

PLAINTIFF'S EXHIBIT

DOW-586

Ed Asbestos
910 Sunderland Place, N.W.
Washington, D.C. 20036
202-293-2980
Fax: 202-293-2915



Memorandum

March 22, 1989

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

From: Darrell K. Mattheis

Subject: OSHA Enforcement Update

OSHA Air Contaminants Final Rule, 29 CFR 1910.1000

Transitional Limits versus Final Rule Limits

ORC has received a number of calls indicating that there is some confusion about when and how compliance is to be achieved with the Transitional Limits and Final Rule Limits of the OSHA final Air Contaminants Rule (54 FR 2332).

Transitional Limits

Substances having Transitional Limits are those that were listed in the old 1910.1000 Z-Tables. These Transitional Limits will remain in effect until December 30, 1992, and compliance with them must be achieved using the methods specified in Paragraph (e) of the Final Rule on Air Contaminants (current). This current Paragraph (e) is the old familiar hierarchy of controls, starting with engineering controls and working down to respirators as a last resort.

After December 30, 1992, employers must comply with the new PELs established in the Final Rule on Air Contaminants, unless OSHA has been unable to complete rulemaking on a Methods of Compliance standard by December 30, 1991 by either publishing a new Methods of Compliance standard that would amend current Paragraph (e), or determining that current Paragraph (e) will not be amended. If OSHA meets the 1991 publication date for a new Methods of Compliance standard, compliance with the newly-established PELs would have to be achieved according to that new standard beginning on December 31, 1992.

ST0071147

However, if by December 31, 1991, OSHA has not published its new Methods of Compliance standard, then the Transitional Limits would remain in effect through December 30, 1993 and the methods of compliance specified in current Paragraph (e) would continue to apply. After December 30, 1993, the newly-established PELs become effective unconditionally and employers will be required to meet these standards according to the current Paragraph (e) provisions until a Methods of Compliance standard is issued and becomes effective.

Final Rule Limits

For the Final Rule Limits, which include both new and revised PELs, compliance can be achieved through any combination of engineering, work practices, and personal protective equipment, effective September 1, 1989 through December 30, 1992. After December 30, 1992, compliance must follow the requirements of either the amended or current Paragraph (e). Unless, by December 31, 1991, OSHA does not publish a new Methods of Compliance standard, that amends Paragraph (e) or determines that Paragraph (e) will not be amended, Paragraph (e) compliance does not begin until December 31, 1993.

Starting September 1, 1989, OSHA will be sampling, for compliance, with both the old and new PELs, they will be looking for evidence of efforts to comply with the new ones by all means, but will expect strict engineering control oriented approaches for substances with transitional limits.

ST0071148

Start Up Dates	PEL Limits	Status of New Methods of Compliance Standard on December 31, 1991	Compliance Rule
1/19/89 through 12/30/92	Transitional	Published or no Change to Paragraph (e)	Current or Revised Paragraph (e)
1/19/89 through 12/30/93	Transitional	Not Published	Current Paragraph (e)
9/1/89 through 12/30/92	New	Published or no Change to Paragraph (e)	Any Reasonable Method
9/1/89 through 12/30/93	New	Not Published	Any Reasonable Method
12/31/92	All	Published or no Change to Paragraph (e)	Current or Revised Paragraph (e)
12/31/93	All	Not Published	Current Paragraph (e) or Revised Paragraph (e)

Asbestos

Asbestos continues to be a an important issue for OSHA compliance. Presently, the big question is the definition of paragraph (e)(6).

The question involves the requirement for negative-pressure enclosures, the exception to the requirements of (e)(6) for small jobs, and the definition of a small job.

Paragraph (e) is Regulated Areas, and (e)(6) is Requirements for Asbestos Removal, Demolition and Renovation Operations.

(e)(6)(1) requires that:

"Wherever feasible, the employer shall establish negative pressure enclosures before commencing removal, demolition, and renovation operations."

(e)(6)(iv) Exception, establishes the exception for small jobs.

"For small-scale, short duration operations, such as pipe repair, valve replacement, installing electrical conduits, installing or removing drywall, roofing, and other general building maintenance or renovation, the employer is not required to comply with the requirements of paragraph (e)(6) of this section."

Negative Pressure Enclosures: The question is, when is a negative pressure enclosure required? OSHA Solicitors have concluded, based on the standard, that a negative pressure enclosure is required whenever the job is a removal, demolition or renovation, regardless of how small, and regardless of the levels of airborne asbestos fibers generated. Some OSHA field people are not as convinced, however, believing that if an employer can demonstrate that the levels of airborne asbestos generated are below the PEL, OSHA would lose in court if a citation were contested.

In one case that is presently in court, the employer was removing asbestos insulation from 140 feet of pipe, treating it as a small job, using glove bags. OSHA came in, sampled for two hours, and found that the exposure for those two hours, was below the Action Level. OSHA cited the employer for not using a negative pressure enclosure for a removal operation, regardless of what the level of exposure was.

The issue here is the application of certain requirements in the standard based upon the presence of asbestos, regardless of the level of any exposure that might take place. If this approach is upheld in court, OSHA would not need to monitor, but simply to ascertain that asbestos was present and whether it was a large or small job.

The OSHA field people are now being told that if the primary reason for the job is the removal of asbestos, it is to be treated as large-scale, and a negative pressure enclosure required. A job is small-scale only if the asbestos removal is secondary to the performance of the job.

Definition Of A Small Job: OSHA has been writing citations for the use of glove bags for what are essentially removal operations. OSHA designed the small job exception for operations where asbestos removal or release is incidental to the performance of the job. OSHA views any operation where the removal of asbestos is the main purpose, as a large-scale job requiring a negative pressure enclosure.

It generally makes no difference that the job could be done in a glove bag with exposure levels below the Action Level. Some employers have used multiple glove bags to sequentially remove asbestos containing insulation from a pipe. OSHA considers this to be a violation of the standard. One standard that some in OSHA have used, is that if a glove bag is longer than ten feet, it is no longer a small job.

In some instances, however, OSHA has allowed the small job designation to be used for what was, in fact, asbestos removal. In one case, where a large building was being renovated, there were one hundred rooms with an essentially identical pipe elbow with asbestos in the insulation. OSHA allowed the contractor to use glove bags on each of the elbows, class it as a small job and not use negative pressure enclosures.

Asbestos Remand: On February 2, 1988, the Court remanded back to OSHA its Asbestos Standard. One of the issues the Court asked OSHA to reconsider was the Short-Term Exposure Limit. OSHA subsequently published an Excursion Limit in response to this part of the Remand. OSHA is presently working on the rest of the Remand, but progress is slow and they are not likely to finish it any time soon. ORC has heard that a hearing on the Remand has tentatively been set for the spring of 1990. It is unlikely that the Court (or the unions that brought the suit) will accept this much delay. It is possible that the Court will rule on the Remand sometime in 1989.

If the Court acts in 1989, we may see some elements of the Remand become part of the Asbestos Standard without a public hearing.

This could mean:

- * Different PELs for different industries.
- * A reduced or eliminated small job exception.
- * A greater use of negative pressure enclosures.
- * A requirement to use only supplied-air or SCBA respirators for work involving any amount of asbestos. The use of negative pressure respirators could be eliminated.
- * Greater restrictions on workplace smoking.
- * A redefinition of competent person.
- * Multi-lingual signs.

In one sense, this is part of a consistent and often successful pattern of action on the part of organized labor. They go to court to force reconsideration of a standard that they disagree with. The Court often Remands the standard back to OSHA, the Agency receives the Remand, and unless there is a time deadline set by the Court, it usually responds slowly.

OSHA does not have to invent reasons to go slow on a Remand. An effective reply to a Remand entails a lot of work on a topic that is no longer in the limelight, often for an administration that had nothing to do with the original standard that was remanded. The staff person who takes time away from a current project to work on a Remand will receive small credit for such efforts.

OSHA needs to be encouraged to submit to the Court a proposed response to the Remand. This response must come within the next 4-6 months, and, even then, it may not satisfy the Court. In the case of the Asbestos Remand, OSHA may have already reached a decision that different PELs can be justified for different industry segments.

Hazard Communication Standard/Access to Employee Medical Records
ORC has received word that, in several cases, OSHA has come into a plant to do an HCS inspection, gone through the company's records, and, finding nothing wrong, did an inspection of company compliance with 1910.20 Employee Access to Exposure and Medical Records.

The inspector evidently based this action on two documents: CPL 2-2.38B, (August 15, 1988) section 8(a) (p.28), and Section (h)(2)(iv) Employee Information and Training of the Hazard Communication Standard. Section 8 is titled, "Employee Information and Training, Paragraph (h)," subpart (a) reads:

"(a) The training requirements of the HCS will generally complement rather than satisfy the existing training requirements contained within other OSHA standards (i.e., expanded health standards, construction requirements, etc.). CSHOs shall continue to ensure that employers' obligations under specific training provisions of other standards are met." (emphasis added)

Section (h)(2)(iv) reads:

"(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information." (emphasis added)

ST0071151

Based upon the requirements of CPL 2-2.38B, and (h)(2)(iv) of the HCS, the inspector then wrote a citation for failure to give annual training, based upon Section (g)(1)(i), (ii) & (iii) Employee Information of OSHA's Access to Employee Exposure and Medical Records standard. This Section requires that:

"(1) Upon an employee's first entering into employment, and, at least annually thereafter, each employer shall inform current employees covered by this section of the following:

- (i) The existence, location, and availability of any records covered by this section;
- (ii) The person responsible for maintaining and providing access to records; and
- (iii) Each employee's rights of access to these records."

Many organizations have not been keeping up with the annual training required by 1910.20, and it leaves them vulnerable to this kind of approach by OSHA. If you have had trouble with OSHA in this area, and would be willing to share the information about the circumstances, we would appreciate hearing about it.

DKM3:lgS

Daniel H. Matthews

ST0071152