Public Citizen

generic names

September 27, 1976

Dr. Morton Corn
Assistant Secretary for Occupational
Safety and Health
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Dr. Corn:

We call your attention to new NIOSH data published by the House Committee on Governmental Operations, which highlight the urgent need for OSHA to require generic name labeling for all industrial chemicals. And we hereby petition, under Section 6(b) of the Occupational Safety and Health Act, that OSHA require each employer to post and provide to each employee and employee representative a list of the generic names of all chemicals used and produced at the workplace.*

DATA SUPPORTING PETITION

In response to a request made during May 1976 hearings, NIOSH submitted data in July and August 1976 to the House Subcommittee on Governmental Operations, which published the data in "Hearings on Control of Toxic Substances in the Workplace," pp. 55-61, released last week.

Bluntly stated, NIOSH indicates that thousands of American workers may sicken and die from chemical exposure, yet never know what hit them.

In brief, NIOSH reports as follows:

+ In a National Hazard Survey of 5,200 plants, NIOSH engineers found workers exposed to 95,000 different trade name products. At 90 percent of the worksites, the users had no knowledge of what chemicals the trade name product contained (pp. 55-56).

+ Of 40,500 trade name products whose composition NIOSH could determine by July (less than half of the 95,000), 18,000,

*The limited scope of this proposal in no way precludes our support of related measures such as container labeling, warning signs and worker education.

or 45 percent, contained chemicals regulated by OSHA (p. 56).

+ Of the identified trade name products, 427 contained one of the 15 regulated carcinogens. And some of these carcinogen-containing products had formulas listed as "trade secrets" by their manufacturers (p.61).

+ In terms of worker exposure, NIOSH found 5,638 workers exposed to trade name products containing carcinogens, with 2,830 of these workers exposed to the "trade secret" carcinogen-containing products (p. 61).

Thus these workers are being stabbed in the back without a chance even to know what they work with. Without this basic knowledge, workers cannot participate in the vital decisions of whether or not to accept or continue employment, or whether or not to seek union or governmental action against an employer.

Statements in the Hearings by Dr. Thomas Mancuso, Mr. Steven Wodka of the Oil, Chemical and Atomic Workers, George Perkel and Eugene Carmack of the Textile Workers Union, and Jacob Clayman and Sheldon Samuels of the Industrial Union Department, AFL-CIO, forcefully state the case for labeling of chemicals.

AUTHORITY FOR REGULATION

Authority for this proposed regulation stems from Sections 2(b)(1), 5(a)(1), 6(b)(7), and 8(c)(3) of the Act.

Section 2(b)(1) encourages employees and employers in their efforts to reduce safety and health hazards in the workplace, and thus strongly implies that employers and employees should exchange information. The most basic health information available is the composition and nature of all chemicals used in the workplace.

Section 5(a) gives employers the general duty to furnish a place of employment "free from recognized hazards." Read together with Section 2(b)(1), this general duty clause implies employee participation in determining what is a "recognized hazard." Again, any meaningful employee input requires a basic knowledge of chemicals used in the workplace.

So basic is the employee's need for information about chemicals in the workplace, that the general duty clause of the Act by itself can reasonably be construed to require such disclosure by employers.

Sections 6(b)(7) and 8(c)(3) specify that OSHA shall require employers to warn employees about the hazards of regulated substances and make exposure data available to employees. During your testimony at the Subcommittee on May

12, 1976, you mistakenly stated that Section 8(c)(3) would apply only when exposure levels exceed a regulated standard (Hearing, p. 89). Actually, the first three sentences of 8(c)(3) clearly apply at all levels of exposure. These sentences specify that OSHA must require employers to keep records of employee exposure to regulated substances and "make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents."

Thus, at least for regulated substances, the Act explicitly orders OSHA to require employer disclosure of the composition and hazards of each substance.

But Act does not REQUIRE MONITORING OF ALL

As to what constitutes a regulated substance, during testimony at the Hearing, Mr. Benjamin Mintz of OSHA was asked whether the threshold limits for about 400 substances listed in 29 C.F.R. 1910.1000 were standards. Mr. Mintz said they were (p. 89). Therefore, Sections 6(b)(7) and 8(c)(3) apply to these 400 chemicals, which NIOSH found as ingredients of 17,987 trade name products (Hearing, p. 56).

or monitoring

But OSHA has not required warnings or data sheets on these 400 chemicals and you could not explain to the Subcommittee why not (Hearing, p. 87).

We know that you consider the toxic substances list in 1910.1000 a "nuisance standard," that inaccurately reflects true hazards.* And we know that the definition of a "hazardous substance" is open to debate. That is exactly why we propose an open generic name listing for all chemicals, so the workers themselves, who bear the risk of exposure, can join in the risk assessment.

SUPPORTING ARGUMENT

Our proposal is a practical and inexpensive way to increase employee awareness of the hazards they face.

We agree with you, Dr. Corn, that providing information on chemical composition is only the first step in eliminating hazards, but OSHA should take whatever steps it can. If generic name identification is an unimportant issue, how do you explain the emphasis placed on it by unions like OCAW or the continuing worker requests for "what's in this stuff"? On the contrary,

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*Testimony of Dr. Corn before the House Subcommittee on Labor and Health, Education, and Welfare on Appropriations for 1977, at 551-557.

it is a very important issue to many people and your decision not to give the issue great attention (Hearing, p. 90) has been most unfortunate.

One objection which has been raised to our own and other chemical identification proposals is that employers themselves do not know the composition of trade name chemicals. You effectively point out, however, that the employer has purchasing leverage with his supplier and can state: "If you do not supply us this information, we are seeking other suppliers" (Hearing, p. 91).

Our generic name proposal would be very inexpensive to implement, with cost being limited to the few worker hours it would take to complete a list of chemicals.

In this fiscal year when OSHA has requested an astounding $6.3 mllion out of a total standards development budget of $10.8 million for impact statements (Hearings, p. 100) that will not help a single worker, hopefully you can find a small amount of money and time to implement a generic name standard that will directly benefit millions of workers.

We look forward to your prompt reply to this letter.

Sincerely,

Peter Greene Health Research Group

Sidney Wolfe Health Research Group

Andrew Maguire Member of Congress

1977?

AN ACTION PROPOSAL ON:

OUR RIGHT TO KNOW!

Eula Bingham, head of OSHA, has been considering the possibility of OSHA issuing a standard that would guarantee workers access to lists of the generic (scientific rather than trade names) names of the chemicals they work with. The wording, scope, and time of implementation of this standard are all undecided as of now. But there has been considerable pressure applied by Congressman Maguire (N.J.) and other members of Congress upon OSHA to take some action in this area.

It is very important that PHILAPOSH, other health & safety groups, unions, and ordinary workers exert pressure to get the strongest possible generic name standard at the earliest date. Particularly, as many shops PHILAPOSH works with (Lee Tire, Gulf, Dupont, Sun Oil to name but a few) have faced great barriers in obtaining this information -- which is the foundation stone without which no effective pro-worker health and safety program can be built.

An OSHA standard giving us the right to know the real names of the substances we work with would give a brand new legal right to unorganized workers. Now, unorganized workers are completely at themercy of management in this regard. With such a standard, unions would no longer be forced to use lengthly grievance & arbitration processes, shop actions, and collective bargaining to get information which should be ours by legal right.

Finally, this is an issue that trade unionist, unorganized workers, and their allies can <u>win</u>. OSHA, in the person of the head, Eula Bingham, seems like it can and probably wants to be pressured by pro-worker forces. But this standard can only come about if we and others like us <u>apply enough pressure</u>.

I feel that the first steps that PHILAPOSH should take to secure our RIGHT TO KNOW are:

1) Mass Petition Eula Bingham to issue a forceful standard as quickly as possible. This should be done at tomorrow's AFL-CIO convention, the OSHA office, with PHILAPOSH members and friends, and other reasonble places. This could easily be done by out members.
2) Petition (same petition) Ms. Bingham to hold regional hearings in Philly on the standard.
3) Pressure area Congresspeople to support and speedup the issuing of this standard.

Submitted by Dudley Burdge

I T ' S Y O U R R I G H T T O K N O W

Under the Occupational Safety and Health Act, Section 6, it's our right to have basic health information. But until a standard is issued and enforced, we must fight for data on a shop by shop basis.

In order to force the company to provide a safe and healthful workplace, you need to have access to information that your company may or should have. This includes:

1. Chemical (or generic, not trade) names of all materials used. You cannot begin to evaluate the toxic properties of a substance without knowing its chemical composition.

2. Monitoring data on chemical, radiation and noise exposure that includes the amount and length of time samples were taken and the number of people exposed.

3. Individual medical records that may document harmful effects of toxic materials. Morbidity (sickness) and mortality (death) data should be collected by the company and provided to the union; this data can indicate major health problems within the workforce.

This is basic information that all individuals and unions should have access to. However, companies often do not possess such data because it cuts into profits to develop it. In any case, the company should be forced to develop this information it it does not have it already. As a rule, the burden should be on the company to generate and provide this information for workers. Getting chemical names is a place to start.

TACTICS FOR GETTING CHEMICAL NAMES

By registered letter, demand from the company a handbook of all the substances manufactured and used in the plant. Specify that this handbook should include the chemical names of all materials, their acute and chronic effects, safe handling techniques, appropriate engineering controls and personal protective equipment and emergency treatment procedures. Demand a date by when this will be provided and that all employees be provided with a copy. There should also be a provision for updating this handbook as chemicals change.

The company will most likely refuse to provide any of this handbook. Consider compromising by accepting a list of chemicals (not trade names). PHILAPOSH can then help you to evaluate their toxic effects.

If the company refuses to agree to even the minimal request, you have a number of options. Consider using the following tactics.

1. RANK AND FILE EDUCATION

   Developing rank and file knowledge about the company's refusal to provide such simple information can lead to shop floor discussions that alone may prove threatening to management. At Scott Paper Co. in Chester, Pa., merely the threat to put out a leaflet by Paperworkers local 448 led to the company handing over the list of chemicals.

2. GETTING TRADE NAMES

   First, obtain from friends in the shipping department a list of materials, manufacturers' names and addresses.

   Second, get all information you can off the labels. In particular, get the manufacture's names and address and the trade name of the product and any code number.

   If you have a "few" major chemical problems, you may be able to find their trade names in one of the limited number of published reference books which contains such information. Copies of these books are available in the PHILAPOSH office.

   If you have a large number of chemicals, you can file a health hazard evaluation with the National Institute of Occupational Safety and Health NIOSH. Request forms are available from PHILAPOSH. This method will produce some results but may take a few months to complete.

3. FILE A GRIEVANCE

It should be claimed that the union as the agent of the employees can not properly represent them without this information. Although it would be helpful to have some general clause in your contract that provides at least general union responsibility for health and safety, your argument should be based on the recognition clause and not on a right implied by the contract. If the grievance is denied by the company, arbitration precedents exist that force the company to provide the information. These decisions are available from PHILAPOSH.
NOTE: The language of the initial grievance is very important, contact PHILAPOSH if you plan to go this route.

4. DIRECT ACTION

When possible, direct action (strikes, slowdowns, other job actions) is the best weapon to use to obtain needed information. It is faster and much more reliable than NIOSH, grievance procedure, or the NLRB. Of course, direct action may be difficult to organize when you are just at the stage of gathering information in order to stimulate rank and file concern in the first place. On the other hand, the right to know is a basic issue which effects every worker.

United Auto Workers local 6 members at International Harvester in Illinois have used the threat of direct action successfully. By threatening to strike, they forced the company to survey the plant for all chemicals used and to distribute the data sheets about chemical effects to all departments.

5. UNFAIR LABOR PRACTICE CHARGE

Before collective bargaining begins, send a registered "opening letter" to the company requesting the generic names of all chemicals (and other information indicated in the first part of this fact sheet). This opening letter is similar to ones used to obtain financial data. Under the National Labor Relation Act, Section 8(a)(5), it is the employer's duty to bargain in good faith. This includes the duty to provide upon request information that is relevant and necessary to allow the employees' representative to bargain intelligently and effectively with respect to wages, hours, and working conditions.

If the company refuses to provide the requested data, you should file an 8(a)(5) charge against the employer with the National Labor Relations Board.

NOTE: This method can take time and it requires legal assistance. Legal aid and a sample opening letter are available from PHILAPOSH.

6. CONTRACT CLAUSES

Negotiate a clause in your contract assuring you the right to particular information and chemical names. Such clauses have been won by many local unions, including OCAW local 8-716 at Tenneco in Burlington, New Jersey and International Chemical Workers Local 619 at Kwicki-Berylco in Boyertown, Pa.

NOTE: Tactics 1,3,4,5 and 6 could also be applied to getting monitoring and medical records.

PHILAPOSH, the Philadelphia Area Project on Safety and Health is an education and action organization that has helped many Delaware Valley unions obtain the information described in this leaflet. For further information contact:

PHILAPOSH Room 607 1321 Arch Street Philadelphia, Pa. 19107

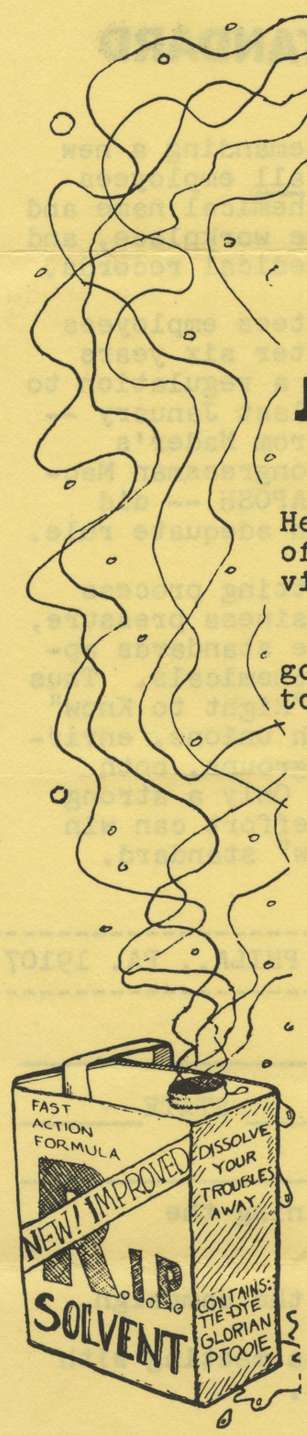
Phone # (215) 568 - 5188

Labor Donated

IT'S OUR RIGHT TO KNOW!

Each day more than 300 workers die from occupational disease or injury. Some deaths are caused by the familiar killers asbestos and vinyl chloride. But there are half a million other substances which cause skin, liver, and lung diseases and cancer every day. And they may also hurt factory neighbors and workers' families.

DO YOU KNOW THE NAMES AND HAZARDS OF THE SUBSTANCES YOU ARE EXPOSED TO? TO PROTECT YOUR HEALTH YOU MUST HAVE THIS DATA. BUT MOST EMPLOYERS WON'T TELL YOU...



JOIN THE RIGHT TO KNOW CAMPAIGN

The Philadelphia Area Project on Occupational Safety & Health (PHILAPOSH) is working with local unions to win lists of chemicals. Already, half a dozen locals have won this vital information.

We are also part of a national effort to force the U.S. government's Occupational Safety & Health Administration (OSHA) to issue a new standard that will:

- REQUIRE GENERIC (OR CHEMICAL, NOT TRADE) NAME LABELING OF ALL WORKPLACE SUBSTANCES.
- REQUIRE EMPLOYERS TO POST THE HAZARDS OF THESE SUBSTANCES.
- REQUIRE EMPLOYERS TO INFORM US OF THE EXTENT OF OUR EXPOSURE AND TO PROVIDE US PERSONAL MEDICAL RECORDS.

SIGN THE PETITION NOW !

(over)

ABOUT PHILAPOSH

The Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) is an independent membership organization of workers, local unions, and health and legal professionals fighting for safety and health in the Delaware Valley. Through technical assistance, educational programs, and employer and OSHA accountability activities, we are building a united labor effort for improved working conditions. Many locals are official PHILAPOSH sponsors. Contact us for more information.

phone: (215) 568-5188

PRESSURE ON EMPLOYERS

Delaware Valley workers are demanding to know what they are exposed to at work. Already, several unions working with PHILAPOSH have won victories:

-United Paper Workers 448 (Scott Paper) Health & Safety Committee won the list by threatening to publicize the company's refusal.

-UAW 1612 (ITE-Gould), International Chemical Workers 619 (Kwicki-Berylco), & Oil, Chemical, & Atomic Workers 8-716 (Tenneco) have won contract clauses guaranteeing chemical lists to the union.

-OCAW 8-398 (Eastern States) & several other locals have obtained trade name lists which can be analyzed.

Other PHILAPOSH involved unionists are waging a coordinated effort to win this right from employers through grievances, arbitration, publicity & other tactics.

PHILAPOSH provides advice, helps analyze trade names and health effects, and, when appropriate helps put public pressure on employers.

A NEW OSHA STANDARD

PHILAPOSH is also demanding a new OSHA regulation so that all employees will have the right to chemical name and hazard data posted in the workplace, and access to exposure and medical records.

The OSHA Act guarantees employees this information, but after six years OSHA has failed to issue a regulation to force compliance. Only last January -- after a legal petition from Nader's Health Research Group, Congressman Macquire (D.-N.J.) and PHILAPOSH -- did OSHA begin to consider an adequate rule.

But the standard setting process may take years. With business pressure, OSHA may try to limit the standards application to just a few chemicals. Thus PHILAPOSH is mounting a "Right to Know" campaign coordinated with unions, environmental, and community groups, both locally and nationally. Only a strong national and grassroots effort can win a complete "Right to Know" standard.

CLIP and RETURN TO PHILAPOSH, RM. 607, 1321 ARCH ST., PHILA., PA. 19107

NAME_____ PHONE_____

ADDRESS_____ CITY_____ STATE_____

UNION_____ COMPANY_____

☐ Our union would like PHILAPOSH assistance in obtaining the list of chemicals we are exposed to.

☐ I will work for my union or groups endorsement of the campaign.

☐ I am interested in participating in actions such as meeting with public officials, picket lines, mass meetings, etc.

☐ Please send ___ more petitions.

IT'S OUR RIGHT TO KNOW!

WE DEMAND EMPLOYERS MAKE AVAILABLE TO WORKERS AND THEIR REPRESENTATIVES GENERIC NAMES (CHEMICAL, NOT TRADE NAMES) OF ALL SUBSTANCES WE, THE WORKERS, MAY BE EXPOSED TO.

WE FURTHER DEMAND THAT THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ISSUE A NEW STANDARD THAT REQUIRES EMPLOYERS TO:

(1) MAKE AVAILABLE TO EMPLOYEES CHEMICAL NAMES, HAZARD MONITORING DATA, PERSONAL WORKPLACE MEDICAL RECORDS, AND ALL OTHER INFORMATION NECESSARY TO EVALUATE THE SAFETY OF SUBSTANCES WORKERS MAY BE EXPOSED TO.

(2) POST IN THE AREA OF USE A SUMMARY OF THE HARMFUL EFFECTS OF ALL CHEMICALS USED.

AND FURTHER, THAT OSHA HOLD REGIONAL HEARINGS ON THIS PROPOSED STANDARD, INCLUDING ONE IN THE DELAWARE VALLEY.

NAME	ADDRESS & ZIP CODE	UNION

We are the employees of the _____

THIS IS A NATIONAL CAMPAIGN CONDUCTED BY THE FOLLOWING LABOR HEALTH COALITIONS: CHICAGO AREA COMMITTEE ON OCCUPATIONAL SAFETY & HEALTH; MASSACHUSETTS COALITION ON OCCUPATIONAL SAFETY & HEALTH; NORTH CAROLINA OCCUPATIONAL SAFETY & HEALTH PROJECT; RHODE ISLAND COMMITTEE ON OCCUPATIONAL SAFETY AND HEALTH.....

IN THE DELAWARE VALLEY THE PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH (PHILAPOSH) IS THE COORDINATING ORGANIZATION. WE ARE AN ACTION & EDUCATION GROUP OF LOCAL UNIONS, WORKERS, AND HEALTH & LEGAL PROFESSIONALS UNITED IN THE FIGHT FOR JOB SAFETY. FOR MORE PETITIONS CONTACT PHILAPOSH, RM. 607, 1321 ARCH ST., PHILA., PA. CALL 215 568-5188.

GAU

NEW MEMBERS AND SPONSORS ARE WELCOME!

Membership Meeting

DO YOU KNOW THE NAMES & HAZARDS OF THE SUBSTANCES YOU ARE EXPOSED TO?

7:30 pm Monday Sept. 12 1977

CLOTHING WORKERS HALL 2115 SOUTH ST., PHILA.

AGENDA

*** MOVING TOWARD ACTION ON THE RIGHT TO KNOW CAMPAIGN

Guest Speaker: Peter Greene, Ralph Nader's Health Research Group, Washington, D. C.

Presentation of Delaware Vallley Action Plan.

Report on National Planning of the Campaign based on national group conference held by PHILAPOSH July 29 -31.

*** ALSO: VOTE ON PROPOSED CONSTITUTIONAL CHANGE
Film Committee & Women's Committee - Shall They Have Seats on the PHILAPOSH Board?

MYSTERY GUEST - PHILAPOSH BUTTON

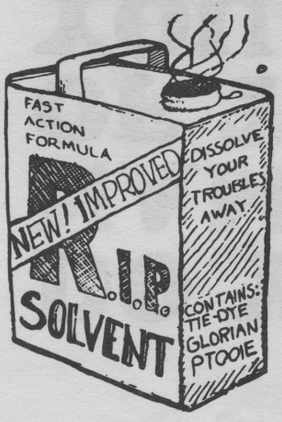
CHILD CARE ON REQUEST.....REFRESHMENTS.....FREE PARKING

Directions: Take Schuylkill Expressway to South Street Exit; take South Street East to 2115. From Ben Franklin Br. take Vine St. to the Expressway and go south (marked to South Jersey). From Walt Whitman Bridge take Schuylkill towards center city.

LABOR DONATED

For More Information, CALL PHILAPOSH, 215 568-5188.

IT'S OUR RIGHT TO KNOW!



THIS FALL A NATIONAL EFFORT BEGINS TO WIN FROM EMPLOYERS AND THE U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION THE RIGHTS TO BASIC WORKPLACE HEALTH INFORMATION. THIS INCLUDES OUR RIGHT TO HAVE A LIST OF ALL SUBSTANCES USED IN THE WORKPLACE, EXPOSURE LEVEL DATA, AND MEDICAL RECORDS, AND TO HAVE THE EMPLOYERS POST THE HEALTH EFFECTS OF ALL SUBSTANCES.

YOU CAN PARTICIPATE IN THIS CAMPAIGN BY GETTING "RIGHT TO KNOW" PETITIONS SIGNED, OBTAINING THE ENDORSEMENT OF YOUR UNION OR GROUP, AND SOLICITING SUPPORT OF ELECTED GOVERNMENT OFFICIALS. FOR THE DELAWARE VALLEY ACTION PLAN.....

COME TO THE MEETING

peter greene

of Ralph Nader's Health Research Group will speak on the national importance of this Campaign. Peter is a key national figure in the job health effort.

WHEN: MONDAY SEPTEMBER 12, 1977

7:30 PM

WHERE: AMALGAMATED CLOTHING WORKERS HALL, 2115 SOUTH STREET, PHILADELPHIA. (Free parking)

CHILD CARE ON REQUEST/REFRESHMENTS

Directions: Take Schuykill Ex'way to South Street Exit; go East to 2115 South. From the Ben Franklin Bridge, take Vine St. to the Schuykill Ex'way & go south (marked to South Jersey). From Whitman Bridge take Schuykill towards Center City.

PHILAPOSH/Philadelphia Area Project on Occupational Safety and Health

Room 607 1321 Arch Street Philadelphia, Pa. 19107 (215) 568-5188

CLIP and RETURN TO PHILAPOSH.

NAME_____ PHONE_____

ADDRESS_____ CITY_____ STATE_____ ZIP_____

UNION/GROUP_____ COMPANY_____

- ☐ Please send information on the Right to Know Campaign, including petitions.
- ☐ I am interested in working on the Campaign. Please contact me.
- ☐ Enclosed is my membership dues for the next year ($6 Regular; $25 Sustaining). Start sending your Newsletter SAFER TIMES right away.
- ☐ I am interested in getting my union to be an official sponsor of PHILAPOSH.
- ☐ I enclose a contribution towards the work of PHILAPOSH (donations are tax-deductible).

DO YOU KNOW THE NAMES & HAZARDS OF THE SUBSTANCES YOU ARE EXPOSED TO?

Philadelphia Area Project on Occupational
Safety & Health
Room 607 1321 Arch Street
Philadelphia, Pa. 19107 215 568-5188

please post

PHILAPOSH

PHILAPOSH is an independent, membership organization of Delaware Valley workers, local unions, and health and legal professionals. We provide technical assistance to those facing hazardous conditions and present classes and other educational programs designed to build knowledge of our health and safety. We are also an action organization, providing cross union support to worker health and safety struggles and holding the Occupational Safety & Health Administration (OSHA) accountable.

SPONSORS

International Union of Electrical Workers District 1 Council
IUE Locals 111, 140
United Rubber Workers Local 785
Negro Trade Union Leadership Council
National Union of Hospital & Health Care Employees (1199C)
DuPont Independent Union, Edgemoor, Del.
International Chemical Workers Locals 619, 959
United Glass & Ceramic Workers Local 514
Glass Bottle Blowers Local 4
Pennsylvania Social Services Union, Philadelphia Chapter
Pa. Federation of Telephone Workers, Philadelphia Division
United Paper Workers International Union Local 1185
Oil, Chemical, and Atomic Workers District 8 Council
OCAW Locals 8-831, 8-398, 8-716, 8-890, 8-760, 8-667

Fall Program

- MEMBERSHIP MEETINGS

November - Struggle in the Coal Fields with UMWA members.

December - Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health.

- SAFETY & HEALTH TRAINING

Programs for Local Unions in the Union Hall.

Central Training Sessions in Philadelphia.

- FILM SERIES

Including films on labor struggles.

TO GET INVOLVED CONTACT PHILAPOSH (SEE REVERSE SIDE).

The Government's Deadly Omission

NYT 4/29/77

In 1972 and 1973, the National Institute for Occupational Safety and Health collected the personnel records of 2,500 workers who had been exposed to cercinogenic substances at dye plants in five states. The substances, benzidine and beta-naphthylamine, have long been known to cause cancer of the bladder. With early warning, the lives of victims of bladder cancer can be prolonged. But most of these 2,500 who had been exposed received no warning.

The workers' records were put on microfilm, in prospect of follow-up studies. Nothing further was ever done. The statistics were compiled, the human beings were forgotten. If mortality studies had been carried out on the group, according to a spokesman for the Occupational Safety Institute, they would undoubtedly have shown an excess of deaths due to bladder cancer.

Now that this episode has been made public by David Burnham's report in this newspaper, physicians at the institute point out that it is not unique. They claim to have neither the facilities nor the legal responsibility to reach out to the people covered by large-scale retrospective studies.

It is true that the Institute for Occupational Safety and Health is a small agency. But is the Department of Health, Education and Welfare, to which it belongs, so poorly staffed and equipped that over four or five years it could not contrive to reach 2,500 imperiled people whose names and Social Security numbers it knew? The fact is, no one tried.

It is also true that the institute's assigned task is to conduct research with a view to setting standards for workers currently exposed to risk, rather than to assist those who have been previously endangered. But does not the possession of such critical information by a public agency and its staff of physicians dictate its own responsibility? The legal question may be decided, in the courts for 400 asbestos workers, covered in a similar study, who contend that the Government should have warned them of their vulnerability to a serious lung disease.

Whatever the legal finding, the bureaucratic inertia revealed by this case is troubling. Pressed to justify the Government's inaction, an institute physician contended that, since the workers could not afford the necessary medical examinations and treatment, alerting them to the heightened risk of cancer would only have "created problems." Is there some income or education qualification for the right to be informed that one's life is in danger?

Belatedly, the Institute for Occupational Safety and Health and the National Cancer Institute are trying to develop a means of notifying the many thousands of men and women who, it is only now being discovered, have been exposed to harmful substances in the past. They work in the knowledge that some Americans have almost certainly suffered and died as a result of the Government's inexcusable act of omission.

See § 8 (c)(3) re employer duty to notify.

Exposed to Hazards On Job, Study Says

By DAVID BURNHAM
Special to The New York Times

WASHINGTON, Oct. 2—An extensive survey of occupational hazards has found that while at work, one out of four Americans is exposed to some substance thought to be capable of causing death or disease.

The Federal survey, the first of its kind undertaken in the United States, also determined that fewer than 5 percent of the places where people work have industrial hygiene services, active plans to prevent or reduce the exposure of employees to hazardous substances and such physical conditions as radiation and excessive noise.

The 697-page survey, a copy of which has been obtained by The New York Times, is already posing questions among health officials about the direction of United States public health policies.

John F. Finklea, head of the National

Continued on Page 22, Column 1

of the delay caused by the attempt to identify the composition of the large number of trade-marked products, the findings are three to five yers old.

During that delay, federal regulation restricting some of the products have been strengthened and exposure to them may have declined. The rules for many products, however, have remained essentially unchanged. Beyond that, only the presence of various hazardous substances, not the level of exposure, was recorded by the inspectors, engineers who had undergone a special nine-week training course.

This means that some of those employees listed by the survey as being exposed to hazardous substances may have had extremely limited contacts with them. But many scientists contend that virually any exposure to a cancer-causing agent,

1 in 4 Americans Exposed to Hazards on Jo

Continued From Page 1

Institute of Occupational Safety and Health, which conducted the survey, said in response to an inquiry that the study provided new evidence that exposure to chemical hazards was "pervasive in a large number of occupations" and that the availability of such preventive services as industrial hygiene was "not what it should be, especially in the smaller firms."

In discussing the costs involved, according to one Government analysis circulating within the Carter Administration and Congress, it could cost as much as $54 billion to provide warnings and health surveillance services to the 21 million Americans now believed to be exposed to harmful conditions while working.

In the course of the National Occupational Health Survey, the results of which the Government hopes to publish in the next two or three months, trained inspectors visited 4,636 plants with 985,000 employees in 67 metropolitan regions. Among the workplaces inspected were sprawling steel mills and family machine shops, hospitals and banks, rubber plants and chemical factories.

Manufacturers Questioned

The goal was to describe the health and safety conditions in the American work environment, and at each of the selected work sites the inspectors obtained information on the number of employees, the availability of medical care, the existence of illness and injury records and the chemical and physical hazards.

A major problem in completing the survey, which was based on inspections made between 1972 and 1974, was that about 70 percent of the substances found at the inspected facilities were identified by trade name rather than chemical composition, so that frequently neither the employer nor the employee knew of the potential hazards.

The National Institute for Occupational Safety and Health, in an attempt to correct this problem, has gotten in touch with more than 10,000 manufacturers and asked them to disclose the composition of their products sold under trade names, a request that so far has been honored for about half the substances.

Among some of the survey's principal findings about the hazards of workplaces in the United States were the following:

¶Somewhat fewer than 2 percent of the workplaces with 8 to 249 employees, 15 percent of those with 250 to 500 employes and 42 percent of those with more than 500 employees received industrial hygiene services. These were defined as the recognition of harmful environmental factors and their effects and the prescription of techniques to reduce them. Only 3.1 percent of all facilities, with 24.2 percent of all employees, provided such services.

¶Hundreds of thousands of workers were exposed to substances believed to cause cancer or other fatal diseases. Acexample, 83,494 full-time workers were exposed to asbestos, 90 percent of them with no protective equipment or engineering controls; 48,484 full-time workers were exposed to benzene, 55 percent of them with no controls, and 144,535 full-time workers were exposed to cutting oil, 75 percent of them with no controls.

¶A large proportion of employees exposed to these substances evidently had not been given medical tests to determine whether their health was threatened. More than three-quarters of all full-time and part-time workers exposed to benzene did not have periodic blood tests, and approximately the same proportion of those exposed to asbestos did not receive pulmonary function tests.

Officials in the National Institute for Occupational Safety and Health admit that the study has shortcomings. Because

Says Federal Survey That Raises Public Health Questions

no matter how limited, may begin the growth of a tumor and ultimately cause death.

The survey found that 880,000 employees, or 1 percent of the work force, were exposed to the 17 carcinogens regulated by the Government. But scientists believe that there are between 1,500 and 2,000 carcinogenic substances and combinations present in the work environment and that new hazards are being added every day.

The staggering size of the problem confronts government, industry and labor with complex policy issues.

Some Issues Discussed

Some of these issues are discussed in a 34-page policy paper prepared by the National Institute for Occupational Safety and Health after The Times disclosed in April that the agency had not informed tens of thousands of workers who had been found to have been exposed to carcinogens, though early warnings could result in cures of prolonged life.

Monitoring workers exposed to hazardous substances, providing them with various types of medical tests and counseling, could cost as much as $2 billion a year, the policy paper said.

Cost of Cancer Treatment

"In view of the extremely high costs associated with reducing the consequences of high exposures to workers in the work plant," the paper said, "it would seem more prudent for industry to institute intensive monitoring procedures and appropriate engineering controls to insure low levels of exposure to physical and chemical agents and thus avoid a recurrence or future growth of this problem."

According to a study by the General Accounting Office last year, for example, direct care and treatment for victims of cancer cost $3 billion to $5 billion a year in medical and hospital costs.

In discussing the cost of locating workers who had been exposed and providing them preventive services, the policy paper noted that the current inflationary impact statements required by the Ford and Carter Administrations before imposition of new health regulations only consider the required costs that would be imposed on industry.

The "impact statements," the policy paper said, "do not consider the potential cost savings or increased productivity for industry, nor do they consider that workers have a right to know about workplace hazards, and that the cost of counseling and medical followup are now hidden or borne by others."

CAPITOL COMMENTS
FROM THE OFFICE OF CONGRESSMAN JAMES J. FLORIO (D 1st-NJ)
WASHINGTON, D.C. 20515

FOR RELEASE: WEEK OF OCTOBER 24-28, 1977
For further information contact Sarah Dowling 609/627-8222 or 227-3305

FLORIO FEELS OSHA ACTION CAN HELP PROTECT WORKERS FROM EXPOSURE TO DANGEROUS CHEMICALS

By JAMES J. FLORIO
Member of Congress

WASHINGTON, DC - More and more we have been reading of American workers being exposed at their places of employment to hazardous materials. Asbestos, kepone, polychlorinated biphenyl (pcb's), and polyvinyl chloride, are but a few of the more publicized materials that can and have caused occupational disease among American workers.

A particular tragedy in this situation is that working men and women for the most part are not even aware of the risk they are taking in handling such materials at their places of employment. In light of this frightening situation, I've asked the Occupational Safety and Health Administration (OSHA) to order employers to post the generic names of chemicals used so employees would know if they were working with substances hazardous to their health.

An extensive survey of occupational hazards has found that one out of every four Americans is exposed to some substance while at work that is thought to cause death or disease -- often cancer. The study pointed out that about 70 per cent of the substances found during the survey were identified by trade names rather than chemical composition.

Thus, neither the employer nor the employee in many cases are/ aware of potential hazard. Employees have the right to know what chemicals they are handling and if they are risking their health.

In addition, a new National Cancer Institute report shows an increase in skin, lung and nasal cavity cancer among residents of Gloucester County as well as in 33 counties nationwide, where oil refining is a major industry. Moreover, the highest incidence of bladder cancer in the United States is found in Salem County -- dense with chemical and petrochemical plants.

We are dealing with people's lives. OSHA should concentrate its efforts in dealing with major health problems such as this, rather than the picayune problems for which that agency has become famous. OSHA has a responsibility of providing the working man and woman with a safe workplace.

(MORE)

During hearings in 1975, the National Institute for Occupational Safety and Health (NIOSH) submitted data to the House Government Operations Subcommittee. That data noted that its National Hazard Survey of 5,200 plants found that workers were exposed to 95,000 different trade name products. At 90 per cent of the worksites they had no knowledge of what chemicals the trade name product contained. Moreover, of 40,500 trade name products whose composition NIOSH could determine, less than half contained chemicals regulated by OSHA.

The lives of workers are being threatened -- and they don't even know it. The workers have a right to know what they are handling so they can deal with the risks involved. Maybe they might want to change jobs -- or perhaps they may want to seek union or governmental action against an employer.

As a member of the House Subcommittee on Health and the Environment, I have written to OSHA Administrator Dr. Eula Bingham pointing out the hazards the working people of our nation are facedwith -- urging my request to order the posting of generic names be honored. I also plan to ask the National Insitute of Health to present a briefing for interested members of Congress on the problem.

It is my hope that through such a briefing, Congress will be made more aware of this problem which may require some remedial legislation. We should begin now to build a foundation for that.

A request from the Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH), a non-profit public interest group has my support as well. This group has asked that workplace safety regulations be increased by:

-Instructing employers to make available to employees chemical names, hazard monitoring data, personal workplace medical records, and other information necessary to evaluate the safety of substances workers may be exposed to.

-Requiring employers to post in the area of use, a summary of the harmful effects of all chemicals used.

-Obtaining regional hearings by OSHA on the proposed standard, including one in the Delaware Valley.

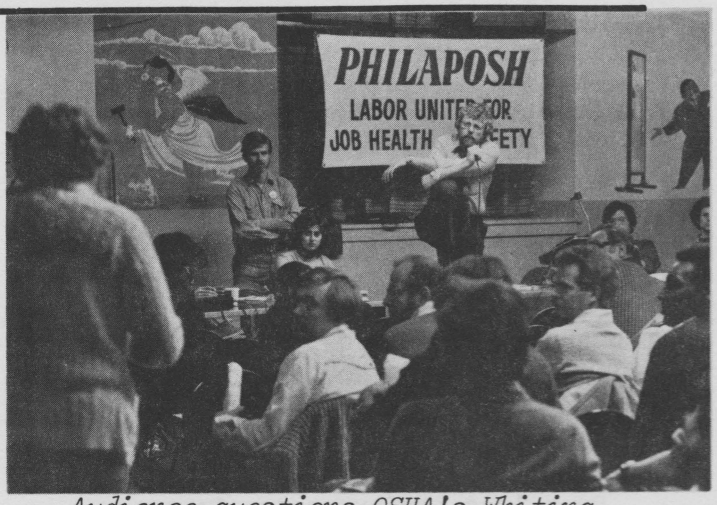
Hopefully, through actions as outlined above, we can begin to protect the American working men and women from being subjected to undue risks to their health and their well being.

an injury to one is an injury to all

SAFER TIMES

Number 9 The Philadelphia Area Project on Occupational Safety and Health January 1978

Top OSHA Aide Backs Right-to-Know



Audience questions OSHA's Whiting.

If OSHA has its way, "trade secrets" will not be exempt from the forthcoming Right-to-Know standard, according to Basil Whiting, assistant deputy secretary of the U.S. Labor Department and OSHA's number-two official.

Whiting told the 100 union members and officials at PHILAPOSH's Dec. 12 membership meeting that the proposed standard will be issued shortly and hearings will begin this spring.

The standard will require employers to keep an alphabetical list of the chemical (generic) names of all substances used in the workplaces, cross-referenced with another list of the common (trade) names of the chemicals. Employers also would be required to keep data sheets about all toxic substances and provide training and education for workers about chemical hazards.

Workers would also have access to all chemical lists, data sheets, monitoring and medical records kept by their employers.

Implementation of a strong standard will be a special victory for PHILAPOSH, which has been waging a national Right-to-Know petition campaign along with other labor coalitions in Massechusetts, Illinois, Rhode Island and North Carolina.

Whiting, a substitute speaker for OSHA director Eula Bingham, said the proposal marks the agency's "shift to common-sense priorities."

OSHA wants to keep the standard simple so it can be adopted soon, he said, hopefully within six months.

But Whiting warned of strong industrial opposition and a long court battle over the trade secrets issue, with companies arguing that if they release chemical names, competitors may benefit.

PHILAPOSH chairman Jim Moran said concern about trade secrets was "just an excuse. Manufacturers all know what is in each other's stuff anyway."

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LEE WORKERS FIGHT TO KNOW

PAGE 3

BUSINESSES ORGANIZE AGAINST INSPECTIONS

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UPDATE

TENNECO TRICKS

Don Motta, Health and Safety Committee member of Oil, Chemical and Atomic Workers Local 8-890, reports that Tenneco refuses to label its bags of polyvinyl chloride (PVC) for export from its Burlington, N.J. plant. OSHA regulations require that PVC containers say, in part, "contains vinyl chloride" and "vinyl chloride is a cancer-suspect agent." While it is unclear if the OSHA rule provides coverage, since the PVC will eventually be shipped overseas, it is evident that Tenneco is risking the health of foreign workers by refusing to label its products.

On a less serious note, Dave Koveleski, President of OCAW Local 8-716 also at Tennoco, reports that the company doctor, in judging whether Dave was fit for work after an illness, has charged him $28 for two visits. It's bad enough to have to go to a company doctor, not to mention having to pay one. Dave, of course, has refused.

POLITICS

PHILAPOSH members have met with U. S. Reps. James Florio (D-NJ), Ray Lederer (D-PA) and Michael Myers (D-PA). As a result all have endorsed the Right-to-Know campaign, as has U.S. Rep. Robert Edgar (D-PA). PHILAPOSH is also asking them to support Delaware Valley field hearings and not to accept trade secret excuses.

MUSICAL CHAIRS

In 1976 and 1977 the Philadelphia area OSHA office had eight changes in area directors. It looks like this: Sachkar to Corrigan to Sachkar to Carey to Page to Corrigan to Daly to Sachkar and now to Walt Wilson. One wonders how the office could make an effective effort with such a turnover. Walt Wilson's phone number is 597-4955. The number stays the same even if the faces change.

CRIMINALS AT WORK

Warner-Lambert Co. and four of its executives were indicted on charges of reckless manslaughter and criminally negligent homicide in connection with a fatal explosion and fire at a Queens [N.Y.] chewing gum factory last Nov.

Six workers died when an explosion believed to be caused by chemical dust roared through the company's American Chicle Co. plant Nov. 21, 1976.

Queens District Attorney John J. Santucci said that the grand jury found that explosive magnesium stearate powder, used as a lubricant in the manufacturing process, was allowed to accumulate in an area where Freshen-Up gum was being made.

The indictment said the company and its officials failed to take remedial action despite complaints from supervisory personnel and notification from an insurance company about the problem.--Wall Street Journal

" It's an emergency, Doc... They need the drill right away..."

WELCOME SPONSORS

United Auto Workers Local 918 (Ford Motor Parts, Pennsauken, N.J.),
United Electrical Workers Local 159 (Cutler Metals, Camden, N.J.),
Burlington County, N.J. AFL-CIO Council.

Lee Workers Fight To Know !

The problem is clear: among the compounds used by the tire industry are some chemicals known to cause cancer and others under investigation as cancer producing. The major tire companies acknowledged as much in 1970 when they agreed to a union demand to finance university research into the dangers.

But at Lee Tire in Conshohocken, Pa., employees concerned with the hazards must work amid chemical drums whose labels have been replaced by classified company codes. Plant officials are shaken by the idea of workers having any control over this damaging information.

Two years ago the local safety committee of United Rubber Workers Local 785, began pressuring the company for chemical data. The struggle that ensued for the union is instructive for all of us in the Right-to-Know campaign. As well as exposing managerial paternalism, the Local's fight has pointed up inadequacies in the grievance and arbitration procedure and the bureaucratic process surrounding OSHA.

In response to the safety committee Goodyear Tires, Lee's parent company, instructed the plant to provide no generic names of chemicals. The safety committee filed a grievance in February 1976. The process was painfully slow. The Local resubmitted the grievance that May. A hearing before an arbitrator was not held until the following March. By then the union had tried unsuccessfully to win a clause in the 1976 contract negotiations giving them the right to generic names.

When the hearing was held, the union found an arbitrator reluctant to force the information from Lee. The URW attorney argued that without the chemical names, the safety committee could not do an adequate job on the plant's health and safety committee. He argued that under the contract's recognition clause, the union has the right to generic names so it can present intelligent demands to improve working conditions. "If the union is not permitted to know the chemicals to which its members are exposed," the attorney argued, "how can the union determine to know if the company is complying with its contract mandate to make reasonable provision for the safety and health of employees?"

The company, which had brought in a corporate lawyer for the hearing, expressed fears of "possible damage claims against the company." It also spoke of "possible misuse and misinformation" of their "trade secrets," and exclaimed "certain things cannot be done without the prior written approval of the company."

Although arbitrators have upheld union grievances in similar cases elsewhere, not so here. The company's claim that the contract gave the union no explicit right to generic names was upheld; the Local had lost.

Meanwhile, a separate complaint had been filed with OSHA about working conditions at Lee. The OSHA inspector was quick to discover the company's intransigence. She described a "running battle" with management to learn the generic names during her inspection a year ago. Some names were provided in a piecemeal fashion, but when OSHA requested all the

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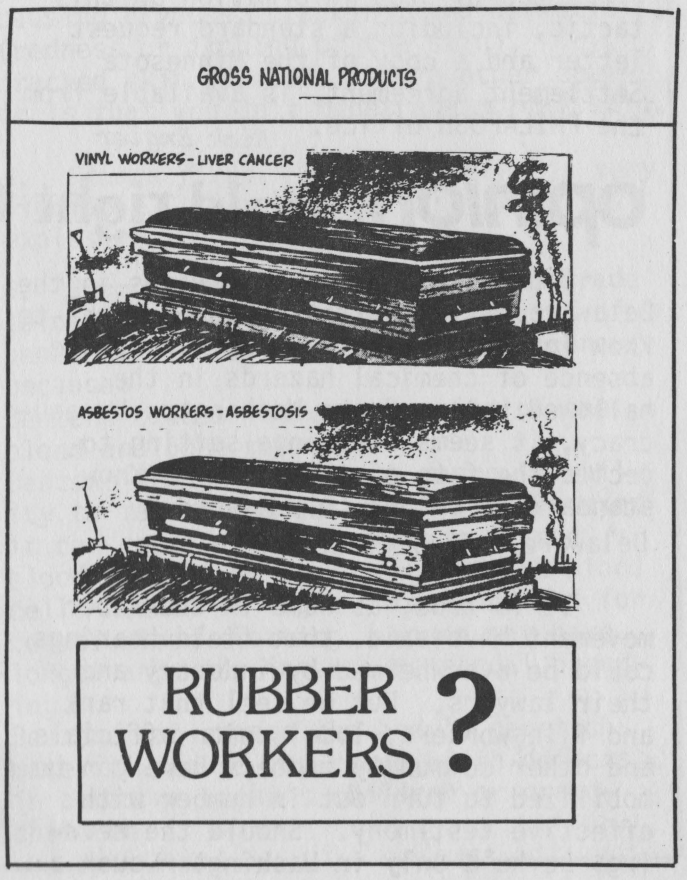


OCAW Wins NLRB Suit

A recent NLRB-supervised settlement agreement between Oil, Chemical and Atomic Workers Local 6-528 and Consolidated Printing Ink of St. Paul, Minn. sets a precedent that can help us win Right-to-Know information.

Under the National Labor Relations Act, the employer's duty to bargain in good faith requires supplying upon request information necessary to allow the union to bargain intelligently and effectively about wages, hours and working conditions. Thus, if companies refuse to provide lists of chemicals and toxicity, and monitoring and medical data after a formal union request letter is submitted, unfair labor practice charges can be filed with the NLRB. By filing such a charge, the Minnesota OCAW local won a list of generic names of all chemicals used, all monitoring results, engineering control and exhaust system data, and an industry noise-level survey performed on similar machinery.

Step-by-step information on this tactic, including a standard request letter and a copy of the Minnesota Settlement agreement, is available from the PHILAPOSH office.

Rick Engler

Workers have a right to know the identity of the substances they work with. Code names prevent this.

opinion/ hold right-to-know hearings here

OSHA should conduct hearings in the Delaware Valley on the proposed Right-to Know (or labeling) standard. With the absence of chemical hazards in the hallowed halls of the Washington bureaucracy, it seems a strange setting to decide the fate of the Right-to-Know standard so desperately needed by Delaware Valley workers.

It is true, as some in the labor movement have said, that field hearings could be overwhelmed by industry and their lawyers. But we feel that rank and file workers, local union officials and other community members here can be mobilized to turn out in number with effective testimony. Should the hearings be held only in Washington such a turnout would be unlikely, since workers would have to take at least one day off from work to attend.

The Delaware Valley has been labeled cancer alley due to the high concentration of industry, especially chemical and oil, and the resulting high cancer mortality rate. The people who live and work in the community *must* be afforded ample opportunity to be heard on the Right-to-Know issue.

It is of the utmost urgency that each of us write to OSHA director Eula Bingham today so that it becomes clear to OSHA that we want Right to Know hearings in Philadelphia. Dr. Bingham's address is Dept. of Labor, 200 Constitution Avenue, N.W., Washington, D.C.

Jim Moran

TOLUENE

Toluene is also called toluol or methyl benzene.

Toluene is a widely used "organic solvent"--it dissolves things that don't dissolve in water. It is used as a cleaning agent and is also part of paints, printing ink, lacquers, and other materials. Some of these many not even say on the label that they contain toluene.

HOW IT HARMS THE BODY

There are 5 main dangers from toluene exposure.

1. *Affects the brain.* Toluene drugs the brain like a powerful narcotic. It causes symptoms similar to those of getting drunk. The severity of symptoms increases with the amount of exposure. 200 parts of toluene per million parts of air (200p.p.m.) can cause:

- muscle weakness
- confusion
- repeated headache
- difficulty of the eyes adjusting to light
- nausea
- clumsiness
- tingling feeling in skin

After effects (such as a worker might have at home after exposure) include:

- fatigue
- general confusion
- difficulty falling asleep

600 to 800 p.p.m. of toluene can also cause:

- staggering
- nervousness

Thousands of p.p.m. of toluene has caused coma and death.

2. *Causes accidents.* Because toluene can severely affect a worker's judgement and coordination, he or she is much more prone to accidents.

3. *Irritates the skin.* Toluene is irritating to the skin, eyes, and upper respiratory tract. Repeated or lengthy contact with liquid toluene will remove the natural fatty substances of the skin, causing dryness, cracking, and dermatitis, (redness or itching of the skin). Dry, cracked skin can also absorb other chemicals that wouldn't penetrate normal skin.

4. *Causes fires.* Liquid toluene is very flammable. Toluene vapor in the air is explosive.

5. *Benzene Poisoning.* Industrial grade toluene contains significant amounts of benzene. Benzene is extremely dangerous because:
Benzene causes leukemia (cancer of the blood and bone marrow).
Benzene destroys the bone marrow's ability to make blood cells. For both sexes it can cause anemia (shortage of red blood cells) and a shortage of the blood cells needed to fight infections and for normal blood clotting. Women may have longer and more intense menstrual bleeding.
Benzene can damage the body's genetic material and so may cause birth defects in a man or woman's children or grandchildren.

HOW TOLUENE ENTERS YOUR BODY

Exposure most often occurs by breathing air that is contaminated with toluene. In the lungs the inhaled toluene is rapidly absorbed into the bloodstream. Toluene can also enter the body through normal skin (and through irritated skin too). The greater the concentration of liquid toluene, the more is absorbed.

HOW TO DETECT TOLUENE EXPOSURE

Smell--not reliable. Although toluene has an odor at the legal limit level, the nose quickly loses its ability to smell it, so the warning value is gone.

Air Sampling. Air at the breathing level can be sampled and analyzed for toluene. The National Institute of Occupational Safety and Health (NIOSH) recommends that workers be exposed to: no more than 100 p.p.m. toluene (the time weighted average concentration for a normal 8 hour workday) and at no time to more than 200 p.p.m. toluene ceiling. However, the Occupational Safety and Health Administration (OSHA) standard of enforcement is 200p.p.m. time-weighted average and 500 p.p.m. ceiling.

Urine testing. The body turns toluene into a by-product chemical (hippuric acid). Urine can be collected at the end of a shift and analyzed for the amount of this by-product. *Note: A routine urinanalysis does <u>not</u> test for this by-product. A special test must be requested.*

HOW TO PREVENT TOLUENE EXPOSURE

Work with toluene should be done only in an area where there is adequate local exhaust ventilation. A local exhaust system consists of a hood close to the work area to suck in the contaminated air, ducts to carry it away, a fan, and an aircleaning device to purify the air before it is vented outside.

General room ventilation is almost useless for controlling solvent vapors. Respirators should not be used as a regular means of protection from solvents. If a respirator is occasionally used it must have an activated charcoal canister (color coded black).

Gloves should be worn to prevent skin contact. It is important that the selected gloves be resistant to toluene and have a cotton lining to absorb sweat.

This factsheet was produced by the PHILAPOSH Health/Technical Committee. For more information, contact the Philadelphia Area Project on Occupational Safety and Health, Room 607, 1321 Arch Street, Phila., Pa. 19107 215-568-5188

PLEASE POST

Put Safety in Your Contract

A Workshop and Discussion

This free educational is about contract language for safety and health and the process of winning it. A panel of Delaware Valley trade unionists will discuss their experiences, Topics covered include language on rights to refuse work, non-discrimination, access to information, prohibition of speed-up, hazard notification, medical exams, and safety committee procedures. There will be written materials to take back and a chance to relate your experience.

Monday, Feb. 6, 1978

7:30 pm

Amalgamated Clothing Workers Hall

2115 South Street, Philadelphia (take South St. Exit of Schyukill Expressway).

Free Parking Adjacent. Refreshments.

This program is sponsored by the SHOP COMMITTEE of the PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY & HEALTH (PHILAPOSH). For more information about health, safety, or PHILAPOSH, call us at (215) 568-5188.

TOOLBOX

Rate Retention

We should remember the importance of rate retention. This policy provides that workers who suffer from accidents and diseases bear no additional economic burden from layoff, demotion, or from loss of benefits after being transferred to another job.

OSHA is considering incorporating a rate retention provision in the lead standard. But until a general standard is implemented protecting workers from arbitrary transfer or demotion, a contract clause should be negotiated with language suggested as follows: "No medical finding shall be the basis for demotion to a lower-paying job category or less seniority. Any employee transferred to another job because of medical findings shall be paid at his or her regular previous rate of pay and all regularly paid benefits shall also accrue."

Winning such a clause can pressure the company to clean up the hazardous work area rather than to expose more people.

We are interested in reporting union experience with rate retention in future *Safer Times*. *Rick Engler*

Walkaround Pay

On Sept. 20 OSHA published a new regulation (29 CFR 1977.21) which requires all employers to pay employees for time spent accompanying OSHA investigators on workplace walkaround inspections and in opening and closing conferences. Participation of worker representatives in these walkarounds is necessary to guarantee that health and safety violations are brought to the attention of the OSHA inspectors.

Any worker not paid for walkaround time should immediately file a section 11 (c) discrimination complaint with the local OSHA office. According to OSHA, three Delaware Valley companies have so far refused to pay for walkaround time.

As expected, the Chamber of Commerce has gone to court in an attempt to prevent OSHA from enforcing the new regulation. If past court decisions on walkaround pay are a guide, we can anticipate the court will say that the new rule violates the OSHA law because the law makes no specific provision requiring employers to pay.

The one sure way to guarantee pay for walkaround time is to include a provision to that effect in the contract. *Jerry Balter*

KNOW YOUR RIGHTS TO WORKERS COMP.

The present rate of weekly Workmen's Compensation Benefits is 2/3 of your gross pay or $199, whichever is lower. In New Jersey, the rate is 2/3 of gross pay or $138, whichever is lower.

If you have any injury or disease that was caused or aggravated by work, you are entitled to Workmen's Compensation benefits. Most of us realize that if we injure ourselves at work we can receive Workmen's Compensation benefits. But the cut hand, the back injury due to a fall, and the pulled muscle caused by lifting over 100 pounds represent a small part of the injuries covered by the Workmen's Compensation Act. When we are doing our regular job in a normal way and pull a muscle or hurt ourselves in any way, we are entitled to receive Workmen's Compensation benefits.

Any injury to body or mind caused in whole or part by your job is covered by Workmen's Compensation. By cause we mean a case where the job is but one of the causes.

Remember, if you suspect that you have an occupational disease, that disease must be diagnosed by a doctor. A doctor can only diagnose occupational diseases if he/she receives a full and complete history from you.

The Workmen's Compensation Act gives you certain rights to receive benefits. But it's up to you to see that your rights are enforced. *Joe Lurie*

Business Organizes Against OSHA

The Occupational Safety and Health Act authorizes OSHA to make unannounced inspections at workplaces throughout the nation. Unfortunately, a number of courts have ruled that this indispensible provision is unconstitutional. The U.S. Supreme Court will hear arguments on the issue this month.

Though workers have found OSHA to be little more than a paper tiger, some business interests are determined to destroy OSHA completely. Ferrol Barlow, a member of the John Birch Society, who has refused OSHA inspection of his own manufacturing plant in Idaho, is leading the campaign to end all OSHA inspections.

Lined up in support of Barlow is the National Chamber of Commerce, the American Farm Bureau Federation, the National Federation of Independent Business and the American Conservative Union's STOP OSHA Project. STOP OSHA has already raised $200,000 from U.S. businessmen, all of whom had been found guilty of violating health and safety standards. The AFL-CIO has submitted a brief to the Supreme Court opposing Barlow and his supporters.

Barlow contends that unannounced inspections violate the constitutional provision against unreasonable searches. He argues, in effect, that an employer's factory is the equivalent of the employer's home, ignoring that the factory is the place where workers live and die during their hours of employment. It is the workers who must demand unobstructed OSHA inspections.

Jerry Balter

LEE WORKERS FIGHT TO KNOW

continued from page 3

names, management refused.

Following pressure from Local 785 and PHILAPOSH, OSHA officials served an administrative subpoena on Lee Tire ordering a list of generic names. The company countered with an offer to provide the names if OSHA allowed no other federal agency to examine the information. OSHA rejected the offer, but did pursue the subpoena.

There the matter rested until Dec. 19, when OSHA, following more PHILAPOSH pressure, served a second subpoena ordering Lee to disclose the names by Jan. 4. Lee again refused, and OSHA asked the Labor Department solicitor to get a federal court order compelling the company to act.

OSHA regional director David Rhone told *Safer Times* that OSHA has never taken such a step here, and said he does not know how soon the matter may be resolved.

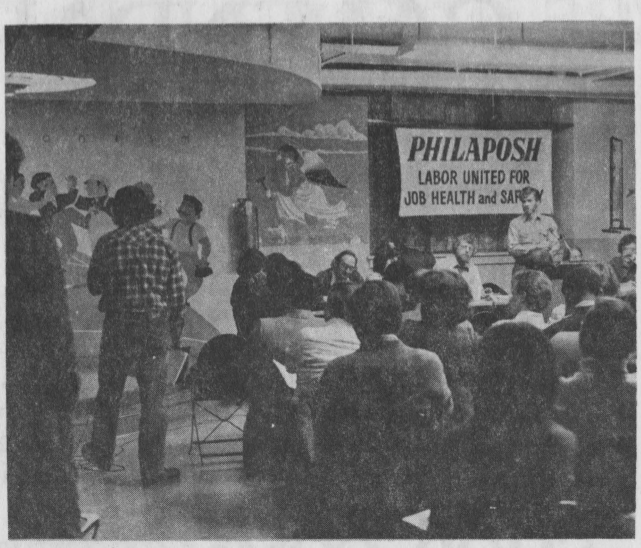
Lee officials refused to discuss the situation with *Safer Times*.

The entire struggle could have been avoided had OSHA implemented its proposed standard to force companies to provide workers with generic names and safety data. Such a right-to-know standard may be implemented by this spring, but is has been several years in the making.

Despite the frustrations, commitment remains firm. The union says scores of Lee workers have signed PHILAPOSH's Right-to-Know petition. At the District 7 convention in September, a rank-and-file delegation helped win the URW International's endorsement of the petition and involved several other locals in the campaign.

John Windfelder, one of the leaders of the local's effort, says the campaign has inspired the International. "It builds their spirits to know of interest back at the factory. They hate to think that the guy who works with this stuff doesn't give a damn til it's too late. Here the activity is coming from the bottom up. That's the way a union should function."

Jim Rensen



John Windfelder, United Rubber Workers Local 785, questions OSHA's Basil Whiting.

continued from page 1

One way to gain workers their right to know even before a standard is implemented is to give them quality literature during regular OSHA inspections. But Kathleen O'Leary, a former OSHA inspector complained that inspectors are forbidden to hand out nongovernment literature.

Whiting and David Rhone, director of the Region 3 OSHA office, agreed that government literature is inadequate, but gave excuses why OSHA couldn't use information prepared by outside groups such as PHILAPOSH and Urban Planning Aid. When Whiting said printing costs were the main obstacle, PHILAPOSH staffer Rick Engler called out, "We use a mimeograph!"

Another concern of Right-to-Know activists is harrassment from employers, which is a violation of the Occupational Safety and Health Act. PHILAPOSH staffer Mary Aull told Whiting of Anita Reber, who was fired by Sperry-Rand Co. after she complained that ozone from a photocopying machine had made her severely ill.

Aull demanded to know why OSHA had dismissed Reber's discrimination case without questioning her about the facts. Whiting said he would investigate.

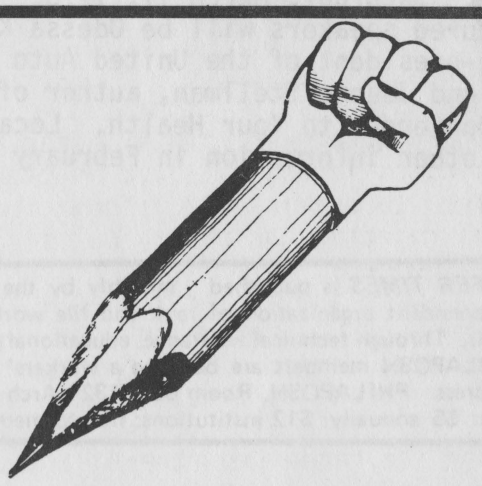
Whiting admitted that OSHA must sort out its own internal problems before it can effectively attack worker problems. "OSHA's a mess in most respects," he told the crowd, referring to the personnel and budgetary problems that have plagued the agency since its inception. "But Dr. Bingham's gonna save this agency," he said.

Many unanswered questions remain about the Right-to-Know issue:
--Will regional hearings be held?
--After the standard is adopted, what penalties will be imposed for noncompliance?
--What information will be on the chemical container labels?
--How much and what type of training will be available to workers?

Moran has led the Right-to-Know campaign by collecting petitions, meeting with elected representatives and winning support from labor, community and environmental groups. "This is not just a labor union argument," he said. "The right to know affects all of us."

The Camden Courier-Post wrote an article and editorial about the meeting. The editorial called the Right-to-Know proposal "an encouraging sign that OSHA's announced shift to 'common sense priorities' is getting off on the right foot... We cannot see how any employer truly concerned about the welfare of workers could refuse to comply."

Debby Levinson & Jim Rensen



Safer Times is coming out monthly. To accomplish this the Newsletter Committee needs your articles, story ideas, graphics, cartoons and help with layout. To help out, give the PHILAPOSH Office a call.

NOTES

Jim Moran, shop steward and founder of the health and safety committee at United Auto Workers Local 1612 (ITE-Gould) has been reelected chairperson of PHILAPOSH. Our new secretary is Anita Reber, a clerical worker. Mike Burke , secretary-treasurer of Local III of the International Union of Electrical Workers, (Westinghouse), is now treasurer. Congratulations!

We also salute Jim Moran on his ruling from a National Labor Relations Board administrative law judge which orders ITE to reinstate him. ITE must also post notices reaffirming employee rights to file complaints with OSHA, NLRB and the Equal Employment Opportunity Commission.

Safer Times contributors this issue: Jerry Balter, Rick Engler, Debby Levinson, Joe Lurie, Jim Moran, Kathleen O'Leary, Jim Rensen, Carol Rogers, Rick Solomon, and George Swift.

RESERVE THE DATE

for the PHILAPOSH and Women's Occupational Safety & Health Task Force Conference "A Women's Work Is Never Done," Saturday, March 11, 1978. Featured speakers will be Odessa Komer, Vice-president of the United Auto Workers and Jeanne Stellman, author of Work Is Dangerous to Your Health. Location and other information in February ST.

CALENDAR

TRAINING

Saturday, January 21, 1978, 10 A.M. to 2 P.M., Hahnemann Medical College, SE Corner of 15th & Vine Streets, Phila. Room 3306. This is a special training session for Health/Technical Committee members on how to work with local unions.

SHOP COMMITTEE

Monday, February 6, 1978, 7:30 P.M. Amalgamated Clothing & Textile Workers Hall, 2115 South Street, Philadelphia.

Topic: Put Safety in Your Contract (see insert flyer)

FILM

Friday, February 10, 7:30 P.M. 1199 - Hospital Workers Hall, 1317 Race Street, Philadelphia. $1.50. Refreshments.

"MODERN TIMES" by Charlie Chaplin

PHILAPOSH member Patti Blumenthal has put together a radio series "Is Your Job Killing You" on WXPN-FM (88.9). The first program is an interview with PHILAPOSH Chairman Jim Moran. The series begins Thursday, February 16 at 10 P.M.

SAFER TIMES is published monthly by the Philadelphia Area Project on Occupational Safety and Health, Inc., a non-profit, independent organization of rank and file workers, union officials, and other people with health, technical, legal and organizing skills. Through technical assistance, educational programs, and demands for the strongest possible enforcement of OSHA regulations, PHILAPOSH members are building a workers' health and safety movement in the Delaware Valley. To get involved, contact us. Address: PHILAPOSH, Room 607, 1321 Arch St., Philadelphia, Pa., 19107. Phone: (215) 568-5188. *SAFER TIMES* subscription rate: $5 annually; $12 institutions; free to members. Labor and non-profit groups may reprint without permission. Please credit

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May 1, 1978

Right To Know

Senator Harrison Williams
U. S. Senate
Washington, D. C.

Dear Senator Williams:

Enclosed is a letter sent to Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health concerning the Right to Know Campaign. It was sent to OSHA by five labor health coalitions. These include groups in Massachusetts, Chicago area, Rhode Island, North Carolina, and Philadelphia. Collectively we represent over 100 local unions active on this issue.

We are requesting that you contact Dr. Bingham about our concerns expressed in this letter and also request a progress report on the indicated issues.

Thank you for your concern with the health of working people.

Sincerely,

Jim Moran

Jim Moran
Right to Know Campaign
Coordinator

This letter is written on behalf of:

The Chicago Area Committee on Occupational Safety and Health
The North Carolina Occupational Safety and Health Project
The Massachusetts Coalition on Occupational Safety and Health
The Rhode Island Committee on Occupational Safety and Health
The Philadelphia Area Project on Occupational Safety and Health

May 1, 1978

Dr. Eula Bingham
Assistant Secretary of Labor for Occupational Safety & Health
United States Department of Labor
200 Constitution Avenue, N. W.
Washington, D. C. 20210

Dear Dr. Bingham:

As you know from our meeting with you last November, five labor health coalitions from across the country, representing over 100 local unions active on this issue, are conducting a "Right to Know" ~~Campaign~~ to encourage OSHA to issue a new standard guaranteeing worker rights to generic name, toxicity, monitoring, and medical information as well as labelling of potential health hazards in the workplace. This Campaign has included petition drives within unions, community, and environmental organizations, meetings with Congresspersons, and other activities.

While we applaud your Administration's efforts in a number of areas, including the proposed cancer policy and the worker training program, we are disappointed in the sluggish handling of the proposed chemical identification standard of which a draft was issued last fall.

We understand that certain technical issues are being reconsidered and that you may have been constrained by economic impact requirements. Still, there is little excuse for why the access to monitoring and medical records component has not yet been proposed as promised. We request that this access rule be issued immediately.

We also request a detailed, written timetable for the further development of the chemical identification standard. We have heard the date June 1 mentioned as its date of issueance, but based on past experience have little reason to expect this occurence by that time. The report on the status of the standard should include, but not be limited to, a current draft and a description of the amount of staff support given to this project. We also would like to finally know, after many Congressional and labor requests, your position on Regional field hearings and in which cities they may occur.

This letter might not have been necessary had it not been for the failure of Grover Wrenn of the Office of Standards to communicate with us. With one exception, he has consistently failed to accept or return our phone calls or make any other effort to inform us of OSHA activities on this issue. Mr. Wrenn strikes us as all too insulated from labor and community accountability. Please discuss his behavior with him.

We consider the Right to Know issue as important as the current concern with the cancer policy. Once issued, a strong Right to Know standard, combined with access provisions, will have an enormous positive impact on worker efforts for safety and health. Immediate action is required.

Sincerely,

Dave Snapp (Jim M.)
Dave Snapp
Rhode Island Committee on OS&H

Jim Moran
Jim Moran
Philadelphia Project on OS&H

over

Dorothea Manuela (y.4.)

Dorothea Manuela
Massachusetts Coalition on
Occupational Safety & Health

David Simmons (y.4.)

David Simmons
Chicago Area Committee on
Occupational Safety & Health

Jane Diamond (y. 4.)

Jane Diamond
North Carolina Occupational
Safety and Health Project

cc: Senator Harrison Williams
Kenneth Barry, Bureau of National Affairs
Joe Velasquez, OSHA
Grover Wrenn, OSHA

PLEASE ADDRESS YOUR REPLY TO:

Jim Moran
Coordinator
Right to Know Campaign
Room 607 1321 Arch Street
Philadelphia, Pa. 19107

REYNOLDS METALS COMPANY

Review Commission Decision

SECRETARY OF LABOR, Complainant v. REYNOLDS METALS COMPANY, Respondent, OSAHRC Docket No. 4385, June 14, 1978.

Daniel W. Teehan, San Francisco, Cal., for complainant.

John R. Amos, Richmond, Va., for respondent.

Review Commission Judge Jerry Mitchell.

Before Cleary, Chairman, and Barnako, Commissioner.

Limits Re Trade Secrets

REVIEW COMMISSION PROCEDURE

1. Law of the Case—Outside Expert for Discovery ►50.70 ►50.45

Review Commission's decision in *Reynolds Metals Company*, 3 OSHC 1749 (1975), limiting Secretary under certain circumstances to use of federal expert for discovery, is law of the case and precludes Secretary's argument upon second review by Commission that limitation to use of federal expert can never be proper.

TRADE SECRETS

2. Discovery—Federal v. Private Expert ►37.01 ►50.45 ►50.305

Question of whether employer has trade secrets that might be revealed if nonfederal expert is allowed to conduct discovery inspection is remanded to Review Commission judge for hearing, with burden on employer to establish existence of trade secrets.

DISCOVERY

3. Federal v. Private Expert—Good Cause ►37.01 ►50.45 ►50.305

Question of whether Secretary has established good cause for use of nonfederal expert to conduct discovery inspection is remanded to Review Commission judge for specific factual findings, with direction that Secretary be permitted to use any expert of his choice if good cause is shown.

Full Text of Decision

BARNAKO, Commissioner:

This case is again before the Commission following Judge Jerry Mitchell's order dismissing a complaint and vacating a citation

which charged Reynolds with a failure to utilize feasible engineering or administrative controls to reduce noise levels to within the limits permitted by 29 C.F.R. §1910.95. Previously, this case was before the Commission on interlocutory appeal of the Judge's order denying the Secretary's motion for discovery through entry upon land. At that time a divided Commission held that although the Secretary was entitled to discovery, he should be restricted to the use of Federal experts to conduct the discovery inspection because Reynolds asserted it had trade secrets which might be revealed if the inspection was conducted by an outside expert and because the Secretary had not shown good cause why it was necessary to use outside experts. *Reynolds Metals Co.*, 3 BNA OSHC 1749, 1975-76 CCH OSHD para. 20,214 (No. 4385, 1975) ("*Reynolds I*"). For the reasons that follow we again remand for further proceedings consistent with this opinion.

This case has had a protracted history involving a dispute over the Secretary's prehearing attempt to discover information relevant to the allegedly excessive noise levels at Reynolds' Haywood, California can manufacturing facility. A representative of the Secretary inspected the Haywood plant in July, 1973. In August, 1973, the Secretary issued Reynolds a citation alleging a failure to comply with the noise standard, §1910.95(b)(1),[1] at five locations in its plant. Following Reynolds' timely notice contesting the citation and its subsequent refusal to allow discovery by entry upon land, the Secretary moved to allow entry by one or more outside experts into Reynolds's plant, for the purpose of discovering facts regarding whether feasible engineering controls exist to reduce noise in the plant.[2]

The thrust of the Secretary's motion was that he was entitled to discovery as a matter of right. He argued that Rule 34 of the Federal Rules of Civil Procedure authorized the requested discovery through Commission Rule of Procedure 2200.2(b). Supra note 2. He further contended that the information sought was relevant to the subject matter of the action and that he was not required to show good cause in order to obtain discovery. The Secretary argued that nothing in the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.*, "the Act") or in the Fourth Amendment precluded discovery. Next, he alleged that Reynolds failed to specify how the requested discovery would, as it contended, constitute a burdensome and oppressive intrusion. Finally, the Secretary noted that Reynolds had available a remedy under Rule 26(c) of the Federal Rules of Civil Procedure which it had not sought. That is, for good cause shown, it could have sought a protective order against what it considered burdensome or oppressive aspects of any discovery request.

Reynolds opposed the motion on the grounds that 1) the discovery request was an unlawful attempt to conduct a post-citation inspection of Reynolds' plant; 2) the Act did not permit witnesses to enter Reynolds' workplace; 3) the Commission's Rules of Procedure did not permit the requested discovery; 4) the discovery request was broad, vague, and ambiguous and accordingly violated the Act; 5) the discovery request established that the citation was improperly issued; and 6) inasmuch as Reynolds has a proprietary interest in its machinery, the discovery request violated Reynolds' rights under §15 of the Act which provides for protecting the confidentiality of trade secrets. Infra note 4.

Judge Mitchell denied the Secretary's motion in its entirety. He also refused to certify the case for interlocutory appeal.

[1] Section 1910.95(b)(1) states:

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16 entitled "Permissible Noise Exposures" includes the following:

Duration per day, hours	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1½	102
1	105
½	110
¼	115

[2] The Commission's Rules of Procedure do not cover discovery by entry upon land, and the discovery rules of the Federal Rules of Civil Procedure therefore apply. 29 C.F.R. §2200.2(b). *See* Reynolds Metals Co., 3 BNA OSHC at 1750. Fed. R. Civ. P. 34, in pertinent part, states:

(a) *Scope.* Any party may serve on any other party a request . . . to permit entry upon designated land or other property in possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. . . .

Fed. R. Civ. P. 37, in pertinent part, states:

(a) *Motion for Order Compelling Discovery.* . . .

(2) *Motion* . . . if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, the discovering party may move for . . . an order compelling inspection in accordance with the request.

Pursuant to Commission Rule 2(b) the Secretary then petitioned the Commission for special permission to appeal the denial of his discovery request.

In his petition for special permission to appeal the Secretary continued to expend the majority of his efforts maintaining that he had an unbridled right to the requested discovery. However, he also noted that Reynolds had raised before Judge Mitchell the question of protecting its alleged proprietary interests. The Secretary commented that Reynolds nevertheless did not claim that trade secrets were involved. In addition, the Secretary alleged that Reynolds had not attempted to make any showing by way of affidavit or sworn testimony to the effect that trade secrets were involved.

The Commission granted interlocutory appeal and the proceedings were stayed pending the Commission's disposition of the appeal. In granting the appeal we ordered that Reynolds could have an opportunity to file a statement in opposition to the Secretary's meorandum in support of his request for special permission to appeal. The Secretary filed nothing further and we also denied his subsequent request to respond to Reynolds' statement in opposition.

In its statement in opposition Reynolds continued to argue primarily that the Secretary had no right to the requested discovery. It did submit, however, an affidavit of its vice-president and general manager of Reynolds' can division which stated that Reynolds was a pioneer in the development of aluminum cans and that its present market position depended on keeping its processes secret.

As noted above, the Commission, in *Reynolds I*, granted the Secretary's motion subject to his use of Federal employees rather than outside experts to conduct the discovery inspection. In doing so I stated in the lead opinion my belief that the Secretary could locate a qualified Federal expert in noise control who, as a Federal employee, would be subject to the sanctions of 18 U.S.C. §1905 for the unlawful disclosure of confidential information.[3] The case was then remanded for further proceedings.

Following the remand the Judge entered an order granting the Secretary's motion for entry upon Reynolds' land but limiting entry to a Federal employee. Pursuant to the Commission decision in *Reynolds I* and the Judge's order, the Secretary conducted a search of 26 Federal agencies for a qualified noise expert and reported to Judge Mitchell that he could find no available Federal expert equivalent in education and experience to the average outside expert he had previously used. The Secretary thereupon moved that the Judge permit the use of outside experts to conduct the discovery inspection. The Judge refused to vacate his previous order limiting entry to a Federal employee and dismissed the case upon the Secretary's statement that he was therefore unable to proceed. The Secretary thereafter petitioned for review and review was granted.

In his brief on review of the Judge's order dismissing the citation and complaint the Secretary concedes that Judge Mitchell was bound by *Reynolds I* and had no alternative to dismiss the case upon the Secretary's contention that he was unable to proceed under the terms of that decision. However, the thrust of the Secretary's contentions have now shifted from the question of his right to inspect to the issue of the manner of inspection where trade secrets have been alleged. While not questioning the legitimacy of Reynolds' proprietary interest claim, the Secretary now contends that any restriction on discovery cannot be based upon a mere unsupported assertion that trade secrets exist. He argues that Reynolds, as the party requesting discovery limitations on the grounds of trade secrets, has the burden of establishing their existence. And in order to meet this burden the Secretary contends that Reynolds must introduce specific facts which establish that the information sought actually involves trade secrets. Furthermore, he argues that the Commission erred in requiring the Secretary to show good cause as to why he should not be limited to using a Federal expert to conduct the inspection. The Secretary contends that, assuming trade secrets are intertwined with information sought in discovery, the trade secrets privilege must yield if, on balance, the Commission determines that the competing interests at stake in the litigation do not justify the withholding of information. The protection of workers from excessive noise, the Secretary asserts, outweighs Reynolds' interest in protecting its trade secrets, and the use of the best available expert to conduct the discovery inspection is essential to enable the Secretary to prove a complex noise case and thereby secure abatement of a noise violation. In any event, the Secretary argues that even if trade secrets exist that warrant protection, the proper safeguard is

[3] 18 U.S.C. §1905 provides for criminal sanctions for any Federal employee who makes unauthorized disclosures of trade secrets of which he learns in the course of his employment.

an order binding an outside expert to confidentiality, not a Federal employee restriction. Finally, the Secretary contends that, even if §15 of the Act[4] authorized the Commission to impose a Federal employee restriction, such a restriction is unreasonable in this case because a survey of Federal agencies indicates a qualified Federal noise expert is unavailable.

Based on the foregoing arguments, the Secretary requests that the case be remanded in order for Reynolds to make a proper showing on its trade secrets claim and, if sustained, for the Judge to then issue an appropriate order allowing the discovery inspection to be conducted by an outside expert but binding the outside expert to confidentiality.

In its review brief urging affirmance Reynolds argues that the only issue is whether, following the Secretary's refusal to proceed, the Judge abused his discretion by dismissing the case. In Reynolds' view it is the law of the case that the Secretary must use a Federal employee to conduct any discovery inspection. Therefore, according to Reynolds, when the Secretary stated he could not proceed under this limitation, the Judge properly dismissed the case. Reynolds also contends that the Secretary cannot now dispute the existence of trade secrets because he failed to raise the issue of their existence either before the Judge or when the case was on interlocutory review before the Commission. Reynolds argues that, in any event, in *Reynolds I* the Commission made the required factual findings, including that Reynolds had trade secrets to protect, and properly balanced the competing interests of the parties. Finally, Reynolds alleges that the Secretary did not make a bona fide attempt to locate a qualified Federal noise expert and therefore did not establish that he was unable to locate such an expert. Reynolds therefore requests that if a second remand is ordered the Commission require the Secretary to prove that he is unable to obtain a qualified Federal employee.

I note initially that the parties disagree as to the issues before the Commission. The Secretary argues that the Commission erred as a matter of law in imposing a Federal employee restriction, but that, assuming such a restriction can ever be proper, it is unjustified in this case because Reynolds has not proved the existence of valid trade secrets and because a diligent search has revealed that a qualified federal expert is unavailable. Reynolds argues that these issues can no longer be litigated and that the only issue is whether the Judge correctly dismissed the complaint upon the Secretary's refusal to proceed in accordance with *Reynolds I*.

[1] In *Reynolds I* the Commission held that, as a matter of law, the Secretary is limited to the use of a Federal employee to conduct a discovery inspection if inspection by an outside expert would endanger the employer's trade secrets and if the Secretary failed to show good cause why it was necessary to use an outside expert. That holding is the law of the case and I therefore reject the Secretary's argument that limiting him to the use of a Federal employee to conduct a discovery inspection can never be proper.

However, contrary to Reynolds' contentions, there are two as yet unresolved issues in this case. The first is whether Reynolds has established the existence of trade secrets.

When *Reynolds I* was decided, Reynolds had placed in the record the affidavit that it had trade secrets a discovery inspection might reveal, and the Act places on the Commission the duty of protecting trade secrets from disclosure. Supra note 4. Therefore, having decided that the Secretary had the right to a discovery inspection, the Commission could not ignore the issue presented by Reynolds' claim of trade secrets. Since the Secretary did not question the existence of trade secrets at the time of *Reynolds I*, we issued a protective order based on the record as it existed at that time.

I agree with the Secretary that, as the party seeking to limit discovery on trade secret grounds, Reynolds has the burden of establishing their existence. Fed. R. Civ. P. 26(c).[5] *See, e.g., Davis v. Romney,*

[4]Section 15 of the Act provides, in part:
. . . In any such proceeding which contains or which might reveal a trade secret the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.
Rule 11 of the Commission's Rules of Procedure, 29 C.F.R. §2200.11(a), in essence parallels §15 of the Act. Rule 26(c) of the Federal Rules of Civil Procedure, *infra* note 6, provides the court with authority to order, under certain circumstances, that discovery be conducted with no one present except persons designated by the court. Fed. R. Civ. P. 26(c)(5). This rule applies to the Commission's proceedings. *Supra* note 2.

[5]Fed. R. Civ. P. 26(c) in part, states:
Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . , the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way: . . . .

55 F.R.D. 337, 340 (E.D. Pa. 1972). However, I reject the Secretary's argument that an affidavit, without more, is an insufficient basis upon which to find that Reynolds possesses trade secrets. Placing this matter in proper perspective, I emphasize that at issue here is a dispute over a pre-hearing discovery motion. And at least at this preliminary stage of the case, it is entirely proper to rely on an uncontroverted affidavit to establish the existence of trade secrets for purposes of a discovery limitation under Rule 26(c). Fed. R. Civ. P. 44(e). *See Israel Aircraft Industries, Ltd. v. Standard Precision,* 559 F.2d 203 (2nd Cir. 1977); *Covey Oil Co. v. Continental Oil Co.,* 340 F.2d 993 (10th Cir. 1965). Consequently, I would normally find that, based on the record as it now exists, Reynolds possesses the necessary trade secrets and that any objection as to their existence is untimely because the Secretary failed to raise the argument prior to our decision in *Reynolds I*.

However, this case is unique both in its procedural history and in its establishment of new legal principles. In the beginning, the question of trade secrets was secondary to the Secretary's right to obtain discovery inspections. However our decision in *Reynolds I* brought the trade secrets issue to the forefront. By placing on the Secretary the duty of finding qualified Federal experts in order to protect trade secrets, we gave the issue of trade secrets added significance. As a result of that decision, the Secretary may not be able to rely upon orders of confidentiality to protect trade secrets. Moreover, instead of using private experts, he must find Federal experts. Although I expressed the limitation in terms of being "confident" the Secretary could locate a qualified Federal expert, the Secretary claims such a task is impossible. Yet failure in this regard may lead to dismissal. Hence whether trade secrets actually exist may become crucial to the ability of the Secretary to proceed. Accordingly, our decision in *Reynolds I* placed the entire issue of trade secrets in a different context. Because the effect trade secrets have on a discovery inspection was an issue of first impression before the Commission and the parties did not fully address the issue prior to *Reynolds I*, I hold that the parties should have the opportunity to relitigate the trade secrets issue and will remand for a hearing on whether Reynolds has the requisite trade secrets. *Cf. Gross Steel and Aluminum Co.,* 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD para. 20,690 (No. 12775, 1976); *Anning-Johnson Co.,* 76 OSAHRC 54/A2, 4 BNA OSHC 1193, 1975-76 CCH OSHD para. 20,690 (No. 3694, 1976).

The second issue yet to be resolved involves the Federal employee restriction. Again, Reynolds contends that our earlier decision is unequivocal in requiring that the Secretary use only Federal employees to conduct the discovery inspection. As noted above, however, I expressed that limitation in terms of being "confident" the Secretary could locate a qualified Federal expert. Thus, our decision did not go so far as to preclude the Secretary from showing good cause why a nonfederal employee must be used, i.e. that a qualified Federal expert was unavailable.

Even accepting Reynolds' position that *Reynolds I* unequivocally required a Federal employee to conduct the discovery inspection, I would nevertheless be constrained to also reconsider the discovery limitation issue in light of the intervening circumstance of the Secretary's alleged inability to locate a Federal expert. *See Brennan v. OSAHRC (John J. Gordon),* 492 F.2d 1027 [1 OSHC 1580] (2nd Cir. 1974); *Faircrest Site Opposition Committee v. Levi,* 418 F. Supp. 1099 (N.D. Ohio 1976); *cf. Placid Oil Co. v. FPC,* 483 F.2d 880 (5th Cir. 1973), *Bookman v. U.S.,* 453 F.2d 1263 (Ct. Cl. 1972).

[2] Accordingly, I am remanding to the Judge for factual findings on the threshold question of whether Reynolds has trade secrets which a discovery inspection would endanger, and on the secondary question of whether the Secretary has shown good cause for using a nonfederal expert. On the issue of whether Reynolds has the requisite trade secrets, the burden is upon Reynolds to establish their existence. If the Judge, after making specific factual findings on the matter, finds that Reynolds has not shown that trade secrets exist, the Secretary is to be granted permission to conduct discovery using any expert he chooses. The second question therefore need not be reached.

[3] If the Judge finds that trade secrets do exist, and after allowing for the introduction of additional evidence, he is to make specific factual findings on whether the Secretary has established good cause for the use of a nonfederal expert. If the Secretary shows good cause, he shall be permitted to use any expert of his choice. If he is unable to establish good cause, the Secretary shall be limited to using a Federal employee to conduct any discovery inspection.

Also, in the event the Judge finds that

trade secrets exist, he is to protect their confidentiality by issuing any such additional orders as may be appropriate, in accordance with our earlier decision in this case and Rule 11 of the Commission's Rules of Procedure.

Accordingly, the case is remanded for further proceedings consistent with this decision.

Concurring Opinion

CLEARY, Chairman, concurring:

This case demonstrates why *Reynolds I* should be reexamined in the near future. Nevertheless, I concur in the result because *Reynolds I* is controlling here.

Commissioner COTTINE took no part in the consideration or decision of this case for the reasons set forth in his separate opinion.

[Ed. note: For Commissioner Cottine's separate opinion, see *Perini Corporation*, 6 OSHC 1609 (1978).]

EASTERN AIR LINES, INC.

Review Commission Final Order

SECRETARY OF LABOR, Complainant v. EASTERN AIR LINES, INC., Respondent, OSAHRC Docket No. 77-734, April 17, 1978.

Edward B. Gaines, Atlanta, Ga., for complainant.

David M. Brown, Atlanta, Ga., for respondent.

Review Commisison Judge James D. Burroughs.

GENERAL DUTY CLAUSE

1. Inflation of Tire and Wheel Assemblies—Use of Tire Cage—"Recognized Hazard" ►118.107

Evidence that employer's failure to provide or require use of tire cage during inflation of tire and wheel assembly to 130 p.s.i. did not pose hazard to employees and was not "recognized hazard" in aircraft maintenance industry requires vacation of citation alleging serious violation of Section 5(a)(1) of Occupational Safety and Health Act.

2. Guardrails on Loading Belts—Failure to Provide—Penalty Assessment ►118.106 ►120.08

Employer's failure to provide guardrails on loading belt used by employees to gain ingress and egress to and from luggage and cargo compartment of aircraft constitutes violation of section 5(a)(1) of Occupational Safety and Health Act, but employer's recognition of need for such guardrails and attempts to provide guardrails that would fit loading belts requires vacation of proposed $420 penalty.

FIRST AID

3. Quick Drenching Facilities—Distance From Work Area ►200.18

Evidence that employees who worked in area where corrosive materials were used had to follow circuitous path that led through electronically operated door to get to quick drenching facilities requires affirmance of citation alleging serious violation of 29 CFR 1910.151(c), which requires that such facilities be located within work area.

Digest of Judge's Report

[Digest] An inspection of the employer's facilities at Hartsfield International Airport in Atlanta, Ga., resulted in the issuance of citations alleging three serious violations of occupational safety and health standards.

[1] For failing to furnish and require employee use of a tire inflation cage when inflating a tire and wheel assembly to 130 p.s.i., the employer was alleged to have violated section 5(a)(1) of the Occupational Safety and Health Act. The basic issue posed by the allegation was whether failure to use tire cages during tire inflation was a "recognized" hazard within the aircraft maintenance industry. The Secretary sought to show that such a hazard was recognized in that the U.S. Air Force and several other commercial airlines used tire cages when inflating tires above the 130 p.s.i. However, the secretary failed to establish that the circumstances under which the Air Force and the other airlines used tire cages were similar to ones in which the employer was cited. Therefore, there was no industry recognition of the cited hazard. The evidence showed that the employer conducted thorough tests and procedures before, during and after its inflation of tire and wheel assemblies and that such procedures were approved by the Federal Aviation Administration as being safe. In addition, there was no evidence that any accident had ever occurred in the employer's facility related to tire and wheel assembly inflation. It was concluded, therefore, that the cited procedure for inflation of tires to 130 p.s.i. did not pose a hazard to the employer's workers. The citation was vacated.

[2] The employer's failure to provide guardrails on loading belts used by employees to enter and leave the luggage and cargo section of an aircraft was cited as a serious violation of the Occupational Safety and Health Act. The employer admitted the violation but contested the proposed $420 penalty. The employer had at one time maintained guardrails on the loading belts but removed them when it was discovered that such guardrails presented a potential for causing finger amputations and crushed hands. Other available guardrails were not found to fit the employer's loading belts, and the evidence showed that the employer had initiated engineering efforts to have manufactured guardrails that would fit its loading belts. These circumstances, including the employer's recognition of the need for such guardrails, justified vacation of the proposed penalty for the affirmed violation.

[3] For failure to have quick drenching facilities for flushing of eyes and body in work areas where employees worked with corrosive materials, the employer was alleged to have violated 29 CFR 1910.151(c). The employer contended that it was in compliance with the standard despite the fact that in order to reach the employer's quick drenching facilities, employees had to follow a circuitous path that led through a electronically operated door that was closed on the day of the inspection. The standard, which does not state what distance the eye and body flushing facilities must be from a given work area, requires that such facilities be placed within the work area. The evidence justified a conclusion that the employer's flushing facilities were not located within the cited work areas and a $210 penalty was assessed.

55th STREET TAXI GARAGE, INC.

Review Commission Final Order

SECRETARY OF LABOR, Complainant v. 55th STREET TAXI GARAGE, INC., Respondent, OSAHRC Docket No. 77-1865, April 26, 1978.

Peter van Schaick, New York, N.Y., for complainant.

George Echelman, President, 55th Street Taxi Garage, Inc., New York, N.Y., for respondent.

Review Commission Judge Edward V. Alfieri.

PENALTY ASSESSMENT

1. Abatement—Violation History ►120.131 ►120.301

Employer's steps toward abatement of serious violations and history of no previous violations justify reduction of $1,000 proposed penalty to $500.

MEANS OF EGRESS

2. Overhead Doors—Exit Access Specifications ►200.081

Overhead roll-type garage doors, incorporating swing-type doors less than 28 inches wide for use when overhead doors are closed, do not comply with specifications set forth at 29 CFR 1910.37(f)(2) and (6); therefore, egress requirements of 29 CFR 1910.36(b)(1) are not satisfied.

Digest of Judge's Report

[Digest] Inspection of the employer's garage in New York City resulted in a citation alleging serious violations of 29 CFR 1910.252(d)(2)(vi)(*c*) (arc welding performed in presence of explosive materials), 1910.252(b)(4)(ix)(*c*) (electrode lead cable with damaged insulation or exposed bare conductor), and 1910.252(e)(2)(iii) (no screen or shield provided for arc welding operation). A $1,000 penalty was proposed. A total of $680 in penalties was proposed for various contested items of a nonserious citation. At the hearing, the employer withdrew his challenge to all but one of the charges—an allegation of nonserious violation of 29 CFR 1910.36(b)(1) (failure to provide sufficient emergency exits). The appropriateness of all the penalties remained in issue.

(1) With respect to the citation for serious violations, a credit for good faith was now justified because acts of abatement had taken place. Because as many as 300 persons were employed, no credit was given for small size. The Secretary failed to consider the employer's history of no previous violations, and a credit for that history was therefore allowed. A penalty of $500 was assessed instead of the $1,500 proposed.

[2] The employer also demonstrated good faith by abating the nonserious violations. A total penalty of $375 was assessed instead of the $680 proposed. This included a $130 penalty for the one item that the employer contested. In addition to a door at the northwest corner, the taxi garage had three roll-type overhead garage doors on the north side. Within each was a swing-type door for use when the overhead door was

U.S. DEPARTMENT OF LABOR
OFFICE OF THE REGIONAL SOLICITOR
3535 MARKET STREET, ROOM 14480
PHILADELPHIA, PENNSYLVANIA 19104
215-596-1126

July 11, 1978

Mr. Rich Engler
Philadelphia Area Project on Occupational
Safety and Health
Room 607 - 1321 Arch Street
Philadelphia, PA 19107

Re: Marshall v. Lee Tire & Rubber Company
USDC ED Pa., Misc. No. 78-223, Region III, SOL NO. 2366

Dear Mr. Engler:

As requested during our telephone conversation of July 10, 1978, attached is a copy of Judge Van Artsdalen's Order dated April 27, 1978 and entered on May 1, 1978.

Very truly yours,

Marshall H. Harris
Regional Solicitor

Enclosure
SOL:MJR:ksr

Right To Know

Ltr to provide OSHA w/ generic names & flow diagrams. But OSHA to protect trade secrets from T.O.F.

Briefs & Orders for ECPC files

used in the production of tires at the Lee facility indicating

PHILAPOSH/Philadelphia Area Project on Occupational Safety and Health

Room 607 1321 Arch Street Philadelphia, Pa. 19107 (215) 568-5188

CONTACT: Rick Engler
Associate Director
215 568-5188

FOR IMMEDIATE RELEASE: Philadelphia, Pa., July 19, 1978.

PHILAPOSH CLAIMS INITIAL VICTORY IN RIGHT TO KNOW CAMPAIGN

The Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) has praised the U. S. Occupational Safety and Health Administration (OSHA) for proposing new rules that would, if implemented, finally guarantee to workers access to vital job health and safety information that has been previously denied to them by industry. The proposed rules, which will be published in the Federal Register 43FR 31371 on Friday, July 21, 1978, will give workers the right of access to personal company held medical records and data indicating the nature of hazardous exposures in the workplace (such as company records showing amounts of chemical carcinogens in workplace air). In the Delaware Valley, companies such as DuPont, Lee Tire, and Mobil Oil have refused to make this information available to workers or their union representatives, thus keeping working people in the dark about risks to their health or even their lives.

Calling the OSHA proposal "A major initial victory for the workers' right to know about the hazards of the workplace environment," PHILAPOSH Chairperson Jim Moran says he "credits this win to the coalition of Delaware Valley union locals, environmental groups, and community organizations, that in cooperation with four similar coalitions in other states, has pressured OSHA for this rule over the last year." A list of these local and regional organizations is attached.

PHILAPOSH, a coalition of 35 union locals in the Delaware Valley, has coordinated both regional efforts and the national coalition. Right to Know Campaign efforts

in the Delaware Valley have included petition gathering, obtaining Congressional endorsements, mass letter writing to OSHA, and public meetings with OSHA officials.

Moran adds that "An industry counterattack is inevitable. No doubt OSHA will be flooded by adverse management reactions claiming that this life protecting proposal will cost too much. Business, as usual, will attempt to delay, water down, and if possible nullify implementation of the proposal through court action."

Moran states further that the Right to Know Campaign "will continue until a final 'access' rule is issued and effectively enforced and that additionally a rule is issued guaranteeing workers the right to know from employers the generic names (not trade names) of workplace substances and the health effects of these substances."

oooooooooo

Information about the details of the proposal may be obtained from:

Cathy Scott
Press Office
Occupational Safety and Health Administration (OSHA), USDOL
202 523-8151

PHILAPOSH, the Philadelphia Area Project on Occupational Safety and Health, is a coalition of 35 unions in the Delaware Valley and health and legal professionals. PHILAPOSH provides technical assistance and educational programs to workers facing job health hazards. We also work for effective enforcement of the Occupational Safety and Health Act. We began in 1975.

Attachments

PARTICIPATING ORGANIZATIONS - THE RIGHT TO KNOW COALITION

National

Chicago Area Committee on Occupational Safety & Health
Massachusetts Coalition on Occupational Safety and Health
North Carolina Occupational Safety and Health Project
Rhode Island Committee on Occupational Safety and Health
Philadelphia Area Project on Occupational Safety and Health

Delaware Valley

All unions listed in the enclosed yellow brochure about PHILAPOSH are Coalition participants with the addition of:

Oil, Chemical, and Atomic Workers Union Local 8-743
Oil, Chemical, and Atomic Workers Union Local 8-5770
United Glass and Ceramic Workers Local 482
Distributive Workers, District 65, Local 95

Also:

United Auto Workers Region 9
Friends of the Earth
Sierra Club (New Jersey Chapter and West Jersey Group)
League for Conservation Legislation
Delaware-Raritan Lung Association
N.J. Conservation Foundation
N.J. Citizens for Clean Air
N.J. Public Interest Research Group
Council of Jewish Women - Cancer Task Force
HOPE (Help Our Polluted Environment)
WISH (Will I Stay Healthy?)
Central Jersey Lung Association
Princeton Center for Alternative Futures
Stony-Brook Millstone Watershed Association
The Philadelphia Council of Neighborhood Organizations (includes 135 groups).

A number of Delaware Valley Senators and Congressman have also endorsed the Campaign.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[29 CFR Part 1910]
[Docket H-112]

ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS

Proposed Rule

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This proposed rule on access to employee exposure records and employee medical records would implement OSHA's policy under the Occupational Safety and Health Act of 1970 that employees have the basic right to know about their exposures to workplace hazards and the effects of exposure. The proposed rule includes requirements for the retention of these records for the duration of employment plus five (5) years and for the availability of these records to employees, former employees, their designated representatives, and to OSHA and NIOSH. When promulgated, the proposed rule will supersede the interim rule requiring preservation of employee exposure records and employee medical records which was effective July 19 (43 FR).

DATES: Comments must be submitted on or before September 22, 1978.

ADDRESS: Comments should be sent to: Docket Officer, Docket No. H-112, Room S-6212, U. S. Department of Labor, Third Street and Constitution Avenue, N. W., Washington, D. C. 20210 (202-523-7895).

Proposed 29 CFR 1910.20
29 CFR 1910.20
See 43 FR 31371
July 21, 1978

FOR FURTHER INFORMATION CONTACT: Mr. David Welsh, Directorate of Health Standards Programs, Room N-3663, U. S. Department of Labor, Third and Constitution Avenue, N. W., Washington, D. C. 20210 (202-523-7174).

FOR ADDITIONAL COPIES CONTACT: Publications Office, OSHA, Room N-3423, U. S. Department of Labor, Third Street and Constitution Avenue, N. W., Washington, D. C. 20210 (202-523-8677).

SUPPLEMENTARY INFORMATION:

Background and Legal Authority

The American labor force numbers about 100 million workers, many of them exposed to toxic materials or harmful physical agents in their workplaces. Millions of these workers are unaware of the hazards posed by these exposures. However, data exist in employee exposure records and employee medical records which will increase the employees' recognition of these hazards in their workplaces.

This proposed rule is being issued in cooperation with the Department of Health, Education, and Welfare. Its purpose is to provide the affected employees and their designated representatives, as well as OSHA and NIOSH, with access to this important safety and health information. The goals of occupational safety and health are not adequately served if employers do not fully share the available information on toxic materials and harmful physical agents with employees. Until now, lack of this information has too often meant that occupational diseases and methods for reducing exposures have been ignored and employees have been unable to protect themselves or obtain adequate protection from their employers. By giving employees and their designated representatives the right to see relevant exposure and medical information, this proposal will make it easier for employees to identify worksite hazards, particularly workplace exposures which impair their health or functional capacity. Increased awareness of workplace hazards will also make it more likely that prescribed work and personal hygiene practices will be followed.

The Assistant Secretary has previously stated OSHA's policy concerning employee's rights to this type of information:

> The Act's declared objectives and specific implementing provisions demonstrate the importance of providing employees with full and complete information about safety and health conditions at their worksite.... Moreover, [the need for] employee access to this information is reinforced by the limited resources of OSHA to inspect worksites for hazards and to impose abatement requirements when violations are found. (42 FR 55623, October 18, 1977).

In carrying forward this policy, OSHA relies specifically upon the authority of sections 8(c) and 8(g) of the Act (29 U.S.C. 657). In addition, many other provisions in the Act, including sections 6(b)(7), 8(e), 9(b) and 13(c), also support OSHA's authority to implement the employee's basic right to know about workplace hazards.

Section 8(c)(1) authorizes OSHA, in cooperation with the Department of Health, Education, and Welfare, to require each employer to "make, keep, and preserve records regarding his activities relating to the Act... as [are] necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses."

Section 8(c)(3) authorizes regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured by a particular OSHA safety and health standard, and also to "make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents."

Authority for this proposed rule is also found in section 8(g) of the Act. Section 8(g)(1) authorizes OSHA and NIOSH to compile, analyze, and publish, either in summary or in detailed form, all reports or information obtained under section 8. In addition, section 8(g)(2) authorizes OSHA and NIOSH to prescribe such rules and regulations as they deem necessary to carry out their responsibilities under the Act.

This proposed rule thus implements the mandate of section 8 and the general mandate of other provisions of the Act by requiring employers to preserve employee exposure and medical records and to make them available to employees, former employees, their designated representatives, and OSHA and NIOSH.

Discussion of the Proposed Rule

Scope and Application

The proposed rule applies to each employer in general industry, maritime, or construction, who makes, maintains, or has access to employee exposure records or employee medical records. The term "record", as used in this proposed rule, is intended to cover any recorded information regardless of its physical form or character. These records may have been maintained by the employer as a result of exposure monitoring or medical surveillance programs initiated by the employer, or the records may have been required by a specific OSHA standard. To come within the scope of this proposed rule, the records do not have to be within the employer's physical control as long as the employer has access to them. The concept of employer access encompasses situations in which any of the employer's officers, employees, agents or contractors (including the corporate medical department) has physical control or access to records, even though they are not generally available to all officers, employees, agents and contractors.

The proposed rule does not mandate the creation of new records or reports, nor impose any independent obligation on employers to monitor or measure employee exposures or to provide medical surveillance or examinations. In addition, the proposed rule does not establish mandatory requirements as to exposure records or medical records or specify their format. Instead, the proposed rule reflects a recognition

that monitoring and medical surveillance are conducted by many employers at their own initiative and that employers retain information concerning the results of this monitoring and medical surveillance. This rule would simply require an employer who makes these records to retain them for specified periods of time and to make them available upon request to employees, former employees, their designated representatives, and to OSHA and NIOSH.

The proposed rule is intended to establish the rights of access under the Act to all employee exposure and employee medical records, whether or not these records are the subject of specific occupational safety and health standards. On the other hand, as explained below, the retention periods of specific standards will continue to apply. At the time of final promulgation, OSHA will make the necessary conforming amendments to current OSHA standards such as those in Subparts T and Z of Part 1910 so that their access provisions will be identical to this rule.

For the purpose of this proposed rule, "employee exposure records" are monitoring or measuring records which contain qualitative or quantitative information that is indicative of employee exposure to toxic materials or harmful physical agents. These records would include determinations of airborne concentrations of chemicals to which an employee is exposed, or would be exposed if not wearing a respirator. They would also include determinations of physical agents within the workplace environment which might impair an employee's health or functional capacity, for example, records of heat, noise, radiation, vibration, or hypo- or hyperbaric (i.e. nonatmospheric) pressure.

Records of area sampling of workplace contaminant levels and representative or random employee sampling are covered by this definition. If a record contains information which is useful to determine employee exposure, the record would be covered by this rule even though the record was not created for occupational health purposes.

An "employee medical record" is a record concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents. This record would include, but is not limited to: (1) the results of medical examinations and tests, (2) any opinions or recommendations of a physician or other health professional (such as a nurse or a medical technician) concerning the health of an employee or employees, and (3) any employee medical complaints relating to workplace exposure.

Both individual exposure and medical records and general research or statistical studies based on information collected from exposure and medical records are included within these definitions. The information in these records is necessary to determine employee exposure to toxic materials or harmful physical agents and the effects of these exposures.

The proposal therefore includes basically common-sense, broad definitions of employee exposure records and medical records which would be subject to disclosure. These records, however, may in fact contain a collection of different kinds of information of varying significance to occupational safety and health. Medical records in particular may

include a multiplicity of information. These include personal and family information to identify the person who is subject of the record, medical histories including family medical histories, medical complaints of the employee, chemical test data (including x-rays and laboratory reports), diagnostic evaluations, records of treatments and prescriptions, and recommendations to the employee and management regarding the employee's condition. Miscellaneous information in the records may include written consents to medical examinations or procedures, referrals for medical service, consulting physicians' medical reports, refusals of medical service, notices of need for medical attention, releases of medical information, and immunization records.

While most of the information in the records will have been volunteered by the employee-patient or obtained by direct examination or observation by the physician, some may have been provided confidentially by third parties (e.g. management, spouses, personal physicians). While all of the information in the records presumably relates to the employee's health status, some may be general in nature and irrelevant to occupational exposure or medical fitness to perform work. Moreover, some of the information may be in the nature of preliminary, informal or subjective notes by the physician which the physician considers to be of possible aid in future diagnoses but have no present

diagnostic value. It is noteworthy that in many well conducted corporate medical programs, only the physician's opinion or recommendations as to the employee's condition or medical fitness to work is available to management, and that the confidentiality of much of the remainder of the records, including the underlying diagnostic data, is maintained by the physician.

Accordingly, OSHA invites comments on whether any types of information in the medical records should be excluded from the disclosure requirements of the final rule. For instance, should the employer (i.e. medical department) have discretion to disclose certain kinds of information (i.e. diagnoses of psychological impairments or terminal illnesses) only to the employee's designated physician? Should physicians' notes of a preliminary, informal, or subjective nature which have not formed the basis of a recommendation or opinion to management be mandatorily disclosable? Should the identities of third parties who have provided information in the medical record be mandatorily disclosable? Should diagnostic records or other kinds of information not available to management be mandatorily disclosable? Should general studies based on information contained in individual exposure or medical records be mandatorily disclosable?

Preservation of Records

Employers will be required to preserve records covered by this proposed rule for at least the duration of the employee's employment in the employer's workplace plus an additional 5 years after the termination of employment. The purpose of this proposed rule is to ensure that affected employees and federal occupational health agencies have access to pertinent exposure and medical records. Relating the retention period to the length of the individual's employment plus a specified period thereafter (i.e. 5 years) is an appropriate means of accomplishing this purpose. There may be situations where this retention period may be longer than absolutely necessary, and others where it is too short to ensure the preservation of the record throughout the latency period of an occupational illness arising from an earlier exposure to toxic materials. OSHA believes that the general retention period of this proposed rule strikes a reasonable balance between these two situations.

Nevertheless, because it recognizes that the longer the retention period, the greater the risk of infringement upon employees' privacy interests and the greater the administrative burden on employers, OSHA invites comments on whether a lesser or longer period should be adopted in the final rule for some or all kinds of records covered by the regulation. Comments are also invited on whether there should be a provision, such as those in specific OSHA standards, for the transfer of record if an employer goes out of business.

Specific recordkeeping requirements have been established by individual OSHA standards based on the specific occupational hazard or illness involved, for example, the commercial diving standard (29 CFR 1910. 401 et seq.), the vinyl chloride standard (29 CFR 1910.1017) and the coke oven emissions standard (29 CFR 1910.1029). Under this proposal, the retention periods of specific OSHA standards would continue to apply to the affected records or portions of the record. This approach is considered appropriate because the retention periods in these specific standards were based on rulemaking evidence of the particular consequences of employee exposure to the toxic material or harmful physical agent (e.g. cancer).

Availability of Records

The proposed rule requires that the employer make employee exposure and medical records available, upon request, for examination and copying. These records bear directly on the employees' exposures to toxic materials and harmful physical agents. For the reasons stated above, access to this information is vital to the identification, treatment, and prevention of occupational illnesses.

Under the proposed rule, employees, former employees and their designated representatives are provided equivalent rights to examine and copy employee exposure records and medical records. (Since employees and former employees are treated alike in this rule, any reference in this preamble or rule to employees includes former employees). This proposal does not provide a limiting definition of "designated representative." Rather, a designated representative could be anyone to whom an employee has given written permission to act on his or her behalf to obtain direct access to his or her records. For instance, a collective bargaining agent, physician, attorney, family member, fellow employee, or anyone else, could be a designated representative, provided the necessary consent were obtained. Access to employee exposure records and medical records by designated representatives is necessary so they can assist the employees they represent in making effective use of their records and in securing their rights under the OSHA Act.

With regard to employee exposure records, employees, former employees, and their designated representatives would have the right to examine and copy all relevant employee exposure records. For the purposes of this proposed rule, "relevant" exposure records encompass records of past, present, and potential exposures, including records of an employee's own exposures, exposure records of other employees with related or comparable exposures, and records containing general exposure information concerning the employee's workplace or working conditions. Thus, an employee and his or her designated representative would be entitled to exposure information that is indicative not only of the employee's current exposures, but also information regarding former exposures and future or potential exposures as well (e.g., exposure information concerning a different workplace or job where an employee may be transferred).

As for employee medical records, employees, former employees, and their designated representatives would have the right to examine and copy only those records of which the employee is the subject or for which written consent has been obtained from the subject employee. Contrary to common industry practice, the proposal places no conditions on the employee's right to gain direct access to his or her own medical records, since the employee should have the option of being as fully informed about his or her health status as the employer's medical department. While OSHA recognizes the importance of having a professionally trained person to interpret and explain the information

contained in the records, and indeed provides for direct access by designated representatives in this proposal, it believes that the benefits of direct employee access outweigh the risk that the employee may misinterpret the information to his or her detriment. Of course, consistently with this proposal, the corporate physician could explain the contents and significance of the medical record in addition to releasing it to the employee or designated representative). At the same time, there may be circumstances where disclosure of information directly to the employee would be damaging. Thus, as previously stated, OSHA invites comments on whether the employer (i.e. medical department) should have discretion to disclose certain kinds of information (e.g. diagnoses of psychological impairments or terminal illnesses) only to the employee's designated physician.

In the absence of written consent, however, this proposal does not provided an employee or designated representative with access to medical records of other employees with related or comparable exposures. OSHA recognizes that these records could be important sources of information to a treating physician, industrial hygienist, epidemiologist or other health researcher. Nevertheless, because of the often personal nature of information contained in medical records and the importance of encouraging candor between patient and physician, it believes that the privacy interest of an individual in his or her medical records must be paramount. Therefore, OSHA belives that written consent must be obtained from the subject employee before access can be gained to that employee's medical records.

This proposal on the availability of employee exposure records and medical records raises several important questions. In particular, OSHA invites comments on the desirability of broadening access to the health information in employee medical records by providing either for the removal of personal identifiers from the records of those employees who have not given written consent, or for making available the essential information only in summary or statistical form. By removing identifying information, it may be possible to protect the privacy of the individuals involved, since the records would then be essentially anonymous, and at the same time to further the occupational health purposes of this rule by making highly relevant medical data more available than would be true under the current proposal. A subsidiary question is whether such broadened access of "anonymous records" should be limited to physicians, industrial hygienists, epidemiologists, and/or other health researchers who represent employees either individually or on behalf of a collective bargaining agent, on the grounds that these health professionals have the professional training and responsibility to respect the confidentiality of sensitive information and to use the information for appropriate health purposes. Comments are also welcome on the question of which categories of personal and family data (e.g., age, sex, race, height, weight, job title, place of residence, social security or payroll numbers) should be removed as personal identifiers to protect the privacy of the employee, and which are necessary to the conduct of valid health and epidemiology studies.

This proposal on the availability of employee exposure records and medical records raises several important questions. In particular, OSHA invites comments on the desirability of broadening access to the health information in employee medical records by providing either for the removal of personal identifiers from the records of those employees who have not given written consent, or for making available the essential information only in summary or statistical form. By removing identifying information, it may be possible to protect the privacy of the individuals involved, since the records would then be essentially anonymous, and at the same time to further the occupational health purposes of this rule by making highly relevant medical data more available than would be true under the current proposal. A subsidiary question is whether such broadened access of "anonymous records" should be limited to physicians, industrial hygienists, epidemiologists, and/or other health researchers who represent employees either individually or on behalf of a collective bargaining agent, on the grounds that these health professionals have the professional training and responsibility to respect the confidentiality of sensitive information and to use the information for appropriate health purposes. Comments are also welcome on the question of which categories of personal and family data (e.g., age, sex, race, height, weight, job title, place of residence, social security or payroll numbers) should be removed as personal identifiers to protect the privacy of the employee, and which are necessary to the conduct of valid health and epidemiology studies.

Finally, in addition to employees, former employees, and designated representatives, the proposed rule makes the covered records available to authorized employees of OSHA and NIOSH for examination and copying, upon their request. This is consistent with sections 8(c)(1) and 8(g)(1) of the Act and other OSHA standards and is necessary for the agencies to carry out their enforcement, investigatory, research and rulemaking functions.

Instruction of Employees

The proposed rule would require the employer to inform employees at least annually of the existence, location and availability of records covered by the rule and to inform them of their rights of access to these records. Employee awareness of their rights under this rule is essential to the fulfillment of its purpose. This requirement therefore will help to make meaningful the rights given to employees by this proposed rule.

Public Participation

Interested persons are invited to submit comments, views and arguments on any issue raised by this proposed rule. These comments must be submitted on or before September 22, 1978, in quadruplicate, to the Docket Officer, Docket No. H-112, Room S-6212, U.S. Department of Labor, Third Street and Constitution Avenue N.W., Washington, D. C. 20210 (202-523-7895). They will be available for public inspection and copying at the above address and will be carefully evaluated and considered by OSHA before it promulgates the final rule.

Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Room S-2315, Third Street and Constitution Ave., N.W., Washington, D. C. 20210 (202-523-9261).

Accordingly, pursuant to sections 8 (c)(1), 8 (c)(3), and 8(g) of the Occupational Safety and Health Act of 1970 (84 Stat. 1599, 1600; 29 U.S.C. 657) and Secretary of Labor's Order No. 8-76 (41 FR 25059), and in accordance with 5 U.S.C. 553, it is proposed to amend 29 CFR Part 1910 by revising §1910.20 to read as follows:

§1910.20 Preservation and access to records.

(a) Scope and application. This section applies to each employer who makes, maintains or has access to employee exposure records or employee medical records, whether or not the records are subject to specific occupational safety and health standards.

(b) Definitions. "Employee exposure record" means a record of monitoring or measuring which contains qualitative or quantitative information indicative of employee exposures to toxic materials or harmful physical agents. This includes both individual exposure records and general research or statistical studies based on information collected from individual records.

"Employee medical record" means a record which contains information concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents. These records may include, but are not limited to:

(1) The results of medical examinations and tests;

(2) Any opinions or recommendations of a physician or other health professional concerning the health of an employee or employees; and

(3) Any employee medical complaints relating to workplace exposure.

Employee medical records include both individual medical records and general research or statistical studies based on information collected from medical records.

(c) Preservation of records. Each employer who makes, maintains, or has access to employee exposure records or employee medical records shall preserve and retain them for at least the duration of the affected employee's employment with the employer plus five (5) years, except where a specific occupational safety and health standard provides a different retention period.

(d) Availability of records. (1) General. The employer shall, upon request, make the records covered by this section available for examination and copying in accordance with the requirements of this paragraph.

(2) Employees, former employees and designated representatives. The employer shall make available to each employee, former employee, or a designated representative, (i) all relevant employee exposure records, and (ii) employee medical records of which the employee or former employee is the subject or for which written consent has been obtained from the subject employee or former employee. For the purposes of this rule, relevant employee exposure records include records of the employee's or former employee's own exposures, exposure records of other

employees or former employees with related or comparable exposures, and records containing general exposure information concerning the employee's or former employee's workplace or working conditions. In addition to records of current exposures, exposure records of past and potential exposures are included in the records which must be made available.

(3) OSHA and NIOSH. The employer shall make available to the Assistant Secretary of Labor, U.S. Department of Labor, the Director of the National Institute for Occupational Safety and Health, and their designees, all employee exposure and medical records.

(e) Instruction of employees. The employer shall inform each employee at least annually of the existence, location and availability of the records covered by this section and of the rights of access to these records.

Signed at Washington, D. C. this day of 1978.

Assistant Secretary of Labor

(Sec. 8, 84 Stat. 1599, 1600 (29 U.S.C. 657); Secretary of Labor's Order No. 8-76 (41 FR 25059); Sec. 4 of the Administrative Procedure Act (5 U.S.C. 553)).

STAUGHTON LYND

LABOR & THE LAW

The right to know if your job causes cancer

An HEW report indicates that at least one in five cancer cases in the U.S. is a result of the workplace environment. Safety and health activists are trying to make exposure records available.

"In These Times" 10/3/78

IN THESE DAYS OF SUNSHINE Laws and Freedom of Information Acts, workers still struggle for the right to know what is in the company's files on them. ¶This right is especially important with regard to medical records. On Sept. 11 the Department of Health, Education and Welfare released a report indicating that a minimum of one in five cancer cases in America is apparently contracted at work. Occupational diseases with a long latency period may be possible to prevent if a worker has access to company data showing the degree to which he or she has been exposed to toxic substances.

The Philadelphia Area Project on Occupational Safety and Health (Philaposh) has been coordinating a national Right-to-Know campaign. Philaposh's objective has been an OSHA regulation requiring companies to provide access to medical records. The campaign has also involved attempts to use the grievance procedure, and the National Labor Relations Board, to achieve the same objective.

Workers at Lee Tire in Conshohocken, Pa., demanded to know the generic names of chemicals with which they must work. The company replaces the labels on chemical drums with classified company codes. Lee workers demanded the "key" to the codes.

Failing to win a contract clause in negotiations, the union filed a grievance. At arbitration the union attorney argued that without the chemical names, the safety committee could not do its job, and that the recognition clause in the contract gave the union a right to the knowledge it needed in order to do an effective job of representation. The company lawyer invoked "possible damages claims" and "trade secrets." The arbitrator ruled against the union.

An Oil, Chemical and Atomic Workers local at Consolidated Printing Ink Company in Minneapolis had better luck by making the same argument before the NLRB. The union filed a charge under Section 8(a)(5) of the National Labor Relations Act, which requires an employer to bargain in good faith. The charge alleged that without access to the generic names of chemicals used in the plant, the union could not carry out its bargaining responsibilities.

There is solid NLRB precedent requiring an employer to provide financial data necessary for effective bargaining. After seeking advice from the NLRB General Counsel in Washington, the Regional Director extended this precedent to cover the provision of the generic names of chemicals. The company thereupon agreed to provide the information.

In July of this year, after enlisting many union bodies as well as certain members of Congress, Philaposh obtained from OSHA the proposed regulation it desired concerning access to medical records.

The proposed regulation was issued on July 21 and will be found in the Federal Register at 29 CFR Part 1910 (translation: volume 29 of the Code of Federal Regulations, part 1910). Copies can be obtained from Publications Office, OSHA, Room N-3423, U.S. Dept. of Labor, Third Street and Constitution Ave., N.W., Washington, D.C. 20210 (202-523-8677). Comments must be submitted by Sept. 22. It is hoped that a final text will be officially promulgated soon afterwards. The proposed regulation applies not only to medical records but to "employee exposure records," whether these are individual exposure records or statistical studies. "Medical records" are defined to include (a) the results of medical examinations and texts, (b) any opinions or recommendations concerning the health of one or more employees by any health professionals, (c) any employee medical complaints.

Under the proposed regulation, management must maintain exposure and medical records for five years after an individual leaves its employment. Philaposh would prefer a longer period corresponding to the actual latency period of occupational diseases.

The employer is obliged to make records available for inspection and copying on request. Any designated representative may make the request. The cost of the copying must seemingly be borne by the employee, another point that could be improved.

Finally, the employer is obligated to inform the employee at least annually of the right created by the proposed regulation.

The Philaposh campaign for this regulation is in cooperation with other "cosh" groups in Chicago, Massachusetts and elsewhere. Petitions in support of the campaign are available from all such groups. The Philaposh address is Room 607, 1321 Arch Street, Philadelphia, Pa. 19107.

Knowledge, unfortunately, is not always power. But it helps. ■

Staughton Lynd, a longtime civil rights and antiwar activist, practices law in Youngstown, Ohio. Readers interested in corresponding with Lynd can write him at 1694 Timbers Ct., Niles, OH 44446.

[1978]

IT'S OUR RIGHT TO KNOW!

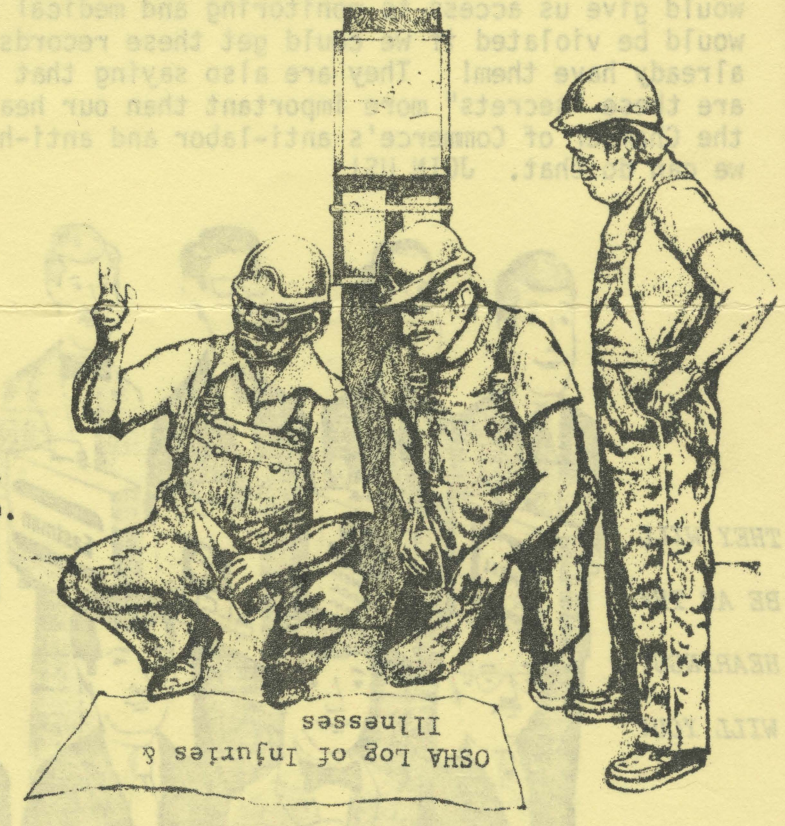
A WORKSHOP AND DISCUSSION

*How to gather important job health information in your shop using the new PHILAPOSH Hazard Evaluation Questionaire (free copies at the meeting).

*How to get data from the company using the grievance procedure, the NLRB, contract bargaining, and other tactics.

*How to use the OSHA Log of Job Related Illnesses & Injuries that you now have access to.

There will also be a discussion of the proposed new access rules from OSHA and what we can do to really win them. This will include planning for our presentation at the OSHA hearings in Washington, D. C. on December 5.



The Right to Know Campaign conducted by PHILAPOSH, unions, and similar groups across the U.S. is well into its second year. Our demands are still that the Occupational Safety and Health Administration (OSHA) issue a rule that will force employers to make available the chemical (not trade) names of all materials we work with, any data they have on our exposures to hazards, our personal medical records for our own use, and that employers post the hazards of all materials in use in the workplace.

OSHA has proposed a rule giving us access to exposure data and our medical records. This is an initial victory. But we must continue the Right to Know Campaign until all the Right to Know provisions are issued and effectively implemented.

TUES. NOV. 21 7:30 P.M.

Amalgamated Clothing Workers Hall

2115 South Street, Philadelphia (take South St. Exit of Schyukill Expressway).

Free Parking Adjacent. Refreshments.

Sponsored by PHILAPOSH, the Philadelphia Area Project on Occupational Safety & Health, Room 607, 1321 Arch St., Phila.,Pa. 19107 215 568-5188. PHILAPOSH is an action and education coalition of 35 Delaware Valley union locals, rank and file workers, and health and legal professionals fighting for all our rights to a safe and healthful workplace.

JOIN THE PICKET!

at the Greater Philadelphia Chamber of Commerce, 1617 JFK Blvd. (Suburban Station Building), Phila. Monday, November 27, 11:45 A.M. to 1:15 P.M.

The U.S. Chamber of Commerce and its local chapters led the fight against labor law reform. But they also have been fighting against our health and safety rights. They filed suit (unsuccessfully) against our right to receive pay while we accompany the OSHA inspector on the walkaround. Now they are attacking OSHA's proposed rule that would give us access to monitoring and medical records. They claim that confidentiality would be violated if we could get these records... but company personnel departments already have them! They are also saying that trade secrets will be endangered... but are these "secrets" more important than our health? Public attention must be focused on the Chamber of Commerce's anti-labor and anti-health activities. This picket is one way we can do that. JOIN US!

THEY WILL BE AT THE HEARINGS. WILL YOU?

COME TO THE HEARINGS

Monday, December 5, 9:30 AM in Washington, D.C. (Tentative Date). U.S. Department of Labor, New Auditorium, 200 Constitution Ave. N.W. Washington, D. C.

"On July 21, 1978, OSHA published a proposed rule on access to employee exposure and medical records and gave interested persons until September 22, 1978 to submit written comments. Based on the widespread interest expressed on the proposal, OSHA has decided to hold informal public hearings on the proposed rule..."

PHILAPOSH will be sending a delegation to Washington, D. C. and we encourage all Delaware Valley unionists to go with us or on their own. There will be an opportunity to question industry representatives from the floor and to talk of your own experiences.

Contact PHILAPOSH by November 10 if you would like to make a formal statement at the hearings. If you would like to be part of the PHILAPOSH delegation come to the Workshop on Tuesday Evening, November 21 or call the Office (215 568-5188).

Labor Donated

Public Citizen

FOR IMMEDIATE RELEASE
SEPTEMBER 27, 1979

FOR FURTHER INFORMATION CONTACT:
ROBERT STULBERG (HRG) (202) 872-0320
or
JIM MORAN (PhilaPOSH) (215) 568-5188
or
STEVE d'ARAZIEN (Cong. Maguire's Office)
(202) 225-4465

September 27, 1979

Dr. Eula Bingham
Assistant Secretary for Occupational
Safety and Health
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Dr. Bingham:

Three years ago today, the Public Citizen Health Research Group (HRG) and Congressman Andrew Maguire petitioned you to issue regulations requiring employers to provide employees with the generic names of all chemicals used and produced at the workplace.*/ We took that action because we firmly believed that, until workers know the hazards to which they are exposed, they cannot effectively use other legal and medical mechanisms available to protect their right to safe and healthful working conditions.

Although you welcomed our petition when you took office and, on numerous occasions since then, have strongly endorsed the principles on which the petition is based,1/ you have taken no action to implement our proposal. Indeed, since the inception of the Occupational Safety and Health Act in 1970, you and your predecessors have not proposed or issued any generic regulations which would require employers to inform their employees about the nature and extent of the various chemical hazards to which they are exposed.2/

Because working people urgently need to identify grave dangers they face on the job and because three years of petitions, letters, meetings and phone conversations have not moved you to action, we have today filed a lawsuit seeking a federal court order requiring you to implement those sections of the OSH Act which guarantee workers the "right to know" the substances they must breathe, swallow and touch every day. (see attached Complaint for Injunctive Relief and Right to Know Chronology). While we are reluctant to initiate legal action at a time when you are busily defending most of your recent health standards against the relentless legal challenges of industrial interests, regulations assuring workers' right to identify the hazards to which they are exposed are so crucial to public health that definitive action is needed.

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*/The Philadelphia Area Project on Occupational Safety and Health (PhilaPOSH) subsequently joined this effort as a co-petitioner.

As you know, the need for the regulations sought in our lawsuit has been well documented by your colleagues at the National Institute for Occupational Safety and Health (NIOSH). In an extensive survey of occupational hazards published in 1976 (which, unfortunately, according to NIOSH officials, accurately reflects the current situation),[3] NIOSH found:

* In 5,200 plants surveyed, workers were exposed to 95,000 different trade name products. At 90 percent of the plants, neither the employers nor employees knew what chemicals were contained in the trade name products.[4]

* Of 40,500 trade name products whose composition NIOSH subsequently identified, 18,000, or 45 percent, contained chemicals regulated by OSHA.[5]

* Of the 40,500 identified trade name products, 427 contained one of the carcinogens regulated by OSHA. Some of these carcinogen-containing products had formulas listed as "trade secrets" by their manufacturers.[6]

* 5,638 workers at the surveyed plants were exposed to trade name products containing carcinogens, and 2,830 of these workers were exposed to carcinogen-containing products with "trade secret" formulas.[7]

* An estimated 7.5 million workers in the general work force are exposed to one or more trade name substances discovered to contain an OSHA regulated substance.[8]

* An estimated 310,000 persons in the general work force are exposed to one or more trade name substances discovered to contain a carcinogen.[9]

When Congress passed the OSH Act, in 1970, it provided you and your predecessors with ample tools to deal with this shocking situation. Section 6(b)(7) requires that all health or safety standards prescribe labels or other warnings "to insure that employees are apprised of all hazards to which they are exposed. . ."[10] Section 8(c)(3) directs you to issue regulations requiring employers to (1) maintain accurate records of worker exposures to potentially toxic materials or harmful physical agents which are regulated by OSHA, (2) give workers an opportunity to observe monitoring or measuring of those substances (3) give workers access to the records of the monitoring or measuring, and (4) give each worker and former worker access to "such records as will indicate his [or her] exposure to toxic materials or harmful physical agents."[11] Finally, Section 8(c)(1) empowers you to issue any regulations needed to enforce the Act or develop "information regarding the causes and prevention of occupational accidents and illnesses."[12]

Despite this sweeping mandate, no generic regulations have been issued implementing these provisions. As a direct result, workers are being exposed daily to dangerous--and, in some cases, lethal--chemicals without ever knowing what hit them. If these workers had simple information about the elements in their working environment, they would be able to complain to their employers, request OSHA inspections, request preventive measures, seek medical assistance and otherwise protect themselves. Without this information, however, these workers are sitting ducks for occupational diseases.

As the House Committee on Government Operations declared in a 1976 report entitled "Chemical Dangers in the Workplace":

> Lack of knowledge about exposure hampers the identification of occupationally caused diseases, illnesses, and deaths and is a major impediment to preventing them . . . OSHA should issue standards called for in Section 6(b)(7) of the Act and follow these with regulations prescribed under Section 8(c)(3) so that employees are aware of their exposure to potentially toxic materials . . . [T]he history of OSHA's regulatory efforts shows that a comprehensive identification system for all known hazardous substances must be given the highest priority.[13/]

Now that this view has been applauded by labor unions, prominent scientists, editorial writers, Congressmen, public interest groups and yourself, it is time for concrete action of the sort proposed in our petition. There is no possible justification for futher delay.

We appreciate your rapid attention to this matter of national importance.

Sincerely,

Sidney M. Wolfe, M.D.
Director/Health Research Group

On behalf of:

Congressman Andrew Maguire and
Philadelphia Area Project on
Occupational Safety and Health

Enclosures

RIGHT TO KNOW CHRONOLOGY:
A HISTORY OF UNREASONABLE DELAY

12/29/70 Congress passes Occupational Safety and Health Act which provides, among other things, for regulations requiring employers to inform employees of the nature and extent of their exposures to potentially toxic materials and harmful physical agents. Occupational Safety and Health Administration (OSHA) charged with implementing the Act.[14]

12/20/74 National Institute for Occupational Safety and Health (NIOSH) recommends to OSHA "that employees be informed about the nature of chemical hazards, both potential and actual, to which they may be exposed."[15]

6/6/75 Standards Advisory Committee on Hazardous Materials Labeling recommends that OSHA issue regulations requiring employers to inform employees of the identity of chemical hazards in the workplace.[16]

5/11/76 Dr. Morton Corn, Assistant Secretary for OSHA, admits that a labeling standard is not a top priority for the agency.[17]

5/23/76 U.S. House Committee on Government Operations recommends that OSHA take "immediate action" to assure that employees are aware of their exposure to potentially toxic materials."[18]

9/27/76 Public Citizen Health Research Group (HRG), Philadelphia Area Project on Occupational Safety and Health (PhilaPOSH) and Congressman Andrew Maguire petition OSHA for regulations requiring "each employer to post and provide to each employee and employee representative a list of the generic names of all chemicals used and produced at the workplace."

1/28/77 OSHA publishes "Advance Notice of Proposed Rulemaking" seeking comments on "whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such a standard to assure that employees are apprised of the hazards to which they are exposed."[19]

3/8/77 OSHA informs HRG that "it is our intention to begin a rulemaking proceeding [concerning a labeling standard] after expiration of the comment period contained in the advance notice [March 29, 1977]."[20]

4/27/77 Dr. Eula Bingham, new Assistant Secretary for OSHA, tells the Subcommittee on Manpower and Housing of the House Government Operations Committee that she will proceed "at full speed" to issue rules requiring employers to furnish the generic names of chemicals their workers use.[21] At the same hearing, John F. Finklea, NIOSH Director reveals survey data indicating that millions of workers are exposed to toxic trade name products, the ingredients of which are unknown.[22]

10/18/77 Undersecretary of Labor Robert J. Brown announces in an address to the National Safety Congress that OSHA will propose a standard for labeling and identification of all chemical substances in the workplace before the end of 1977.[23]

11/1/77 OSHA Assistant Secretary Bingham announces at a meeting of public interest representatives that OSHA will propose "a relatively simple labeling standard" before January 1, 1978.[24]

11/21/77 OSHA Health Standards Director Grover Wrenn announces at a symposium on "Labeling and Warning Systems" that "it is . . . our intention to complete the drafting of this proposed [labeling] regulation within the remainder of this calendar year, to issue it as a proposal in the Federal Register and to convene a hearing early next year, following some appropriate period of time for written comments by interested parties."[25]

12/30/77 OSHA issues draft of proposed labeling standard and invites public comment.[26]

1/10/79 Sources in OSHA's Health Standards Office state that no deadline has been set for issuance of a proposed labeling standard.[27]

FOOTNOTES FOR LETTER AND CHRONOLOGY

1. "Labor Agency to Rush Rules for Business On Disclosing Chemical Peril to Workers," Wall Street Journal, April 29, 1977, p. 14. See note 22.

2. OSHA's recent standards for exposure to specific hazardous substances, such as lead and benzene, have required employers to inform employees about the nature and extent of their exposures to those substances. However, these regulations apply to only a miniscule number of the hazardous substances commonly found in the workplace.

3. Conversation between Joe Seta, Acting Chief of NIOSH Surveillance Branch, and Robert B. Stulberg, HRG Attorney, September 24, 1979

4. Hearings on Control of Toxic Substances in the Workplace before a Subcommittee of the House Committee on Government Operations, 94th Cong., 2d Sess. (1976), pp. 55-56.

5. Id. at p. 61.

6. Id.

7. Id.

8. "The Right to Know: Practical Problems and Policy Issues Arising from Exposures to Hazardous Chemical and Physical Agents in the Workplace," NIOSH Publication, July 1977, p. 14.

9. Id.

10. 29 U.S.C. 655(b)(7).

11. 29 U.S.C. 657 (c)(3).

12. 29 U.S.C. 657 (c)(2).

13. Chemical Dangers In The Workplace: Thirty-Fourth Report by the Committee on Government Operations, H.R. No. 94-1688, 94th Cong., 2d Sess. (1976), pp. 4,5,20.

14. See notes 8-10.

15. "A Recommended Standard . . . An Identification System for Occupationally Hazardous Materials," NIOSH Publication, 1974, p. 1.

16. "Report of the Standards Advisory Committee on Hazardous Materials Labeling to the Assistant Secretary of Labor for Occupational Safety and Health; U.S. Department of Labor," June 6, 1975.

17. See n. 11, p. 18.

18. See n. 11, pp. 5,10.

19. 42 Fed. Reg. 5372 (January 28, 1977).

20. Letter from Bert M. Concklin, Acting Assistant Secretary of OSHA, to Sidney M. Wolfe, HRG Director, March 8, 1977.

21. See note 1.

22. Statement of Dr. John F. Finklea before Subcommittee on Manpower and Housing of House Committee on Government Operations, NIOSH Publication, April 27, 1979.

23. "OSHA Will Propose Standard On Labeling Chemical Substances," BNA Current Report, Occupational Safety and Health Reporter, October 20, 1977, p. 708.

24. Notes of a meeting with Eula Bingham, and HRG, PhilaPOSH and other groups, November 1, 1977.

25. "Labeling and Warning Systems: Proceedings of a Topical Symposium November 21-22, 1977, Washington, D.C.," American Conference of Governmental and Industrial Hygienists (1978), pp. D-3 - D-4.

26. "Chemical Lists, Data Sheets Included in Draft of Proposed Rules," BNA Current Report, Occupational Safety and Health Reporter, January 12, 1978, pp. 1235, 1254.

27. Phone conversations between sources in OSHA's Health Standards Office and HRG Attorney Robert B. Stulberg, January 10, 1979.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP
2000 P Street, N.W.
Suite 708
Washington, D.C. 20036, (202)872-0320,

PHILADELPHIA AREA PROJECT ON
OCCUPATIONAL SAFETY AND HEALTH
1321 Arch Street
Room 201
Philadelphia, Pa. 19107, (215)568-5188,

and

UNITED STATES CONGRESSMAN ANDREW MAGUIRE
1314 Longworth House Office Building
Washington, D.C. 20515, (202)225-4465

Plaintiffs,

v. Civil Action No.

RAY MARSHALL, Secretary
United States Department of Labor
Third Street & Constitution Avenue, N.W.
Washington, D.C. 20210

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This action seeks an order directing the defendant (a) to comply with his statutory duties under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. ("OSHA") by commencing and concluding proceedings under Sections 6 (b)(7), 8(c)(1) and 8(c)(3), 29 U.S.C. §§ 655(b)(7), 657(c)(1), 657 (c)(3), to promulgate rules requiring employers to apprise employees and employee representatives of the identity of all potentially toxic materials and harmful physical agents to which they may be or may have been exposed in the workplace, and (b) to take action on a petition for rulemaking filed by plaintiffs on September 27, 1976, upon which no final action has yet been taken.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337 and 1361.

3. Plaintiff Public Citizen Health Research Group ("HRG") is a non-profit public interest organization maintaining its principal place of business in Washington, D.C. HRG engages in research and advocacy on health issues, including occupational safety and health. Many of HRG's contributors are and/or have been unknowingly exposed at their workplaces to potentially toxic materials and harmful physical agents. Certain of its contributors have suffered occupational injuries or diseases because of these exposures.

4. Plaintiff Philadelphia Area Project on Occupational Safety and Health ("PhilaPOSH") is a non-profit public interest organization maintaining its principal place of business in Philadelphia, Pa. PhilaPOSH engages in research and advocacy on occupational health issues on behalf of its members,most of whom are industrial workers in the Delaware Valley. Many of PhilaPOSH's members are and/or have been unknowingly exposed at their workplaces to potentially toxic materials and harmful physical agents. Certain of its members have suffered occupational injuries or diseases because of these exposures.

5. Plaintiff Andrew Maguire is a member of the United States House of Representatives representing the Seventh Congressional District of the State of New Jersey. Many of his constituents are and/or have been unknowingly exposed at their workplaces to potentially toxic materials and harmful physical agents. Certain of his constituents have suffered occupational injuries or diseases because of these exposures.

6. Defendant Ray Marshall is the Secretary of the United States Department of Labor (the "Secretary") and is responsible for implementing the provisions of OSHA.

7. The National Institute for Occupational Safety and Health ("NIOSH") is authorized by Section 22(d) of OSHA, 29 U.S.C. § 271(d), (a) to conduct research necessary for development of criteria for new occupational safety and health standards and (b) to make recommendations concerning new occupational safety and health standards.

8. According to research conducted by NIOSH, millions of American workers are and have been exposed at their workplaces to numerous potentially toxic materials and harmful physical agents. These workers include many of the members and contributors of plaintiffs PhilaPOSH and HRG and constituents of plaintiff Andrew Maguire.

9. According to the NIOSH research, many of these workers do not know and have no way of knowing the identity of the potentially toxic materials or harmful physical agents to which they are or have been exposed.

10. Because many of these workers lack knowledge about the identity of the toxic materials and harmful physical agents to which they are or have been exposed, they are unable to take effective steps to prevent and, where necessary, treat the adverse effects of such exposures.

11. In 1974, NIOSH issued a document entitled "A Recommended Standard...An Identification System for Occupationally Hazardous Materials" in which it recommended that the Secretary issue regulations requiring employers to inform employees about the nature of the chemical hazards, both potential and actual, to which they may be exposed.

12. The Standards Advisory Committee on Hazardous Materials Labelling (the "Advisory Committee") was established by the Secretary in 1974, pursuant to Section 7(b) of OSHA, 29 U.S.C. § 656(b), to develop guidelines for a standard concerning identification of hazardous materials in the workplace.

13. In 1975, the Advisory Committee submitted a report in which it recommended that the Secretary issue regulations pursuant to Section 6(b)(7) of OSHA, 29 U.S.C. § 655(b)(7), requiring employers to inform employees about the nature of the hazardous materials to which they may be exposed.

14. In 1976, the U.S. House of Representatives Committee on Government Operations issued a report in which it recommended that the Secretary take immediate action to issue regulations, pursuant to Sections 6(b)(7) and 8(c)(3) of OSHA, 29 U.S.C. §§ 655(b)(7), 657(c)(3), to assure that employees are aware of their exposure to potentially toxic materials.

15. Three years ago, on September 27, 1976, plaintiffs HRG and Andrew Maguire filed with the Secretary a petition to issue regulations requiring each employer to inform each employee of the generic names of all chemicals used and produced in the workplace. Plaintiff PhilaPOSH was subsequently added as a co-petitioner.

16. On January 29, 1977, the Secretary issued an Advance Notice of Proposed Rulemaking, (the "Advance Notice") requesting public comment on whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such a standard. The deadline for submission of comments was March 29, 1977.

17. On March 8, 1977, the Secretary, acting through a designee, informed plaintiffs by letter that their petition was under consideration and that the Secretary intended to begin a rulemaking proceeding on the matter after the comment period contained in the Advance Notice expired.

18. On March 28, 1977, plaintiffs submitted comments on the Advance Notice to the Secretary.

19. On numerous occasions between April 1977 and November 1977, the Secretary, acting through his designees, pledged to issue, by January 1, 1978, a proposed regulation requiring employers to inform their employees of hazards in the workplace.

20. On numerous occasions since January 1, 1978, the Secretary acting through his designees, has pledged to issue a proposed regulation requiring employers to inform their employees of hazards in the workplace.

21. Notwithstanding these pledges, the Secretary has not issued the promised proposed regulations. Nor has the Secretary otherwise acted on plaintiffs' petition.

22. The purpose of OSHA, stated in Section 2(b), 29 U.S.C. § 651(b), is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.

23. To accomplish this purpose, Congress, in OSHA, directs and empowers the Secretary to issue regulations requiring employers to inform employees of the identity of hazards in the workplace.

24. Section 8(c)(3) of OSHA, 29 U.S.C. § 657(c)(3), directs the Secretary to issue regulations requiring employers to (a) maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which must be monitored or measured under Section 6 of OSHA, 29 U.S.C. § 655, (b) permit employees to observe said monitoring or measuring, (c) permit employees access to said records and (d) permit each employee or former employee access to such records as will indicate his or her own exposure to toxic materials or harmful physical agents.

25. Section 6(b)(7) of OSHA, 29 U.S.C § 655(b)(7), directs the Secretary, when issuing any standard under Section 6(b) of OSHA, 29 U.S.C. § 655(b), to prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed.

26. Section 8(c)(1) of OSHA, 29 U.S.C. § 657(c)(1), empowers the Secretary to issue regulations necessary or appropriate for enforcement of OSHA or for developing information regarding the causes and prevention of occupational accidents and illnesses.

27. At least since 1974, the Secretary has been aware of the need to fulfill the purposes of OSHA by issuing regulations requiring employers to apprise present employees and former employees of the identity of the potentially toxic materials and harmful physical agents to which they may be or have been exposed in the workplace.

28. Three years have expired since plaintiffs filed their petition, and more than two years have expired since the Secretary first pledged to begin a rulemaking proceeding on the matters raised in the petition, but the Secretary has still not acted on the petition.

29. Members and contributors of the plaintiff organizations and constituents of plaintiff Maguire will continue to suffer irreparable injury if said proceedings are not initiated and promptly concluded.

30. The failure to initiate proceedings to promulgate said regulations and to act on plaintiffs' petition constitutes a failure to perform a statutory duty owed to plaintiffs and action unlawfully withheld and unreasonably delayed in violation of plaintiffs' rights under Section 10(e)(1) of the Administrative Procedures Act, 5 U.S.C. § 706(1).

31. Unless the Court directs the Secretary to perform his statutory duties and act on the petition, the Secretary will continue to violate plaintiffs' rights.

WHEREFORE, plaintiffs pray for an order (1) directing defendant to take action forthwith on plaintiffs' petition for rulemaking filed September 27, 1976, (2) directing the defendant to propose forthwith, under Sections 6(b)(7), 8(c)(1) and 8(c)(3) of OSHA, 29 U.S.C. §§ 655(b)(7), 657(c)(2), 657(c)(3), rules requiring employers to apprise employees and employee representatives of the identity of all poten-

tially toxic materials and harmful physical agents to which they may be or may have been exposed in the workplace, (3) retaining jurisdiction over this action to insure that there is no unreasonable delay by defendant in completing the rulemaking proceedings, (4) awarding plaintiffs their costs and disbursements in this action; and (5) granting plaintiffs such other and further relief as may be just and proper.

Dated: Washington, D.C.
September 27, 1979

Respectfully submitted,

Alan B. Morrison

Robert B. Stulberg

John Cary Sims

Suite 700
2000 P Street, N.W.
Washington, DC 20036
(202) 785-3704

Attorneys for Plaintiffs