PLAINTIFF'S EXHIBIT WRG-1093

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Current Report

Litigation

OSHA'S EMERGENCY ASBESTOS STANDARD STRUCK DOWN BY FIFTH CIRCUIT COURT

The U.S. Court of Appeals for the Fifth Circuit March 7 struck down the Occupational Safety and Health Administration's emergency temporary standard (ETS) governing permissible workplace exposure to asbestos because the record failed to show a "grave" risk as defined by the agency or that the ETS is "necessary" as that term is used in the Occupational Safety and Health Act.

This ruling in *Asbestos Information Association/ North America v. OSHA* (Nos. 83-4687 — 4689 and 83-4711) upheld the challenge to the emergency rule filed last November by an organization of American and Canadian manufacturers of asbestos products (Current Report, Nov., 10, 1983, p. 587). The appeals court had granted a temporary stay of the standard, which reduced the time-weighted permissible exposure level (PEL) for ambient asbestos fibers from two fibers per cubic cemtimeter (f/cc) to 0.5 f/cc, pending judicial review of the rule (11 OSHC 1724).

The Occupational Safety and Health Act permits the secretary of labor to bypass normal rulemaking procedures and issue an ETS if he determines that "employees are exposed to grave danger from exposure to substances ... determined to be toxic or physically harmful," and that emergency action "is necessary to protect employees from such danger." Employers can comply with an ETS by "any practical combination" of engineering controls, work practices, and personal protective equipment.

Writing for a three-judge panel, Circuit Judge E. Grady Jolly criticized the timing of OSHA's action, saying, "No new data or discovery leads OSHA to invoke its extraordinary ETS powers and lower the asbestos PEL. Rather, OSHA bases its conclusion that a grave danger exists on quantitative risk assessments, which are mathematical extrapolations, of the likelihood of contracting an asbestos-related disease at various levels of exposure to asbestos particles. The risk assessment, which OSHA completed in July 1983, and a meeting a few months earlier between [OSHA head Thorne Auchter] and a recognized expert in the asbestos epidemiology field [Irving Selikoff of the Mt. Sinai School of Medicine], heightened OSHA's awareness of the asbestos situation and precipitated the ETS."

Judge Jolly noted that OSHA partially justified the ETS on the ground that promulgation of a lower asbestos exposure limit may take years to complete. However, he warned, the ETS statute is not to be used merely as an interim relief measure, "but treated as an extraordinary power to be used only in 'limited situations' where a grave danger exists." The agency cannot use its ETS powers as "a stop-gap measure," Jolly reasoned.

OSHA's Lack of New Data

The court rejected AIA's contention that OSHA had no grounds to issue an ETS because it had known of the potentially serious health risks of asbestos for years and had failed to take action. While acknowledging that new information may be a sound basis for an ETS, the court declined to hold that OSHA cannot issue an ETS in its absence. "As OSHA admits, the agency's failure to act may be evidence that a situation is not a true emergency," the court observed, but agreed with OSHA that failure to act "does not conclusively establish that a situation is not an emergency."

The court also discounted AIA's argument that compliance with the new PEL will have an adverse "ripple effect" on the asbestos products market because asbestos users will substitute other products for asbestos in response to the alarm the ETS would cause throughout the industry in labeling the situation as an emergency. "The industry will have felt any ripple effects precipitated by OSHA's declaration of an emergency," and the court's holding cannot undo whatever harm has been done, Judge Jolly explained. He added that the court was not convinced that the ETS "seriously jeopardizes the asbestos industry."

However, the court found no "grave danger" to workers warranting an emergency standard lowering workplace exposure to asbestos. Judge Jolly characterized the court's inquiry as "a narrow one" requiring it to evaluate both the nature of the consequences of exposure, and also the number of workers likely to suffer those consequences.

OSHA claimed that a permanent PEL of 0.5 f/cc would save 64 lives per one thousand workers over a working life of 45 years. Over six months, an ETS setting the same exposure limit would save an estimated 80 lives in a worker population of 375,399. The secretary determined that 80 lives at risk is a grave danger. The court declared it is "not prepared to say it is not."

Although the secretary does not need to support an ETS with "scientific certainty," the court said he must present a statement of reasons for his decision to issue an emergency standard. "OSHA has made the *number* of deaths avoided — at least 80 — the basis for its rulemaking. Yet it is apparent ... that the actual number of lives saved is uncertain, and is likely to be substantially less than 80. Both the gravity of the risk as defined by OSHA and the necessity of an ETS to protect against it are therefore questionable," the court reasoned.

Uncertainty of Risk Assessment

The Fifth Circuit court also found that "although risk assessment analysis is an extremely useful tool," the results of its application to a small slice of time are speculative because the underlying data-base projects only long-term risks. OSHA conceded some unreliability and uncertainty to be inherent in risk assessment generally, the court noted. Accordingly, "Applying the risk assessment process to a period of six months, one-ninetieth of OSHA's estimated working lifetime, only magnifies those inherent uncertainties."

The court also concluded that issuance of an ETS on asbestos is not necessary to protect workers. "Even assuming that OSHA's projected benefits would accrue from the ETS," the court said, "the agency has not proved that the ETS, OSHA's most dramatic weapon in its enforcement arsenal, is 'necessary' to achieve the projected benefits."

Judge Jolly noted that the "probable practical effect" of the ETS is that employers would require workers exposed to

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asbestos to wear respirators. Current OSHA regulations require employers to outfit workers with respirators that provide up to one hundred-fold protection. "Yet OSHA did not include in its calculations the effect of enforcing the current standard by requiring employers in the drywall construction and demolition industry to furnish these respirators," the judge wrote.

The court also stated, however, that its finding that substantial evidence does not exist to support a six-month ETS "should not be construed as a prediction that a lower asbestos PEL would fail under judicial scrutiny if OSHA promulgates it pursuant to proper notice-and-comment rulemaking procedures."

This ruling, joined by Chief Judge Charles Clark and Circuit Judge Alvin B. Rubin, appears in the Full Text section of this issue, and also will appear in a future Decisions issue.

Asbestos

INVALIDATION OF OSHA'S ASBESTOS ETS PLEASES INDUSTRY, FAILS TO SURPRISE LABOR

The Asbestos Industry Association is "obviously pleased" with the U.S. Court of Appeals for the Fifth Circuit's March 7 decision striking down the Occupational Safety and Health Administration's emergency temporary standard for asbestos, according to the association's executive director, B. J. Pigg.

The court invalidated the ETS on the ground that the agency lacked the evidence of "grave danger" to employees exposed to the fiber necessary to support emergency action (see related article in this issue.)

The emergency temporary standard lowering the permissible workplace exposure limit for asbestos from two fibers per cubic centimeter of air to 0.5 f/cc of air was issued by OSHA Nov. 4, 1983 (Current Report, Nov. 10, p. 587). The AIA had immediately challenged the ETS, contending that the rulemaking represented a "precipitous" action based on "the unfounded conclusion that a health 'emergency' exists" under the two f/cc standard, and the appeals court had granted a temporary stay of the ETS (Current Report, Dec. 1, 1983, p. 691).

Pigg stated, however, that the decision did not alter the association's position that OSHA should initiate a rulemaking to develop a more stringent asbestos standard that will better protect worker health. "The association has been aggressively urging the agency to develop new regulations on an expedited basis," Pigg asserted.

"The ETS was issued without notice or public hearings and thus bypassed the normal rulemaking process that is essential for a full airing of the very complex scientific and technical issues involved," according to Pigg. He added that "it was never necessary for OSHA to declare an 'emergency,' because asbestos manufacturers and users have made significant strides over the last decade and most exposures are already well below the existing permanent standard."

The court's conclusion that the standard should not become effective absent notice and comment rulemaking "vindicates the association's position," Pigg said.

Margaret Seminario, associate director of the AFL-CIO's Department of Occupational Safety, Health, and Social Security, told BNA that while the decision does not appear to be devastating, it does prove "that the Fifth Circuit will never uphold an ETS." "We've known in the past that industry has a friend in the Fifth Circuit and apparently they still do," she said.

Seminario stressed that "the important thing is to get an effective standard into place to protect the health of asbestos workers and that is up to OSHA." Referring to a rumored reduction in the permissible exposure level by the Office of Management and Budget to 0.2 f/cc, she stated that if the final rule is "a respirator standard," then it does not matter what the permitted level is. "It would be no more stringent than the present proposal" if it still requires the use of respirators, Seminario emphasized.

Enforcement

IMPLICATIONS OF AID BY AUCHTER TO FUTURE EMPLOYER DENIED BY PARTIES

The owner and president of a holding company which Assistant Secretary of Labor Thorne G. Auchter will shortly join denied implications in two newspaper articles that there was a connection between Auchter being given the job and an OSHA dismissal of two 1981 citations against one of the firm's subsidiaries for alleged violations of Occupational Safety and Health Administration standards.

In a March 13 statement, Auchter also contended that there was "absolutely no impropriety" in his involvement with the handling of the 1981 citations.

B.B. Andersen, head of B.B. Andersen Companies, Inc., told BNA March 13 that he had "never talked, met, or had anything to do with [Auchter] until January of this year," when Auchter was brought to his attention as a possible candidate for president of B.B. Andersen Companies, Inc.

Auchter March 6 announced his intention to resign from his post as administrator of OSHA at the end of this month to become president of the holding company (Current Report, March 8, p. 1051).

Articles in the *Kansas City Star* and the *Washington Post* noted that OSHA had inspected one of Andersen's construction sites in March 1981, and that two citations were drawn up against B.B. Andersen Construction Company, Inc., one alleging 10 serious violations and the other alleging two willful violations. A total penalty of $12,600 was proposed.

Subsequently, however, the agency decided not to issue the citations. According to the newspaper reports, the dismissal of the citations was approved by Auchter.

Andersen, in a telephone interview, stated that Auchter was not involved in a meeting between Andersen and regional OSHA officials that preceded the dismissal of the citations. "According to my records and my memory, I was the only one there at the meeting with the [OSHA] regional people in Kansas City," he told BNA.

Andersen said he recently had decided to leave his post as president of the holding company to pursue other interests, and was "looking for a good administrator" for the position. In January, he received an unsolicited telephone call from "someone" at the U.S. Department of Labor, who reported that Auchter planned to leave the government and might be a suitable candidate. Andersen said he could not remember the name of the person who called him. It was only after this that he contacted Auchter, met him, and offered him the post, he said.

Court Case

The OSHA citations also were challenged by the company in a case that ultimately was addressed by the U.S. Court of Appeals for the Tenth Circuit. In *B.B. Andersen Construc-*

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