811 F.2d 613, 631 (D.C. Cir.), vacated as moot, 817 F.2d 890 (1987). OSHA itself acknowledged, as the Court noted in this case, that "no 'toxic substance' has more clearly demonstrated detrimental health effects on humans than has asbestos.' 51 Fed. Reg. 22615." BCTD v. Brock, 838 F.2d at 1262. These propositions, we submit, serve to delineate the framework of an appropriate enforcement order.

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[4] The rulemaking proceeding in the promulgation of the asbestos standard resulted in a record "with over 340 exhibits and approximately 55,000 pages." BCTD v. Brock, 838 F.2d at 1263.

The Court has continuing jurisdiction over its own mandate. Dilley v. Alexander, 627 F.2d 407, 410-11 (D.C. Cir. 1980). The Court also has authority to issue orders necessary to enforce compliance with its earlier mandate. International Ladies' Garment Workers' Union v. Donovan, 733 F.2d 920, 922 (D.C. Cir.), cert. denied sub nom. Breen v. International Ladies' Garment Workers' Union, 469 U.S. 820 (1984); City of Cleveland v. Federal Power Commission, 561 F.2d 344, 346 (D.C. Cir. 1977); United Steelworkers of America v. Pendergrass, 819 F.2d 1263 (3d Cir. 1987). See also 28 U.S.C. § 1651 ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ."). Additionally, this Court is empowered by the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed . . ." 5 U.S.C. § 706(1). See also 5 U.S.C. § 555(b) ("within a reasonable time, each agency shall proceed to conclude a matter presented to it.").

The Secretary's continuing failure to address this Court's order and opinion with regard to the asbestos standard warrants action by this Court to enforce its Judgment. The Secretary has not even been able or willing to establish a complete schedule for reconsidering the various facets of the asbestos standard remanded by the Court, but has merely stated that the agency will issue a proposal in another eight months, nearly two years after the Court's opinion in this matter. As was the case with the STEL, see supra n. 3, only a specific Court order that the agency take specific action by a set time will cause OSHA to complete its rulemaking.

This Court has had repeated occasions to criticize OSHA's proclivity for delay in the promulgation and revision of health standards under the OSH Act and has often found it necessary to set a specific rulemaking time framework for the agency to comply with its legal obligations. See, Farmworker Justice Fund, 811 F.2d at 631 ("the decision to delay a field sanitation standard yet again appears unreasonable in light of the prolonged delay that has already occurred in this case," -- court ordered issuance of standard within 30 days); International Union, UAW v. Donovan, 756 F.2d 162, 164-65 (D.C. Cir. 1985) ("we believe that the petitioners have shown the agency's actions to be unduly delayed and its explanation for delay to be questionable" and cautioning "we will look with extreme displeasure on any variance from the schedule and will not hesitate to set a date certain for completion of the administrative proceeding if the [respondents] unreasonably delay."); Public Citizen v. Auchter, 702 F.2d at 1153-54 ("we fully agree with the district court that 'OSHA has embarked upon the least responsive course short of inaction' . . . [and] therefore hold that OSHA must expedite the rulemaking in which it is now engaged. . . . [We] direct the Assistant Secretary to issue a notice of proposed rulemaking within thirty days of the date of this decision and to proceed expeditiously thereafter . . ..")

OSHA's failure to comply with the Court's order in the asbestos case forces the BCTD to now seek further relief from this Court. We discuss below each of the remand issues as to which enforcement is necessary as well as the specific relief requested with regard to each.

1. Permissible Exposure Limit ("PEL") -- The Court ordered OSHA to address the matter of further reducing the PEL for certain work operations "to afford workers the benefits of more stringent standards in areas where they are feasible." BCTD v. Brock, 838 F.2d at 1273. The Court noted that OSHA's Tables 22 and 23, (see Appendix H), which are found in the preamble to the standard and are based on evidence in the record, indicate several industry subcategories for which current airborne asbestos concentrations are "well below 0.2 f/cc, several of them well below even 0.1 f/cc." BCTD v. Brock, 838 F.2d at 1273.[5] Quoting OSHA's brief, the Court pointed out that "the agency acknowledg[ed] that in many operations the 0.1 f/cc level 'is already met on average by the best plants.'" Id.

This Court's order presented the Secretary with at least one and possibly two tasks. First, the Court directed OSHA to "provide

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[5] Although the Court's discussion with regard to disaggregation focused on brake repair in the general industry sector, it is clear that this issue must also be addressed with regard to construction. The Court's rationale, its general discussion of the issue, and its specific reference to Table 23, which is a chart containing a breakdown of various operations in the construction industry, make clear that the Secretary must address disaggregation of the construction industry standard.

a little more enlightenment", id., by explaining the analysis underlying its decision to reject lower PELs for certain operations in favor of a uniform PEL. Certainly, explaining and documenting reasons for a policy decision already made does not require further rulemaking as suggested in the Acting Assistant Secretary's letter. Second, the Court stated that to the extent that OSHA may rely on factors other than administrative convenience for declining to set lower PELs, it should make specific findings. The Court noted that the agency's own data shows many operations with current average concentrations below 0.1 f/cc. By the agency's own admission, therefore, there is no need for delay on this issue. Accordingly, this Court should order the Secretary, within 30 days either, 1) to promulgate PELs of less than 0.2 f/cc in the construction industry in operations "where they are feasible" or, 2) provide the Court with its explanation for declining to do so.

2. Respirator Classification -- The Court noted that OSHA did not dispute the BCTD's contention that protection factors assigned to various respirators are not supported by the evidence. Nevertheless, on the basis of the Secretary's representation that OSHA was in the process of reevaluating its general respirator standard, 29 C.F.R. § 1910.134, the Court ordered OSHA to complete its reevaluation "without undue delay" and to incorporate the results into the asbestos standard. Id. at 1274-75. Clearly, OSHA has not heeded that admonition.

The agency began its review of the respirator standard in May, 1982 when it published an Advance Notice of Proposed Rulemaking. 47 Fed. Reg. 20803. Then, in October, 1986, OSHA published its timetable for completing review of the general respirator standard. 51 Fed. Reg. 38593; see Appendix I. In its timetable OSHA projected it would publish a Notice of Proposed Rulemaking by January, 1987, and complete the rulemaking by January, 1988. Id. It is now May, 1989 and OSHA has not even published its Notice of Proposed Rulemaking for respiratory protection. Rather, on April 24, 1989, OSHA published a revised timetable projecting that it would publish a proposed rule in June, 1989 with a final rule in June, 1990. 54 Fed. Reg. 16868; see Appendix J. Not a word has been mentioned, to the Court, the parties, or the public, about the effect of this delay on the asbestos standard. Indeed, OSHA's notice states that there is no legal deadline for review of the general respirator standard. Id.

In light of OSHA's blatant disregard for the Court's direction to act "without undue delay", its callous indifference to the lives and health of construction workers, and its admission that the present standard "credit[s] various respirators with more effectiveness than the record supports",[6] BCTD v. Brock, 838 F.2d

[6] In April 1986 the EPA and the National Institute for Occupational Safety and Health issued a joint report entitled A Guide to Respiratory Protection for the Asbestos Abatement Industry. (See Appendix K.) In that report, based on "the best and most current information", Appendix K at p. 1, those agencies recommended that only two types of respirators be used for asbestos abatement work out of the thirteen types of respirators permitted by OSHA in its asbestos standard at that time. Id.

at 1275, OSHA should be ordered within 30 days to modify the standard by assigning new and lower protection factors based upon the existing record and "the best available evidence", 29 U.S.C. § 655(b)(5).

3. Monitoring -- The Court ordered OSHA to clarify the construction industry standard to state explicitly that resumption of periodic monitoring is required where a change in workplace conditions may result in exposures above the action level. BCTD v. Brock, 838 F.2d at 1276. OSHA agreed that this requirement is implicit in the standard. Furthermore, this requirement is already written into the general industry standard. Accordingly, there is no need for any delay or "fact-gathering" whatsoever with regard to this issue. The Court should, therefore, order OSHA to incorporate this provision into the construction industry standard within seven days.

4. Warnings and labels -- The Court ruled that warnings and labels in English only are not adequate to provide protection to the significant number of non-English-speaking workers in the construction industry. Id. at 1276-77. While the Court was concerned that the BCTD's proposal -- that warnings and labels be bilingual in the languages that predominate in the workforce area -- "would impose 'an unduly stringent requirement on those construction employers whose workforce is comprised solely of English-speaking persons,'" id. at 1277 (quoting 51 Fed. Reg. 22,724), the Court stated, "the agency is surely capable of

designing a rule covering only employers with a significant number of non-English speakers." Certainly, the Court's analysis can be followed without further rulemaking proceedings. Accordingly, this Court should order OSHA to require employers to utilize bilingual warnings and labels in languages that are spoken by a substantial portion of the employer's workforce. We suggest that the Court specify that 10% of the workforce qualifies as a substantial portion.

5. Reporting and record transfer requirements -- The Court directed the Secretary to consider a requirement that all construction industry employers file reports with OSHA prior to engaging in any asbestos project. The Court also directed OSHA to consider requiring all employers engaged in asbestos-related work to maintain records of the location of asbestos in a workplace and to transfer these written records to building owners. Id. at 1278. It is hard to imagine what fact-gathering could be required for these two matters or why the agency would be unable to act on them before January 1990 at the earliest. Accordingly, the Court should direct OSHA, 1) to require all construction industry employers to file reports with OSHA before engaging in any asbestos-related work and, 2) to require all employers contracting or subcontracting asbestos-related work to establish, maintain and transfer to building owners written records of the presence and location of any

asbestos products in the workplace.[7]

6. Scope of "competent person" requirement -- The Court ordered the Secretary to expand the competent person requirement to cover all asbestos-related construction work or to provide "a more persuasive explanation for [her] refusal to do so." Id. at 1279. Again, there is no need to conduct further rulemaking with regard to this issue, because what is required is an explanation of why the Secretary chose a policy which on its face appears to be legally deficient because it deprives a group of workers of the meaningful protection required by the exacting criterion of section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5). If OSHA does not have a "persuasive explanation" for its unwillingness to expand the scope of this requirement, it follows that its only objective in pursuing further rulemaking is to search for a post-hoc rationalization for its earlier action. Delay for this purpose cannot be condoned. Accordingly, the Court should order OSHA within fifteen days either, 1) to expand the scope of the "competent person" requirement to all asbestos-related work or, 2) to provide a "persuasive explanation" for not doing so.

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[7] There is no need to resolve in this proceeding the issue whether the OSH Act places any requirements on construction owners vis-a-vis workers not employed by them. The relief requested herein is limited to requiring employers to establish, maintain and transmit records with regard to buildings in which their employees work. Even in the absence of an OSH Act requirement that non-employer building owners retain such records, it is likely that other statutory, regulatory, or contractual requirements, or self-imposed moral obligations, would result in such retention and thereby render this requested relief meaningful.

7. Small-scale short-duration operations -- The Court ordered OSHA to reconsider the exemption for "small-scale short-duration operations" from the negative-pressure enclosure requirement and from the competent person requirement. BCTD v. Brock, 838 F.2d at 1279-80. With regard to the negative pressure enclosure, the Court noted that the exemption as worded "seems to erase the rule", id., and referred to OSHA's response that explanatory language in the preamble limits the exemption "to 'those work operations where it is impractical to construct a negative-pressure enclosure because of the configuration of the work environment.'" Id. (Quoting 51 Fed. Reg. at 22,711). The Court, therefore, directed OSHA to consider "including this clarification in the regulations themselves." Id. at 1279-80. There can be no reason why it is necessary to engage in further fact-finding to include language in the standard to reflect that which OSHA both stated in the preamble and represented to the Court was implicit in the standard. Accordingly, the Court should order OSHA within 7 days to amend the provision in question by explicitly limiting the scope of the exemption to situations where it is impractical to construct a negative-pressure enclosure because of the configuration of the work environment.

With regard to the exemption from the competent person requirement for small-scale short-duration operations, the Court ruled that "neither the record nor common sense provides clear support for the 'small-scale short-duration operations' exception from the competent person requirement. . . ." *Id*. at 1279 n. 6. Accordingly, the Secretary should be directed within seven days to remove the exemption from the competent person requirement for small-scale short-duration operations.

PRAYER FOR RELIEF

For the foregoing reasons, the BCTD respectfully requests this Court to enter an order requiring OSHA to proceed as follows in its reconsideration on remand of the construction industry asbestos standard:

A. PEL -- Within thirty days promulgate PELs of less than 0.2 f/cc for those operations in the construction industry "where they are feasible", or provide the Court with an explanation for declining to do so.

B. Respirator Classification -- Within thirty days, assign lower protection factors to respirators permitted for exposure to asbestos in accord with the evidence in the rulemaking record, and the best evidence otherwise available.

C. Monitoring -- Within seven days add a provision to the construction industry asbestos standard that explicitly requires resumption of periodic monitoring where a change in workplace conditions may result in exposures above the action level.

D. Warnings and Labels -- Within thirty days add to the construction industry asbestos standard a requirement that employers utilize warnings and labels in those languages that are spoken by a substantial portion of the employer's workforce. Ten percent of the employer's workforce constitutes a substantial portion.

E. Reporting and Record Transfer --

1) Within thirty days, require all construction industry employers to file reports with OSHA before engaging in any asbestos project.

2) Within thirty days, require all construction industry employers contracting or subcontracting asbestos-related work to establish, maintain and transfer to building owners written records of the presence and location of any asbestos products in the workplace.

F. Competent Person -- Within fifteen days expand the scope of the competent person requirement to cover all asbestos-related work, or provide a persuasive explanation for not doing so.

G. Small-Scale Short-Duration Operations --

1) Within seven days, include in the asbestos standard appropriate language stating that for removal, demolition, and renovation, the exemption from the negative-pressure enclosure requirement for small-scale short-duration operations is limited to situations where it is impractical to construct a negative-

pressure enclosure because of the configuration of the work environment.

2) Within seven days, remove the exemption from the competent person requirement for small-scale short-duration operations.

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