BC: File

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UNION CARBIDE
THE DISCOVERY COMPANY

April 21, 1975

PLAINTIFF'S EXHIBIT
UC-4639

Mr. Ken Campbell
Montello, Inc.
P. O. Box 130
Sand Springs, OK 74063

Dear Ken:

The information promised during our telephone conversation of April 16th is enclosed. The approach of presenting your problem and your monitoring data to the Dallas OSHA office and requesting a meeting still looks best to me. When you have your presentation together we will be glad to review it. I don't have anything you could use as a guide or format.

Regards,

H. B. Rhodes
Technology Manager

HBR:gt
Enclosure

cc: Messrs. W. C. Thurber
J. L. Myers
J. V. Murray

Requirements for Signs

We have located the Review Commission decision, Amoco Docket No. 4904, on signs that we discussed and a copy will be forwarded to you as soon as I receive it. Unfortunately it is not as clear-cut or as favorable as we had hoped.

As I understand it, the decision spoke to both signs and housekeeping in an area where loose asbestos was stored and where a thick coating was usually spread over the floor with people walking in it. The judge ruled that under these conditions it was reasonable to cite for both violations even though the inspector had not actually backed this with dust counts. This ruling also has been appealed to the full commission and therefore is not settled.

Actually, it seems to me that paragraph (a) of the Knorpp letter gives us the handle we need. You have a substantial amount of field data with SVB that shows the levels are consistantly far below the allowable limits. You also have the UOSHA results, the Shell data, plus Knorpp's own test. This evidence should be presented, together with your complaint of injury to OSHA in writing. With this information in hand, if they continue to hand out citations without monitoring they would seem to be leaving themselves open to serious charges of improper enforcement and harassing.

Medical Examinations

Union Carbide recently met with OSHA to attempt to get a clarification of the medical examination question. The results are summarized below.

Mr. Lewis Cox, Special Assistant to the Assistant Secretary, OSHA helped arrange meetings in Washington with Mr. A. Reis, Senior Representative from the Office of Standards Development and Mr. C. McClure, Chief Compliance Officer, OSHA. Mr. W. C. Thurber, Product Manager for "Calidria" Asbestos represented Union Carbide.

Mr. Reis stated that they now expect to publish the proposed changes in the standard about mid-May. If public hearings are requested, as expected, this would move the promulgation of the final regulations to about the end of the year. He was very careful not to provide any specifics but did say that the medical examination problem had been cleared up in a way that should be satisfactory. The original NIOSH Criteria Document recommended a cutoff exposure level below which examinations are not required of one half of the allowable levels. It is our impression that something like this will be proposed for the revised regulations.

Mr. McClure stated that their definition of "exposure to asbestos" meant any exposure above the background level. On the advice of the Solicitor General's office, there is nothing they can do now to alter this. When the proposed new standards are published, he indicated he would consider putting out a guidance directive to their field people but made no firm commitment to do so.

It is clear that OSHA has decided that the sweeping medical examination requirements in the present regulations are not necessary and present great difficulty in compliance. They are moving to change this but unfortunately the changes will not be effective until about the end of 1975.

Regarding the OSHRC ruling on medical examinations, a digest of the United Engineering and Constructors case OSHRC Docket 7355 is shown below. This is probably quite similar to the story you received from the Tulsa area director.

OSHRC Ruling on Medical Examinations

In decision of Dec. 11, Occupational Safety and Health Review Commission ruled on alleged violations of three asbestos medical examination requirements (Sections 1910.93a(j) (2), preplacement exams; 1910.93a(j) (3), annual exams; and, 191093a(j) (4) on termination of employment.) Alleged violations affected operations in which asbestos dust concentrations exceeded ceiling concentration of 10 fibers/ml, including stripping dry joints, stripping and sleeving induction heating coils, and placing asbestos blanket and pulling cable. Judge rejected argument that medical exams must be provided only upon proof of employee's regular and continual exposure to asbestos at the rate of 5 fibers of longer than 5 micrometers per cubic centimeter of air. Judge said language of asbestos standard does not set level of exposure but requires exams if employees "are exposed to airborne concentrations of asbestos fibers." Court said Secretary of Labor is not obliged to prove wisdom of a standard after it is promulgated. In response to argument that examinations contribute to research and therefore costs should be borne by Government, Court held purpose of exams is to protect workers and not to perform research. The Commissioners subsequently directed a review of this decision to determine whether the cited standard requires medical examinations when any trace of the substance is present, or only when levels approach or exceed permissible limits.

This case has now been combined with two cases involving General Aniline and Film, OSHRC Dockets 3203 and 4008 for consideration by a three man review commission. The question has, therefore, not been finally resolved. In the event the next decision goes against the plaintiffs they can, if they choose, take further recourse to the courts. It is certainly possible that this agreement will not be settled before the revised regulations are promulgated.

Monitoring

The question of the definition of "place of employment" and monitoring by function has been discussed with OSHA. As usual all that resulted was the following generalities:

> There cannot be a firm definition of place of employment.
>
> They want the compliance officers to act like reasonable people but not deviate from the standard.
>
> If a contractor has a number of people doing the same job at a number of field locations and checks several and finds them to be well within compliance it is probably not reasonable to expect him to check every site. Further, continued spot checking as time passes would be reasonable.

As you can see, this kind of thing may be useful in informal discussions with OSHA field offices but doesn't cut any ice when things get down to short strokes.

HBR:gt
Attachment

FILE

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

AMOCO OIL COMPANY,

Respondent.

DECISION AND ORDER

OSAHRC Docket No. 4804

OSHRC EXECUTIVE SECRETARY
JUDGE'S DECISION REC'D MAY 16 1974
FINAL ORDER ON JUN 17 1974

Appearances:

For the Secretary of Labor:
Ronald G. Whiting, Esq.
Office of the Solicitor
Denver, Colorado

For the Respondent:
Jerry M. Gross, Esq.
Standard Oil Company (Indiana)
P.O. Box 5910A
200 East Randolph Drive
Chicago, Illinois 60680

For the Affected Employees:
Steven Wodka
Citizenship-Legislative Department
Oil, Chemical and Atomic Workers
1126 16th Street, N.W.
Washington, D. C. 20036

James A. Cronin, Jr., Judge, OSAHRC:

Statement of the Case

This is a proceeding under section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., hereafter called the Act) contesting 11 items of a Citation and

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Notification of Proposed Penalty issued by the complainant to the respondent on September 7, 1973 under the authority of sections 9(a) and 10(a) of the Act. The citation was the result of an inspection on August 23, 1973 of respondent's oil refinery at Casper, Wyoming.

The complaint amended the citation by withdrawing item 3 of the citation and deleting the proposed penalty of $35.00. Subsequently, a motion to correct an erroneous citation of the standards alleged to have been violated was granted (§1910.93a instead of §1910.93(a)).

The complaint moved to withdraw item No. 1 of the citation. Without objection this motion was granted (Tr. 7).

Item 4 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (d)(4)(iii)(b) as follows:

> "Employer did not inform persons laundering asbestos contaminated clothing of the requirement to prevent the release of airborne asbestos fibers in excess of exposure limits (1)."

The standard as promulgated by the Secretary provides:

> "Any employer who gives abestos-contaminated clothing to another person for laundering shall inform such person of the requirement in (a) of this subdivision to effectively prevent the release of airborne asbestos fibers in excess of the exposure limits prescribed in paragraph (b) of this section."

Item 5 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (d)(4)(i) (c) as follows:

> "The employer did not have asbestos contaminated clothing transported in sealed impermeable bags and labelled to indicate the contents (1)."

The standard as promulgated by the Secretary provides:

> "Contaminated clothing shall be transported in sealed impermeable bags, or other closed, impermeable containers, and labeled in accordance with paragraph (g) of this section."

Item 6 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (f)(1) as follows:

> "Employer had not caused places of employment where asbestos fibers were released to be monitored in such a way as to determine whether every employee's exposure to asbestos fibers was below prescribed limits."

The standard as promulgated by the Secretary provides:

> "(f) Monitoring -- (1) Initial determinations. Within 6 months of the publication of this section, every employer shall cause every place of employment where asbestos fibers are released to be monitored in such a way as to determine whether every employee's exposure to asbestos fibers is below the limits prescribed in paragraph (b) of this section. If the limits are exceeded, the employer shall immediately undertake a compliance program in accordance with paragraph (c) of this section."

Item 7 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (f)(2)(i) as follows:

"Employer had not established a personal monitoring program to collect samples from the breathing zone of employees exposed to asbestos fibers. (1)"

The standard as promulgated by the Secretary provides:

"(2) Personal monitoring - (i) Samples shall be collected from within the breathing zone of the employees, on membrane filters of 0.8 micrometer porosity mounted in an open-face filter holder. Samples shall be taken for the determination of the 8-hour time-weighted average airborne concentrations and of the ceiling concentrations of asbestos fibers."

Item 8 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (f)(3)(i) as follows:

"Employer had not established an environmental monitoring program to collect samples from areas of work environments where asbestos fibers might reach breathing zone of employees."

The standard as promulgated by the Secretary provides:

"(3) Environmental monitoring - (i) samples shall be collected from areas of a work environment which are representative of the airborne concentrations of asbestos fibers which may reach the breathing zone of employees. Samples shall be collected on a membrane filter of 0.8 micrometer porosity mounted in an open-face filter holder. Samples shall be taken for the determination of the 8-hour time-weighted average airborne concentrations and of the ceiling concentrations of asbestos fibers."

Item 9 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (g)(1)(i) as follows:

"Employer had not provided and displayed caution signs at each location where airborne concentrations of asbestos fibers might be in excess of exposure limits, as follows:
a. Insulation storage building
b. Turnaround building storage room
c. Water pump room of the number 1 vacuum pump building
d. Stock Tank House "

The standard as promulgated by the Secretary provides:

"(g) Caution signs and labels. (1) Caution signs. (i) Posting. Caution signs shall be provided and displayed at each location where airborne concentrations of asbestos fibers may be in excess of the exposure limits prescribed in paragraph (b) of this section. Signs shall be posted at such a distance from such a location so that an employee may read the signs and take necessary protective steps before entering the area marked by the signs. Signs shall be posted at all approaches to areas containing excessive concentrations of airborne asbestos fibers."

Item 11 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (h)(1) as follows:

"Employer had not maintained external surfaces free of accumulation of asbestos fibers, as follows:
a. A water treating tank on west side of the maintenance shop from which loose asbestos hung from sides and was scattered on ground around the tank.
b. Area at and below several lines located near ground level on the east side of the number 9 pipe still from which loose asbestos hung from the lines and was scattered on the ground.
c. Area at and on the ground below a line on the south side of the penetration asphalt tank from which asbestos insulation hung and was scattered on the ground below the line."

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The standard as promulgated by the Secretary provides:

> "(h) Housekeeping - (1) Cleaning. All external surfaces in any place of employment shall be maintained free of accumulations of asbestos fibers if, with their dispersion, there would be an excessive concentration."

Item 13 of the citation, as amended, alleges a violation of 29 C.F.R. 1910.93 a (j)(3) as follows:

> "Employer had not provided or made available annual medical examinations on or before January 31, 1973 to employees exposed to airborne concentrations of asbestos fibers which included, as a minimum, all of the following:
> a. A chest roentgenogram
> b. A history to elicit symptomatology of respiratory disease
> c. Pulmonary function tests to include forced vital capacity and forced expiratory volume at one second ($FEV_{1.0}$)."

Respondent contests only a. and b. of item 13. The standard as promulgated by the Secretary provides:

> "(3) Annual examinations. On or before January 31, 1973, and at least annually thereafter, every employer shall provide, or make available, comprehensive medical examinations to each of his employees engaged in occupations exposed to airborne concentrations of asbestos fibers. Such annual examination shall include, as a minimum, a chest roentgenogram (posterior-anterior 14 x 17 inches), a history to elicit symptomatology of respiratory disease, and pulmonary function tests to include forced vital capacity (FVC) and forced expiratory volume at 1 second ($FEV_{1.0}$)."

Pursuant to due notice, this case was heard at Casper, Wyoming on March 6, 1974. Subsequently, all parties filed briefs in support of their respective positions.

Jurisdiction and Issues

Respondent does not contest Commission jurisdiction of this matter and admits that it is an employer engaged in a business affecting commerce. Respondent denies allegations of violation and therefore, issues to be resolved and determined are:

1. Whether respondent violated the alleged standards?

2. If respondent violated cited standards, what penalties are appropriate?

Findings of Fact

The record has been considered and evaluated in its entirety. The facts set forth below are specifically found in resolving the issues presented in this case and any of respondent's proposed findings inconsistent with them are denied.

Complainant's compliance officer, Harry C. Hutton, conducted an inspection and closing conference at respondent's refinery facilities, Casper, Wyoming, on August 23rd and 24th, 1973. This refinery employs approximately 293 employees (Tr. 25).

During his inspection the compliance officer did not monitor or take samples of the air to determine what the concentration of airborne asbestos might be in the various areas referenced in the citation (Tr. 36). Also, no surveys or tests were taken by him to determine if employees' clothing was asbestos contaminated (Tr. 39-40).

There were no caution signs with respect to asbestos posted at, or at the approaches to, the Insulation Storage Building, Turnaround Building storage room, Water Pump Room of the No. 1 Vacuum Pipe Building or Stock Tank House, and "[A]sbestos was present at these locations" (Tr. 12, 51-52).

In the Insulation Storage Building asbestos insulation was stored in boxes and "in the open" (Tr. 56). This sheet metal building has cracks and chinks in it and when the wind blows, the room becomes "full of dust" (Tr. 57).

In the Turnaround Building storage room, loose insulation was "all over the floor . . . rather thick" - and there was an open burlap sack of what appeared to be asbestos. There also was molded insulation piled on shelves (Tr. 57). Walking in, or sweeping up, loose asbestos will cause it to enter the air (Tr. 80).

Inside the Water Pump Room was a mortar box that the insulators use to mix their water with dry asbestos to make the "mud" which is applied to items which can't be covered with molded insulation. At the Stock Tank House

removed insulation had been "left laying there" (Tr. 57-58).

Loose asbestos insulation was hanging from, and laying on the ground around the Water Treating Tank on the west side of the maintenance shop (Tr. 13; Secretary's Ex. 1; Tr. 52). On the east side of the No. 9 Pipe Still loose asbestos insulation was hanging from the pipe lines located 12 inches above the ground and asbestos insulation which had fallen off these pipes was lying on the ground (Tr. 13; Secretary's Ex. 2, Tr. 53). In the south side area of the Penetration Asphalt Tank loose asbestos insulation was hanging from pipes and some of it had fallen on the ground (Tr. 13-14, Secretary's Ex. 3).

Insulation and pipe fitter employees at the refinery come into almost daily contact with asbestos (Tr. 47). All process and utility lines above ground, and almost all vessels, are covered with "asbestos-type" insulation (Tr. 47, 71). When the insulators mix, saw, hammer and pull at the insulation during installation and stripping procedures, asbestos becomes airborne (Tr. 47-48, 81). Pipe fitters and insulators (who number perhaps a dozen individuals, Tr. 24)) get asbestos on their workclothes (Tr. 48, 71, 74-75).

Operators come in near proximity with the asbestos insulation on the pipe lines when pipe fitters or insulators make repairs on the lines, and operators get asbestos on their clothes when opening or closing the valves on the process units (Tr. 65).

Employees at the refinery provide their own work clothes and take care of their laundering (Tr. 17, 40, 65). The respondent does not transport or place asbestos contaminated clothing in closed impermeable containers and has never given any instructions on how to handle asbestos contaminated clothing (Tr. 48).

As of August 23, 1973, the respondent had a program which provided scheduled medical examinations on a voluntary basis, including x-rays, every other year to employees under 50 years of age and every year for employees over 50 years of age (Tr. 18-19, 30, 66-72). The compliance officer was unable to determine if in fact the employees had taken these physicals or when they had taken them because no physical examination records were available at the plant for his review (Tr. 39). Medical examinations also were available annually to employees working with asbestos if requested by the employees but employees had not been specifically advised of this availability (Tr. 110).

Pipefitter Craig had a physical last year (1973) but he forgot to go and get his scheduled x-ray (Tr. 62). Operator Venn, who is over 50, received an x-ray at Christmas time of 1973 (Tr. 66). Insulator Evers had a physical last year (1973) (Tr. 77). Insulator Gale doesn't remember when he had his last physical (Tr. 73).

During the physical examination a history of symptomatology of respiratory disease is elicited and the physical examination form so provides (Tr. 108). No pulmonary function studies had been performed as of August 23, 1973 because the equipment for such studies, although ordered, had not been delivered to respondent (Tr. 107).

As of August 23, 1973 no monitoring procedures for asbestos had been undertaken by respondent at the Casper, Wyoming refinery. Respondent's Director of Environmental Health Services, Paul D. Halley, directed studies sometime in 1972 at respondent's Texas City refinery and its Whiting, Indiana refinery to determine the concentration of asbestos fibers in the atmosphere of the work areas. These studies involved a survey of the areas where asbestos was being used or handled and the measurement of the exposure of individuals working with asbestos (Tr. 96-97). The resultant findings of these surveys indicated that the concentration of asbestos was within the present levels as specified in the standards but "in a few cases" they would exceed the average exposure limit which goes into effect in 1976. Based on these studies, respondent determined that there was sufficient evidence to indicate that there would be "no exposure at Casper" (Tr. 98).

On September 4, 5, and 6, 1973, and February 12, 1974, the Casper, Wyoming refinery was monitored for airborne

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asbestos concentrations in most of the areas referenced in the citation and no evidence of exposure in excess of the standard was found by respondent[1/] (Tr. 115).

In No. 4 Pump House the removal process for various types of insulation, insulating cement, and "mud" was monitored, and samples taken. Samples also were taken while a clean-up of the room was being conducted (Tr. 105). These samples show that the airborne concentrations of asbestos under these controlled conditions were in excess of the limits permitted by the standard and permit the finding that when repair work is taking place on pipes covered with asbestos insulation an excessive asbestos concentration "might arise" (Tr. 105, 119-120).

Discussion

A. As to Violations

On this record, respondent was in clear violation of 29 C.F.R. 1910.93 a(f)(1) on August 23, 1973 for not monitoring its Casper, Wyoming refinery within six months of the publication of the asbestos standard to determine whether the concentrations of asbestos dust at that location were within the allowable limits of section 1910.93 a(b). The standard was published on July 7, 1972 and requires an employer to monitor every place of employment, where

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1/ No monitoring took place at the Stock Tank House and Water Treating Tank (Tr. 102).

asbestos fibers are released, sometime during the six month period following that date. The evidence overwhelmingly establishes that certain work processes at the Casper refinery cause the airborne release of asbestos fibers and the asbestos contamination of employees' work clothes; therefore, respondent was obliged to conduct the prescribed initial monitoring procedures.

The language of this subsection is explicit and unambiguous and respondent was not justified in arrogating to itself, for whatever reason, the decision of which of his work places should be, or should not be, initially monitored. As pointed out in the brief of the affected employees - if respondent desired relief from initial monitoring at the Casper refinery it should have made formal application for a variance in accordance with section 6(d) of the Act rather than rely on its interpretation of an alleged "informal" discussion between its Director of Environmental Health Sciences and a representative of the Secretary of Labor.

In failing to conduct an initial monitoring prior to August 23, 1973 respondent obviously did not comply with the personal and environmental monitoring methods prescribed by 1910.93 a(f)(2)(i) and 1910.93 a(f)(3)(i), respectively.

Although as a general matter each subsection of the regulations is a separate standard for purposes of citation, we consider it appropriate to assess a single penalty only against an employer when the identical factual situation constitutes a violation of more than one subsection. Accordingly, respondent will be assessed one penalty for its three violations of the subsections under 1910.93 a(f). See Secretary v. Hawkins Construction Company, No. 3173 (Review Commission Final Order 1973).

The respondent argues essentially that in order to establish a violation of the caution signs and housekeeping subsections (1910.93 a(g) and 1910.93 a(h)(1)) the Secretary must establish by appropriate sampling methods that the concentrations of asbestos in the referenced areas were in excess of the exposure limits prescribed in 1910.93 a(b). We disagree for reasons similar to those enunciated by the Court of Appeals in the case of Industrial Union Department, AFL-CIO et al. v. James D. Hodgsen, Secretary, Department of Labor __F.2d__ (D. C. Cir. April 15, 1974).

In reviewing the various provisions of 1910.93 a the court construed the "Methods of compliance" provisions of 1910.93 a(c) as operative and generally applicable to all workplaces covered by the asbestos standards, thereby rejecting the suggestion of the parties in that case that

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these provisions are restricted in their application to those situations in which initial monitoring has reflected a violation of the exposure limits prescribed by 1910.93 a(b). The court, in so concluding, reasoned these objective control measures were intended not only to correct violations that have been discovered but also as a supplement to the monitoring procedure. As the court points out:

> "Whether monitoring detects impermissible concentrations of asbestos dust in a particular workplace may depend upon when and how the sample is taken. The danger that hazardous conditions will consequently exist undetected and unremedied can be reduced by requiring that certain objective control measures be employed as well."

Finally, the circuit court further indicated in its decision that whenever a standard prescribing controls supplementary to the monitoring program is modified by language tending to limit its applicability, this language must be narrowly construed and any exception confined to workplaces that present "no serious question of compliance".

We view the caution signs and housekeeping requirements of 1910.93 a in a like manner. These particular standards also are supplementary objective control measures designed to insure that employees will handle carefully materials likely to produce asbestos dust and prevent employees from being exposed to such dust needlessly. Therefore, the modifying language included in these standards will not

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stored in the open and where
the floor . . . rather thick".
cause it to enter the air and
show that cleaning up loose

asbestos may result in excessive concentrations of asbestos (Tr. 105; Respondent's Ex. A).

Although caution signs also should be posted at any location where asbestos insulation "mud" is being mixed and processed by insulators, the mere presence of the mortar box in the Water Pump Room of No. 1 Vacuum Pipe Building, without more, does not establish that asbestos mud was being manufactured at that location, thereby requiring a posting of a caution sign. Therefore, no violation of item 9c. is found.

With respect to the conditions existing at the Stock Tank House, "removed insulation had been left there", we believe it would have been more appropriate for the Secretary to cite these conditions under item 12 of the citation, which alleges a violation of the housekeeping standard (1910.93 a(h)(2).[2/]

The testimony and photographic evidence is persuasive that respondent violated 1910.93 a(h)(1) for not maintaining certain workplace surfaces free of excessive accumulations of asbestos fibers.

We again point out that the housekeeping standards are intended as objective control measures, operative even if monitoring does not establish that the concentration level of asbestos exceeds 1910.93 a(b). The standard in question, 1910.93 a(h)(1), is designed to protect against conditions

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2/ We find it noteworthy that respondent did not contest item 12 of the citation.

that can be identified as hazardous without resort to monitoring, and as to which monitoring is least effective. Thus, we do not accept respondent's argument that the Secretary's compliance officer must create a dispersion of the accumulated asbestos fibers in such a situation, and then monitor it, before a violation can be established.

The prevailing conditions on August 23, 1973 permit an inference that the existing accumulations of loose asbestos fibers at the referenced areas presented a reasonable foreseeability that their dispersion would exceed the standard's permissible limits.

No violation of 1910.93 a(d)(4)(iii)(b) and (c) by respondent was established. Both of these subsections are concerned only with the laundering of asbestos contaminated clothing by an employer and the procedures to be followed in such a situation. But as of August 23, 1973, respondent had not been providing for the laundering of asbestos contaminated clothing and these provisions become operative only when laundering is being performed or provided by an employer. Perhaps there are standards that require the respondent under conditions prevailing at the Casper refinery to provide special protective clothing and launder it; but respondent was not cited under them and these issues were not tried with the express or implied consent of the parties.

Respondent concedes that prescribed pulmonary function tests were not provided to its employees prior to August 23, 1973 and therefore, a violation of 1910.93 a(j)(3) was committed. The additional issue raised, however, is whether respondent provided or made available medical examinations which included x-rays and a history to elicit symptomatology of respiratory disease between July 7, 1972 and January 31, 1973, as required by the language of the standard.3/

The Secretary proved that respondent for the past several years has had an announced policy of scheduling, and making available, medical examinations, including x-rays, on a yearly basis to employees over 50 years of age, and every two years for employees under 50. This policy, of course, does not comply with the standard which makes no age distinction; all employees, whatever their age, must be provided with annual medical examinations.

Respondent's witness, Mr. Halley, initially testified that x-rays were made available annually on request to all employees working in "hazardous" occupations.4/ At a later point, however, he testified that he doubted whether employees under 50 had ever been told of the x-rays'

3/ The provisions of 1910.93 a(j)(5), which provide that "recent" medical examinations are not required if an employee has been examined in the year preceding July 7, 1972 in accordance with 1910.93 a(j)(3), are not applicable because no employee at Casper received a pulmonary function test prior to January 31, 1973.

4/ His testimony on this point is limited to x-rays alone.

availability on a yearly basis. Obviously, until the employees are advised of a change in respondent's policy, respondent has not made annual medical examinations available to all employees.

In view of Mr. Halley's testimony concerning the company's medical examination form, respondent appears in compliance with the requirement that annual medical examinations must include a history to elicit symptomatology of respiratory disease.

B. As to Penalties

Due consideration has been given to all evidence of record relating to the four factors required by section 17(j) of the Act in assessing penalties: gravity of the violations, the size of respondent, its good faith, and the absence of any prior history of violations under the Act. With the exception of items 6, 7, 8 and 9 of the citation we find the Secretary's proposed penalties for the established violations appropriate (Secretary's Ex. No. 4).

Although only one penalty will be assessed for items 6, 7 and 8 we believe that the Secretary has seriously underestimated the gravity of respondent's failure to conduct the initial monitoring of the Casper refinery. The initial monitoring requirement is a key provision of the asbestos standard, "especially important because the results of that process often determine when and what protective measures are required". 5/ By not monitoring in the prescribed period

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5/ Industrial Union Department, AFL-CIO et al. v. Secretary, Department of Labor, supra.

between July 7, 1972 and January 7, 1973, the respondent needlessly delayed for more than a year the utilization of control measures at respondent's Casper workplace necessary to protect the health of its employees (Tr. 105, lines 11-23). A penalty of $250.00 therefore, is considered appropriate for violation of this standard.

The Secretary proposed no penalty for respondent's failure to provide and display caution signs at the asbestos insulation storage building and Turnaround Building storage room. We consider that the moderate gravity of this violation requires some penalty and a penalty of $100.00 is considered reasonable and appropriate.

Conclusions of Law

1. The respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and obliged to comply with those standards promulgated under Part 1910, Title 29, of the Code of Federal Regulations.

2. On August 23, 1973, the respondent was in violation of 29 C.F.R. 1910.93 a(f)(1), 1910.93 a(f)(2)(i) and 1910.93 a(f)(3)(i). A single penalty of $250.00 for these three violations is appropriate.

3. On August 23, 1973, the respondent was in violation of 29 C.F.R. 1910.93 a(j)(3) and a penalty of $40.00 for this violation is appropriate.

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4. On August 23, 1973 the respondent was in violation of 29 C.F.R. 1910.93 a(h)(1) and a penalty of $30.00 for this violation is appropriate.

5. On August 23, 1973 the respondent was in violation of 29 C.F.R. 1910.93 a(g)(1)(i) and a penalty of $100.00 is appropriate.

6. On August 23, 1973 the respondent was not in violation of 29 C.F.R. 1910.93 a(d)(4)(iii)(b) and 1910.93 a(d)(4)(iii)(c).

ORDER

Based on the foregoing findings, conclusions of law and the entire record, it is ORDERED:

1. Violations of 29 C.F.R. 1910.93 a(f)(1), 1910.93 a(f)(2)(i) and 1910.93 a(f)(3)(i) are hereby AFFIRMED and a penalty of $250.00 is ASSESSED.

2. A violation of 29 C.F.R. 1910.93 a(j)(3) is hereby AFFIRMED and a penalty of $40.00 ASSESSED.

3. A violation of 29 C.F.R. 1910.93 a(h)(1) is hereby AFFIRMED and a penalty of $30.00 ASSESSED.

4. A violation of 29 C.F.R. 1910.93 a(g)(1)(i) is hereby AFFIRMED and a penalty of $100.00 ASSESSED.

5. Items 1 and 3 of the citation, and any proposed penalties based thereon, are hereby VACATED.

6. The alleged violations of 29 C.F.R. 1910.93 a(d)(4)(iii)(b) and 1910.93 a(d)(4)(iii)(c) (items 4 and 5 of the citation), and any proposed penalties based thereon, are hereby VACATED.

James A. Cronin, Jr.
Judge, OSAHRC

Dated: MAY 16 1974

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