

MINUTES OF THE MEETING

of the

HEALTH AND ENVIRONMENTAL AFFAIRS COMMITTEE

Wednesday, April 28, 1982 at 9:00 AM

Sheraton Inn at LaGuardia, New York, NY

*FMSI-15
8/23/82*

MEMBERS PRESENT

James W. Armstrong, Chairman
David E. Stone
John O. Pearson
Richard W. Dean

Bendix Corporation
Bendix Corporation
Raybestos-Manhattan, Inc.
Thiokol Corporation

MEMBERS ABSENT

Charles H. Borcharding
Thomas M. Peden
George J. Bohrer

Abex Corporation
Nuturn Corporation
H. K. Porter Company

OTHERS PRESENT

Carmen A. Morello
Edward W. Drislane
John C. Dieffenderfer
Esther S. Foer
David Pullen

Thiokol Corporation
Friction Materials Standards Institute
Legal Counsel
Asbestos Compensation Council
Asbestos Compensation Council

The meeting was called to order by the Chairman, Mr. Armstrong, at 9:00 AM. With Ms. Foer and Mr. Pullen from the Asbestos Compensation Council in attendance, the Chairman stated that the Committee would deviate from the formal agenda, and ask Ms. Foer and Mr. Pullen to proceed with background on the Asbestos Compensation Council. He asked that Coalition representatives provide the Committee with background on the Coalition, along with information on proposed legislation and aims of the Coalition.

Ms. Foer advised that the Asbestos Compensation Coalition was made up of nine companies which have probably borne the brunt of litigation on asbestos disability. In most cases, existing compensation is inadequate for the disabled, while the costs that have been incurred have gone disproportionately to lawyers rather than to the victims. She noted that S.1643 (The Hart Bill) was a vehicle to bring the problem to debate, and it had four desirable objectives:

- (1) It provided for delivery of reasonable compensation to the party harmed by asbestos disease.
- (2) Compensation was based on sound medical reasons.
- (3) This compensation was the exclusive remedy for disability.
- (4) Contributions to fund the costs are directed from all responsible parties, including the Federal Government.

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Ms. Foer noted that representatives of the Coalition had testified in these areas when hearings were held on H. R. 5735 (The Miller Bill) earlier in April. A copy of an editorial that appeared in the Washington Post the day before this Committee Meeting was distributed to the attendees, "The Asbestos Mess". This editorial advocated a legislative approach to the compensation problem and ended with the following statement, "The present system is serving no one but--who else?--the lawyers."

It was noted that this editorial from a respected molder of opinion supported aims of the Asbestos Compensation Coalition. It was asked if the Miller Committee was open to revision. It was stated that the fact that Congressman Miller supported compensation type legislation was a step in the direction suggested by the Coalition, as he had formerly advocated settling all disputes in the courts.

When asked for a realistic judgement on what legislative approach would finally emerge, it was stated that the Hart Bill would probably not reach the floor, and while the Miller Bill may pass the House, it is unlikely that it could pass the Senate in its present version.

Mr. Pullen stated that the Coalition is working on an alternative approach to current legislative approaches (The Hart Bill, The Fenwick Bill, and The Miller Bill). This would involve many changes, and one would be changing the statute of limitations in several states. In many states today, a worker cannot file a Workmen's Compensation claim if the statute of limitations has expired. For example, if a worker had become disabled in 1980 from exposures in 1950, and was no longer employed where exposed, and the period of time since employment exceeded the statute, that worker may not have a remedy from Workmen's Compensation. The change suggested is that the statute become effective from time of manifestation of disease rather than from time of exposure to the hazard. Also, it was suggested that instead of product liability awards, a supplemental compensation award for asbestos-related disease could be triggered by a state compensation award.

As for funding this approach, a party subject to litigation could take either of two approaches: (1) Fight the litigation individually, or (2) Participate in funding, with the would-be plaintiff having access to this compensation fund as the exclusive remedy. In support of this approach, Mr. Pullen stated that this remedy would not change existing state compensation programs. It would not require either the Hart Bill, Fenwick Bill, or Miller Bill. It compensates the victim with a supplemental award in addition to a regular compensation award. This approach also includes one of the Coalition's points - that the Federal Government is one of the responsible parties.

In background comments, Mr. Pullen noted that there are over 15,000 lawsuits now in litigation on asbestos-related disability. New cases are coming into the courts at the rate of 350 to 500 per month. An important feature of the Coalition's approach is that a company can elect to participate or not participate in the funding. He illustrated for example, if a company was not involved in litigation, it could elect not to participate in the funding. If it had (again, for example) less than ten cases, it could fight those cases in the courts. If it had more than ten cases, it could decide to participate in the compensation plan. Mr. Pullen noted that this alternate approach wouldn't be for asbestos alone, but could include other materials suspect in the work-place.

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In order to effect such an approach, this plan would take a generic approach:

- (1) Enabling Statute for all occupational diseases.
- (2) Implementing Resolution (for specific diseases relating to materials such as asbestos, uranium, etc...).

This plan would have to address questions such as: How to fund the plan; The level of benefits for the claimant; Precise definition of the diseases; Other responsible party involvement; The applicability of general liability insurance coverage; Definition of Federal Government involvement.

In response to a question, it was stated that the Asbestos Compensation Coalition was organized under Section 501(c)(6) of the Internal Revenue Code, and as such, it could not lobby. Its Members, however, are free to lobby in behalf of solutions to this problem. The Coalition may attempt to work out approaches for solution of member problems, and it may draft statements. However, the individual members will do the lobbying. They may testify at hearings and give similar input in the legislative process. This is what the Coalition is now doing, and had been doing the week earlier on the Miller Bill. It was stated that the alternative approach would address problems that have been noted with both the Hart Bill and the Miller Bill.

A question was asked about assessment of manufacturers from foreign countries. It was noted that the friction materials market in the United States is being penetrated significantly by foreign manufacturers. Would they be assessed in any of the current legislative approaches? In reply, Mr. Pullen stated that they would not be assessed with any current legislative initiatives. It was stated that under the Miller and Hart Bills, this would be one more cost for domestic industry not shared by those exporting to this country. It is another step in making the United States less competitive in its own market. It was suggested that since the Government advocates free trade, that this is, perhaps, another area that supports Federal contribution to a compensation fund.

While noting that neither the Hart Bill or the Miller Bill are likely to advance this year, there could be legislative movement in this area in 1983 - after the elections. None of the legislative approaches in their present form is likely to become law.

In response to a question concerning difficulties with the Miller Bill, it was stated that the negative areas were:

- (1) The Federal Government is excluded from any obligation.
- (2) The presumptions against asbestos are overwhelming.
- (3) It would require 50 supplemental compensation funds, with funding allocations by percents for those manufacturing products with asbestos as a major constituent, those manufacturing with asbestos as a minor constituent, and those employing workers who work with asbestos products. No assessment is targeted for those exporting to the United States.

In the discussion, it was suggested that if Company A was not involved materially in asbestos litigation, why should it accept an assessment for funding? At what point would it become worthwhile for Company A to participate in the funding?

It was stated that with the suggested alternate approach, a defendant could elect to participate in the compensation fund even after the initiation of litigation. An assessment would then be made at some percent of the fund, in proportion to the costs of litigation. This plan would eliminate the non-productive costs of litigation. One manufacturer has hard estimates that it costs \$150,000 to deliver \$28,000 to the injured party under current litigation procedures. This includes court costs, plaintiff and defense attorney fees, and the costs of successful litigation by the defendant where no award is made.

Mr. Pullen requested the Committee to recommend support for the Coalition's objectives. He suggested that its proposals be put before the full Membership of the Institute. He stated that the Coalition was preparing a written proposal detailing what has been called the "alternate approach" at this meeting. While the Coalition hopes to have this together soon, it would most likely be prepared prior to the Institute's June 16-17 Membership Meetings.

Whether the Coalition's plans would appeal to the Members is a question. The Coalition would like hearings in 1983 on this new approach. They intend to make their recommendations part of the public record in 1983.

A Member asked about the likelihood of Federal Contributions to any plan. It was stated that if industry is guilty, the Government is equally guilty. They ran the shipyards where the most litigation has developed. The Government concurred with the threshold limits which later proved to be insufficient. The Government sat in on asbestos health hearings. They sold asbestos from the Federal stockpile. The most serious health consequences from asbestos exposure were those in the shipbuilding industry during World War II, when the Navy pushed production at all costs to support expedited delivery of ships and systems. It was stated that perhaps that would not be as convincing as the savings to the Government, which itself is a defendant in many asbestos disability cases. There is also the cost to the FICA system from those disabled, the court costs in litigation - even where the Government can claim sovereign immunity, and the fact that one-half of those exposed during the relatively uncontrolled days were involved in Federal work. Many of the claims against the Government come from company suits under FTCA (Federal Tort Claims Act). While the Government may not have the product liability exposure of private industry when it invokes "sovereign immunity", it is costing the Government substantially under existing programs and litigation. It is asked that the Government be treated equally with private industry.

Ms. Foer stated that many of the comments expressed at this meeting were put in writing by those testifying at the hearings on H.R. 5735 (The Miller Bill). She gave the Secretary a copy of these comments for subsequent distribution to the Committee. It was also stated that the Institute would receive a copy of the Coalition's recommendations for a legislative solution before our June Meetings.

At this point, there were no more questions. The Chairman thanked Ms. Foer and Mr. Pullen for their input and stated that the Institute would contact them on the Institute's consideration of a presentation by the Coalition to the full Membership.

MINUTES OF PREVIOUS MEETING

The minutes of the meeting held January 14, 1981 had been distributed to the Committee. These minutes were reviewed and a motion was made for their acceptance.

Upon motion duly made, seconded and unanimously passed, it was:

RESOLVED: To accept the minutes of the January 14, 1981 meeting as written.

FMSI 06437

ASBESTOS COMPENSATION COALITION

As noted in the agenda, a reason for hearing representatives of the Asbestos Compensation Coalition at this meeting was to determine if the Institute should extend to the Coalition an invitation to address the full Membership. If such a presentation were made, it should emphasize the extent of litigation now in process, whether for Workmen's Compensation or product liability. The Membership is interested in what is going on and how serious the litigation really is. They may have questions on product liability litigation. What legislation is under consideration? Should it be supported? Some litigation has already been noted as regards exposure in the brake repair shops.

It would be worthwhile to present to the Membership background on the Hart Bill. It is a "super compensation" bill, limited to asbestos. The Miller Bill is broader and relates to any hazardous material. A question is whether the Institute should endorse the proposals of the Coalition. There would be no way of establishing positions without hearing what the Coalition has to say. The Committee Members concurred in extending an invitation to the Coalition to address the full Membership.

Upon motion duly made, seconded and unanimously passed, it was:

RESOLVED: To recommend that the President invite representatives of the Asbestos Compensation Coalition to address the full Institute Membership at its June 1982 Meeting.

It was suggested that the Institute recommend that the Coalition include in its presentation figures on the dollars involved in current litigation, the number of cases that have reached the courts, and the legal implications of this litigation for the Members. Also, it was suggested that the Coalition give brief explanations of the content of the Hart Bill and the Miller Bill. And in summing up, it was suggested that the Coalition note what it now proposes as an alternate compensation plan. For logistics of the June Meeting, it was recommended that the Institute advise that the time available for a presentation would be one hour minimum, one and a half hours maximum, and allow one-half hour additional time for questions.

STATUS OF OCCUPATIONAL SAFETY AND HEALTH REGULATIONS

A brief review of Federal OSHA plans was requested. One Member stated that if a new exposure level were proposed by OSHA, it was his understanding that it would be at the TWA level of 1 fiber per cc. Apparently, pressure is off the asbestos issue at this time because there is a set of regulations in existence at this time, and there are other areas of concern. It was stated that if actions were under consideration, hazard warnings and labelling changes would likely be proposed. One Member stated that while there was nothing in writing at this time, OSHA does plan to issue an Advance Notice of Proposed Rulemaking (ANPRM) on occupational exposure to asbestos in 1982. Part of OSHA's current concern is exposure in the construction industry.

It was noted that while there may be nothing imminent at the Federal level, there has been movement by some States. California has enacted legislation for a long list of hazardous materials, and while the list of regulated substances has been proposed, it has not yet been finalized. Asbestos is on the list. The applicable statute is the "General Industry Safety Code - State of California - 5194." The legislature in Connecticut is considering legislation of hazardous materials under which asbestos would be included.

ENVIRONMENTAL PROTECTION AGENCY

A Member stated that the EPA planned an Alert for Brake Mechanics. This would probably be part of the current thinking at EPA which is considering actions in the area of education, labelling and work practices. The Federal EPA has had a series of personnel changes of recent date. One change moved Richard Guimond out of the asbestos area. Mr. Guimond was succeeded by a Mr. Dorsey, who in turn was moved to another assignment. It would not appear that there is imminent regulation under the Toxic Substances Control Act.

The main area of concern is likely to be the disposal of hazardous waste. Different jurisdictions describe wastes differently. In Texas, used brake linings are considered a regulated waste. New Jersey is cracking down on all wastes, while the emphasis is on chemicals. Some call the products "Hazardous Waste", "Controlled Waste", or "Regulated Waste." The main area of regulation appears to be at the State level.

There has been a shrinkage of waste disposal sites and of waste management companies. Because this is at a State level, it is difficult for the Institute to track the movements on available landfills and waste disposal sites. It was suggested that since this is now becoming a significant problem, the Institute should so advise the Members. It should be emphasized that this is no longer a problem at the Federal level alone, but is becoming more acute at the local level.

A recent thrust at the Federal level was to assure the financial responsibility of waste generators. This suggested insurance coverage requirements for generators - to assure coverage for non-sudden environmental impacts. There is great difficulty in establishing insurance premium rates for coverage of this type of unknown environmental impact. All materials - not just asbestos - must be of concern. With asbestos being inert, more concern is probably with phenol, formaldehyde, lead, and some of the solvents used in the manufacturing cycle.

NIOSH INVESTIGATION OF HEALTH HAZARDS IN BRAKE LINING REPAIR
AND MAINTENANCE WORKERS OCCUPATIONALLY EXPOSED TO ASBESTOS

In 1977, Mount Sinai School of Medicine was awarded a \$180,000 contract for the captioned study. The work was to be complete in 1978. The Institute provided input to Dr. Nicholson of Mount Sinai, as regards background and practices in the friction materials industry. The Institute was asked to critique an early section on background history in early 1979. We criticized it severely, and advised Dr. Nicholson that if he was crediting Mr. Drislane and Mr. Wagner for some of the statements in this draft, then we wanted that "credit" removed. In early 1980, the Secretary asked Richard Guimond of EPA's Office of Toxic Substances when the Nicholson report for NIOSH would be ready, and he replied that it would be ready in about six months - making it July 1980. We had indicated that before EPA regulated, it would be well to rely on some studies and particularly the Mount Sinai study. This study was to specifically conduct a medical survey on brake repair mechanics and report on those results.

The only thing produced to date is a NIOSH "Assessment of Asbestos Exposure to Mechanics Performing Brake Service Operations Including Recommended Procedure of Asbestos Brake and Clutch Servicing." NIOSH emphasizes that this is a "Draft" report. It was dated April 27, 1981.

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In no place does this "Draft" report touch on the health effects of asbestos exposure in the brake repair shop. It repeated some of the inaccurate background and history statements of the early 1979 Nicholson draft. It is obvious that if this study is now complete, NIOSH did not get what was called for in the \$180,000 contract form. And if the health effects are not reported thereon, why? Can it be inferred that the results were not what were anticipated by the contractor? The Asbestos Information Association has written NIOSH asking for the current status of this project. It was suggested that the Institute also ask NIOSH for the results of this study, which, if available, might shed more light on the health effects of asbestos exposure in the brake repair shop. If the results were negative, those results should also be part of the public record.

Upon motion duly made, seconded and unanimously passed, it was:

RESOLVED: That the Institute request NIOSH to provide it with the current status of the 1977 NIOSH contract with the Mount Sinai School of Medicine for "Investigation of Health Hazards in Brake Lining Repair and Maintenance Workers Occupationally Exposed to Asbestos."

The Secretary was directed to draft this letter to NIOSH and send it to Mr. Armstrong for approval before mailing.

Part of the concern with the NIOSH work is that an earlier draft by Dr. Nicholson which was filled with inaccuracies has apparently become the source document for other reports in this field. Once inaccurate and/or misleading literature reaches the field, even in draft form, it becomes "fact" in later reports with or without attribution to the source. It was noted that the Royal Commission in Ontario, Canada has been quite prolific with papers on the asbestos question. Again, the Royal Commission papers refer to earlier papers which are in dispute as the source for certain assumptions and/or conclusions in Royal Commission papers. The source of these papers is:

Royal Commission on Matters Arising from Asbestos
London, Ontario
Canada

COMMITTEE AND INSTITUTE ACTIONS IN SUPPORT OF THE MEMBERSHIP SINCE THE JANUARY 1981 MEETING OF THE COMMITTEE

The Secretary reported on actions taken at the Institute Office based on Committee recommendations in January 1981. Among these were the following:

On February 19, 1981, the Institute advised the Membership on certain publications and services available which could be helpful in the occupational safety, health, and environmental areas: BNA Occupational Safety and Health Reporter; BNA Chemical Reporter; Fishbein Occupational Health & Safety Letter; Employment Safety and Health Guide (CCH)

The Institute released BULLETIN NO. 710 on March 9, 1981, on "Asbestos and Current EPA Requirements Regulating Hazardous Waste Disposal." This included copies of the EPA notice on Identification and Listing of Hazardous Waste, and noted that asbestos had been "temporarily" removed from the list of hazardous materials as it was earlier controlled under regulations in the National Emissions Standards for Hazardous Air Pollutants (NESHAPS).

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The Institute released BULLETIN NO. 711 on March 9, 1981, on "Material Safety Data Sheets." With that notice, it prophetically noted that there was movement in the state of California to make utilization of the "Material Safety Data Sheet" mandatory. The MSDS is required in the new California regulations.

The foregoing were three areas of advice to the Membership in coping with the various government regulatory initiatives. The Institute Office also conducted the survey called for by the Committee. This was to seek input from the Members on areas where the Institute might take action to help the Members. There were replies from only 6 of 21 Members. One Member strongly took exception to circulating the questionnaire at all, alleging that it was not on firm footing legally. When the replies were tabulated, the one area of 'exchange of information on citations and allegations by government authorities' drew considerable concerned questioning. Based on the concern by the Membership on areas of action, and the lack of response by the Membership, the project was dropped. This was discussed at the Board of Directors and Membership Meetings in June 1981.

Based on this review, the Institute took action on every item recommended by the Committee. Was there some other area that the Committee should have addressed? One Member questioned actions at Consumer Product Safety Commission (CPSC). The most significant part of this question was addressed by Legal Counsel in his letter of July 13, 1978, after there had been questions on this subject at the 1978 Annual Meeting. Counsel's letter stated in part:

Moreover, brake lining is not a "consumer product" in terms of the Consumer Product Safety Act. Under that Act, 15 U.S.C. #2052 expressly excludes from the definition of "consumer product" all "motor vehicle equipment," the latter including all replacement as well as original items. Brake lining is governed by the Motor Vehicle Safety Standards Act, 15 U.S.C. #1391 et seq., under which the recall method is orderly.

The Consumer Product Safety Act provisions could be applied to friction devices in garden tractors, appliances, bicycles, et cetera. Most Members are not engaged in these areas. It was also stated that where a manufacturer was using asbestos in these friction devices, there have not been any regulations proposed by CPSC for these items. CPSC's earlier actions have been in areas where asbestos is "friable" and not locked-in to the product.

APPROVED LANDFILLS

As indicated earlier in the minutes, two areas of major concern are in litigation (which was covered with the presentation by the Asbestos Compensation Coalition) and landfills for friction materials waste. The problem is not applicable to friction materials manufacturers only, as the problem will be shared with friction materials users - the independent brake rebuilder in particular. Do the various States have lists of approved landfills? By "approved landfills" one is asking of landfills where used friction materials may be deposited. It was suggested that the problem is more than used brake linings, and should include grinding dust from friction materials. Some would consider this dust to not contain free fibers, for the asbestos has been encapsulated with resins. Others might consider this "asbestos dust". If chemicals or ingredients such as lead could leach from the product in a landfill, the manufacturer would have to supply this leaching information to the landfill operator.

FMSI 06441

In trying to find this information there may be confusion on descriptions of landfills: Secure Landfill versus Hazardous Waste Landfill; Secure versus Intermediate Landfill; Class 1 versus Class 2 Landfill. Perhaps it would be simpler to ask the Membership for information on landfills. The basic concern could be summed up: (1) There are two materials - used friction materials and grinding dust; (2) Where does one get rid of them? What is the exposure or visibility if the Institute were to ask State or Regulatory authorities? It might result in an agency's reaction to automatically include used friction materials in their lists of "hazardous waste" and thus restrict disposal options. It was suggested that someone other than the Institute might ask. Use of Legal Counsel for this inquiry was suggested. After additional discussion, it was recommended that the Board of Directors be asked to approve such a request and suggest the means for making the inquiry.

Upon motion duly made, seconded and unanimously passed, it was:

RESOLVED: That the Board of Directors approve a request to the Environmental Protection Agency for a listing of approved landfills for disposal of friction materials waste and suggest the means for making this request.

It was also suggested that any Member who has such information send a copy of such listing to the Institute Office. A question was raised on who at the Agency should be addressed. It was suggested that while a formal list may not be available, the information itself should be available. There must be a list of all landfills (the Universe). There is probably a list of problem landfills. There must be a positive listing of landfills which would accept this type of waste. There would probably be a reluctance for anyone to say such-and-such a landfill was "approved" because of problems that may develop in later years. Some of the problem landfills of today were probably "approved" landfills a few years back.

PRODUCT LIABILITY

The Secretary advised that he had received a request for the Institute's support of a trade association supporting a Federal Product Liability Law. He did not have the papers at the meeting as this request missed the papers carried to the Meeting. This Group requested Institute support and a contribution of \$100. While the Secretary stated that there was precedence for such support - - the Institute supports the Automotive Information Council with an annual contribution - - there were neither papers nor proposal to review at the Meeting. The Secretary was asked to circulate this notice on a Federal Product Liability Law to Committee Members to request comment. After review of comments, the Secretary will ask the Committee Chairman and Legal Counsel for their recommendations or comments.

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There being no other business brought to the attention of the Committee, upon motion duly made, seconded, and unanimously passed, it was:

RESOLVED: To Adjourn

Adjourned at 1:00 PM.

E. W. Drislane
Secretary

FMSI 06442