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Johns-Manville

Internal Correspondence

To R. B. Von Wald - 2-17

Date April 19, 1979

From D. H. Markusson - 2-18

Copies to Earl Parker - 1-03

Subject OSHA REPORTING SYSTEM - OCCUPATIONAL DISEASE - WAUKEGAN

BACKGROUND

It has come to our attention through the Health, Safety & Environment Department that occupational disease cases arising at the Waukegan, Illinois plant subsequent to the adoption of the Occupational Safety & Health Act in July 1972 may not have been recorded on OSHA forms at the time required by OSHA Recording and Reporting Regulations, 29 C.F.R. 1904.1 et. seq. For the period 1972 to date we are dealing with a total of 23 cases. In researching this matter the undersigned and Don Ungemah have examined the Occupational Safety & Health Act, regulations promulgated thereunder, OSHA Review Commission decisions, and have had the assistance of consultation from Bill Reitze.

ISSUES

In consideration of this matter the following issues are presented:

1. What are OSHA Recording and Reporting requirements for occupational disease cases?

2. Has our Waukegan facility failed to report and record occupational disease cases as required by OSHA regulations, and if so, what remedial action should be taken at the present time?

3. Assuming Waukegan's treatment with regard to the recording and reporting of occupational disease cases constitutes a prima facie violation of OSHA regulations what are the penalties to which the company might be subject?

4. Can OSHA regulations regarding recording and reporting of occupational disease cases, and disclosure to employees and employee representatives be reconciled with medical confidentiality as to the identity of particular individuals?

5. Should OSHA be advised of any remedial action taken by the company?

6. Does the company have defenses to any OSHA litigation which may arise out of the present situation?

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These issues will be discussed in their numerical order in the DISCUSSION section of this memo.

RECOMMENDATIONS:

1. That OSHA logs (Form 100, now OSHA Form 200) from 1972 to date be amended to include occupational disease/pneumoconiosis cases which have been identified by the Waukegan plant. This amendment should be done by the Waukegan plant. This amendment should be done in the form of an addendum to be attached to the log for each respective year except in the case of 1979 where we will merely make the entries on the current log.

2. That a similar addendum be attached to each annual summary (OSHA Form 102) maintained in our files in order that the amended logs reconcile with the annual summaries.

3. That supplemental records (OSHA Form 101) be completed for each case added to the log.

4. That the amended annual summaries not be requested for inspection.

5. That with respect to the medical confidentiality issue identification of particular individuals on the OSHA log be handled as follows:

   (a) For individuals who have executed the form utilized at the Waukegan plant and indicating that they desire to have the union notified as to their diagnosis of occupational disease that their name be entered on the log.

   (b) For individuals who have indicated that they do not desire to have the union notified of their diagnosis that they be identified on the log as John Doe 1, John Doe 2, etc.

   (c) For individuals, if any, for which no form has been executed indicating a preference as to notification of the union that such individuals be treated as John Does for purposes of log entries.

6. That OSHA not be specifically advised of our amendment to OSHA records as outlined above.

7. That procedures be established to insure the transmittal of medical diagnostic information to the individuals responsible for maintaining OSHA records in order that such records may be accurate and up to date prospectively.

(OTHER SECT. re Disease Awards)

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DISCUSSION

1. The OSHA Recording and Reporting Regulations are set forth in 29 C.F.R. 1904.1 et. seq., and are relatively simple. The regulations require the maintenance of a log of all recordable occupational injuries and illnesses together with a supplemental record of each injury and illness and an annual summary of injuries and illnesses to be posted for inspection.

   Section 1904.12 sets forth the definitions of what constitutes a "recordable occupational injury or illness". Occupational illnesses are "recordable" if they involve a fatality or a lost work day. In addition, there is the following requirement which would cover most of the pneumoconiosis cases at Waukegan:

   > "Nonfatal cases without lost work days which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve: loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost work day cases."

   OSHA instructions for completing the log of occupational injuries or illnesses call for entry of occupational illnesses as of the date of initial diagnosis of illness.

2. Based upon information received from the Waukegan facility we have not logged 23 individuals identified as having pneumoconiosis since the effective date of OSHA in 1972. Accordingly, there is certainly a prima facie indication that we have failed to comply with recording and reporting regulations with respect to occupational illness. The only caveat which could be placed on this is the question of "diagnosis". As discussed above the regulations call for the logging of occupational illness as of the initial date of "diagnosis". There is the question of when is asbestosis diagnosable as a clinical disease. We can foresee cases where there are x-ray findings compatible with occupational disease, but a definitive diagnosis would be premature based only upon x-ray findings. Since we have had no review of the medical files on the 23 individuals in question it is impossible to draw any firm conclusions. This would be a tenuous argument at best, but is one to be kept in mind in the event of any subsequent litigation as a possible substantive defense.

OSHA directives for completing the logs of occupational injuries and illnesses (OSHA Form 100 supplanted by OSHA Form 200) have consistently permitted amendment of the logs. While such instructions are phrased with a view toward amending previous entries it is not inconsistent with the spirit of the regulations to classify additions of previously omitted information as an amendment.

It is our judgment that we treat the 21 cases identified by Waukegan as information requiring the amendment of OSHA logs of occupational injuries and illnesses. The log for each respective year should be amended by adding thereto an addendum setting forth the cases of pneumoconiosis. Consistent with the amendment of the log we should also complete an OSHA form 101, a supplementary record, for each case. In addition, we should prepare an addendum to each annual summary and annex the same to the previous annual summaries in order that the total cases in the annual summaries will coincide with the number of cases set forth in the log, as amended.

These records, as amended, should be returned to our permanent files at our Waukegan facility.

3. There has been concern expressed that due primarily to the length of time during which pneumoconiosis cases have not been entered on the OSHA log and the particularly sensitive nature of asbestos related disease that we might be subject to the criminal penalty sections of the Occupational Safety & Health Act. Based upon our analysis we do not feel the criminal sanction sections of the Occupational Safety & Health Act are applicable to the Waukegan situation, and at very least we would have strong defenses to any attempt to proceed against the company for criminal sanctions.

29 C.F.R. 1904.9 makes specific reference to penalties for falsification of records or failure to keep records. Even the title of the section is significant. It reads as follows, "Initials - Falsification - Failure to Keep Records or Reports". It is to be noted that even in the title of the section falsification and failure to keep records are categorized as two distinct items.

Section A of Section 1904.9 references Section 17(g) of the Occupational Safety & Health Act, which addresses itself to knowingly making any false statement, representation, or certification in any application, record, plan, or other document filed or required to be maintained pursuant to the Act, and provides for a fine of up to $10,000 or six months

imprisonment or both. We have not made any overt false statements or representations, but rather, our act is one of omission. At first blush it would appear an argument is available that we have made a false statement or representation by virtue of our omission.

However such a contention is negated by a consideration of Subsection (b) of Section 1904.9.

Subsection (b) of Section 1904.9 provides as follows:

> "Failure to maintain records or file reports required by this part, or in the details required by forms and instructions issued under this part, may result in the issuance of citations and assessment of penalties as provided for in Sections 9, 10 and 17 of the Act."

Thus Subsection (b) specifically provides for the J-M situation, i.e., failure to maintain records, and the same is treated as a completely distinct category from the overt falsification of records covered under Subsection (a) of Section 1904.9.

There is a maxim of statutory construction and interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Following this maxim the overt falsification has been expressly mentioned in Subsection (a) and that is the only reference in the regulations to criminal penalties, and by virtue of the clarification for the specific category of failing to maintain records as set forth in Subsection (b) it would appear clear that the mere failure to make log entries would not carry with it any possibility of criminal sanctions.

In addition please note the specific language of Subpart (b) of Section 1904.9 which mandates the issuance of citations for failure to maintain records. When looking at the penalty sections of the Act the issuance of citations does not lead to criminal sanctions. The criminal sanctions provisions are completely separate from the citation provisions.

Section 17(b) of the Act provides for citations of serious violations with a civil penalty of up to $1,000 for each such violation. Accordingly it would seem that OSHA might treat the Waukegan situation as a serious violation and on the assumption we are speaking of 21 cases they could seek a civil penalty of up to $1,000 for each such violation or seek a total of $21,000. In addition, Section 17(a) of the Act provides for civil penalties

of not more than $10,000 for wilful and repeated violations. Arguably the violation has been repeated each year since 1972 so that for each year subsequent to 1972 it could be argued that there has been a repeated violation which could call into play 6 years and result in OSHA seeking $60,000 in civil penalties.

Finally consideration must also be given to Section 17(i) of the Act which provides for a civil penalty of up to $1,000 for violation of the annual posting requirements. OSHA could argue that since the cases were not logged and accordingly were not included on the annual summary (OSHA Form 102) that the posting requirements have been violated for each year and seek civil penalties of $7,000.

Our research of the cases indicates that most failures to report have been treated as de minis violations. Therefore, it would seem that the possible civil penalties set forth above would be in the extreme. Our experience with OSHA cases indicates that rarely are maximum penalties sought or assessed. We do not intend to discount the possible seriousness of civil penalties which certainly could reach in excess of $50,000.

(4) An item of serious concern at Waukegan and the subject of NLRB litigation is the matter of disclosure to the union of the identity of individuals with occupationally related illnesses. Prior to August 21, 1978 access to records on OSHA logs was governed by 29 C.F.R. 1904.7, and was limited to compliance officers, NIOSH officers, and other government agents, but did not permit access by the union or individual employees.

Effective August 21, 1978 29 C.F.R. 1904.7 was amended to provide access to OSHA logs and summaries by any employee, former employee, and their representatives for examination and copying in a reasonable manner and at reasonable times.

The prima facie legal requirements may be summarized as follows:

Prior to August 21, 1978 the OSHA log requires the name of the individual diagnosed with an occupational illness, but regulations did not permit access to such records by the employees or their bargaining agent.

Under no circumstances are we required to permit employee access to our OSHA records prior to August 1978.

Subsequent to August 21, 1978 the employees and/or their representatives are entitled to access to the OSHA log (OSHA Form 200), which requires the name of the individual with a diagnosed occupational disease.

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For the period subsequent to August 21, 1978 there is in our judgment a method whereby we can comply with the OSHA recording requirements, permit the employees and/or their representatives the right to examine the log and still protect the medical confidentiality of the identity of given individuals. At Waukegan employees diagnosed with an occupational illness are given a form to sign which acknowledges the diagnosis and secondly contains a directive that they either do or do not want such information released to the union. In cases where they have indicated they do want the information released to the union their identity becomes academic and the entry on the OSHA log could be by employee name as required by the regulation. In cases where the employee requested that his identity not be made known to the union we feel that he should be entered on the log as John Doe 1, John Doe 2, etc. Based upon the introductory comments to the amendment of 29 C.F.R 1904.7 it is our feeling that the objectives of the amendment in permitting employee and union access to records can be satisfied without the exact name of the employee. We do not feel that identification by a John Doe reference will do any violence to the intention of the regulation. Of course, it is possible that we might have to litigate this question with OSHA, but we feel that we would have an excellent posture in any such litigation.

Even though employee access to OSHA records is denied prior to August 21, 1978 for purposes of consistency we are recommending that the identification by name of pneumoconiosis cases for the period prior to August 1978 also be governed by the employees indication on disclosure of information and John Doe treatment as specified above. In cases where the file contains no written directive executed by the employee as to the dissimilation of information we are recommending that his name be entered as a John Doe.

(5) In our recommendations we have suggested that at the present time OSHA not be advised as to the amendment of our logs and OSHA records. Our reasoning in arriving at this recommendation is that nothing will be gained by making such a disclosure to OSHA at the present time. Legally, we will not establish good faith by making such a disclosure, and secondly, there is not legal obligation to make such a disclosure. The Act requires the maintenance of accurate records not the transmittal of such records to OSHA every time an entry is made or a change or amendment is made. In our judgment such a disclosure to OSHA would carry with it the strong likelihood of an immediate citation.

We realize that a strong argument can be made for disclosure to OSHA on the grounds of perhaps putting the matter to rest

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once and for all without extended legal proceedings. We would be more comfortable with this argument if we knew the area director and the reaction he might have to such a discussion. If we can develop additional information along these lines further consideration might be given to immediate discussion.

(6) It is entirely possible that OSHA will proceed against the company for violations of 29 C.F.R. 1904.7. In such case we feel we have adequate defenses. Our only defense to the overall substance of any such citation charging us with failure to keep records would be the issue of "medical diagnosis" as to when a case becomes substantial. It is impossible to speculate on this defense at the present time as we would have to examine the particular medical files.

We feel we are in an excellent posture should OSHA endeavor to proceed in any manner other than by civil citation. In other words, if OSHA attempts to proceed in seeking criminal sanctions we would have excellent arguments to seek for dismissal of such sanctions. With respect to civil citations we have accumulated the necessary cases for precedent and would argue for nonserious or de minimis type penalties. It is entirely possible that the case could revolve more around the proposed penalty rather than the citation itself.