

PLAINTIFF'S
EXHIBIT
AL-944



Organization Resources
Counselors, Inc.

Memorandum

April 28, 1987

To: ORC Occupational Safety and Health Group
ORC Occupational Safety and Health Lawyers Group
ORC Occupational Safety and Health Physicians Group
ORC Mine Safety and Health Group

From: W. William Ament

Subject: Recent Litigation of Interest

William E. Brock, Secretary of Labor v. General Dynamics Land
Systems Division (No. 85-1826)

On April 14, 1987, the United States Court of Appeals for the District of Columbia Circuit reversed a decision by the OSHRC regarding an OSHA citation issued under Section 5(a)(1) (The General Duty Clause) of the Occupational Safety and Health Act.

OSHA cited General Dynamics for violations of the General Duty Clause because the company used a chemical solvent that caused injury to several of its employees. An Administrative Law Judge (ALJ) found that since there is a specific OSHA safety standard for the substance (freon) General Dynamics could not have been found to have violated Section 5(a)(1). The ALJ, in writing his decision subsequently adopted by the Review Commission, supported his conclusion by citing "(1) the legislative history of the Act and its general policy aims, (2) a rule of statutory construction that 'the specific takes precedence over the general,' and (3) OSHA's preemption regulation in 29 CFR Section 1910.5(c) as interpreted by the Commission."

The Secretary did not argue that there was a violation of the specific OSHA Standard, but that the Review Commission was wrong in vacating the General Duty Clause citation. In reaching his conclusion, he argued that the specific OSHA Standard addressed a much narrower set of unsafe working conditions than does the General Duty Clause.

The defendant asserted that the unsafe working conditions at issue were within the scope of the specific OSHA Standard and that compliance with that standard precluded the use of a General Duty

Clause citation under OSHA regulations. In reaching its conclusion, the Court noted that both the Secretary and the UAW (which entered the case as an intervenor) had assumed that the existence of a specific standard would preempt the General Duty Clause from being applied to a specific hazard addressed by that standard. Both parties assumed this to be true even when an employer knows the standard to be inadequate in a particular circumstance.

The Court viewed the issue as whether any specific OSHA standard, in this case the Freon Standard, could preempt the General Duty Clause. It is clearly the view of the Court that the plain language of the Occupational Safety and Health Act states that "the Act does not empower of the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the General Duty Clause." The Court held that only Congress, "the repository of all legislative power," could permit such action.

The Court expands on this concept by holding that if an employer knows a specific standard will not protect its workers then the employer still has a duty under Section 5(a)(1) of the Act to provide a safe workplace over and above the requirements of a specific safety standard. On the other hand, the Court holds that if the employer does not have the knowledge that a safety standard is inadequate he will have "satisfied that duty" by complying with the OSHA standard.

The result of this decision is that the rules of the game have been changed. An employer knowing that specific standards are not adequate to protect its workers in a particular situation or in general, is no longer protected from the threat of General Duty Clause citation by mere adherence to OSHA standards. Additionally, it would appear that employers who use internal standards as their own standard are admitting that the OSHA standards are not adequate for situations within their plants.

It is of interest that the Judge who wrote this decision, James Buckley, has a very conservative pedigree and that the nature of his conclusion which is based on a strict reading of the plain language of the Act and its legislative history is also a conservative concept.

Secretary of Labor v. Morrison-Knudsen, Inc. (13 OSHC 1121)

The OSHRC held in favor of the defendant because OSHA failed to produce evidence that the employees whose OSHA noise dose was being measured did not use personal protective equipment for the entire period of the measurement. The compliance officer had observed that the employees were not using their personal protective equipment on several occasions during the measurement period. The only evidence presented by OSHA was that one of the employees had stated that he did not wear the equipment because "he liked

to be able to hear the machinery". The Review Commission rejected this testimony because it could be construed in a manner that was not inconsistent with the employee wearing the personal protective equipment for a period of time long enough to be within the standard.

This decision once again is evidence of Review Commission Chairman Buckley's belief that cases before the Commission must be properly prepared. In this case, the Secretary simply had not presented evidence that 'in the Commission's view' was necessary to prove a violation and, therefore, was not adequate.

Secretary of Labor v. Collier-Keyworth Company (No. 80-2848)

In this second decision concerning the OSHA Noise Standard, the OSHRC agreed with Collier-Keyworth that Table G-16 of the OSHA Noise Standard 1910.95(a)-(b) was not intended to regulate impulse noise.

The Review Commission accepted Collier-Keyworth's argument that the OSHA Noise Standard intended to treat impulse noise differently than other noise. It noted that there was a specific provision in the OSHA Noise Standard that addressed the subject of impulse noise which stated that "such noise could not exceed 140 decibels peak sound pressure level."

In reaching its conclusion, the Review Commission studied the history of the standard. It found that the OSHA Standard was a "established federal standard" under Section 3(10) of the OSH Act and was adopted without amendment under Section 6(a) of that Act. The Review Commission also determined that the original intent of the standard was to separate impulse from steady state noise.

The Commission held that a dosimeter reading may not be reliable even though it may be of a higher level of technology than previously used sound level meters and that failure to include impulse noise may not be good industrial hygiene practice. It stated that it "has no authority to 'update' any standard through interpretation according to the latest scientific findings. Such legislative authority resides in the Secretary, who, in rulemaking, may consider whether new findings about physical agents make regulation necessary and what new duties should therefore be imposed on employers. For the Commission to interpret a standard to produce what it believes to be greater protection for employees than the Secretary originally intended both usurps the Secretary's rulemaking authority and detracts from the statutory right of those affected by a rule to participate in the rulemaking process."

Secretary of Labor v. Hilton-Davis Chemical Company (13 OSHC 1182)

An OSHRC Judge held that Hilton-Davis had violated the OSHA Hazard Communications Standard because it failed to set forth "appropriate hazard warnings" on labels included on containers of various chemicals. One of the issues addressed by the Review Commission was that whether "target organs" needed to be included on the labels. The issue of concern in this case was what should be included under the term "appropriate hazard warnings". The ALJ noted that the provision concerning this term does not specify the exact message that must be contained but leaves it up to the manufacturer.

The ALJ held that, since the appropriate provision of the standard does not make reference to target organs, whether they would be included in the label must be interpreted in the context of the whole standard. The ALJ found that "the definition of 'hazard warning' makes it clear that the hazards of the chemical are to be conveyed on the container label."

The definition of "health hazard" includes the reference to Appendix A which provides further definitions and explanations of the scope of health standards. The ALJ goes on to note that Appendix A "makes it clear that employees exposed to health hazards must be apprised of both the change in the body function and the signs and symptoms that may occur to signal a change." The ALJ summarizes the language from Appendix A stating that "where the specific organ is not known, a general warning statement is permitted." But, "that target organ hazards should be listed if the chemical causes damage to a specific organ." Hilton-Davis had been using the National Paint and Coatings Association HMIS system.

Secretary of Labor v. Taft Broadcasting Company, Kings Island Division (13 OSHC 1137)

The OSHRC held "that Fourth Amendment protection may extend to employer records if employers have a reasonable expectation of privacy in them." The records specifically referred to in this case are the logs and summaries of occupational injuries and illnesses maintained by Taft. The Court examined prior decisions rejecting "the view that the classification of business records as 'required records' automatically means they are entitled to no protection under the Fourth Amendment."

The Review Commission found that an employer has some expectation of privacy concerning these records. The Review Commission noted that injury records predated OSHA and the Federal government could not have obtained those early records without some "sort of legal process." In addition, the records contain information that is of interest to the employer as well as to OSHA because it gives detailed information about manufacturing processes and procedures in a particular plant. For these reasons, the Review Commission supported Taft's view that there is a privacy expectation.

The Review Commission also goes on to argue that the concept of a warrantless demand for records is generally applied to pervasively regulated industries which is not the case here. As a result, a warrant or its equivalent is necessary in such situation in order to obtain records without the employer's permission. In this case, Taft had little expectation of an inspection and, therefore, a warrant was necessary.

Keco Industries, Inc. (13 OSHRC 1161)

The OSHRC held, among other things, that the continued refusal of Keco to produce injury and illness records when presented a warrant by OSHA was in violation of 29 CFR 1904.7. The OSHRC did not quarrel with the right of the employer to refuse oral requests by OSHA for injury records. The Commission stated that it was proper that the employer assert its rights under the Fourth Amendment by "demanding that OSHA present it with compulsory legal process".

The Review Commission found that once Keco had been presented with the warrant it could not refuse to give up the records. There was no question that Keco was aware of the requirements of 29 CFR 1904.7 because it had previously been found in violation of the same offense and, in fact, concerning the same records.

Of particular interest in this case was that the Review Commission upheld the determination that the violation was willful in that "it was committed voluntarily with either an intentional disregard to the requirements of the Act or plain indifference to employee safety." This is significant because of the other recordkeeping cases that are about to come before the Commission.

Secretary of Labor v. Emerson Electric Company (13 OSHC 1171)

In another case concerning recordkeeping, Emerson had been requested by an OSHA Compliance Officer to produce injury records. Emerson refused to do so. Unlike the prior case, OSHA did not obtain a warrant or issue a subpoena but went ahead and issued a citation. As a result, the Review Commission held that "Section 1904.7(a) violates the Fourth Amendment to the extent that it purports to authorize an inspection of required records without a warrant or its equivalent." Since the Secretary neither obtained a warrant or issued a subpoena, the Review Commission vacated the citation.

Secretary of Labor v. De Kalb Forge Company (13 OSHC 1146)

Of particular interest in this case is the decision by the OSHRC that the failure of OSHA to publish its Field Operations Manual (FOM) "in compliance with Section 3 of the Administrative Procedure Act" does not make OSHA's inspection program unlawful. The Review

Commission argues that the FOM does not impose any obligations upon the employer, but is merely a listing of procedural guidelines for compliance officers when they conduct OSHA inspections.

It would seem reasonable to believe that the Review Commission would reach the same conclusion if it examined guidelines such as those for Asbestos or the Hazard Communication Standard. Perhaps, however, it would reach a contrary decision if it had the BLS Guidelines on Recordkeeping before it. The distinction that can be made is that the BLS Guidelines for Recordkeeping were intended for employer consumption and not merely for inspection conduct by compliance officers.

New Jersey State Chamber of Commerce v. State of New Jersey (13 OSHC 1097)

The U.S. District Court for the District of New Jersey found that the New Jersey Asbestos Act and Regulations are expressly preempted as to occupational safety and health issues by the Asbestos Standard of the Occupational Safety and Health Act. Additionally, the Court found that non occupational issues, although not preempted by Federal OSHA regulations, were unenforceable. The Court reached this conclusion, because it found that "the preempted provisions are not severable from the remaining provisions in that the Asbestos Program makes no sense and is no longer comprehensive and cohesive when stripped of the invalid provisions".

United States of America v. Anderson, Clayton and Company (13 OSHC 1073)

The U.S. District Court for the Eastern District of California held that NIOSH does have the authority to "conduct research, experiments and demonstrations to develop plans, and establish criteria, promulgate regulations, authorize programs and publish results of such investigations, and to conduct industry-wide studies". In California, despite the fact that California is a state plan state, the Court finds no relationship between the authority granted NIOSH and provisions of the Occupational Safety and Health Act concerning state plans and therefore no reason to prevent NIOSH from proceeding with its programs in California.

Harry Barth v. The Firestone Tire and Rubber Company (No. C-85-20534-RPA)

The United States District Court for the Northern District of California refused to dismiss a complaint against the Firestone Tire and Rubber Company as alleged (1) "fraudulent active concealment and misrepresentation; (2) battery; (3) intentional infliction of emotional distress; (4) unfair and deceptive trade practices; and (5) equitable relief." Barth alleged that when he worked for the

defendant, he had been exposed to benzene, despite the fact that the employer had asserted during the entire period of time of Barth's employment that the exposures to the various substances (particularly benzene) at issue in this case were not present in the workplace.

The plaintiff does not argue that there is a symptom of any injury that "can be clinically diagnosed at this time". Barth alleges instead that his immune system has been damaged making him more susceptible to various forms of cancer and "he further asserts an injury purely through the increased risk of cancer". Additionally, he asserts injury "through fear and emotional distress." The Court accepts these allegations because this is a motion to dismiss and the Court does not have to consider proof in this proceeding.

The findings for the Court concluded that the plaintiff may sue outside of the workers' compensation law because he has alleged that the defendant has fraudulently concealed the aggravation of injuries caused by exposures. Again, the Court does not look for proof of the allegations, but merely that the allegations were made.

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