PLAINTIFF'S EXHIBIT

UC-4436

IRC, ORC, JDR&P SYMPOSIUM ON
CONTRACTOR SAFETY:
LEGAL AND PRACTICAL CONCERNS
FOR THE PROTECTION OF THE CONTRACT WORKER

Session of Thursday, October 24, 1991

What If A Disaster Should Happen?

LEGAL ISSUES

Robert C. Gombar
Arthur G. Sapper

JONES, DAY, REAVIS & POGUE
Washington, D.C.

What If A Disaster Should Happen?

LEGAL ISSUES

Robert C. Gombar
Arthur G. Sapper

JONES, DAY, REAVIS & POGUE
Washington, D.C.

October 24, 1991

I. An Overview of the Inspection

A. Handling The Inspection; Warrant Issues.

1. *Should A Warrant Be Demanded?* There is no easy answer to the question. There are many considerations:

    a. *Losing The Ability to Negotiate.* An employer who refrains from immediately demanding a warrant is usually able at the opening conference to reach agreements or understandings with OSHA on the scope of the inspection, the subject under investigation, the handling of evidence, and conduct of employee interviews. Once a warrant is demanded, the employer effectively loses control of the situation and has less ability to negotiate effectively.

    b. *Criminal Liability.* If a death has occurred, the company could be indicted under Section 17(e) for any willful violation that led to the death. Company officials also could be indicted under 18 U.S.C. § 2 for aiding or abetting. State and local prosecutors might also bring charges if an employee is merely injured or might have been injured. OSHA shares its information with the U.S. Department of Justice and with state prosecutors. Although it is unclear whether a company faced with an OSHA fatality investigation is entitled to Fourth Amendment protections appropriate for criminal investigations, the criminal consequences may well affect whether a warrant is demanded and the showing to be made by OSHA in order to obtain a warrant.

b. A videotape recorder.

c. An audiotape recorder.

d. Notebooks.

e. Document production log.

f. Inkpad stamps stating "Trade Secret -- X Company", "Business Confidential Information -- X Company", and "Confidential -- Attorney Work Product."

g. A copy of OSHA's standards, OSHA's Field Operations Manual, OSHA Instruction CPL 2.94, *OSHA Response to Significant Events of Potentially Catastrophic Consequence* (July 22, 1991), and industry standards (*e.g.*, those from the Chlorine Institute, American Petroleum Institute, etc.). A copy of OSHA Instruction CPL 2.94 is appended as Attachment I.

h. A contingency plan for setting aside office space, equipment and clerical staff for the team. The team will need office space, work tables, telephones, copy machines, fax machines, telephone answering machines, locking file cabinets, office supplies, and secretarial help, especially if outside counsel will be brought. A personal computer with electronic mail capability may also be helpful; OSHA investigative teams expect to use such computers routinely in catastrophe investigations (see OSHA Instruction CPL 2.94, *OSHA Response to Significant Events of Potentially Catastrophic Consequence* § G.7.f(3)(d), p. 22 (July 22, 1991)).

3. Train the team:

a. Basics of the Occupational Safety and Health Act.

i. The obligation to comply with standards.

ii. The obligation to comply with the General Duty Clause.

iii. Purpose of the investigation.

b. Rights and obligations during inspections (they are management's eyes, ears, and mouthpiece).

6. Pre-inspection audit compliance efforts:

   a. Injury/Illness records correct and up-to-date (29 CFR Part 1904).

   b. Hazard communication program (29 CFR § 1910.1200). Check your MSDS's, labels, chemicals list, training, written program.

   c. Access provisions for exposure and medical records (29 CFR § 1910.20).

   d. Periodic testing and medical monitoring required by various standards (29 CFR Part 1910, Subpart Z).

   e. OSHA standard for emergency response and spill clean-up (29 CFR § 1910.120).

   f. Lock-out/Tag-out program (29 CFR § 1910.147).

   g. Process hazards analyses.

7. Review existing internal and insurance audits:

   a. OSHA is likely to request previous self-audits and audits by insurance companies.

   b. Review auditor recommendations and status of audit response efforts. Be prepared to explain any matters not addressed.

   c. If audit documents are to be given to OSHA, consider also producing your audit response documents, even if OSHA has not requested them.

C. The Catastrophe.

1. *Notify Counsel.* In addition to notification of all other necessary personnel, notify corporate counsel at once.

2. *OSHA Presence During Emergency Response.* OSHA may well attempt to enter the plant and be present during the emergency response.

   a. OSHA will likely attempt to videotape or photograph the accident scene at once, from a public area if necessary.

b. Decide whether to tell OSHA that if the inspection is limited to certain areas, no warrant will be demanded. Decide whether to demand a warrant for the inspection of the premises or a warrant or subpoena for inspection of records. See the discussion above.

c. Introduce members of the management walkaround team.

d. OSHA will explain the purpose of the inspection (if it didn't at plant gate). Ask for more details if desired.

e. OSHA will discuss the inclusion of representatives of company employees and the employees of other employers on site during the inspection.

   i. *Strikes*. If employees are on strike, should the representative of striking employees be admitted to the plant? One case holds that the employer may exclude representatives of strikers. *See Amoco Oil Co. v. Marshall*, 469 F. Supp. 1234 (S.D. Tex. 1980).

f. OSHA will ask for inclusion of representatives of employees. This may raise the issue whether the employer should pay the employee representative for his time, the so-called "walkaround pay issue."

g. Determine how many inspection teams there will be. Be sure that each OSHA inspector or OSHA inspection team is accompanied by a management representative at *all times*.

2. *The Walkaround:*

   a. Be courteous but not overly cooperative; give no information (oral or written) unless OSHA asks for it *specifically*. Be careful not to make damaging admissions.

   b. Produce no records or documents during the walkaround. *Insist* that the document control system be followed.

   c. Never produce personally-identifiable medical records unless OSHA produces a medical records access order or the employee's written consent.

   d. Maintain coverage at *all* times, including lunch and other breaks. Insist that OSHA inspectors not wander off alone. The employer has a legal right to accompany the inspector.

   e. Duplicate all measurements and industrial hygiene sampling.

   f. If OSHA will be taking its own videotapes or developing its own photographs, take side-by-side videotapes or photographs. Record the sequence of each scene or shot, and record what each depicts.

   g. Inform OSHA if a videotape or photograph may depict trade secrets or business confidential information.

   h. Set up a procedure for arranging employee interviews. Tell employees that interviews with OSHA are to be conducted in accordance with the employee-interview procedure. Instruct your walkaround representatives to object if interviews conducted during the walkaround exceed a reasonable amount of time (*e.g.*, five to ten minutes) and to insist that longer interviews be scheduled in accordance with the employee interview procedure.

      i. *Role of Counsel*. Counsel should interview witnesses and persons OSHA is likely to interview. Brief witnesses on the OSHA interviewing process.

o. Debrief the walkaround team members every day, perhaps as a team rather than individually. Keep a daily diary of events.

3. *The Closing Conference:*

   a. Decide who will attend.

   b. Take comprehensive notes (perhaps use a tape recorder, although it generally is not recommended).

   c. Guard against damaging admissions.

   d. Make no abatement date promises but some estimates may be appropriate.

   e. Use the closing conference to correct errors and misunderstandings before any citation is issued.

   f. Ask inspector to specify the citations that probably will be issued and how the violations will be characterized (willful, repeated, serious, nonserious).

   g. To the extent possible, use the conference for discovery purposes.

4. *Post-Closing Conference.*

   a. Present any exculpatory information that the inspector missed.

   b. Have all inspection reports by walkaround representatives completed and submitted to counsel.

   c. Consider pre-citation settlement.

5. *Post-Citation.*

   a. After the citations have been issued, ask for an informal conference and present any additional information. Perhaps negotiate informal settlement. *N.B.* Informal conference does not stop the running of the 15 working-day contest period.

   b. Ask counsel to file a notice of contest.

viii. Circumstances under which evidence may be disconnected, videotaped, photographed, marked, moved, repositioned, or removed from the site; and

ix. Timeframes by which all parties will submit proposals for testing, removal, preserving equipment and other relevant events.

b. *Daily Agreements*. OSHA and the company may also enter into "daily" signed agreements, i.e., agreements that implement the main agreement and state precise understandings on how the agreement will be implemented with respect to a specific matter or piece of evidence.

2. *Agreement For Examining Or Testing Equipment*. OSHA may seek a separate agreement for the circumstances governing the examination or testing of equipment. These subjects too should be covered by both a main agreement and "daily" agreements. OSHA will likely insist that the following points be covered:

a. A prohibition against the alteration by either OSHA or the employer of equipment until documentation of significant items to both parties' satisfaction.

b. Dates by which identifying and diagramming the location and condition of all pertinent equipment will start and how equipment will be identified.

c. The parties who must be present in order to observe the documentation process.

d. Specific dates and times within which OSHA will identify equipment and other items to be removed, preserved or tested.

e. Circumstances under which the employer and OSHA may test the equipment;

f. Circumstances under which results, data and information obtained as a result of testing will be shared;

a. *Private Consultants Hired By OSHA: A Limitation on Protection Accorded By Section 15 and the Trade Secret Act*. Section 15 and the Trade Secret Act applies only to federal employees. Private consultants hired by OSHA to review trade secret information are not subject to either Section 15 or the Trade Secret Act. Hence, the employer should negotiate an agreement to identify information and documents as trade secret and to give the employer certain protections if OSHA hires a private consultant. *Owens-Illinois, Inc.*, 6 BNA OSHC 2162 (OSHRC 1978).

2. *Methods of Protection*. To protect trade secrets, the employer should do at least the following:

a. *Review and Stamping of Documents, Notes and Photographs*. As noted above, the company should insist either that it or OSHA stamp as "Trade Secret" or "Business Confidential" *all* notes and photographs taken in areas containing trade secrets or business confidential information. Also, as noted above, the company may offer to develop OSHA's film, keep one set of prints for itself, and stamp those of OSHA's prints that contain trade secret or business confidential information.

b. *Document Control*. As noted above, as part of the document control system, the company should review all documents requested by OSHA to determine whether they may be privileged or whether they contain, among other things, trade secret or business confidential information.

c. *Notification to OSHA*.

i. *At the Beginning*. At the beginning of the inspection, the company should either enter into a confidentiality agreement with OSHA (see below) or provide OSHA with a letter notice regarding trade secrets and business confidential information.

d. *Outside Expert Agreements.* If OSHA desires that an outside expert tours confidential areas of the facility, or review confidential documents, the company should demand that OSHA enter into an agreement with the expert. Under the agreement, the company would have the right to challenge the selection of the expert on the ground that the expert is or has been closely aligned with a competitor of the company. The consultant would also promise not to disclose the information except to OSHA. Most important, the agreement would make the company a third-party beneficiary of the agreement, entitled to enforce it by seeking damages. *Owens-Illinois, Inc.*, 6 BNA OSHC 2162 (OSHRC 1978).

C. Relations With Contractors During Catastrophe Investigations.

1. *The Key: Good Relations With Contractors.* Friendly and cooperative working relations between the host employer and contractors will be important to forming joint positions and defenses against OSHA.

   a. *Sharing Information.* The host and contract employers may find it in their interests to share information about OSHA's theories and areas of interest. Facts will dictate, to a large degree, the level of cooperation.

   b. *Coordination of Positions.* The host employer may not wish a contractor to accept an OSHA citation that might adversely affect the operations of the host employer. Convincing the contractor to challenge the citation would be in the host employer's interest.

2. *It's Your Plant.* The host employer may insist on the right to be notified of, and to be present during, all walkarounds, opening and closing conferences involving contractors. It is the host employer's property and he may insist on being present during those events.

E. Separation of Government Investigators From The Company's Investigators.

1. *The Need For Separation.* A company that has undergone a catastrophic event may well undertake an investigation of the cause. This investigation should be conducted by counsel in such a way that it is protected by the attorney-client and attorney work product privileges. Those privileges could be waived, however, through inadvertent disclosure of information to those not part of counsel's team.

2. The only solution is to keep the company's investigative team members, and especially its products, away from OSHA.

   Note: The findings of the team may be disclosed to OSHA if it is to the company's advantage to do so; *e.g.,* when the information is exonerating. It may be presented to OSHA in a formal presentation, either oral or written, that does not refer to the investigative report in any way.

6688s