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JUL 11 1980

Washington Bulletin

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80-15 file benzene July 3, 1980

Yesterday, the United States Supreme Court handed down its decision on the Occupational Safety and Health Administration's permanent standards limiting exposure to benzene, which had been challenged by NPRA, other industry groups and a representative sampling of the refining and petrochemical industry. The decision announced by the Court affirmed a ruling by the Fifth U. S. Court of Appeals setting aside the OSHA regulations which would have limited employee exposure to benzene to 1 part per million (ppm) over an eight-hour period. In addition, the regulations would have required numerous monitoring, labeling, health surveillance, medical record and work practice controls to be placed into effect. Also, OSHA's regulations proscribing dermal contact with benzene were overturned.

The decision of the Supreme Court consisted of four concurring opinions affirming the judgment issued by five members of the Court, and a dissenting opinion concurred in by the remaining four justices who would have upheld OSHA's regulation. Because of the complexity, as well as the diversity of views, it is perhaps too early to assess the significance of the decision with respect to regulatory agencies which operate under statutes other than the Occupational Safety and Health Act. [redacted], however, that the decision in the benzene case represents a significant by officials within OSHA who have maintained [redacted] by placing an impossible burden on industry. Another [redacted] by the Court's opinion was that the meaning of the word "[redacted]" as used in the statute [redacted]." The Court said that [redacted] As a consequence, four of the justices believe that the Secretary of Labor had erred in failing to make a threshold finding that the existing 10 ppm standard for benzene was unsafe in the sense that significant risks were present and that they could be eliminated or lessened by a change in practices which were premised on a 1 ppm standard. Another criticism of the regulation was that it rested on a series of assumptions that the incidence of leukemia resulting from benzene exposure at 10 ppm might be reduced by lowering the exposure level to 1 ppm.

The decision also found fault with OSHA's failure to justify a finding that the benefits to be realized from the standard had a reasonable relationship to its one-half billion dollar price tag. Justice Powell, in a separate opinion, took issue with this specific point. He concluded that the agency was required to determine that the economic effects of the standard "bear a reasonable relationship to the expected benefits." He continued, "An occupational health standard is neither 'reasonably necessary' nor 'feasible,' as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits." Carrying this argument further Mr. Powell said:

> "It is simply unreasonable to believe that Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the economic viability of particular industries -- or significant segments thereof -- is threatened. As the plurality observes, OSHA itself has not chosen to carry out such a self-defeating policy in all instances. ... If it did, OSHA regulations would impair the ability of American industries to compete effectively with foreign businesses and to provide employment for American workers."

It should further be noted that Justice Powell defended his criticism stating that:

> "...a standard-setting process that ignored economic considerations would result in a [redacted] than could be achieved under standards set with reference to the comparative benefits available at a lower cost."

Mr. Justice Rehnquist provided the fifth vote to those of Powell, Stevens, Chief Justice Burger and Stewart in affirming the lower court's decision. His concurrence was based on a somewhat different approach. It is his contention that the primary responsibility for the regulation's failing was an impermissible delegation of responsibility to the Secretary by Congress. [redacted]id, "I believe that this case presents the Court with what has to be one of the most difficult issues that could confront a decision-maker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths."

e continued that he believed "that Congress, the governmental body best-suited and most obligated to make the choice confronting us in this case, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court." He devoted a great deal of his concurring opinion to a discussion which does not represent the opinion of a majority of the Court, but is a perceptive analysis of a serious flaw in the present regulatory environment with which industry must contend. Justice Rehnquist advocated that the Court should "reshoulder the burden of insuring that Congress itself make the critical policy decisions." In arguing that delegation of this type of decision should not be given to regulatory agencies by Congress, he described three important functions of the "nondelegation doctrine." The first was to insure to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of government most responsive to the popular will. Secondly, where Congress finds it necessary to delegate authority, it should provide the recipient of that authority with an intelligible principle to guide the exercise of the delegated discretion. Thirdly, the doctrine should insure that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards. Justice Rehnquist continues, "I believe the legislation at issue here fails on all three counts." He said:

> "The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy. For Congress to pass that decision on to the Secretary in the manner it did violates, in my mind, John Locke's caveat -- reflected in the cases cited earlier in this opinion -- that legislatures are to make laws, not legislators."

One further passage in Justice Rehnquist's opinion bears examination because of its cogency:

> "If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process."

good historical summary

Yesterday's decision upheld that of the U. S. Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, which decided the benzene case on October 5, 1978. OSHA's initial attempt at reducing the permissible benzene exposure limit from 10 ppm to 1 ppm came in May 1977. OSHA issued an emergency temporary standard which never went into effect due to a successful judicial challenge by NPRA and others. Subsequently, OSHA published a proposed permanent standard on May 27, 1977. Public hearings followed, and on February 3, 1978, the permanent benzene standard was announced with an effective date of March 13, 1978. This led the parties back to court and a temporary stay of the new standard was issued on the day the regulations would have gone into effect. A month later, the Fifth Circuit ordered the temporary stay to be continued until a final review on the merits of the suit had occurred. Shortly thereafter OSHA amended its benzene standard to exempt workplaces where exposure was from liquid mixtures containing 0.1 percent benzene by volume.

Obviously, the decision represents a ~~tremendous setback in OSHA~~'s efforts to establish a ~~comprehensive carcinogen program~~, an action that is still pending. A footnote in the opinion in which the four justices voted to affirm has some ~~interesting references to the generic cancer policy~~ and may extend some hope for application of this decision to the broader regulatory endeavor in the future. In part, it states:

> "After hearing the evidence, the Agency relied on the same policy view it had stated at the outset, ... namely, that, in the absence of clear evidence to the contrary, it must be assumed that no safe level exists for exposure to a carcinogen. The Agency also reached the entirely predictable conclusion that industry had not carried its concededly impossible burden, ... of proving that a safe level of exposure exists for benzene. As the Agency made clear later in its proposed generic cancer policy, ... it felt compelled to allow industry witnesses to go over the same ground in each regulation dealing with a carcinogen, despite its policy view. The generic policy, which has not yet gone into effect, was specifically designed to eliminate this duplication of effort in each case by foreclosing industry from arguing that there is a safe level for the particular carcinogen being regulated."

In other words, one might perceive that at least four justices would have some trouble in any possible court review of OSHA's cancer policy, should that occur.

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