rule "is far too restrictive and invalidates alternative dosimeter types which would be equivalently effective," de Bernardo said. Regarding testing booths, the Chamber attorney said that "essentially laboratory conditions" would be required to meet the low frequency noise specifications for the booths, which he called an "impractical and unworkable requirement."

► There is confusion in the standard of the terms "noise" and "dose" which causes "significant ambiguity."

► Training program requirements are excessive and present "the potential for harassment of employers."

► Recordkeeping requirements are "far too excessive and costly," particularly for small and medium-sized businesses.

► The calibration requirements for dosimeters and audiometers are "exhaustive" and require more testing than necessary to ensure accuracy.

► Projections of the number of workers covered by the amendment, the overall cost of compliance, and the cost per worker for compliance are "badly underestimated."

► The requirements that only audiologists, qualified physicians, and otolaryngologists evaluate audiograms and perform certain duties is "excessively costly and an inefficient use of limited professional resources since trained technicians and qualified nurses could adequately perform such responsibilities."

► The agency miscalculated the effect of impulse noise on measurements.

The Chamber has sought to stay the rule since it was issued on Jan. 16 (Current Report, Jan. 22, p. 833). Last month, the Chamber proposed to Reagan's task force on regulatory reform that the eight-hour time-weighted noise exposure to which workers must be exposed to be included in industrial hearing conservation programs under the new rule be raised from 85 dB to 90 dB (Current Report, Feb. 19, p. 1266).

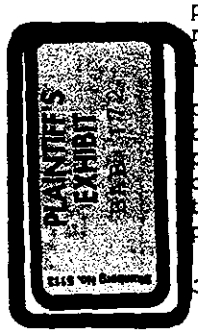
ORC Petition

A similar petition requesting suspension of the effective date of the Occupational Safety and Health Administration's new hearing conservation amendment, full review of the record compiled on the amendment, and a reopening of the record also was submitted March 2 to Secretary of Labor Raymond J. Donovan by the Organization Resources Counselors, Inc.

ORC criticized the amendment for relying on specification rather than performance criteria and for being too technically complex for most employers. "In our view, OSHA can solve the broad problem and many of the specific problems [contained in the amendment] only if it substitutes a performance standard for the excessively specification-oriented amendment," the organization stated.

ORC shares similar concerns with the Chamber of Commerce about a number of issues, including specifications for test booths, recordkeeping requirements, specifications required for dosimeters, whether dosimeters are reliable under the requirements of this program, definitions of significant threshold shift and revised baseline in the program, enforcement and need for the 14-hour quiet period, requirements for audiometer calibration, training requirements, effect of impulse noise on measurements, and limitation of audiogram review to certain physicians.

In addition, ORC requested that several issues, such as the cost effectiveness of the amendment, the number of workers covered and the resulting overall cost of the amendment, the provision for employee monitoring of the program, possible confusion between the requirements of the amendment and those of the old standard, the handling of computer programs, and the requirement that noise levels as low as 80 dBA be included in the time weighted average, receive additional consideration and review before the amendment becomes effective.



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Asbestos

OSHA INSTRUCTION GIVES PROCEDURES FOR DOCUMENTING PAST EMPLOYEE EXPOSURE

Procedures for documenting past employee exposure to airborne asbestos fibers when concentrations can not be measured by taking of air samples on the day of the inspection or thereafter were detailed in an Occupational Safety and Health Administration instruction issued Feb. 18.

The instruction, CPL 2-2.21A, sets guidelines for determining whether asbestos had been used or handled regularly at the workplace — or, if it had been used or handled on an irregular basis, whether employees were exposed to "significant amounts" of asbestos-containing dust — for the purposes of the medical examination requirements of the asbestos standard (Reference File, 31:8306).

Compliance officers are instructed to obtain monitoring results from the employer or contractor, or from other sources. Information necessary to document asbestos use or handling is to be obtained through employee, employer representative, or union interviews, and through written employer information if it exists.

The instruction cancels a similar document issued in October 1978 but, except for the addition of the procedures for documenting past exposure, leaves it essentially unchanged (Current Report, Nov. 2, 1978; Reference File, 21:9158).

Text of the instruction follows.

Text of OSHA Instruction CPL 2-2.21A

Subject: 29 CFR 1910.1001(j)(2), (3) or (4), Minimum Airborne Fiber Concentration for Initiating and Continuing Asbestos Medical Examinations.

A. *Purpose.* This instruction provides uniform inspection and compliance procedures for the medical examination requirement in the asbestos standard.

B. *Scope.* This instruction applies OSHA-wide.

C. *Cancellation.* OSHA Instruction CPL 2-2.21, October 11, 1978, is canceled.

D. *Action.* OSHA Regional Administrator and Area Directors shall assure that enforcement of 29 CFR 1910.1001 (j)(2), (3) or (4) is consistent with the guidelines in G. of this instruction.

E. *Federal Program Change.* This instruction describes a Federal program change which affects State programs. Each Regional Administrator shall:

1. Ensure that this change is forwarded to each State designee.

2. Explain the technical content of the change to the State designee as requested.

3. Ensure that State designees are asked to acknowledge receipt of this Federal program change in writing, within 30 days of notification, to the Regional Administrator. This acknowledgement should include a description either of the State's plan to implement the change or the reasons why the change should not apply to that State.

4. Review policies, instructions and guidelines issued by the State to determine that this change has been communicated to State program personnel. Routine monitoring activities (accompanied inspections and case file reviews) shall also be used to determine if this change has been implemented in actual performance.

F. *Background.* OSHA has determined that generally citations should, as a matter of policy, be issued for

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violations of 29 CFR 1910.1001(j)(2), (3) or (4), only when employees are exposed to a minimum of 0.1 asbestos fibers longer than 5 micrometers per cubic centimeter of air, as determined by the sampling method prescribed in section G.2. of this instruction. [The phrase "fibers longer than 5 micrometers per cubic centimeter of air" shall hereafter be abbreviated as "fibers/cc."] However, for situations in which sampling of exposure is infeasible, citations may be issued as provided in G.5. of this instruction.

G. *Enforcement Guidelines.*

1. Medical examinations as per 29 CFR 1910.1001 (j)(2), (3) or (4) will be required for any 7- to 8-hour time-weighted average concentration of 0.1 fibers/cc, or for a greater concentration.

2. Sampling procedures will follow Chapter X of the IHFOM with the additional guidelines of G.3 and 4. of this instruction.

3. *Sampling for Exposures to Asbestos Dust with Low Levels of Contamination (e.g., Mixed with Other Minerals).*

a. For exposure to dust that is mostly asbestos and is expected to be below the permissible exposure limit, the same filter should be used for the entire shift, but no longer than 8 hours.

b. For exposure expected to be at or above the permissible exposure limit, several samples may be required during the shift to avoid overloading the filters.

4. *Sampling for Exposure to Asbestos Dust with High Levels of Contamination.*

a. Several samples of exposure may be required during the shift to avoid overloading the filter.

b. Filters should be changed only after a minimum of 1 hour of sampling time for exposures expected to be close to 0.1 fibers/cc. Seven or eight 1-hour samples can be collected during the day.

5. *Past Exposures.* When employees have been exposed to asbestos but air samples cannot be taken on the day of the inspection or thereafter, citations for serious violation of 29 CFR 1910.1001(j)(2), (3) or (4) should be issued according to the following procedures:

a. Determine that employees were exposed to airborne concentrations of asbestos, and that the use or handling of asbestos was performed on a regular basis; or that the use or handling of asbestos was performed on an irregular basis, but employees were exposed to significant amounts of dust containing asbestos.

NOTE: Compliance officers shall obtain monitoring results from the employer (contractor) or other source (e.g., insurance company; company or plant for whom contracting work is being done; building owner/building management; other Federal, State or local agency), and shall indicate exposure levels above 0.1 fibers/cc of asbestos.

b. Document, by employee, employee representative, and union interviews, that this work was performed routinely, on a repeated basis; or that the use or handling of asbestos was performed on an irregular basis, but employees were exposed to significant amounts of dust containing asbestos. In addition, obtain documentation from written employer information on these routine operations, if it exists.

c. The violative conditions must have occurred at least within the previous 6 months to meet the requirements of Section 9(c) of the Occupational Safety and Health Act.

6. *Types of Violations.*

a. A "serious" violation of 29 CFR 1910.1001(j)(2), (3) or (4) would exist where an employer does not provide the required medical examinations, and an employee is exposed to 0.1 or more fibers/cc.

b. For definitions and guidance on "repeated", "willful" or a "failure to correct" violation, see the FOM, Chapter VIII.

Litigation

COURT RULES GRAIN DUST ACCUMULATION VIOLATES OSHA HOUSEKEEPING STANDARD

An employer that has been cited twice for violation of the Occupational Safety and Health Administration's housekeeping standard, for failure to prevent accumulations of grain dust in its grain elevator, is in repeated, serious violation of that housekeeping standard, the U.S. Court of Appeals for the Fifth Circuit, Unit A, ruled March 5.

This decision in *Bunge Corporation v. Secretary of Labor and OSAHRC* (No. 79-1906) affirmed a ruling of the Occupational Safety and Health Review Commission (7 OSHC 1326).

The case arose out of the inspection of the employer's Destrehan, La., grain elevator. During that inspection, the OSHA compliance officer found 42 locations where dust and grain had accumulated. The citation charged that this condition was in violation of 29 CFR 1910.22(a)(1) and that it created a fire hazard. This citation was the third such citation issued to the employer for violation of the same housekeeping standard. The first and third citations involved dust accumulations and the second involved material and ropes left in walking areas.

After a hearing on the merits of the case, an OSAHRC judge found the employer to be in repeated, serious violation of the housekeeping standard and assessed a $10,000 penalty. This appeal followed.

The employer did not dispute the existence of the dust accumulations at the grain elevator but, instead, argued that the housekeeping standard had been impermissibly expanded to include fire and explosion hazards. According to the employer, grain dust fire and explosion hazards can only be addressed by promulgating a specific rule covering those hazards. The appellate court rejected that argument, stating, "[w]hile a specific rulemaking may be preferable, OSHA is by no means obligated to countenance dangerous conditions pending the promulgation of a regulation that specifically addresses one of the hazards that the condition generates."

This opinion, which was written by Circuit Judge Sam D. Johnson, who was joined by Circuit Judges Irving L. Goldberg and Henry Politz, will appear in a future Decisions issue.

State Plans

MONETARY PENALTIES AGAINST WORKERS SUBJECT OF OSHA INSTRUCTION TO FIELD

States are not absolutely prohibited from leveling economic penalties against workers who fail to comply with job safety and health standards, but any state considering the inclusion of such sanctions in its state plan should evaluate the action carefully to determine whether it "weakens the effectiveness of the overall enforcement program," according to an Occupational Safety and Health Administration field directive.

The document, OSHA Instruction STP 2-1.8A, dated Feb. 24, also said that a state which includes such penalties in its plans "must show how these sanctions would *not* reduce the overall effectiveness of the state's enforcement program below that of the federal enforcement program."

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