

File Asbestos
General Info 1988

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Memorandum

PLAINTIFF'S
EXHIBIT

AL-1537

February 16, 1988

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

From: W. *William* Ament

Subject: Recent Court Decision on Asbestos

The U.S. Court of Appeals for the District of Columbia upheld OSHA's "findings concerning significant risk and the feasibility of the new PEL," but could not find "substantial evidence supporting several of the Agencies conclusions: its categorical ban on the spraying of asbestos containing products and its decisions not to adopt a lower PEL for certain major industrial subgroups, an STEL, smoking related regulations, and some of BCTD's (the Building of Construction Trades Department AFL-CIO) suggested safety measures." Because of those findings, the Court remanded the case back to OSHA for reconsideration.

The Court agreed with OSHA that a significant risk exists. It also held that a significant risk could well exist at the .1 f/cc level and noted that OSHA had selected the .2 f/cc level because it was the lowest feasible level rather than being one that would eliminate significant risk.

In responding to the claims raised by the Asbestos Information Association (AIA), the Court stated that "when called upon to review technical determinations and matters to which the agency lays claim to special expertise, the Courts are at their most deferential. Our primary duty is merely to scrutinize the record to insure that the Secretary has made his findings of fact on the basis of substantial evidence and has provided a reasoned explanation for his policy assumptions and conclusions." In this instance, the Secretary had properly identified the studies and authorities on which he had relied to reach his decisions and, as a result, had "adequate support for his scientific assumptions and findings." In response to the AIA contention that OSHA

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exhibited a bias toward worker safety, the Court referred to other cases which supported "risking error the side of over protection rather than under protection."

The Court rejected arguments by the AIA that the .2 f/cc is not technologically feasible. It did not accept the arguments that the methodology of measurement was deficient and found that "here OSHA has merely adopted a universal protocol where none had previously prevailed." Additionally, the Court decided that OSHA had gone as far as it could in guarding against random sampling error by adding the full value of the standard sampling error to its measurements in determining compliance.

The Court also rejected the two AIA attacks concerning technological feasibility that are independent of the measurement issue. As to the need for respirators in some situations, the Court noted that OSHA had properly "provided that the employer must use (engineering controls and work practices)...to obtain the lowest achievable levels and supplement them with respirator use."

As to random control fluctuations, the Court rejected AIA's argument that, because OSHA would not issue a citation unless it "has reason to believe that there are circumstances within the employer's control to account for the high exposure measurement," the Agency was "relying on too much human discretion and...defeating (the OSH Act's) requirements that standards be expressed in terms of objective criteria." The court found that the OSHA enforcement policy was proper since the OSH Act does not require only "objective criteria" but includes the words "wherever practicable."

In other areas, the Court rejected OSHA's ban on the spraying of asbestos products because the Agency simply did not provide sufficient background information to support that position. Also, the Court found that the failure of the Agency to issue a smoking control regulation along with the asbestos standard, despite its findings that "asbestos exposure poses heightened risks to smokers" was not supported by the Agency's statements. The Court noted that OSHA has made certain lifestyle requirements, such as the trimming of beards to allow a good face seal for respirators. As a result, the short shrift given to a possible OSHA mandated smoking control program was not acceptable.

The Court rejected OSHA's decision to limit the standard's PEL to the .2 f/level for all industries, even though OSHA acknowledged that such a level would not eliminate all significant risk. The Court was unpersuaded by OSHA's arguments concerning "the Secretary's discretion to decide what industry should be grouped together for regulatory purposes." The Court, therefore, remanded this issue to the Secretary so that he could address "the issue

of disengaging the general industry standard to afford workers the benefits of more strenuous standards in areas where they are feasible."

As to the requirements for a STEL, the Court did not accept OSHA's conclusion and gave the agency sixty days to reconsider.

If you are interested in a copy of this decision, I will be glad to send one to you.

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