

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File No. 746

Re-submitted 12/11 RULE REVIEW CHECKLIST

DATE RULE RECEIVED ~~11-6~~ 12/11
DATE FOR REVIEW ~~11/16~~ 12/20
DATE DUE ~~11-20~~ 12/26

Adopted w/a hearing _____
Adopted w/o a hearing X
Temporary rule _____

Approved _____ Disapproved 11/20 Returned to Agency _____

Resubmitted _____ Due _____
Approved _____ Disapproved _____ Returned to Agency _____

Date filed w/Secretary of State _____ Revisor approved 11/12/87
disapproved _____

- -

✓ Rule as Adopted

✓ Rule as Proposed

✓ Order Adopting 11.3.87 Date

N/A Notice of Intent to Solicit Outside Opinion

✓ Order for rulemaking
N/A Date of Hearing

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
✓ Sufficiency

✓ Affidavit of Mailing Notice or rulemaking
9.10.87 At least 30 days prior to ~~hearing~~/adoption

✓ Mailing list Certificate

✓ Publication in State Register
9.14.87 At least 30/~~20~~ days prior to ~~hearing~~/adoption

N/A Hearing Examiner's Report

Chief Hearing Examiner's Report(s)
_____ Approving H.E.'s Report
_____ Approving agency action

✓ Agency's Findings of Fact

N/A LCRAR Report or agency Affidavit

N/A Certificate of Board's Resolution Adopting Rules

N/A Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

N/A Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

✓ Affidavit of Mailing Notice of Submission to Attorney General

N/A Notice of Submission to the Attorney General

Rule 71 746

January 27, 1982

The Honorable Donna Peterson
State Representative
254 State Office Building
St. Paul, MN 55155

Re: Adopted Rules Governing Access to Employee Exposure and Medical Records; Discrimination against Employees; and Recording and Reporting Occupational Injuries and Illnesses

Dear Representative Peterson:

This letter is written as a follow-up to our telephone conversation on this date.

As I informed you, I am the attorney who was charged with the review as to legality of the above-referenced administrative rules. In an earlier letter to this office, you had expressed concern over the legality of the rules.

Please be advised that during my review of the rules I researched all applicable federal and case law, and I am of the opinion that the rules in question were not at odds with the same. Consequently, I approved, and the rules were filed with the Secretary of State on December 22, 1981.

If you have any questions, please feel free to call me.

Very truly yours,

TED A. MARTINEZ
Special Assistant
Attorney General

Administration Division
530 State Office Building
435 Park Street
Saint Paul, MN 55155
Telephone: (612) 296-0315

TAM:drw

Department of Labor and Industry
Occupational Safety and Health Division

Adopted Rules Governing Access to Employee Exposure and Medical Records; Discrimination against Employees; and Recording and Reporting Occupational Injuries and Illnesses

Rules as Adopted

Chapter Eighteen:
Access to Employee Exposure and Medical Records

8 MCAR S 1.7230 Purpose and scope. Federal Occupational Safety and Health Standard 1910.20, "Access to Employee Exposure and Medical Records," 29 Code of Federal Regulations, Section 1910.20 (1980) is adopted by reference.

8 MCAR S 1.7231 Modified definition. The terms "Assistant Secretary of Labor for Occupational Safety and Health" and "assistant secretary" as used in 29 Code of Federal Regulations, Section 1910.20 shall mean the Commissioner of the Department of Labor and Industry for the purpose of 8 MCAR S 1.7230.

8 MCAR S 1.7232 Conforming amendments. Revisions to 29 Code of Federal Regulations, Section 1910, Subpart T (Commercial Diving Operations) and Subpart Z (Toxic and Hazardous Substances) adopted by the Federal Occupational Safety and Health Administration on May 23, 1980 and published at 45 Federal Register, Volume 45, 35281-35284 are adopted by reference.

Chapter Nineteen:
Discrimination Against Employees

8 MCAR S 1.7240 Authority and background. Minn. Stat. SS 182.654, subd. 9, and 182.669 prohibit discrimination against an employee because the employee exercised any rights granted under the act on the employee's behalf or on behalf of others. Any employee who believes that he or she has been discharged or discriminated against by any person because the employee exercised any right authorized by the act as described in 8 MCAR

S 1.7242, may file a discrimination complaint with the Commissioner of the Department of Labor and Industry.

8 MCAR S 1.7241 Purpose and scope. The rules in this chapter implement Minn. Stat. S 182.669 of the act and set forth general policies for enforcement of the discrimination provisions of Minn. Stat. S 182.669.

8 MCAR S 1.7242 Definition. For the purpose of 8 MCAR SS 1.7240-1.7247 "act" means the Minnesota Occupational Safety and Health Act of 1973.

8 MCAR S 1.7243 Protected activities.

A. Occupational safety and health complaints. An employee or authorized employee representative may file a complaint about unsafe or unhealthful working conditions with an employer and may request personal protective equipment from the employer. An employee or authorized employee representative may also file a written complaint about unsafe or unhealthful working conditions with the Commissioner of the Department of Labor and Industry. Written complaints may be given to an occupational safety and health investigator prior to or during an inspection of the place of employment.

B. Refusal to work under unsafe conditions.

1. Unless provided by 8 MCAR SS 1.7240-1.7247 there is no right granted by the act for employees to leave the job because of potentially unsafe conditions at the workplace. Initially an employer should be notified of hazardous conditions. If corrections are not accomplished or if a dispute arises about the existence of a hazard, the employee or authorized employee representative may request an occupational safety and health inspection of the workplace by giving notice to the commissioner of the hazardous condition.

2. If an employee has a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition in the workplace, an employee acting in good faith may refuse to work if there is no reasonable alternative. The condition must be so hazardous that

a reasonable person would conclude that there is a real danger of death or serious injury and that there is insufficient time to eliminate the danger through enforcement procedures. The employee must, where possible, request the employer to correct the hazardous condition. An employer may not discharge or discipline an employee who refuses to perform assigned tasks under these conditions. However, an employer is not required to pay employees for tasks not performed.

C. Inspection participation. The authorized employee representative may participate in the opening conference prior to the inspection and the closing conference following the inspection. The employer shall pay the authorized employee representative regular wages for time spent participating in the inspection and opening and closing conferences.

D. Testimony. An employee may not be discriminated against because the employee has testified or is about to testify in proceedings under or related to the act. This protection includes testifying in proceedings instituted by the employee or any statement or testimony given in judicial, quasi-judicial and administrative proceedings.

E. Contestation. An employee or authorized employee representative may file a written notice of contest with the Occupational Safety and Health Review Board contesting a citation, proposed assessment of penalty, type of violation, or the time fixed for abatement in a citation issued to an employer.

F. Informal conferences. An employee or authorized employee representative may participate in informal conferences held between the employee's employer and the Department of Labor and Industry.

8 MCAR S 1.7244 Unprotected activities.

A. Permitted discipline. That certain of an employee's activities are protected by the act does not protect an employee from discipline or discharge for other legitimate reasons ~~including tardiness, unauthorized absences or poor workmanship~~.

B. Protected and unprotected activities combined. If participation in an activity protected by the act was a

substantial reason for discharge or other adverse action by an employer, the employee's rights under the act have been violated. Whether a discharge or other adverse action was because of protected activity will be determined on the facts in each particular case.

8 MCAR S 1.7245 Claim procedures.

A. Who may file. A complaint alleging discrimination under Minn. Stat. S 182.669 may be filed by an employee or an authorized employee representative.

B. Time for filing. The complaint must be filed, either orally or in writing, with the Commissioner of the Minnesota Department of Labor and Industry within 30 days after the alleged discriminatory act occurred.

C. Form of filing. Verbal complaints must be reduced to written form by the Department of Labor and Industry and sent to the complainant for signature. The form must be signed and returned to the department within 15 days of receipt by the complainant. Upon receipt of the signed complaint, the commissioner will make an investigation as he deems appropriate. If the complainant fails to sign and return the written statement within the 15 days, the case shall be closed.

D. Notice of commissioner's determination. The commissioner shall notify the complainant of the commissioner's determination regarding the complaint within 90 days of receipt of a signed complaint.

8 MCAR S 1.7246 Other proceedings.

A. Deferral. The commissioner may defer action on a complaint filed concurrently with the Department of Labor and Industry and another agency until a determination by the other agency has been made if the rights asserted in other proceedings are substantially the same as rights given under the act and the other proceedings will not violate the rights guaranteed by the act.

B. Accepting other decisions. The commissioner may accept the results of other proceedings as a final determination of a

complaint if those proceedings dealt adequately with all factual issues; were fair, impartial and valid; and the outcome of the proceedings is not contradictory to the purpose of the act. If the other action is dismissed without proper hearing, the dismissal is not a final determination of the complaint filed with the commissioner.

8 MCAR S 1.7247 Enforcement proceedings.

A. Court action. Minn. Stat. S 182.669 authorizes the commissioner to bring an action against the employer in the district court in the county where the alleged discrimination occurred or in a county where the employer transacts business if it is determined that a discriminatory act has been committed against an employee.

B. Settlement. Upon completion of an investigation, the commissioner may decide upon a settlement acceptable to all concerned parties rather than proceeding with court action.

C. Complaint withdrawal. An employee may withdraw a discrimination complaint at any point following the initial submission.

D. Independent commissioner action. If an employee voluntarily withdraws a discrimination complaint, the commissioner may decide to proceed with an investigation on his own if he believes a discriminatory act has been committed.

Chapter Twenty-two:
Recording and Reporting
Occupational Injuries and Illnesses

8 MCAR S 1.7292 Log and summary of occupational injuries and illnesses.

A. Each employer shall maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment, except that under the circumstances described in paragraph B. of this section an employer may maintain the log and summary of occupational injuries and illnesses at a place other than the establishment. Each employer shall enter each recordable occupational injury

and illness on the log as early as practicable but no later than 6 working days after receiving information that a recordable case has occurred. For this purpose OSHA Form No. 200 or any private equivalent may be used. OSHA Form No. 200 or its equivalent shall be completed in the detail provided in the form and the instructions contained in OSHA Form No. 200. If an equivalent to OSHA Form No. 200 is used, such as a printout from data-processing equipment, the information shall be as readable and comprehensible to a person not familiar with the data processing equipment as the OSHA Form 200 itself.

8 MCAR S 1.7295 Annual summary.

A. Each employer shall post an annual summary of occupational injuries and illnesses for each establishment. Each annual summary shall consist of a copy of the year's totals contained in the log and summary of occupational injuries and illnesses for the particular establishment. OSHA Form No. 200 shall be used for this purpose, and shall be completed in the form and detail as provided in the instructions contained therein.

B. The summary shall be completed no later than one month after the close of each calendar year.

C. Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employee of the employer, who supervises the preparation of the annual summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the annual summary is true and complete.

8 MCAR S 1.7297 Access to records.

A. Access by departments. Records provided for in 8 MCAR S 1.7292, 8 MCAR S 1.7294, and 8 MCAR S 1.7295 shall be available

for inspection and copying by authorized representatives of the Department of Labor and Industry and the Department of Health.

B. Access by employees. The log and summary of recordable occupational injuries and illnesses (OSHA Form No. 200) for any establishment in which the employee is or was employed provided for in 8 MCAR S 1.7292 shall, upon request, be made available by the employer to any employee, former employee, and their representatives for examination and copying in a reasonable manner and at reasonable times.

C. Bargaining for additional access. Nothing in this rule shall preclude employees and employee representatives from collectively bargaining for access to information relating to occupational injuries and illnesses in addition to the information made available under this rule.

D. Extent of access. Access to the log and summary provided under this rule shall pertain to all logs and summaries retained under the requirements of 8 MCAR S 1.7296.

8 MCAR S 1.7304 Small employers.

A. Exemption. An employer who had no more than ten (10) employees at any one time during the calendar year immediately preceding the current calendar year need not comply with any of the requirements of this chapter except 8 MCAR S 1.7298 concerning fatalities or multiple hospitalization accidents (i.e., he need not prepare the log, OSHA Form No. 200; the Supplementary Record, OSHA Form No. 101; nor prepare or post the summary, OSHA Form No. 200).

B. Limitation of exemption. Paragraph A. shall not apply when an employer has been notified in writing by the Bureau of Labor Statistics that he has been selected to participate in a statistical survey of occupational injuries and illnesses. If selected, an employer will be required to maintain a log of occupational injuries and illnesses (OSHA Form No. 200) in accordance with 8 MCAR S 1.7292 and to make reports in accordance with 8 MCAR S 1.7306 for the period of time which is specified in the notice.

OFFICE OF THE REVISOR OF STATUTES

Certificate of Approval of Adopted Rules

Agency: Department of Labor and Industry, Occupational Safety and Health Division

Rule Numbers:
8 MCAR SS 1.7230; 1.7231; 1.7232; 1.7240; 1.7241; 1.7242; 1.7243; 1.7244; 1.7245; 1.7246; 1.7247; 1.7292; 1.7295; 1.7297; 1.7304

Rule Title: Adopted Rules Governing Access to Employee Exposure and Medical Records; Discrimination against Employees; and Recording and Reporting Occupational Injuries and Illnesses

Type of Rules: Permanent X

Temporary _____

Documents Incorporated by Reference:

None except those approved by statute

The attached Rules are approved as to form.

APPROVED AS TO LEGALITY
Dec. 22 1981
WARREN SPANNAUS ATTORNEY GENERAL
BY Ted A. Mullins
SPECIAL ASSISTANT ATTORNEY GENERAL

Steven C. Cross
Revisor of Statutes

Name: John C. Fuller
John C. Fuller

Title: Assistant Revisor

Phone: 296-0955

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
DEC 23 1981
Secretary of State

9:27 A.M.

Section 1910.1008 (g)(2)(ii)
Section 1910.1009 (g)(2)(ii)
Section 1910.1010 (g)(2)(ii)
Section 1910.1011 (g)(2)(ii)
Section 1910.1012 (g)(2)(ii)
Section 1910.1013(g)(2)(ii)
Section 1910.1014(g)(2)(ii)
Section 1910.1015(g)(2)(ii)
Section 1910.1016(g)(2)(ii)
Section 1910.1017(m)(2)–(m)(6)
Section 1910.1018(q)(3)(ii)–(q)(3)(iii);
Appendix A (Section VIII)
Section 1910.1025(n)(4)(ii)–(iii)
Section 1910.1028(l)(3)(ii)–(l)(3)(iv);
Appendix A (Section VII)
Section 1910.1029(m)(3)(ii)–(m)(3)(iv)
Section 1910.1043(k)(3)(ii)–(k)(3)(iv)
Section 1910.1044(p)(3)(ii)–(p)(3)(iv)
Section 1910.1045(q)(4)(ii)–(q)(4)(iii);
Appendix A (Section VII.D.)
Section 1910.1046(h)(2)(ii)
Section 1990.151(q)(3)(ii)–(q)(3)(iii)
Section 1990.152(q)(3)(i)–(q)(3)(iii)

Finally, these conforming amendments do not amend existing "transfer of records" provisions in specific standards; i.e., those provisions in existing standards which require employers to transfer certain mandated records to NIOSH either upon going out of business or upon the expiration of the standard's records preservation period. However, paragraph 1910.20(h), which is being incorporated into the specific standards by these conforming amendments, does contain some additional requirements, particularly involving notification of employees when an employer is going out of business. These requirements in paragraph 1910.20(h) are meant to apply to employers covered by the specific standards. Accordingly, the following sections of specific standards are being amended or added to best clarify this intent:

Section 1910.440(b)(4)
Section 1910.1017(m)(3)
Section 1910.1018(q)(4)(iv)
Section 1910.1025(n)(5)(iv)
Section 1910.1028(l)(4)(iv)
Section 1910.1029(m)(4)(iv)
Section 1910.1043(k)(4)(iv)
Section 1910.1044(p)(4)(iv)
Section 1910.1045(q)(5)(iv)
Section 1910.1046(h)(3)(iv)
Section 1990.151(q)(4)(iv)

All the above-referenced conforming amendments will go into effect when 29 CFR 1910.20 becomes legally effective.

VIII. Authority, Signature, and the Standard

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

The Federal Register has been requested to officially file this document at 1 p.m. E.D.T. on May 21, 1980, which shall be the time of issuance of this document as provided by 29 CFR 1911.18. The time of issuance is the earliest moment that petitions for judicial review may be filed.

Accordingly, pursuant to sections 6(b), 8(c) and 8(g) of the Occupational Safety and Health Act of 1970 (84 Stat. 1593, 1599, 1600; 29 U.S.C. 655, 657), the Secretary of Labor's Order 8–76 (41 FR 25059) and 29 CFR Part 1911, Chapter XVII of Title 29, the Code of Federal Regulations is hereby amended by revising section 1910.20 and by adding Appendices A and B, and by making conforming amendments to existing occupational safety and health standards in Part 1910.

Signed at Washington, D.C., this 14th day of May 1980.

Eula Bingham,

Assistant Secretary of Labor.

Part 1910 of Title 29 of the Code of Federal Regulations (CFR) is amended as follows:

Subpart C—General Safety and Health Provisions

1. Section 1910.20 is revised to read as follows, including the addition of Appendices A and B:

§ 1910.20 Access to employee exposure and medical records.

(a) *Purpose.* The purpose of this section is to provide employees and their designated representatives a right of access to relevant exposure and medical records; and to provide representatives of the Assistant Secretary a right of access to these records in order to fulfill responsibilities under the Occupational Safety and Health Act. Access by employees, their representatives, and the Assistant Secretary is necessary to yield both direct and indirect improvements in the detection, treatment, and prevention of occupational disease. Each employer is responsible for assuring compliance with this section, but the activities involved in complying with the access to medical records provisions can be carried out, on behalf of the employer, by the physician or other health care personnel in charge of employee medical records. Except as expressly provided, nothing in this section is intended to affect existing legal and ethical obligations concerning the maintenance and confidentiality of employee medical information, the duty to disclose information to a patient/employee or any other aspect of the medical-care relationship, or affect existing legal obligations concerning the protection of trade secret information.

(b) *Scope and application.* (1) This section applies to each general industry, maritime, and construction employer who makes, maintains, contracts for, or has access to employee exposure or medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents.

(2) This section applies to all employee exposure and medical records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents, whether or not the records are related to specific occupational safety and health standards.

(3) This section applies to all employee exposure and medical records, and analyses thereof, made or maintained in any manner, including on an in-house or contractual (e.g., fee-for-service) basis. Each employer shall assure that the preservation and access requirements of this section are complied with regardless of the manner in which records are made or maintained.

(c) *Definitions.* (1) "Access" means the right and opportunity to examine and copy.

(2) "Analysis using exposure or medical records" means any compilation of data, or any research, statistical or other study based at least in part on information collected from individual employee exposure or medical records or information collected from health insurance claims records, provided that either the analysis has been reported to the employer or no further work is currently being done by the person responsible for preparing the analysis.

(3) "Designated representative" means any individual or organization to whom an employee gives written authorization to exercise a right of access. For the purposes of access to employee exposure records and analyses using exposure or medical records, a recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

(4) "Employee" means a current employee, a former employee, or an employee being assigned or transferred to work where there will be exposure to toxic substances or harmful physical agents. In the case of a deceased or legally incapacitated employee, the employee's legal representative may directly exercise all the employee's rights under this section.

(5) "Employee exposure record" means a record containing any of the following kinds of information

concerning employee exposure to toxic substances or harmful physical agents:

(i) environmental (workplace) monitoring or measuring, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to interpretation of the results obtained;

(ii) biological monitoring results which directly assess the absorption of a substance or agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess the biological effect of a substance or agent;

(iii) material safety data sheets; or

(iv) in the absence of the above, any other record which reveals the identity (e.g., chemical, common, or trade name) of a toxic substance or harmful physical agent.

(6)(i) "Employee medical record" means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel, or technician, including:

(A) medical and employment questionnaires or histories (including job description and occupational exposures),

(B) the results of medical examinations (pre-employment, pre-assignment, periodic, or episodic) and laboratory tests (including X-ray examinations and all biological monitoring),

(C) medical opinions, diagnoses, progress notes, and recommendations,

(D) descriptions of treatments and prescriptions, and

(E) employee medical complaints.

(ii) "Employee medical record" does not include the following:

(A) physical specimens (e.g., blood or urine samples) which are routinely discarded as a part of normal medical practice, and are not required to be maintained by other legal requirements,

(B) records concerning health insurance claims if maintained separately from the employer's medical program and its records, and not accessible to the employer by employee name or other direct personal identifier (e.g., social security number, payroll number, etc.), or

(C) records concerning voluntary employee assistance programs (alcohol, drug abuse, personal counseling programs) if maintained separately from the employer's medical program and its records.

(7) "Employer" means a current employer, a former employer, or a successor employer.

(8) "Exposure" or "exposed" means that an employee is subjected to a toxic substance or harmful physical agent in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes past exposure and potential (e.g., accidental or possible) exposure, but does not include situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations.

(9) "Record" means any item, collection, or grouping of information regardless of the form or process by which it is maintained (e.g., paper document, microfiche, microfilm, X-ray film, or automated data processing).

(10) "Specific written consent" (i) means a written authorization containing the following:

(A) the name and signature of the employee authorizing the release of medical information,

(B) the date of the written authorization,

(C) the name of the individual or organization that is authorized to release the medical information,

(D) the name of the designated representative (individual or organization) that is authorized to receive the released information,

(E) a general description of the medical information that is authorized to be released,

(F) a general description of the purpose for the release of the medical information, and

(G) a date or condition upon which the written authorization will expire (if less than one year).

(ii) A written authorization does not operate to authorize the release of medical information not in existence on the date of written authorization, unless this is expressly authorized, and does not operate for more than one year from the date of written authorization.

(iii) A written authorization may be revoked in writing prospectively at any time.

(11) "Toxic substance or harmful physical agent" means any chemical substance, biological agent (bacteria, virus, fungus, etc.), or physical stress (noise, heat, cold, vibration, repetitive motion, ionizing and non-ionizing radiation, hypo- or hyperbaric pressure, etc.) which:

(i) is regulated by any Federal law or rule due to a hazard to health,

(ii) is listed in the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) (*See* Appendix B),

(iii) has yielded positive evidence of an acute or chronic health hazard in human, animal, or other biological testing conducted by, or known to, the employer, or

(iv) has a material safety data sheet available to the employer indicating that the material may pose a hazard to human health.

(d) *Preservation of records.* (1) Unless a specific occupational safety and health standard provides a different period of time, each employer shall assure the preservation and retention of records as follows:

(i) *Employee medical records.* Each employee medical record shall be preserved and maintained for at least the duration of employment plus thirty (30) years, except that health insurance claims records maintained separately from the employer's medical program and its records need not be retained for any specified period;

(ii) *Employee exposure records.* Each employee exposure record shall be preserved and maintained for at least thirty (30) years, except that:

(A) Background data to environmental (workplace) monitoring or measuring, such as laboratory reports and worksheets, need only be retained for one (1) year so long as the sampling results, the collection methodology (sampling plan), a description of the analytical and mathmematical methods used, and a summary of other background data relevant to interpretation of the results obtained, are retained for at least thirty (30) years; and

(B) Material safety data sheets and paragraph (c)(5)(iv) records concerning the identity of a substance or agent need not be retained for any specified period as long as some record of the identity (chemical name if known) of the substance or agent, where it was used, and when it was used is retained for at least thirty (30) years; and

(iii) *Analyses using exposure or medical records.* Each analysis using exposure or medical records shall be preserved and maintained for at least thirty (30) years.

(2) Nothing in this section is intended to mandate the form, manner, or process by which an employer preserves a record so long as the information contained in the record is preserved and retrievable, except that X-ray films shall be preserved in their original state.

(e) *Access to records.* (1) *General.* (i) Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time,

place, and manner, but in no event later than fifteen (15) days after the request for access is made.

(ii) Whenever an employee or designated representative requests a copy of a record, the employer shall, within the period of time previously specified, assure that either:

(A) a copy of the record is provided without cost to the employee or representative,

(B) the necessary mechanical copying facilities (e.g., photocopying) are made available without cost to the employee or representative for copying the record, or

(C) the record is loaned to the employee or representative for a reasonable time to enable a copy to be made.

(iii) Whenever a record has been previously provided without cost to an employee or designated representative, the employer may charge reasonable, non-discriminatory administrative costs (i.e., search and copying expenses but not including overhead expenses) for a request by the employee or designated representative for additional copies of the record, except that

(A) An employer shall not charge for an initial request for a copy of new information that has been added to a record which was previously provided; and

(B) An employer shall not charge for an initial request by a recognized or certified collective bargaining agent for a copy of an employee exposure record or an analysis using exposure or medical records.

(iv) Nothing in this section is intended to preclude employees and collective bargaining agents from collectively bargaining to obtain access to information in addition to that available under this section.

(2) *Employee and designated representative access.* (i) *Employee exposure records.* Each employer shall, upon request, assure the access of each employee and designated representative to employee exposure records relevant to the employee. For the purpose of this section, exposure records relevant to the employee consist of:

(A) records of the employee's past or present exposure to toxic substances or harmful physical agents,

(B) exposure records of other employees with past or present job duties or working conditions related to or similar to those of the employee,

(C) records containing exposure information concerning the employee's workplace or working conditions, and

(D) exposure records pertaining to workplaces or working conditions to which the employee is being assigned or transferred.

(ii) *Employee medical records.* (A) Each employer shall, upon request, assure the access of each employee to employee medical records of which the employee is the subject, except as provided in paragraph (e)(2)(ii)(D) below.

(B) Each employer shall, upon request, assure the access of each designated representative to the employee medical records of any employee who has given the designated representative specific written consent. Appendix A to this section contains a sample form which may be used to establish specific written consent for access to employee medical records.

(C) Whenever access to employee medical records is requested, a physician representing the employer may recommend that the employee or designated representative:

(*1*) consult with the physician for the purposes of reviewing and discussing the records requested,

(*2*) accept a summary of material facts and opinions in lieu of the records requested, or

(*3*) accept release of the requested records only to a physician or other designated representative.

(D) Whenever an employee requests access to his or her employee medical records, and a physician representing the employer believes that direct employee access to information contained in the records regarding a specific diagnosis of a terminal illness or a psychiatric condition could be detrimental to the employee's health, the employer may inform the employee that access will only be provided to a designated representative of the employee having specific written consent, and deny the employee's request for direct access to this information only. Where a designated representative with specific written consent requests access to information so withheld, the employer shall assure the access of the designated representative to this information, even when it is known that the designated representative will give the information to the employee.

(E) Nothing in this section precludes a physician, nurse, or other responsible health care personnel maintaining employee medical records from deleting from requested medical records the identity of a family member, personal friend, or fellow employee who has provided confidential information concerning an employee's health status.

(iii) *Analyses using exposure or medical records.*

(A) Each employer shall, upon request, assure the access of each employee and designated representative to each analysis using exposure or medical records concerning the employee's working conditions or workplace.

(B) Whenever access is requested to an analysis which reports the contents of employee medical records by either direct identifier (name, address, social security number, payroll number, etc.) or by information which could reasonably be used under the circumstances indirectly to identify specific employees (exact age, height, weight, race, sex, date of initial employment, job title, etc.), the employer shall assure that personal identifiers are removed before access is provided. If the employer can demonstrate that removal of personal identifiers from an analysis is not feasible, access to the personally identifiable portions of the analysis need not be provided.

(3) *OSHA access.* (i) Each employer shall, upon request, assure the immediate access of representatives of the Assistant Secretary of Labor for Occupational Safety and Health to employee exposure and medical records and to analyses using exposure or medical records. Rules of agency practice and procedure governing OSHA access to employee medical records are contained in 29 CFR 1913.10.

(ii) Whenever OSHA seeks access to personally identifiable employee medical information by presenting to the employer a written access order pursuant to 29 CFR 1913.10(d), the employer shall prominently post a copy of the written access order and its accompanying cover letter for at least fifteen (15) working days.

(f) *Trade secrets.* (1) Except as provided in paragraph (f)(2) of this section, nothing in this section precludes an employer from deleting from records requested by an employee or designated representative any trade secret data which discloses manufacturing processes, or discloses the percentage of a chemical substance in a mixture, as long as the employee or designated representative is notified that information has been deleted. Whenever deletion of trade secret information substantially impairs evaluation of the place where or the time when exposure to a toxic substance or harmful physical agent occurred, the employer shall provide alternative information which is sufficient to permit the employee to identify where and when exposure occurred.

(2) Notwithstanding any trade secret claims, whenever access to records is requested, the employer shall provide

access to chemical or physical agent identities including chemical names, levels of exposure, and employee health status data contained in the requested records.

(3) Whenever trade secret information is provided to an employee or designated representative, the employer may require, as a condition of access, that the employee or designated representative agree in writing not to use the trade secret information for the purpose of commercial gain and not to permit misuse of the trade secret information by a competitor or potential competitor of the employer.

(g) *Employee information.* (1) Upon an employee's first entering into employment, and at least annually thereafter, each employer shall inform employees exposed to toxic substances or harmful physical agents of the following:

(i) the existence, location, and availability of any records covered by this section;

(ii) the person responsible for maintaining and providing access to records; and

(iii) each employee's rights of access to these records.

(2) Each employer shall make readily available to employees a copy of this standard and its appendices, and shall distribute to employees any informational materials concerning this standard which are made available to the employer by the Assistant Secretary of Labor for Occupational Safety and Health.

(h) *Transfer of records.* (1) Whenever an employer is ceasing to do business, the employer shall transfer all records subject to this section to the successor employer. The successor employer shall receive and maintain these records.

(2) Whenever an employer is ceasing to do business and there is no successor employer to receive and maintain the records subject to this standard, the employer shall notify affected employees of their rights of access to records at least three (3) months prior to the cessation of the employer's business.

(3) Whenever an employer either is ceasing to do business and there is no successor employer to receive and maintain the records, or intends to dispose of any records required to be preserved for at least thirty (30) years, the employer shall:

(i) transfer the records to the Director of the National Institute for Occupational Safety and Health (NIOSH) if so required by a specific occupational safety and health standard: or

(ii) notify the Director of NIOSH in writing of the impending disposal of records at least three (3) months prior to the disposal of the records.

(4) Where an employer regularly disposes of records required to be preserved for at least thirty (30) years, the employer may, with at least (3) months notice, notify the Director of NIOSH on an annual basis of the records intended to be disposed of in the coming year.

(i) *Appendices.* The information contained in the appendices to this section is not intended, by itself, to create any additional obligations not otherwise imposed by this section nor detract from any existing obligation.

(j) *Effective date.* This section shall become effective on August 21, 1980. All obligations of this section commence on the effective date except that the employer shall provide the information required under paragraph (g)(1) of this section to all current employees within sixty (60) days after the effective date.

Appendix A to § 1910.20—Sample Authorization Letter for the Release of Employee Medical Record Information to a Designated Representative

I, ————, (full name of worker/patient) hereby authorize ———— (individual or organization holding the medical records) to release to ———— (individual or organization authorized to receive the medical information), the following medical information from my personal medical records:

_____

_____

(Describe generally the information desired to be released).

I give my permission for this medical information to be used for the following purpose: ————, but I do not give permission for any other use or re-disclosure of this information.

(Note.—Several extra lines are provided below so that you can place additional restrictions on this authorization letter if you want to. You may, however, leave these lines blank. On the other hand, you may want to (1) specify a particular expiration date for this letter (if less than one year); (2) describe medical information to be created in the future that you intend to be covered by this authorization letter; or (3) describe portions of the medical information in your records which you do not intend to be released as a result of this letter.)

_____

_____

_____

_____

_____

_____

Full name of Employee or Legal Representative

Signature of Employee or Legal Representative

Date of Signature

Appendix B to § 1910.20—Availability of NIOSH Registry of Toxic Effects of Chemical Substances (RTECS) [1]

The final standard, 29 CFR 1910.20, applies to all employee exposure and medical records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents (paragraph (b)(2)). The term "toxic substance or harmful physical agent" is defined by paragraph (c)(11) to encompass chemical substances, biological agents, and physical stresses for which there is evidence of harmful health effects. The standard uses the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) as one of the chief sources of information as to whether evidence of harmful health effects exists. If a substance is listed in the latest printed RTECS, the standard applies to exposure and medical records (and analyses of these records) relevant to employees exposed to the substance.

It is appropriate to note that the final standard does not require that employers purchase a copy of RTECS, and many employers need not consult RTECS to ascertain whether their employee exposure or medical records are subject to the standard. Employers who do not currently have the latest printed edition of the NIOSH RTECS, however, may desire to obtain a copy. The RTECS is issued in an annual printed edition as mandated by section 20(a)(6) of the Occupational Safety and Health Act (29 U.S.C. 669(a)(6)). The 1978 edition is the most recent printed edition as of May 1, 1980. Its Foreward and Introduction describes the RTECS as follows:

"The annual publication of a list of known toxic substances is a NIOSH mandate under the Occupational Safety and Health Act of 1970. It is intended to provide basic information on the known toxic and biological effects of chemical substances for the use of employers, employees, physicians, industrial hygienists, toxicologists, researchers, and, in general, anyone concerned with the proper and safe handling of chemicals. In turn, this information may contribute to a better understanding of potential occupational hazards by everyone involved and ultimately may help to bring about a more healthful workplace environment. (p. iii)

"This Registry contains 124,247 listings of chemical substances: 33,929 are names of different chemicals with their associated toxicity data and 90,318 are synonyms. This edition includes approximately 7,500 new chemical compounds that did not appear in the 1977 Registry. (p. xiii)

"The Registry's purposes are many, and it serves a variety of users. It is a single source document for basic toxicity information and for other data, such as chemical identifiers and information necessary for the preparation of safety directives and hazard

[1] On April 24, 1980, the Director of the Federal Register approved for incorporation by reference into 29 CFR 1910, the 1978 edition of the National Institute for Occupational Safety and Health Registry of Toxic Effects of Chemical Substances (the Registry). (See 29 CFR 1910.20 (c)(11)(ii)).

evaluations for chemical substances. The various types of toxic effects linked to literature citations provide researchers and occupational health scientists with an introduction to the toxicological literature, making their own review of the toxic hazards of a given substance easier. By presenting data on the lowest reported doses that produce effects by several routes of entry in various species, the Registry furnishes valuable information to those responsible for preparing safety data sheets for chemical substances in the workplace. Chemical and production engineers can use the Registry to identify the hazards which may be associated with chemical intermediates in the development of final products, and thus can more readily select substitutes or alternate processes which may be less hazardous. (p. xiii)

"In this edition of the Registry, the editors intend to identify "all known toxic substances" which may exist in the environment and to provide pertinent data on the toxic effects from known doses entering an organism by any route described. Data may be used for the evaluation of chemical hazards in the environment, whether they be in the workplace, recreation area, or living quarters. (p. xiii)

"It must be reemphasized that the entry of a substance in the Registry does not automatically mean that it must be avoided. A listing does mean, however, that the substance has the documented potential of being harmful if misused, and care must be exercised to prevent tragic consequences. (p. xiv)"

The RTECS 1978 printed edition may be purchased for $13.00 from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, D.C. 20402 (202-783-3238) (Order GPO Stock No. 017-033-00346-7). The 1979 printed edition is anticipated to be issued in the summer of 1980. Some employers may also desire to subscribe to the quarterly update to the RTECS which is published in a microfiche edition. An annual subscription to the quarterly microfiche may be purchased from the GPO for $14.00 (Order the "Microfiche Edition, Registry of Toxic Effects of Chemical Substances"). Both the printed edition and the microfiche edition of RTECS are available for review at many university and public libraries throughout the country. The latest RTECS editions may also be examined at the OSHA Technical Data Center, Room N2439-Rear, United States Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 (202-523-9700), or at any OSHA Regional or Area Office (*See*, major city telephone directories under United States Government-Labor Department).

Subpart T—Commercial Diving Operations

2. Section 1910.440 is amended by revising paragraphs (b)(2) and (b)(4) to read as follows:

s1910.440 Recordkeeping requirements.

* * * * *

(b) * * *

(2) Records and documents required by this standard shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i). Safe practices manuals (s1910.420), depth-time profiles (s1910.422), recordings of dives (s1910.423), decompression procedure assessment evaluations (s1910.423), and records of hospitalizations (s1910.440) shall be provided in the same manner as employee exposure records or analyses using exposure or medical records. Equipment inspections and testing records which pertain to employees (s1910.430) shall also be provided upon request to employees and their designated representatives.

* * * * *

(4) After the expiration of the retention period of any record required to be kept for five (5) years, the employer shall forward such records to the National Institute for Occupational Safety and Health, Department of Health and Human Services. The employer shall also comply with any additional requirements set forth at 29 CFR 1910.20(h).

* * * * *

Subpart Z—Toxic and Hazardous Substances

3. Section 1910.1001 is amended by revising paragraphs (i)(2) and (j)(6)(ii) to read as follows:

s1910.1001 Asbestos.

* * * * *

(i) * * *

(2) *Access.* Employee exposure records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(l).

* * * * *

(j) * * *

(6) * * *

(ii) *Access.* Records of the medical examinations required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i). These records shall also be provided upon the request to the Director of NIOSH. Any physician who conducts a medical examination required by this paragraph shall furnish to the employer of the examined employee all the information specifically required by this paragraph, and any other medical information related to occupational exposure to asbestos fibers.

4. Section 1910.1003 is amended by revising paragraph (g)(2)(ii) to read as follows:

s1910.1003 4-Nitrobiphenyl.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i). These records shall also be provided upon request to the Director.

* * * * *

5. Section 1910.1004 is amended by revising paragraph (g)(2)(ii) to read as follows:

s1910.1004 alpha-Naphthylamine.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i). These records shall also be provided upon request to the Director.

* * * * *

6. Section 1910.1006 is amended by revising paragraph (g)(2)(ii) to read as follows:

s1910.1006 Methyl chloromethyl ether.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i). These records shall also be provided upon request to the Director.

* * * * *

7. Section 1910.1007 is amended by revising paragraph (g)(2)(ii) to read as follows:

s1910.1007 3-3'-Dichlorobenzidine (and its salts).

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)-(e) and (g)-(i). These records shall also be provided upon request to the Director.

* * * * *

8. Section 1910.1008 is amended by revising paragraph (g)(2)(ii) to read as follows:

s1910.1008 bis-Chloromethyl ether.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

9. Section 1910.1009 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1009 beta-Naphthylamine.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

10. Section 1910.1010 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1010 Benzidene.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

11. Section 1910.1011 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1011 4-Aminodiphenyl.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

12. Section 1910.1012 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1012 Ethyleneimine.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

13. Section 1910.1013 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1013 beta-Propiolactone.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

14. Section 1910.1014 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1014 2-Acetylaminofluorene.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

15. Section 1910.1015 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1015 4-Dimethylaminoazobenzene.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

16. Section 1910.1016 is amended by revising paragraph (g)(2)(ii) to read as follows:

s 1910.1016 N-Nitrosodimethylamine.

* * * * *

(g) * * *

(2) * * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall also be provided upon request to the Director.

* * * * *

17. Section 1910.1017 is amended by revising the introductory text of paragraph (m)(2) and paragraph (m)(3) and removing paragraphs (m)(4), (m)(5) and (m)(6) to read as follows:

§ 1910.1017 Vinyl chloride.

* * * * *

(m) * * *

(2) Records of required monitoring and measuring and medical records shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i). These records shall be provided upon request to the Director. Authorized personnel rosters shall also be provided upon request to the Assistant Secretary and the Director.

(i) * * *

(ii) * * *

(iii) * * *

(3) In the event that the employer ceases to do business and there is no successor to receive and retain his records for the prescribed period, these records shall be transmitted by registered mail to the Director, and each employee individually notified in writing of this transfer. The employer shall also comply with any additional requirements set forth in 29 CFR 1910.20(h).

18. Section 1910.1018 is amended by revising paragraphs (q)(3)(ii) and Appendix A Section VIII. by removing paragraph (q)(3)(iii) and by adding paragraph (q)(4)(iv) to read as follows:

s1910.1018 Inorganic arsenic.

* * * * *

(q) * * *

(3)* * *

(ii) Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i).

(4)* * *

(iv) The employer shall also comply with any additional requirements involving the transfer of records set in 29 CFR 1910.20(h).

* * * * *

Appendix A—Inorganic Arsenic Substance Information Sheet

* * * * *

VIII. Access to Records

You or your representative are entitled to records of your exposure to inorganic arsenic and your medical examination records if you request your employer to provide them.

* * * * *

19. Section 1910.1025 is amended by revising paragraphs (n)(4)(ii), removing paragraph (n)(4)(iii) and by adding paragraph (n)(5)(iv) to read as follows:

§1910.1025 Lead.

* * * * *

(n)* * *

(4)* * *

(ii) Environmental monitoring, medical removal, and medical records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (2)–(i). Medical removal records shall be provided in the same manner as environmental monitoring records.

(5)* * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

20. Section 1910.1028 is amended by revising paragraphs (l)(3)(ii) and Appendix A Section VII, by removing paragraphs (l)(3)(iii) and (l)(3)(iv) and by adding paragraph (l)(4)(iv) to read as follows:

§1910.1028 Benzene.

* * * * *

(1)* * *

(3)* * *

(ii) Employee exposure measurement records and employee medical records required by this section shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a)–(e) and (g)–(i).

(4) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

Appendix A—Substance Safety Data Sheet, Benzene

* * * * *

VII. Access to Records.

You or your representative are entitled to see the records of your exposure to benzene and your medical examination records if you request your employer to provide them.

* * * * *

21. Section 1910.1029 is amended by revising paragraphs (m)(3)(ii), removing paragraphs (m)(3)(iii) and (m)(3)(iv), and by adding paragraph (m)(4)(iv) to read as follows:

§1910.1029 Coke oven emissions.

* * * * *

(m) * * *

(3) * * *

(ii) Employee exposure measurement records and employee medical records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a)–(e) and (g)–(i).

(4) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

22. Section 1910.1043 is amened by revising paragraphs (k)(3)(ii) by removing paragraphs (k)(3)(iii) and (k)(3)(iv) and by adding paragraph (k)(4)(iv) to read as follows:

§1910.1043 Cotton dust.

* * * * *

(k) * * *

(3) * * *

(ii) Employee exposure measurement records and employee medical records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (g)–(i).

(4) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

23. Section 1910.1044 is amended by revising paragraphs (p)(3)(ii) by removing paragraphs (p)(3)(iii) and (p)(3)(iv) and by adding paragraph (p)(4)(iv) to read as follows:

§1910.1044 1,2-Dibromo-3-chloropropane.

* * * * *

(p) * * *

(3) * * *

(ii) Employee exposure monitoring records and employee medical records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a)–(e) and (g)–(i).

(4) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

24. Section 1910.1045 is amended by revising paragraphs (q)(4)(ii) and Appendix A section VI, D by removing paragraph (q)(4)(iii) and by adding paragraph (q)(5)(iv) to read as follows:

§1910.1045 Acrylonitrile.

* * * * *

(q) * * *

(4) * * *

(ii) Records required by paragraphs (q)(1)–(q)(3) of this section shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20 (a)–(e) and (q)–(i). Records required by paragraph (q)(1) shall be provided in the same manner as exposure monitoring records.

(5) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

Appendix A—Substance Safety Data Sheet for Acrylonitrile

* * * * *

VI. Access to Information

* * * * *

D. Your employer is required to release your exposure and medical records to you or your representative upon your request.

* * * * *

25. Section 1910.1046 is amended by revising paragraph (h)(2)(ii) and by adding paragraph (h)(3)(iv) to read as follows:

§1910.1046 Exposure to cotton dust in cotton gins.

* * * * *

(h) * * *

(2) * * *

(ii) Employee medical records shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a)–(e) and (g)–(i).

(3) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

26. Section 1990.151 is amended by revising paragraphs (q)(3)(ii) by removing paragraph (q)(3)(iii) and by adding paragraph (q)(4)(iv) to read as follows:

§1910.151 Model Standard pursuant to section 6(b) of the Act.

* * * * *

(q) * * *
(3) * * *

(ii) Employee exposure measurement records and employee medical records required by this section shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a)–(e) and (g)–(i).

(4) * * *

(iv) The employer shall also comply with any additional requirements involving transfer of records set forth in 29 CFR 1910.20(h).

* * * * *

27. Section 1990.152 is amended by revising paragraphs (q)(3)(i) and (q)(3)(ii) and removing (q)(3)(iii) to read as follows:

§1990.152 Model Emergency Temporary Standard pursuant to section 6(c).

* * * * *

(q) * * *
(3) * * *

(i) The employer shall assure that all records required to be maintained by this section be made available upon request to the Assistant Secretary and the Director for examination and copying.

(ii) Employee exposure measurement records and employee medical records required by this section shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1990.20(a)–(e) and (g)–(i).

* * * * *

(Secs. 6(b), 8(c) and 8(g) (84 Stat. 1593, 1599, 1600; 29 U.S.C. 655, 657), the Secretary of Labor's Order 8–76 (41 FR 25059) and 29 CFR Part 1911, Chapter XVII of Title 29)

[FR Doc. 80–15389 Filed 5–21–80; 8:45 am]
BILLING CODE 4510–26–M

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29 CFR Part 1913

Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records

AGENCY: The Occupational Safety and Health Administration of the United States Department of Labor (OSHA).

ACTION: Final rule.

SUMMARY: These rules of agency practice and procedure, promulgated today as a new 29 CFR 1913.10, govern OSHA access to personally identifiable employee medical information contained in medical records. The rules are structured to protect the substantial personal privacy interests inherent in identifiable medical records, while also permit OSHA to make beneficial use of these records for proper occupational safety and health purposes. The rules regulate the manner in which OSHA will seek access to employee medical records, and how the medical information will be protected once in the agency's possession.

EFFECTIVE DATE: August 21, 1980.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, Department of Labor, OSHA, Office of Public Affairs, Third Street and Constitution Avenue, NW., Room N–3641, Washington, DC 20210 (202–523–8151). Copies of this document may be obtained at any time by request to the OSHA Office of Public Affairs at the address or telephone number listed above, or by contacting any OSHA regional or area office.

SUPPLEMENTARY INFORMATION:

I. Introduction

The statement of reasons accompanying these regulations (the preamble) is divided into four parts, numbered I through IV. The following is a table of contents for this preamble:

I. Introduction
II. Pertinent Legal Authority
III. Summary and Explanation of the Regulations
A. Paragraph (a)—*General policy.*
B. Paragraph (b)—*Scope and application.*
C. Paragraph (c)—*Responsible persons.*
D. Paragraph (d)—*Written access orders.*
E. Paragraph (e)—*Presentation of written access order and notice to employees.*
F. Paragraph (f)—*Objections concerning a written access order.*
G. Paragraph (g)—*Removal of direct personal identifiers.*
H. Paragraph (h)—*Internal agency use of personally identifiable medical information.*
I. Paragraph (i)—*Security procedures.*
J. Paragraph (j)—*Retention and destruction of records.*
K. Paragraph (k)—*Results of an agency analysis using personally identifiable employee medical information.*
L. Paragraph (l)—*Annual report.*
M. Paragraph (m)—*Inter-agency transfer and public disclosure.*
N. Paragraph (n)—*Effective date.*
IV. Authority, Signature, and the Regulations

Part III is a provision-by-provision discussion of the regulations in lettered paragraphs corresponding to the lettered paragraphs of the regulations. It provides a brief summary of each provision and the evidence and rationale supporting it. References to the rulemaking record in the text of the preamble are in parentheses, and the following abbreviations have been used:

1. Ex. : Exhibit number to Docket H–112
2. Tr. : Transcript page number

These rules of agency practice and procedure are issued pursuant to sections 8(c)(1) and 8(g) of the Occupational Safety and Health Act of 1970 ("the Act") (84 Stat. 1599, 29 U.S.C. 657), section (e) of the Privacy Act (5 U.S.C. 552a(e)), and the government's general housekeeping statute (5 U.S.C. 301).

A. Background

The Occupational Safety and Health Administration (OSHA) has today published a final standard, 29 CFR 1910.20, governing access to employee exposure and medical records. Subparagraph (e)(3) of section 1910.20 provides for unconsented OSHA access to personally identifiable employee medical records. The need for OSHA access to employee medical records, and the decisionmaking involved in providing for unconsented OSHA access, are explained in the preamble accompanying 29 CFR 1910.20. The final regulations set forth below as § 1913.10 of 29 CFR establish agency procedures governing OSHA access to these records. These rules of agency practice and procedure serve to (1) control the circumstances under which OSHA seeks access to personally identifiable medical records, and (2) protect personally identifiable medical information once it has been obtained by the agency. These procedures are intended to preclude possible misuse of employee medical records, while at the same time enable medical record information to play a constructive role in agency efforts directed to the prevention of occupational injury and disease.

B. History of the regulations

These final regulations, 29 CFR 1913.10, have been developed in concert with the promulgation of 29 CFR 1910.20. 29 CFR 1910.20 was first published on July 19, 1978 (43 FR 31019) as an interim final rule. This rule required the indefinite retention of employee exposure and medical records, and required that these records be made available upon request to OSHA and to NIOSH (the National Institute for Occupational Safety and Health). This interim final rule was followed by a proposed rule published on July 21, 1978 (43 FR 31371) which proposed to expand 29 CFR 1910.20 to include employee and employee representative access to employee exposure and medical records, whether or not these records were subject to specific occupational safety and health standards. The proposed rule also set a definite minimal time period for the retention of these records. OSHA gave interested persons until September 22, 1978 to present written comments, views or arguments on any issue raised by the proposal. A total of 211 initial comments were received. Based on the

To: Ted Martinez
Date: 12/18/81
Re: Labor + Industry — Occupational Injuries + Illnesses

Rules as Adopted

The Fed. regs., 29 CFR § 1910.20, are adopted by reference in this rule but the text of same is included in this submission and attached to the rule for informational purposes only. There is no intention to make the text part of the rule nor to publish it.

Note the letter from Rep. Peterson + my notes attached

Donna Peterson
District 60B
Hennepin County
Committees:
Vice Chairman: General Legislation and Veterans Affairs
Taxes
Commerce and Economic Development
Reapportionment and Elections

Minnesota House of Representatives

Harry A. Sieben, Jr., Speaker

December 2, 1981

RECEIVED
DEC 3 1981
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Judith Wehrwein
Office of Attorney General
530 State Office Building

Dear Ms. Wehrwein:

It has come to my attention that the proposed adoption of rules governing OSHA rules might not be consistent with case law and federal law. I am particularly concerned about the concept that an employer need not pay an employee who refuses to perform work under hazardous conditions. It is my understanding that the Minnesota proposed rule may be more broad than the court ruling.

Would you please advise me of your understanding of this rule and what, if anything, can be done at this time. Representative Karen Clark has a bill to clarify this, however, I am concerned that the state is going beyond its authority and that her bill will not become law.

Thank you.

Sincerely,

Donna Peterson
State Representative

DP:ll
cc: Phil LaPorte

Reply to: ☐ 254 State Office Building, St. Paul, Minnesota 55155 Office: (612) 296-4274
☐ 2824 38th Ave. So. Minneapolis, Minnesota 55406 Home: (612) 722-7918

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
SAINT PAUL 55101

TELEPHONE:
(612) 296-6107

IN REPLY REFER TO

December 22, 1981

Mr. Ted Martinez
Special Assistant Attorney General
530 State Office Building
St. Paul, Minnesota 55155

Dear Mr. Martinez:

It has come to my attention as Director of the Minnesota Occupational Safety and Health Division, that a letter has been directed to the Attorney General's Office during the review period for our regulations concerning the protection of those employees who choose not to perform assigned tasks because of a reasonable apprehension of death or serious injury. By way of response let me indicate that it is the position of the Department of Labor and Industry that our proposed regulation is consistent with the United States Supreme Court's decision in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). The commenting party has suggested that the proposed state regulation (which is similar to the federal regulation given approval by the U. S. Supreme Court in Whirlpool) is not consistent with Whirlpool and other federal case law. It is our view that it is consistent.

At issue is the "strike with pay" concept. Neither the federal regulation involved or the proposed state regulation requires an employer to keep on the payroll an employee who is refusing to work under hazardous life-threatening conditions. However, the regulation states that to discriminate against an employee who reasonably believes his life is in danger if he continues to work and who thereby absents himself is an act which can result in the employee being awarded back pay among other things.

The U. S. Supreme Court in Whirlpool addressed this problem and the "strike with pay" issue as follows:

> When it rejected the "strike with pay" concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety. But the regulation at issue here does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger."

December 22, 1981

Mr. Ted Martinez
Special Assistant Attorney General
St. Paul, MN.
Page 2

See page 16 of the attached slip opinion.

As you can see, one of the primary grounds for upholding the Federal Secretary's regulation was the fact that the regulation did not fly in the face of congressional intent with respect to the strike with pay concept. The United States District Court for the Northern District of Ohio, in a case which is to be found at 1980 CCH OSHD Para. 24,956, hearing the case on remand in an opinion dated October 31, 1980, awarded back pay to employees who were discriminated against by Whirlpool Corporation. They did so under the provisions of the Federal Occupational Safety and Health Act which prohibit discrimination against employees who have engaged in protected activities such as refusing to work in life-threatening conditions.

The Supreme Court seems to be saying that if the Federal Secretary's regulation provided a strike with pay provision requiring employers to continue to pay employees their regular pay checks when they have absented themselves from work for reasons of safety, that such would conflict with congressional intent.

Under the Minnesota regulation, as it is proposed, discharging or otherwise discriminating against an employee i.e., denial of pay, because they have engaged in activities protected by the regulation, would be a discriminatory act under Minn. Stat. § 182.669 for which a Minnesota District Court "may order rehiring of the employee, reinstatement of his former position, fringe benefits, seniority rights, back pay, recovery of compensatory damages, and reasonable attorneys fees, or other appropriate relief." The Minnesota OSH Division on three separate occasions has brought actions in district court under the provisions of Minn. Stat. § 182.669 seeking back pay and reinstatement for employees who have been discharged because they have been discriminated against under the Minnesota Occupational Safety and Health Act and this Department will continue to enforce the provisions of that section of Minnesota law when the discriminatory acts include discharging employees who have absented themselves from work for reasons of imminent life-threatening conditions.

Thank you for your consideration of this information.

Very truly yours,

IVAN W. RUSSELL, Director
Occupational Safety and
Health Division

IWR:jsb

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHIRLPOOL CORP. *v.* MARSHALL, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78–1870. Argued January 9, 1980—Decided February 26, 1980

Section 11 (c)(1) of the Occupational Safety and Health Act of 1970 (Act) prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act. Respondent Secretary of Labor promulgated a regulation providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. Claiming that a suspended wire mesh screen in petitioner's manufacturing plant used to protect employees from objects occasionally falling from an overhead conveyor was unsafe, two employees of petitioner refused to comply with their foreman's order to perform their usual maintenance duties on the screen. They were then ordered to punch out without working or being paid for the remainder of their shift, and subsequently received written reprimands, which were placed in their employment files. Thereafter, respondent brought suit in Federal District Court, alleging that petitioner's actions against the two employees constituted discrimination in violation of § 11 (c)(1) of the Act, and seeking injunctive and other relief. While finding that the implementing regulation justified the employees' refusals to obey their foreman's order, the District Court nevertheless denied relief, holding that the regulation was inconsistent with the Act and therefore invalid. The Court of Appeals reversed and remanded, agreeing that the employees' actions were justified under the regulation but disagreeing with the conclusion that the regulation was invalid.

Held: The regulation in question was promulgated by respondent in the valid exercise of his authority under the Act, and constitutes a permis-

Syllabus

sible gloss on the Act, in light of the Act's language, structure, and legislative history. Pp. 6–19.

(a) The regulation clearly conforms to the Act's fundamental objective of preventing occupational deaths and serious injuries. Moreover, the regulation is an appropriate aid to the full effectuation of the Act's "general duty" clause, which requires an employer to furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees. The regulation thus on its face appears to further the Act's overriding purpose and rationally complements its remedial scheme. Pp. 9–11.

(b) The facts that Congress, at the time it was considering passage of the Act, rejected a so-called "strike with pay" provision (whereby an obligation would be imposed on employers to continue to pay employees who absented themselves from work for reasons of safety), and also rejected a provision that would have given the Labor Department, in imminent-danger situations, the power temporarily to shut down all or part of an employer's plant, do not indicate a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue. In contrast to the "strike with pay" provision, the regulation does not require employers to pay workers who refuse to perform assigned tasks in face of imminent danger, but simply provides that in such case the employer may not "discriminate" against the employees involved. And in contrast to the "shutdown" provision, the regulation accords no authority to Government officials but simply permits private employees to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition. Pp. 11–19.

593 F. 2d 715, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 78–1870

Whirlpool Corporation, Petitioner, v. Ray Marshall, Secretary of Labor. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 26, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Occupational Safety and Health Act of 1970 (Act) [1] prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act.[2] The Secretary of Labor (Secretary) has promulgated a regulation providing that, among the rights that the Act so protects, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.[3] The ques-

[1] Pub. L. 91–596, 84 Stat. 1590 (1970), as amended by Pub. L. 95–251, 92 Stat. 183 (1978), 29 U. S. C. §§ 651 *et seq.*

[2] Section 11 (c)(1) of the Act, 29 U. S. C. § 660 (c)(1), provides in full:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or other of any right afforded by this chapter."

[3] The regulation, 29 CFR § 1977.12, 38 Fed. Reg. 2681, 2683 (1973), as corrected 38 Fed. Reg. 4577 (1973), provides in full:

"(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11 (c) also protects employees from discrimination occurring because of the exercise 'of any right afforded by this Act.' Certain rights are explicitly

tion presented in the case before us is whether this regulation is consistent with the Act.

I

The petitioner company maintains a manufacturing plant

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provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

"(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8 (f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11 (c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

"(b)(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

in Marion, Ohio, for the production of household appliances. Overhead conveyors transport appliance components throughout the plant. To protect employees from objects that occasionally fall from these conveyors, the petitioner has installed a horizontal wire mesh guard screen approximately 20 feet above the plant floor. This mesh screen is welded to angle-iron frames suspended from the building's structural steel skeleton.

Maintenance employees of the petitioner spend several hours each week removing objects from the screen, replacing paper spread on the screen to catch grease drippings from the material on the conveyors, and performing occasional maintenance work on the conveyors themselves. To perform these duties, maintenance employees usually are able to stand on the iron frames, but sometimes find it necessary to step onto the steel mesh screen itself.

In 1973 the company began to install heavier wire in the screen because its safety had been drawn into question. Several employees had fallen partly through the old screen, and on one occasion an employee had fallen completely through to the plant floor below but had survived. A number of maintenance employees had reacted to these incidents by bringing the unsafe screen conditions to the attention of their foremen. The petitioner company's contemporaneous safety instructions admonished employees to step only on the angle-iron frames.

On June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger mesh had not yet been installed.[4] Following this incident, the

[4] As a result of this fatality, the Secretary conducted an investigation that led to the issuance of a citation charging the company with maintaining an unsafe walking and working surface in violation of 29 U. S. C. § 654 (a)(1). The citation required immediate abatement of the hazard and proposed a $600 penalty. Nearly five years following the accident, the Occupational Safety and Health Review Commission, affirmed the citation, but decided to permit the petitioner six months in which to correct

petitioner effectuated some repairs and issued an order strictly forbidding maintenance employees from stepping on either the screens or the angle-iron supporting structure. An alternative but somewhat more cumbersome and less satisfactory method was developed for removing objects from the screen. This procedure required employees to stand on power-raised mobile platforms and use hooks to recover the material.

On July 7, 1974, two of the petitioner's maintenance employees, Virgil Deemer and Thomas Cornwell, met with the plant maintenance superintendent to voice their concern about the safety of the screen. The superintendent disagreed with their view, but permitted the two men to inspect the screen with their foreman and to point out dangerous areas needing repair. Unsatisfied with the petitioner's response to the results of this inspection, Deemer and Cornwell met on July 9 with the plant safety director. At that meeting, they requested the name, address, and telephone number of a representative of the local office of the Occupational Safety and Health Administration (OSHA). Although the safety director told the men that they "had better stop and think about what [they] were doing," he furnished the men with the information they requested. Later that same day, Deemer contacted an official of the regional OSHA office and discussed the guard screen.[5]

The next day, Deemer and Cornwell reported for the night shift at 10:45 p. m. Their foreman, after himself walking on some of the angle-iron frames, directed the two men to perform their usual maintenance duties on a section of the old screen.[6] Claiming that the screen was unsafe, they refused

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the unsafe condition. *Whirlpool Corp.*, [1979] 3 CCH Empl. Safety & Health Guide ¶ 23,552 (May 11, 1979). A petition to review that decision is pending in the United States Court of Appeals for the District of Columbia Circuit.

[5] The record does not disclose the substance of this conversation beyond the fact that it concerned the safety of the guard screen.

[6] This order appears to have been in direct violation of the outstanding

to carry out this directive. The foreman then sent them to the personnel office, where they were ordered to punch out without working or being paid for the remaining six hours of the shift.[7] The two men subsequently received written reprimands, which were placed in their employment files.

A little over a month later, the Secretary filed suit in the United States District Court for the Northern District of Ohio, alleging that the petitioner's actions against Deemer and Cornwell constituted discrimination in violation of § 11 (c)(1) of the Act.[8] As relief, the complaint prayed, *inter alia*, that the petitioner be ordered to expunge from its personnel files all references to the reprimands issued to the two employees, and for a permanent injunction requiring the petitioner to compensate the two employees for the six hours of pay they had lost by reason of their disciplinary suspensions.

Following a bench trial, the District Court found that the regulation in question[9] justified Deemer's and Cornwell's refusals to obey their foreman's order on July 10, 1974. The court found that the two employees had "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm," that the danger presented had been "real and not something which [had] existed only in the minds of the employees," that the employees had acted in good faith, and that no reasonable alternative had realistically been open to them other than to refuse to work. The District Court nevertheless denied relief, holding that the Secretary's regulation was inconsistent with the Act and therefore invalid. *Usery* v. *Whirlpool Corp.*, 416 F. Supp. 30, 32–34.

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. *Marshall* v. *Whirlpool Corp.*, 593

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company directive that maintenance work was to be accomplished without stepping on the screen apparatus.

[7] Both employees apparently returned to work the following day without further incident.

[8] See n. 2, *supra*.

[9] See n. 3, *supra*.

F. 2d 715. Finding ample support in the record for the District Court's factual determination that the actions of Deemer and Cornwell had been justified under the Secretary's regulation, *id.*, at 719, n. 5,[10] the appellate court disagreed with the District Court's conclusion that the regulation is invalid. *Id.*, at 721–736. It accordingly remanded the case to the District Court for further proceedings. *Id.*, at 736. We granted certiorari, — U. S. —, because the decision of the Court of Appeals in this case conflicts with those of two other Courts of Appeals on the important question in issue. See *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (CA5 1977); *Marshall* v. *Certified Welding Corp.*, — F. 2d — (CA10 1978). That question, as stated at the outset of this opinion, is whether the Secretary's regulation authorizing employee "self-help" in some circumstances, 29 CFR § 1977.12 (b)(2), is permissible under the Act.

II

The Act itself creates an express mechanism for protecting workers from employment conditions believed to pose an emergent threat of death or serious injury. Upon receipt of an employee inspection request stating reasonable grounds to believe that an imminent danger is present in a workplace, OSHA must conduct an inspection. 29 U. S. C. § 657 (f)(1). In the event this inspection reveals workplace conditions or practices that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the Act,[11] 29 U. S. C. § 662

[10] In its petition for certiorari, the petitioner did not cite this aspect of the Court of Appeals' decision as raising a question for review. Accordingly, the issue of whether the regulation covers the particular circumstances of this case is not before the Court. Sup. Ct. R. 23 (c); *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177–179.

[11] These usual enforcement procedures involve the issuance of citations and imposition of penalties. When an OSHA inspection reveals a violation of 29 U. S. C. § 654 or of any standard promulgated under the Act, the

(a), the OSHA inspector must inform the affected employees and the employer of the danger and notify them that he is recommending to the Secretary that injunctive relief be sought. 29 U. S. C. § 662 (c). At this juncture, the Secretary can petition a federal court to restrain the conditions or practices giving rise to the imminent danger. By means of a temporary restraining order or preliminary injunction, the court may then require the employer to avoid, correct, or remove the danger or to prohibit employees from working in the area. 29 U. S. C. § 662 (a).[12]

To ensure that this process functions effectively, the Act expressly accords to every employee several rights, the exercise of which may not subject him to discharge or discrimination. An employee is given the right to inform OSHA of an imminently dangerous workplace condition or practice and request that OSHA inspect that condition or practice. 29 U. S. C. § 657 (f)(1).[13] He is given a limited right to assist the OSHA inspector in inspecting the workplace, 29 U. S. C. §§ 657 (a)(2), (e) and (f)(2), and the right to aid a court in determining whether or not a risk of imminent danger in fact exists. See 29 U. S. C. § 660 (c)(1). Finally, an affected employee is given the right to bring an action to compel the Secretary to seek injunctive relief if he believes the Secretary has wrongfully declined to do so. 29 U. S. C. § 662 (d).

Secretary may issue a citation for the alleged violation, fix a reasonable time for the dangerous condition's abatement, and propose a penalty. 29 U. S. C. §§ 658 (a), 659 (a), 666. The employer may contest the citation and proposed penalty. 29 U. S. C. § 659 (a), (c). Should he do so, the effective date of the abatement order is postponed until the completion of all administrative proceedings initiated in good faith. 29 U. S. C. §§ 659 (b), 666 (d). Such proceedings may include a hearing before an administrative law judge and review by the Occupational Safety & Health Review Commission. 29 U. S. C. §§ 659 (c), 661 (i).

[12] Such an order may continue pending the consummation of the Act's normal enforcement proceedings. 29 U. S. C. § 662 (b).

[13] Should the Secretary determine that "there are no reasonable grounds to believe that a violation or danger exists he shall notify the employee[] . . . of such determination." *Ibid.*

In the light of this detailed statutory scheme, the Secretary is obviously correct when he acknowledges in his regulation that, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." [14] By providing for prompt notice to the employer of an inspector's intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger. And in the few instances where this does not occur, the legislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition at the worksite.

As this case illustrates, however, circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.

Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 U. S. C. § 657 (g)(2) and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to

[14] See n. 3, *supra*.

expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer.

The question before us is whether this interpretative regulation [15] constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140. See *Ford Motor Credit Co.* v. *Milhollin*, — U. S. —; *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356.

A

The regulation clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries.[16] The Act, in its preamble, declares that its purpose

[15] The petitioner has raised no issue concerning whether or not this regulation was promulgated in accordance with the procedural requirements of the Administrative Act (APA), 5 U. S. C. § 553. Thus, we accept the Secretary's designation of the regulation as "interpretative," and do not consider whether it qualifies as an "interpretative rule" within the meaning of the APA, 5 U. S. C. § 553 (b) (A).

[16] The Act's legislative history contains numerous references to the Act's preventive purpose and to the tragedy of each individual death or accident. See, *e. g.*, S. Rep. No. 1282, 91st Cong., 2d Sess., 2 (1970), Leg. Hist. 142; 116 Cong. Rec. 37628 (1970), Leg. Hist. 516–517 (Sen. Nelson); 116 Cong. Rec. 37628, 37630 (1970), Leg. Hist. 518, 522 (Sen. Cranston); 116 Cong. Rec. 37630 (1970), Leg. Hist. 522–523 (Sen. Randolph); H. R. Rep. No. 1291, 91st Cong., 2d Sess., 14, 23 (1970), Leg. Hist. 844, 853; 116 Cong. Rec. 38366 (1970), Leg. Hist. 978 (Rep. Young); 116 Cong. Rec. 38367–38368 (1970), Leg. Hist. 981 (Rep. Anderson); 116 Cong. Rec. 38386 (1970), Leg. Hist. 1031, 1032 (Rep. Dent); 116 Cong. Rec. 42203 (1970), Leg. Hist. 1210 (Rep. Daniels). As stated by Senator Yarborough, a sponsor of the Senate bill:

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's

and policy is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to *preserve* our human resources. . . ." 29 U. S. C. § 651 (b). (Emphasis added.)

To accomplish this basic purpose, the legislation's remedial orientation is prophylactic in nature. See *Atlas Roofing Co.* v. *Occupational Safety Comm'n,* 430 U. S. 442, 444–445. The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Moreover, the Secretary's regulation can be viewed as an appropriate aid to the full effectuation of the Act's "general duty" clause. That clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U. S. C. § 654 (a)(1). As the legislative history of this provision reflects,[17] it was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation inde-

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work with their bodies intact." 116 Cong. Rec. 37625 (1970), Leg. Hist. 510.

House and Senate debates are reprinted, along with the House, Senate, and Conference Reports, in a one-volume Committee Print entitled Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited *supra* and hereafter as Leg. Hist.).

[17] See S. Rep. No. 1282, 91st Cong., 2d. Sess., 9–10 (1970), Leg. Hist. 149–150; H. R. Rep. No. 1291, 91st Cong., 2d Sess., 21–22 (1970), Leg. Hist. 851–852.

pendent of the specific health and safety standards to be promulgated by the Secretary. Since OSHA inspectors cannot be present around the clock in every workplace, the Secretary's regulation ensures that employees will in all circumstances enjoy the rights afforded them by the "general duty" clause.

The regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme.[18] In the absence of some contrary indication in the legislative history, the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose. *United States* v. *Bacto-Unidisk*, 394 U. S. 784, 798; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 486.

B

In urging reversal of the judgment before us, the petitioner relies primarily on two aspects of the Act's legislative history.

1

Representative Daniels of New Jersey sponsored one of several House bills that led ultimately to the passage of the Act.[19] As reported to the House by the Committee on Education and Labor, the Daniels bill contained a section that was

[18] It is also worth noting that the Secretary's interpretation of 29 U. S. C. § 660 (c) (1) conforms to the interpretation that Congress clearly wished the courts to give to the parallel antidiscrimination provision of the Federal Mine Safety and Health Amendments Act of 1977, 30 U. S. C. § 801 *et seq.* The legislative history of that provision, 30 U. S. C. § 815 (c)(1), establishes that Congress intended it to protect "the refusal to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 181, 95th Cong., 1st Sess., 35 (1977). See *id.*, at 36; 123 Cong. Rec. S10287–S10288 (daily ed. June 21, 1977) (remarks of Sen. Church, Sen. Williams, Sen. Javits).

[19] H. R. 16785, 91st Cong., 2d Sess. (1970), Leg. Hist. 893–976 (1970) (bill as reported to the House). See H. R. Rep. No. 1291, 91st Cong., 2d Sess. (1970), Leg. Hist. 831.

soon dubbed the "strike with pay" provision.[20] This section provided that employees could request an HEW examination of the toxicity of any materials in their workplace. If that examination revealed a workplace substance that had "potentially toxic or harmful effects in such concentration as used or found," the employer was given 60 days to correct the potentially dangerous condition. Following the expiration of that period, the employer could not require that an employee be exposed to toxic concentrations of the substance unless the

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[20] Section 19 (a)(5) of H. R. 16785, *supra*, Leg. Hist. 969–970 (as reported to the House floor) provided in relevant part:

"The Secretary of Health, Education, and Welfare shall publish . . . a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

The Committee Report explained the provision as follows:

"There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay. . . . Nothing herein restricts the right of the employer, except as he is obligated under other agreements, to assign a worker to other non-prohibited work during this time. This should eliminate possible abuse by allowing the employer to avoid payment for work not performed." H. R. Rep. No. 1291, *supra*, at 30, Leg. Hist. 860.

employee was informed of the hazards and symptoms associated with the substance, the employee was instructed in the proper precautions for dealing with the substance, and the employee was furnished with personal protective equipment. If these conditions were not met, an employee could "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

This provision encountered stiff opposition in the House. Representative Steiger of Wisconsin introduced a substitute bill containing no "strike with pay" provision.[21] In response, Representative Daniels offered a floor amendment that, among other things, deleted his bill's "strike with pay" provision.[22] He suggested that employees instead be afforded the right to request an immediate OSHA inspection of the premises, a right which the Steiger bill did not provide. The House ultimately adopted the Steiger Bill.[23]

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[21] H. R. 19200, 91st Cong., 2d Sess. (1970), Leg. Hist. 763–830 (bill as originally introduced). See H. Res. 1218, 91st Cong., 2d Sess. (1970), Leg. Hist. 977.

[22] 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1004, 1005, 1008–1009, 1071 (Rep. Daniels). See 116 Cong. Rec. 38369 (1970), Leg. Hist. 986 (Rep. Perkins). Representative Daniels explained to the House why he was proposing his amendment:

"The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm." 116 Cong. Rec. 38377–38378 (1970), Leg. Hist. 1009.

[23] 116 Cong. Rec. 38715 (teller vote), 38723–38724 (roll call vote) (1970), Leg. Hist. 1091, 1112–1115.

Representative Daniels' proposed amendments were never acted upon. His original bill was voted down in favor of the Steiger bill. See 116 Cong. Rec. 38704–38705, Leg. Hist. 1064 (the Chairman and Rep. Perkins); 116 Cong. Rec. 38707, Leg. Hist. 1072 (Rep. O'Hara).

The bill that was reported to and, with a few amendments, passed by the Senate never contained a "strike with pay" provision.[24] It did, however, give employees the means by which they could request immediate Labor Department inspections.[25] These two characteristics of the bill were underscored on the floor of the Senate by Senator Williams, the bill's sponsor.[26]

After passage of the Williams bill by the Senate, it and the Steiger bill were submitted to a conference committee. There, the House acceded to the Senate bill's inspection request provisions.[27]

The petitioner reads into this legislative history a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue in this case. The petitioner argues that Congress' overriding concern in rejecting the "strike with pay" provision was to avoid giving employees a unilateral authority to walk off the job which they might abuse in order to intimidate or harass their employer. Congress deliberately chose instead, the petitioner maintains, to grant employees the power to request immediate administrative inspections of the workplace which could in appropriate cases lead to coercive judicial remedies. As the petitioner views the regulation, therefore, it gives to

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[24] S. 2193, 91st Cong., 2d Sess. (1970), Leg. Hist. 204–295 (bill as reported to Senate by Senate Committee on Labor and Public Welfare). See S. Rep. No. 1282, 91st Cong., 2d Sess. (1970), Leg. Hist. 141.

[25] See S. 2193, *supra*, § 8 (f) (1), Leg. Hist. 252–253.

[26] "[D]espite some wide-spread contentions to the contrary, . . . the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." 116 Cong. Rec. 37326 (1970), Leg. Hist. 416.

[27] H. R. Rep. No. 1765, 91st Cong., 2d Sess., 37–38 (1970), Leg. Hist. 1190–1191. See 29 U. S. C. § 657 (f).

workers precisely what Congress determined to withhold from them.

We read the legislative history differently. Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury. The remedy which the rejected provision furnished employees could have been invoked only after 60 days had passed following HEW's inspection and notification that improperly high levels of toxic substances were present in the workplace. Had that inspection revealed employment conditions posing a threat of imminent and grave harm, the Secretary of Labor would presumably have requested, long before expiration of the 60-day period, a court injunction pursuant to other provisions of the Daniels bill.[28] Consequently, in rejecting the Daniels bill's "strike with pay" provision, Congress was not rejecting a legislative provision dealing with the highly perilous and fast-moving situations covered by the regulation now before us.

It is also important to emphasize that what primarily troubled Congress about the Daniels bill's "strike with pay" provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section.[29] It is instructive that virtually

[28] See H. R. 16785, *supra*, § 12 (b), Leg. Hist. 956 (bill as reported to House).

[29] Congress' concern necessarily was with the provision's compensation requirement. The law then, as it does today, already afforded workers a right, under certain circumstances, to walk off their jobs when faced with hazardous conditions. See 116 Cong. Rec. 42208 (1970), Leg. Hist. 1223–1224 (Rep. Scherle) (reference to Taft-Hartley Act). Under Section 7 of the National Labor Relations Act (NLRA), 29 U. S. C. § 157, employees have a protected right to strike over safety issues. See *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9. Similarly, Section 502 of the Labor Management Relations Act, 29 U. S. C. § 143, provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike." The effect of this

every time the issue of an employee's right to absent himself from hazardous work was discussed in the legislative debates, it was in the context of the employee's right to continue to receive his usual compensation.[30]

When it rejected the "strike with pay" concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety. But the regulation at issue here does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger. It simply provides that in such cases the employer may not "discriminate" against the employees involved. An employer "discriminates" against an employee

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section is to create an exception to a no-strike obligation in a collective-bargaining agreement. *Gateway Coal Co.* v. *United Mine Workers*, 414 U. S. 368, 385.

The existence of these statutory rights also make clear that the Secretary's regulation does not conflict with the general pattern of federal labor legislation in the area of occupational safety and health. See also 29 CFR § 1977.18.

[30] See 116 Cong. Rec. 37326 (1970), Leg. Hist. 416 (Sen. Williams); 116 Cong. Rec. 38369 (1970), Leg. Hist. 986 (Rep. Perkins); 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1005, 1009, 1071 (Rep. Daniels); 116 Cong. Rec. 38379 (1970), Leg. Hist. 1011 (Rep. Randall); 116 Cong. Rec. 38391 (1970), Leg. Hist. 1046 (Rep. Feigham); 116 Cong. Rec. 38714 (1970), Leg. Hist. 1089 (Rep. Horton).

The petitioner cites two passages in the legislative debates that, at first blush, appear to suggest that Congress was also concerned with employee walkouts not accompanied by pay. One is a statement by Representative Cohelan, a supporter of the Daniels bill, that "a comprehensive occupational safety and health program . . . must permit the worker to leave his post whenever and wherever conditions exist that endanger his health or safety." 116 Cong. Rec. 38375 (1970), Leg. Hist. 1001. The other is a statement by another Member that the Daniels bill did not authorize "strikes without pay." 116 Cong. Rec. 38708 (1970), Leg. Hist. 1075. Read in context, however, it is clear that both statements were referring to the "strike with pay" provision contained in the Daniels bill.

only when he treats that employee less favorably than he treats other similarly situated.[31]

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The second aspect of the Act's legislative history upon which the petitioner relies is the rejection by Congress of provisions contained in both the Daniels and the Williams bills that would have given Labor Department officials, in imminent danger situations, the power temporarily to shut down all or part of an employer's plant.[32] These provisions aroused considerable opposition in both Houses of Congress. The hostility engendered in the House of Representatives led Representa-

[31] Deemer and Cornwell were clearly subjected to "discrimination" when the petitioner placed reprimands in their respective employment files. Whether the two employees were also discriminated against when they were denied pay for the approximately six hours they did not work on July 10, 1974, is a question not now before us. The District Court dismissed the complaint without indicating what relief it thought would have been appropriate had it upheld the Secretary's regulation. The Court of Appeals expressed no view concerning the limits of the relief to which the Secretary might ultimately be entitled. On remand, the District Court will reach this issue.

[32] The version contained in the Daniels bill would have authorized the Secretary to issue a shutdown order of no more than 5 days' duration. See H. R. 16785, *supra*, § 12 (a), Leg. Hist. 955–956 (bill as reported to the House); H. R. Rep. No. 1291, *supra*, at 25, Leg. Hist. 855.

As reported to the Senate, the version contained in the Williams bill limited the permissible duration of the administrative order to 72 hours and required that a Regional Director of the Labor Department concur in the order. S. 2193, *supra*, § 11 (b), Leg. Hist. 263–264. See S. Rep. No. 1282, *supra*, at 12–13, Leg. Hist. 152–153; S. Rep. No. 1282, *supra*, at 56–57, Leg. Hist. 195–196 (individual views of Sen. Javits). On the floor of the Senate, amendments were adopted that would have required the Labor Department official authorizing the inspector's actions to be an official appointed with the advice and consent of the Senate and that would have mandated that the employer be given prior notice of the reasons for the shutdown. 116 Cong. Rec. 37621–37622 (1970), Leg. Hist. 499–500; 116 Cong. Rec. 37624–37625 (1970), Leg. Hist. 508–509. See S. 2193, *supra*, § 12 (b), Leg. Hist. 562–563 (bill as passed by Senate).

tive Daniels to delete his version of the provision in proposing amendments to his original bill.[33] The Steiger bill that ultimately passed the House gave the Labor Department no such authority.[34] The Williams bill, as approved by the Senate, did contain an administrative shutdown provision, but the conference committee rejected this aspect of the Senate bill.[35]

The petitioner infers from these events a congressional will hostile to the regulation in question here. The regulation, the petitioner argues, provides employees with the very authority to shut down an employer's plant that was expressly denied a more expert and objective United States Department of Labor.

As we read the pertinent legislative history, however, the petitioner misconceives the thrust of Congress' concern. Those in Congress who prevented passage of the administrative shutdown provisions in the Daniels and Williams bills were opposed to the unilateral authority those provisions gave to federal officials, without any judicial safeguards, drastically to impair the operation of an employer's business.[36] Con-

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[33] 116 Cong. Rec. 38372, 38376, 38378, 38707 (1970), Leg. Hist. 993, 1005, 1009–1010, 1011, 1071 (Rep. Daniels). As Representative Daniels explained:

"[B]usiness groups have expressed great fears about the potential for abuse. They believe that the power to shut down a plant should not be vested in an inspector. While there is no documentation for this fear, we recognize that it is very prevalent. The Courts have shown their capacity to respond quickly in emergency situations, and we believe that the availability of temporary restraining orders will be sufficient to deal with emergency situations. Under the Federal rules of civil procedure, these orders can be used *ex parte*. If the Secretary uses the authority that he is given efficiently and expeditiously, he should be able to get a court order within a matter of minutes rather than hours." 116 Cong. Rec. 38378, Leg. Hist. 1009–1010.

[34] H. R. 19200, *supra*, § 12, Leg. Hist. 796–798.

[35] H. R. Rep. No. 1765, *supra*, at 40, Leg. Hist. 1193.

[36] See 116 Cong. Rec. 35607, 37602 (1970), Leg. Hist. 299, 452–453 (Sen. Saxbe); 116 Cong. Rec. 37338 (1970), Leg. Hist. 425 (Sen Dominick); 116 Cong. Rec. 37602 (1970), Leg. Hist. 453–454 (Sen. Schweiker); 116 Cong. Rec. 41763 (1970), Leg. Hist. 1149 (Sen. Prouty); H. R. 1291,

gressional opponents also feared that the provisions might jeopardize the Government's otherwise neutral role in labor-management relations.[37]

Neither of these congressional concerns is implicated by the regulation before us. The regulation accords no authority to government officials. It simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.

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For these reasons we conclude that 29 CFR § 1977.12 (b)(2) was promulgated by the Secretary in the valid exercise of his authority under the Act. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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supra, at 55–57, Leg. Hist. 885–887 (minority report); 116 Cong. Rec. 38368 (1970), Leg. Hist. 983 (Rep. Anderson); 116 Cong. Rec. 38372, 38702 (1970), Leg. Hist. 992, 1058 (Rep. Steiger); 116 Cong. Rec. 38378–38379 (1970), Leg. Hist. 1011–1012 (Rep. Randall); 116 Cong. Rec. 38393 (1970), Leg. Hist. 1050 (Rep. Michel); 116 Cong. Rec. 38394 (1970), Leg. Hist. 1052 (Rep. Broomfield); 116 Cong. Rec. 38704 (1970), Leg. Hist. 1062 (Rep. Sikes); 116 Cong. Rec. 38713 (1970), Leg. Hist. 1087 (Rep. Robison); 116 Cong. Rec. 42203 (1970), Leg. Hist. 1210 (Rep. Daniels).

[37] See 116 Cong. Rec. 37346 (1970), Leg. Hist. 448 (Sen. Tower); H. R. 1291, *supra*, at 55–57, Leg. Hist. 885–887 (minority report); 116 Cong. Rec. 38393 (1970), Leg. Hist. 1050 (Rep. Michel). Some of these Members of Congress expressed particular fears over the possible pressures which might be brought to bear on an inspector during a strike.

Commission rule 73(a), 29 C. F. R. § 2200.73(a), provides that "[i]n all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary." Reasonably construed, this rule requires the Secretary to prove the elements of a violation. See *Brennan v. OSHRC*, 511 F. 2d 1139 (9th Cir. 1975). The question we decide here is whether the Commission erred when it placed upon Mountain States the burden of proving the violation was unpreventable. The Fourth Circuit, in reviewing a Commission decision involving circumstances similar to those here, held the Commission may not place the burden on the employer. *Ocean Elec. Corp. v. Secretary of Labor*, 594 F. 2d 396 (4th Cir. 1979). See also *Horne Plumbing & Heating Co. v. OSHRC*, 528 F. 2d 564 (5th Cir. 1976); *Brennan v. OSHRC*, 511 F. 2d 1139 (9th Cir. 1975). But see *Danco Const. Co. v. OSHRC*, 586 F. 2d 1243, 1247 n. 6 (8th Cir. 1978). We agree with the result reached by the Fourth Circuit.

The Commission has consistently held that to establish a serious violation the Secretary must prove the employer knew or should have known of the likelihood of the noncomplying condition or conduct. *E.g.*, Harvey Workover, Inc., [1979] Occup. Safety & Health Dec. (CCH) ¶ 23,830. Accord, *Brennan v. OSHRC*, 511 F. 2d 1139 (9th Cir. 1975). Here, however, the Commission seems to have determined that the Secretary's burden of showing the employer's knowledge was met by proof that Halverson had some supervisory responsibilities and that Halverson knew his own failure to wear rubber gloves was a violation. The premise is that because a corporate employer acts and acquires knowledge through its agents, ordinarily the actions and knowledge of its supervisory employees are imputed to the employer.

When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge—actual or constructive—of noncomplying conduct of a subordinate. Upon a showing of the supervisor's knowledge, it is not unreasonable to require the employer to defend by showing the failure to prevent violations by subordinates was unforeseeable. But when the noncomplying behavior is the supervisor's own a different situation is presented. Halverson knew he personally violated the safety standards, of course; if we impute that knowledge to the employer—and declare that now the employer must show the noncomplying conduct was unforeseeable—we are shifting the burden of proof to the employer. All the Secretary would have to show is the violation; the employer then would carry the burden of nonpersuasion.

The same flaw is present in the Secretary's argument that, even if it bears the burden of showing the violation was foreseeable, it need only present a prima facie case, after which the burden shifts to the employer to prove unpreventability. See *Danco Const. Co. v. OSHRC*, 586 F. 2d 1243, 1247 n. 6 (8th Cir. 1978); *Brennan v. OSHRC*, 511 F. 2d 1139, 1143 (9th Cir. 1975). In the present context the prima facie case would be made by showing the supervisor's violation and imputing that knowledge, because he is a supervisor, to the employer. To interpret the rule as the Secretary requests would be to leave the Secretary only the initial burden of making out its case on a critical element and to impose on Mountain States the ultimate risk of nonpersuasion in violation of the Commission's own procedural rule 73(a).

The Commission's failure to abide by its rule is arbitrary conduct and therefore its decision must be set aside. See 5 U. S. C. § 706(2)(A). Because the Commission made its findings in light of the burden of proof erroneously allocated to Mountain States, the decision is remanded for reconsideration.

Reversed and remanded for proceedings consistent herewith.

[¶ 24,566] Firestone Tire and Rubber Company

Text of opinion of the United States District Court for the Central District of Illinois-Springfield Division dated May 20, 1980. Docket No. 78-3226.

Employee Discrimination—Refusal to Perform Dangerous Work—Tower Work During Night Storm—Effect of Arbitration Award. Suspension of an employee from work for a week for refusing to return to work on a carbon black tower about 40 feet above ground during a stormy night shift was discriminatory under § 11(c)(2) of the Act because he acted reasonably and in good faith believed that he would have exposed himself to a real danger of death or serious injury. The employee, who had been working with two others to install a temporary, 20-pound roto-vane (chute) on the tower, after a 3:30 a. m. dinner break refused the foreman's instruction to replace the temporary installation with a 150-pound permanent vane because of weather conditions on the tower. The foreman replied that he must either return to the tower or "clock out" and

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return to work only through his union. In seven years of employment with the company, the employee had never been disciplined or refused a job assignment. The foreman knew of his exemplary record. At no time during the shift prior to or concurrent with the employee's checking out did the foreman examine conditions on the tower or attempt in any other way to discover the prevailing conditions there.

Access to the tower's catwalk was by a ladder which did not provide proper clearance, it was snowing, and the temperature was below freezing with a wind of at least 10 mph. Coupled with mist coming from a nearby cooling tower, these conditions caused the ladder, catwalk rail and catwalk to be slippery with snow and ice. The hazardous conditions were exacerbated by lighting in the work area so poor that the employees held flashlights in their teeth to see.

The employer was ordered to provide back pay with interest for the suspension period, to restore the employee's seniority and other rights and privileges, and to clear its records of all mention of the employee's suspension. An arbitration award made in response to a grievance filed by the union on the employee's behalf did not preclude the secretary from seeking relief under § 11(c).

Back reference: ¶ 573.

[Text of Opinion]

Findings of Fact and Conclusions of Law

This case is before the Court after bench trial on March 27, 1980. Having considered the pleadings, stipulations of the parties, documents in evidence, testimony of witnesses, and arguments of counsel, the Court makes the followng findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, Ray Marshall, is the Secretary of Labor, United States Department of Labor, and has brought this action in his official capacity under Section 11(c)(2) of the Occupational Safety and Health Act (29 U. S. C. § 660(c)(2)).

2. Defendant, the Firestone Tire and Rubber Company, is a corporation with a facility located at 2500 North 22nd Street, Decatur, Macon County, Illinois. At this facility, Defendant is engaged in the manufacture of automobile tires and other related activities. Defendant regularly and recurrently handles goods and materials received from, and ships goods located outside of, the State of Illinois.

3. Located at Defendant's facility is a carbon black tower. This tower is used to store carbon black, (a substance that is used in the tire-manufacturing process) and to distribute the carbon black through roto-vanes onto conveyor belts. The roto-vanes are located on the first level of the tower, about 35-40 feet above the ground. These conveyor belts transport the carbon black to Banburies where it is utilized in the manufacturing process. Tires cannot be manufactured without carbon black.

4. A breakdown in the roto-vane could result in the slowing down or stoppage of the tire manufacturing process due to insufficient carbon black.

5. Carl Frost began his employment with Defendant in June, 1969 as maintenance mechanic, also known as a millwright or machine repairman. He is still employed by the Defendant in that capacity.

6. As of March 15-16, 1976, Carl Frost had been an exemplary employee of Defendant. In the seven years he had worked for Firestone, Frost had never been disciplined nor had he ever refused a job assignment. Frost was recognized by his co-workers and his supervisors as a good, reliable employee.

7. On March 15-16, 1976, and at all times relevant thereto, Frost was a member in good standing of Local 713, United Rubber, Cork, Linoleum and Plastic Workers of America, his authorized employee representative.

8. On March 15, 1976, Frost was working on the "A" Shift. This shift began at 11:00 p. m. and ended at 7:00 p. m. on March 16, 1976.

9. On the night of March 15-16, Frost and fellow employees Michael Groves and Larry Johnson were assigned to fabricate a temporary roto-vane (or chute) and install it on the carbon black tower. They were also responsible for repairing the permanent roto-vane. The temporary roto-vane was fabricated out of a metal bucket and weighed about 15-20 pounds. The permanent roto-vane weighs approximately 150 pounds.

10. The temporary roto-vane was finished at about 1:00 a. m. and at that time Frost and the two other employees climbed up the tower to install a catwalk composed of grated metal. Access to this catwalk was by a ladder which did not provide proper clearance. The Defendant was subsequently cited for an OSHA violation with respect to the ladder. It did not contest this violation.

11. The weather on March 15-16, 1976 was dismal. Rain showers accompanied by fog began at about 8:00 p. m. and turned to snow at about 9:00 p. m. It continued

snowing throughout most of the night. The temperature was just below freezing with a wind of least 10 mph. These conditions, coupled with mist coming from a nearby cooling tower, caused the ladder, catwalk rail and catwalk to be covered with ice and snow, and made them very slippery.

12. The hazardous conditions on the carbon black tower were further exacerbated by insufficient lighting in the area in which the work was being performed. Only one light in the tower was working and it was shielded from the installation location. The lighting was so poor that the employees used flashlights and had to hold them in their teeth in order to see.

13. These conditions prompted Frost and the others to be very cautious. They continued installing this temporary roto-vane until approximately 3:00 a. m. At that time, needing one final part to complete this temporary installation, Frost and the others decided to take their dinner.

14. The normal dinner break on Shift "A" is 3:00 a. m.

15. At approximately 3:30 a. m. Frost and the others were preparing to return to the tower to finish the temporary installation when Foreman Don Apke approached them and instructed to remove the temporary roto-vane, hoist the permanent roto-vane up the tower using a make-shift hoist and install it. Frost refused to do this claiming that it was "wet, cold and dark" and that it was "too bad" on the tower.

16. Apke told Frost either to do the job or "clock-out" and return to work only through the Defendant's Industrial Relations Department. Frost refused to do the job and "clocked-out".

17. The words used by Frost in his refusal to install the permanent roto-vane, when coupled with his exemplary record and the knowledge of Foreman Don Apke regarding Frost's record and regarding the nature of the assignment, were equivalent to saying "unsafe" and "dangerous".

18. At no time during Shift "A" prior to or concurrent with Frost "clocking-out" did Apke examine the conditions on the carbon black tower or in any other way attempt to apprise himself of the prevailing conditions on the tower or to correct them or protect the employees.

19. The other two employees continued the installation even though they felt the conditions were unsafe because they were afraid of being laid off or discharged.

20. Frost attempted to contact OSHA but was unsuccessful in his efforts. He therefore requested Jack Dougherty, Union Divisional Chairman, to contact OSHA. Dougherty succeeded in contacting OSHA.

21. Frost was subsequently suspended without pay for two weeks. This supsension was reduced to one week with the weight of two weeks because of Frost's good record.

22. An OSHA Section 11(c) complaint was filed on Frost's behalf by Union Divisional Chairman Jack Dougherty on March 17, 1976. It was received by an agent of the Plaintiff on March 22, 1980.

23. A grievance was also filed by the Union on Frost's behalf. It was pursued through arbitration where, on October 15, 1978, Arbitrator Charles Killingsworth upheld Defendant's action.

Conclusions of Law

1. The Court has jurisdiction over Plaintiff's claims under Section 11(c)(2) of the Occupational Safety and Health Act of 1970 (29 U. S. C. § 660(c)(2)).

2. Defendant, the Firestone Tire and Rubber Company, is and at all relevant times, was a "person" and an "employer" within the meaning of Sections 3(4) and and 3(5) of the Act (29 U. S. C. §§ 652(4) and (5)).

3. Carl Frost, at all times relevant hereto, was an "employee" within the meaning of Section 3(6) of the Act (29 U. S. C. § 652(6)).

4. A discrimination complaint was timely filed on behalf of Carl Frost by an authorized representative in accordance with Section 11(c)(2) of the Act (29 U. S. C. § 660(c)(2) and the Secretary's regulations (29 C. F. R. 1977.15(a), (c) and (d)).

5. The existence of an arbitrator's award does not in any way preclude the Secretary of Labor from seeking relief under Section 11(c). 29 C. F. R. 1977.18; *Alexander v. Gardner-Denver*, 415 U. S. 40 (1974); *Marshall v. N. L. Industries*, No. 78-2289, 1980 CCH OSHD ¶ 24,354 (7th Cir. 1980).

6. On March 15-16, Carl Frost reasonably and in good faith believed that going back on the tower to install the permanent roto-vane would expose him to hazardous conditions and a real danger of death or serious injury.

7. The conditions causing Frost's apprehension of death or serious injury were of such a nature that a reasonable person, under the circumstances then confronting Frost, would conclude that there was a real danger of death or serious injury.

8. That Frost, when confronted with the choice between not performing his assigned task and having to "clock-out", return through Defendant's Industrial Relations Department and face the attendant consequences, or subjecting himself to a real danger of serious injury or death arising from the hazardous conditions on the carbon black tower, had no reasonable alternative other than to refuse the job assignment.

9. Carl Frost gave notice to the Defendant through his words and actions that the installation of the permanent roto-vane presented a real danger of death or serious injury and the employer did nothing to correct the hazardous conditions.

10. Defendant's suspension of Carl Frost violated Section 11(c)(1) of the Act and 29 C. F. R. 1977.12(b)(2). *Whirlpool Corporation v. Marshall*, — U. S. —, 100 S. Ct. 383, 48 USLW 4139 (1980); *Marshall v. N. L. Industries*, No. 78-2289, 1980 CCH OSHD ¶ 24,354 (7th Cir., 1980).

11. Judgment is entered in favor of the Plaintiff and against the Defendant, granting the following relief:

(a) Defendant restrained from withholding wage compensation Carl Frost would have been paid during the period March 16, 1976 to March 23, 1976, but for the illegal suspension, together with interest on such back pay from the date such back pay became due until it is actually paid.

(b) Defendant to restore to Carl Frost full seniority and other rights and privileges enjoyed as if the illegal suspension had not occurred.

(c) Defendant to expunge from its record all mention of the suspension of Carl Frost.

(d) Defendant to pay the costs of this action. Enter this 23 day of May, 1980.

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[¶ 24,567] Foster and Kleiser

Text of Review Commission decision dated June 24, 1980. OSHRC Docket No. 77-632. The Judge's decision appears at 1978 OSHD ¶ 22,638.

Review Commission—Post-Hearing Amendment of Citation—Trial by Implied Consent. The case was remanded to the Judge for a ruling on the Secretary's post-hearing motion to amend the citation to allege that the employer's failure to enforce the use of lifelines, safety belts and lanyards constituted a § 1926.28(a) personal protective equipment violation. The Judge had vacated the original § 1926.104(a) charge, following Commission precedent, on grounds that the standard specifies conditions to be met when personal protective equipment is used, but does not require the employer to enforce the use of such equipment. The Judge was instructed to determine if all issues relevant to the amended charge would have been tried by implied consent and without prejudice to the employer—and, if so, to determine whether there was a § 1926.28(a) violation.

Back reference: ¶ 4569.

Preston Padden for the employer. Baruch A. Fellner and William S. Kloepfer for the Secretary.

[Text of Review Commission Decision]

Before CLEARY, Chairman; BARNAKO and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Paul L. Brady is before the Commission for review pursuant to section 12(j) [1] of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678. Judge Brady vacated a citation alleging that Respondent, Foster and Kleiser, failed to comply with the standard at 29 C. F. R. § 1926.104(a) in that it was not enforcing the use of lifelines, safety belts, and lanyards at its workplace in Akron, Ohio. The judge reasoned that section 1926.104(a) only specifies certain conditions that must be met when lifelines, safety belts, and lanyards are used, but does not require an employer to enforce the use of such equipment.

The Secretary petitioned for review of the judge's decision. In his petition, the Secretary did not pursue his original allegation that Respondent failed to comply with section 1926.104(a).[4] Instead, the Secretary moved to amend the citation to allege that Respondent's alleged failure to enforce the use of lifelines, safety belts, and lanyards constituted a failure to comply with

[1] 29 U. S. C. § 661(i).

[2] This standard provides:

§ 1926.104 *Safety belts, lifelines, and lanyards.*

(a) Lifelines, safety belts, and lanyards shall be used only for employee safeguarding. Any lifeline, safety belt, or lanyard actually subjected to in-service loading, as distinguished from static load testing, shall be immediately removed from service and shall not be used again for employee safeguarding.

[3] We note that the judge's conclusion that § 1926.104(a) does not require an employer to enforce the use of personal protective equipment is consistent with Commission precedent. *Gulf Oil Co.*, 77 OSAHRC 216/B10, 6 BNA OSHC 1240, 1978 CCH OSHD ¶ 22,737 (No. 14281, 1977).

This Commission was established to independently decide questions of law and policy on a uniform, national basis. To temporarily overrule our precedent pending judicial review of our final orders in these three cases would be in derogation of our function. I therefore conclude that, aside from the inadequate showing of irreparable harm in these cases, the UMWA has not established the appropriateness of the relief it seeks.

[¶ 24,331] General Motors Corp., Central Foundry Division

Digest of Judge's decision filed with the Commission February 20, 1980. OSHRC Docket No. 79-1209. Paul E. Dixon, Judge.

General Duty Clause—Failure to Guard Catwalk Adjacent to Conveyor—Machine Guarding—Conveyor Pulleys—Wilful Violations—Deliberate Removal of Guards. Penalties of $10,000 each were assessed for two wilful violations of § 1910.212(a) nip point guarding requirements: failure to provide a guard over a portion of a magnetic head pulley on a mag head conveyor, and failure to guard the tail pulley of a Serpentix bucket line conveyor. A $900 penalty was assessed for violation of the general duty clause by failing to keep a catwalk in the area of the two converging conveyor belts free from an obstruction (power equipment), or to guard the catwalk to prevent employees from slipping or falling onto the mag head conveyor and being injected into the bucket line conveyor.

The citation was issued following the death of a worker who had a leg amputated at the mag head pulley and was pulled onto the moving mag head conveyor belt and fed into the unguarded vertical bucket line. Guarding on the upper portion of the magnetic head and conveyor had been removed some six months before the accident. The employer's assertion that it did not know of the missing guards, the hazardous conditions, and the exposure or access of employees was rejected. When safety and health problems were brought to the attention of supervisory personnel, there was a consistent pattern of employee harassment, lack of responsiveness, and equivocation. The firm's safety program was found to be no more than a "paper program" which showed a substantial indifference to the health and safety of employees. The foreman in charge of the replacement of the mag head pulley ordered the guard removed and set aside, and the victim's supervisor knew of the violative conditions. The Serpentix tail pulley guarding was removed and not replaced in the interest of production, and the employer deliberately chose not to protect the nip point despite employee complaints. During a period of at least six months, management and supervisory personnel made frequent routine tours and trips through the area while the guarding was absent.

Vincent Candiello for the employer. Gerald C. Moton and Cyrus A. Alexander for the Secretary.

[¶ 24,332] National Industrial Constructors, Inc.

Text of opinion of United States District Court for the District of Nebraska dated January 25, 1980. Docket No. 78-0-139. Robert V. Denney, District Judge.

Employee Discrimination—Refusal to Perform Unsafe Work v. Pay Dispute. An employee discharged for refusing to sew plastic weather protection sheets from steel beams at a power plant construction site was not discriminated against under the Act's § 11(c) because his refusal was founded on pay rather than safety reasons. Plastic sheets to hasten concrete curing in cold weather were to be sewn together by workers sitting on cross beams with their feet on the beams' lower flanges and lanyards wrapped around the beams. The employer had previously reached an agreement with OSHA representatives on this method of accomplishing the task. Erection of safety lines was not feasible because the beams were a high stress area of the completed project which could not be weakened by drilling rockbolts to secure the lines. The worker, a carpenter, refused to go out on the beam even though there were long lanyards available, and when he was discharged, two carpenters' helpers said they might as well be fired also. The helpers had not been assigned the sewing job. The three, paid between $5 and $7.56 an hour, told the general foreman and said again in the personnel office that if they were paid ironworker's pay of $9.18 an hour they would do the work. They never complained about safety conditions to the employer and did not in good faith try to get the employer to correct what seemed to be dangerous working conditions. Safety was raised as an issue only after the discharge, in a discussion with the personnel director over the wording of their termination slips. The decision was made before the Supreme Court *Whirlpool* decision but the Court noted that

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under the conditions of OSHA's discrimination regulation, § 1977.12(b), in the Sixth Circuit *Whirlpool* decision the Secretary did not carry his burden of proof.

Back reference: ¶ 573.

J. Taylor Greer for the employer. Thomas E. Korson for the Secretary.

[Text of Opinion]

DENNEY, District Judge: This matter is before the Court after trial and submission of written final arguments. The following opinion shall constitute the Court's findings of fact and conclusions of law.

This is an action under § 11(c) of the Occupational Safety and Health Act [Act], 29 U. S. C. § 660(c). Plaintiff is the Secretary of Labor; defendant is an employer subject to the Act. Plaintiff seeks an order of reinstatement for three employees, who, plaintiff contends, were discriminatorily discharged for filing complaints with defendant National Industrial Constructors, Inc. [NIC] and for exercising rights which are protected under the Act. Plaintiff also seeks an order of back pay for the three employees to make them whole, and other relief.

The three employees on behalf of whom the Secretary has sued are Richard E. Brainard, Jerry A. Long and Stanley Zierlein. All three were employed at the Gerald Gentleman Power Plant, Unit 1 construction site near Sutherland, Nebraska. Brainard was a journeyman carpenter and worked with Zierlein and Long (who were carpenter helpers) on the same carpenter crew with other employees under the supervision of foreman Phillip Ericson. The three employees were discharged by NIC on November 11, 1976.

On November 30, 1976, Brainard filed a complaint of discrimination under § 11(c) of the Act. His complaint was filed with a representative of the Occupational Safety and Health Administration [OSHA]. On December 2, 1976, Brainard filed a charge with the National Labor Relations Board; in that charge, Brainard alleged that NIC "discharged Richard E. Brainard, Jerry Long and Stanley Zierlein . . . because of their refusal to perform work under abnormally dangerous conditions." NIC received this charge prior to December 10, 1976.

On December 7, 1976, Zierlein filed a complaint of discrimination under § 11(c) of the Act with a representative of OSHA. Long filed a similar complaint with OSHA on December 17, 1976.

Section 11(c)(1) of the Act provides as follows:

> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.
> 29 U. S. C. § 660(c)(1).

Plaintiff contends that the defendant violated this section in two instances. First, plaintiff argues that the former employees were discharged for filing complaints under the Act. Second, plaintiff asserts that these employees were discharged for exercising rights protected by the Act.

In November of 1976, concrete flooring was being installed in the turbine area of the power plant under construction by defendant, NIC. The concrete was poured into wooden forms built around decking at various levels of the framework of vertical, horizontal and diagonal steel beams of various sizes constituting the structure of the building that would ultimately be the floors in the building. Due to colder temperatures prevailing at this time of year, it was necessary to drape and secure plastic sheeting around the area where the concrete was being poured in order that heat could be supplied and held around the freshly poured concrete to permit it to cure properly.

Around November 10 and 11 of 1976, Ericson's crew was completing the job of installing plastic sheeting around Areas 6 and 8 of the operating floor in the turbine structure preparatory to having concrete poured on the decking that was laid over these areas. Areas 6 and 8 were next to each other and had an overall dimension of 64 feet long from east to west by 32 feet wide from north to south. Adjacent to the two areas on the south was the turbine pedestal, which consisted of eight feet of solid concrete set on legs extended to the ground. The top of the concrete constituting the turbine pedestal was approximately the same elevation as the operating floor. [Tr. 167; 14-171:25].

Ten feet below the operating floor were five steel I-beams about twelve feet apart that were a part of the steel structure of the building under construction. The beams, which ranged in size from 12-18 inches wide to 2 to 3 feet deep, extended north-south across the edges and middle of the space under Areas 6 and 8 [Tr. 176:3-25; Ex. #8].

The plastic was available in sheets approximately 20 feet wide by 40 feet long. The vertical edges of the sheets were lapped over each other to form a seal and

For further action, if any, see Case Table at ¶ 7995.

the sheets were lowered around the edge of the operating floor on the south side by the turbine pedestal and northerly across the open space beneath and back up through the pipe chase (a large hole in the concrete floor just to the north of Areas 6 and 8) to be secured at the north sides of Areas 6 and 8 [Tr. 172:1-173:10; 188:1-6 Ex. #8].

The seams formed by the overlapping sheets were to be laced together with the use of nails. [Tr. 174:10-12]. The lacing was to be done by men straddling a horizontal steel beam corresponding approximately with the location of the seam with extra long lanyards looped around the beam and back to their safety belts. The plastic would be lowered so that any man sitting on the beam could reach it and slide along the beam lacing the seam together with nails. [Tr. 174:13-16; 175:6-186:1-188:8; 209:17-18]. After the plastic edges were laced together, the plastic was then raised again to tighten it and form a sort of cocoon around the decking where the concrete was to be poured. [Tr. 174:24-175:4; see Pretrial Order of April 19, 1979].

On November 10, 1976, two members of Ericson's crew, Douglas Baker and Mark Jones, with the assistance of others on the crew, had completed the job of pulling the plastic sheeting down and around the bottom of the operating floor in Areas 6 and 8. In accomplishing this task, they had sat on and worked from the crossbeams below. The plastic was secured for the night with wire temporarily attached between two by fours, which were nailed to the plastic, and steel rebars on the north side of Areas 6 and 8. The wire could then be loosened to permit the lowering of the plastic to the beams below. [Tr. 120:21-121:20; 174:24-175:21].

On the morning of November 11, 1976, Ericson assigned Brainard the job of sewing the seams of the plastic together from the beams below. [Tr. 177:15-19]. Ericson sent Brainard to the tool shop to check out safety belts and lanyards. [Tr. 9:19-21; 177:7-14]. When Brainard came back with the belts and six foot regular length lanyards, Ericson told him that the regular lanyards would not work. [Tr. 177:24-178:11]. Ericson then sent another helper on the crew to the shop to get longer lanyards. [Tr. 178:12-16]. The helper returned with three of the longer lanyards which were placed at Ericson's print table [Tr. 178:17-24].

The print table was located on the operating floor about 10 to 15 feet from the permanent stairway and about 30 feet from the east edge of Area 6. [Tr. 179:3-180:5; Ex. #8]. There was a landing on the stairway at the same level as the crossbeams extending below Areas 6 and 8. [Tr. 39:14-17].

After receiving his assignment from Ericson, Brainard walked part way out onto one of the larger horizontal beams that constituted the south and north sides of the space below the operating floor and to which were connected the crossbeams from which he was to perform the sewing together of the plastic. [Tr. 10:21-22; 21:20-22:3]. Brainard had with him a regular length lanyard, attached to his safety belt. [Tr. 22:4-7]. Apparently, he was not aware the longer lanyards had been brought to the work site, nor was he apparently aware that Ericson had another longer lanyard permanently checked out and located at his print table. [Tr. 12:16-19; 102:10-20; 189:5-112]. Brainard never went out on one of the crossbeams from where he would be working, nor did he use the regular lanyard to see if it would wrap around a crossbeam and permit him to do the assigned work. [Tr. 22:4-14]. Brainard merely surveyed the area and came back off the beam. [Tr. 10:23-11:9; 21:22-23].

Sometime after 9:00 A. M., on November 11, 1976, after Brainard had gone out onto the beam and come back in, Erickson, having left this work area to check on the work progress elsewhere, returned. [Tr. 180:9-21]. Seeing that the sewing work had not yet started, Ericson talked with Brainard on the permanent stairway landing and told him he had to get started with the sewing immediately, since they wanted to start the concrete pour soon thereafter. [Tr. 180:21-181:5]. Brainard made no response. [Tr. 181:6-7].

Subsequently, around 10:00 A. M., Brainard walked up to Ericson on the operating floor decking and said to him: "I'm going to have to chicken out on you, Phil." [Tr. 77:18-24; 182:1-8]. Ericson replied: "I suppose you know what I have to do." [Tr. 182:9-10]. Nothing more was said by Brainard and Ericson told him to get his tools together. [Tr. 182:11-14]. Ericson then went to the carpenter shop to see Billy Wilson, his superintendent. [Tr. 183:1-6].

As Brainard was gathering his tools together, Zierlein heard from him that he (Brainard) just had been discharged by Ericson. [Tr. 95:15-96:3]. Zierlein then approached General Foreman Charles Gross, who had come up onto the operating floor, and told Gross that he (Zierlein) wanted to transfer off of Ericson's crew. [Tr. 204:16-24]. When Gross asked why, Zierlein stated that he did not want to do weather protection work. [Tr. 205:1-2] Zierlein was joined by Brainard and Long in the conversation with Gross and Brainard stated that he had just been fired by Ericson and he also wanted off of Ericson's crew. [Tr. 205:3-6]. Both Zierlein and Long each told Gross that if Brainard was

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going to be fired, they might as well be fired. [Tr. 78:1-5; 110:10-22; 205:6-8].

During this conversation, Gross remembered that Brainard stated that they were not getting ironworkers' pay of $9.18 per hour and, as a result, they did not want to do the weather protection work unless they got the higher rate of pay.[1] [Tr. 205:16-17]. Long also remembered that one of the men mentioned higher pay in the conversation with Gross; however, he thought it was probably Zierlein who made such statements [Tr. 74:11-20; 76:11-78:8]. At trial, Gross testified that during the conversation none of the three men ever made any mention that the reason they wanted a transfer from Ericson's crew was that the work was unsafe, that longer lanyards or safety lines were needed, or that Long had a fear of working at heights. [Tr. 208:1-11, 213:12-15].

The conversation of the three men with Gross lasted some three to four minutes [Tr. 217:14-17] and concluded with Gross telling them that he would talk to Ericson [Tr. 205:18-19]. Gross then assigned the men to work on Jim Hunt's labor crew [Tr. 205:18] and left to go down to the carpenters shop. [Tr. 205:19-20; 206:1].

At the carpenter's shop, Gross located Ericson [Tr. 205: 23-206:1] and found that Ericson had secured Wilson's approval of Brainard's discharge. [Tr. 218:12-17]. Gross informed Ericson and Wilson that Zierlein and Long also refused to do the weather protection work. [Tr. 184:7-9; 206:22-23]. Gross told Wilson that the problem with the three men had to do with wages; since the carpenters were working up on the steel structure, they wanted the same wage as the ironworkers. [Tr. 207:5-11].

Wilson then directed Ericson to ask the three men one more time if they were going to do the work and if they refused to terminate them. [Tr. 184:24-25; 207:12-16]. Ericson returned to the work area and asked each man, in turn, whether he was going to do the work. [Tr. 185:10-12]. Each man answered in the negative, and was terminated. [Tr. 185:13-15]. Ericson first took all three to the carpenter shop to turn in any checked-our [out] gear, and then to the personnel office to await the processing of their termination papers. [Tr. 185:19-25].

The three men arrived at the personnel office at approximately 11:00 A. M. At that time, Dave Roberts, the personnel director, was down at the main office. Margaret Birchfield, personnel secretary, called down to the main office and informed Roberts that the three men were there and wanted to speak to him. [Tr. 219:20-220:5; 227:4-15].

When Roberts returned to the office, the three men informed him that they had been terminated and were upset about it. [Tr. 220:6-9]. They explained that they had been terminated because they had refused to do something that they believed was unsafe. [Tr. 220:10-12]. Not being familiar with the work area, Roberts left to find out what was going on. [Tr. 220:13-16].

Roberts went down to the carpenter shop and met with Wilson and Gross. [Tr. 220:21-221:1]. He told them what the three men had said. However, Wilson and Gross informed Roberts that the problem of the three men was not safety but wages. They explained that the men were complaining about not receiving $9.18 per hour for doing the work they were assigned to do. [Tr. 221:3-9]. Recognizing that this was a "whole new ball game," Roberts went back to the personnel office with Wilson [Tr. 221:10-13].

While Roberts was at the carpenter shop, Mrs. Birchfield remained at the personnel office. While there, she overheard Zierlein state that "if they would put him back to work at 9.18 an hour, they would go back to work." [Tr. 228:17-25]. Mrs. Birchfield looked up and saw the other men nodding in agreement. [Tr. 229:1-2]. Thereafter, Mrs. Birchfield noticed that Brainard had gone into Roberts' office and was going through Roberts' papers. Mrs. Birchfield mentioned that these were personal matters and that Brainard should not be going through those papers. Brainard stated that he wanted to see what was on his papers. Mrs. Birchfield told him that they would be shown to him when the others returned. [Tr. 229:10-18]. During this period of time, safety conditions were never discussed. [Tr. 229:21-23].

When Roberts and Wilson returned to the personnel office, they conversed further with the three men. [Tr. 222:3-6]. Roberts told them that after having talked to Supervision, it seemed to him that the men's complaint had to do with wages rather than safety. [Tr. 222:8-10]. The three admitted that they had talked about wages, but still maintained that their chief complaint was safety. [Tr. 222:10-22; 223:17-22]. Wilson told Roberts that this was the first time he had heard about safety being a problem in the area. [Tr. 222:12-14].

When Roberts and the three men were through discussing the men's complaints,

[1] Brainard was first employed by NIC as a journeyman carpenter on September 20, 1976, and from that date forward received a wage rate of $7.56 per hour. Zierlein was first employed by NIC on September 7, 1976, as a carpenter helper, and he initially received a wage rate of $4.32 per hour; effective October 4, 1976, his wage rate was increased to $6.48 per hour. Long was first employed by NIC on September 13, 1976, as a carpenter helper and received at that time and thereafter, a wage rate of $5.00 per hour. [Tr. 7:25-7A:10].

the conversation focused on their termination slips. Originally, when the men came to the personnel office, their termination slips read: "Refused to do assigned work." [Tr. 221:17-222:2]. After talking with Roberts, they insisted that there be some notation to the effect that they were terminated because of safety reasons. [Tr. 222:21-23]. As a result, Roberts added the notation at the bottom of the three termination slips: "Employee feels he was aksed to do work he thought was unsafe." [Tr. 222:23-223:5].

I.

The first issue before the Court is whether Brainard, Zierlein and Long were discharged for filing complaints under or related to the Act. With respect to this issue, it should be noted that there is no claim in this case that the defendant discharged these men because they had filed complaints with OSHA or any other governmental entity. Rather, the plaintiff claims that the former employees allegedly filed complaints with their employer and were allegedly discharged as a direct result thereof.

29 C. F. R. § 1977.9 (1979) deals particularly with the provisions of Section 11(c)(1) of the Act relating to complaints under the Act and the protection of employees making such complaints. That portion of the regulation which is directly applicable to complaints filed with employers reads as follows:

> Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.
>
> 29 C. F. R. § 1977.9(c) (1979).

Generally, those courts which have addressed this issue have agreed with the Secretary's interpretation of the Act, as expressed in § 1977.9(c), that a complaint made by an employee to his or her employer is a valid § 11(c) complaint. *Marshall v. Springville Poultry Farms, Inc.*, 445 F. Supp. 2, 3 (M. D. Pa. 1977); *Usery v. Granite-Groves, A Joint Venture*, 5 OSHC (BNA) 1935 (D. C. C. 1977).

However, the Secretary's regulations also make clear that there can be no finding of a violation of the Act unless the discharge or other adverse action taken against the employee was caused by the exercise of a protected activity. 29 C. F. R. §§ 1977.6(b), 1977.9(c) (1979). The protected activity, in this instance the alleged making of a complaint to the defendant, has to have been a *substantial reason* for the discharge, or there must be a finding that the discharges would not have occurred *but for* engagement in protected activity, in order for there to be a conclusion that Section 11(c) has been violated. 29 C. F. R. § 1977.6(b) (1979); see also *Mitchell v. Goodyear Tire & Rubber Co.*, 278 F. 2d 562, 565 (8th Cir. 1960).

Applying the above guidelines, the Court finds that the evidence, as related earlier in this opinion, conclusively shows that these former employees were not discharged because they made complaints to the defendant regarding unsafe conditions of the work they were asked to perform. No mention of any allegedly unsafe or hazardous conditions on NIC's construction site was ever made to Ericson or Gross or any other supervisory or management employee of NIC by any of the three men prior to their discharges. In fact, Gross regarded the problem as one of wages, rather than safety, and so reported to Wilson, who made the decision that the men should be discharged if they were not willing to perform the work. Indeed, it was not until *after* the men were discharged and in the personnel office that any mention of unsafe conditions was made. At that time, discussions were held as to the entry on each man's termination which read: "Refused to do assigned work." As a result of these discussions, Roberts added the notation on each man's termination slip: "Employee feels he was asked to do work he thought was unsafe."

In short, there is no clear evidence that prior to their discharges, these men made any complaints to NIC regarding the conditions of the work they were to perform. Thus, the Court finds that these three former employees were not discharged by the defendant for filing complaints under or related to the Act.

II

Alternatively, the plaintiff alleges that Brainard, Zierlein and Long were discharged for refusing to perform an assigned task which would have exposed them to the risk of serious injury or death and that by taking such actions the three employees were exercising a right protected by the Act. Accordingly, the plaintiff argues that such discharges were wrongful under Section 11(c)(1) of the Act.

While the Act is silent as to whether employees are justified in declining to perform allegedly unsafe work, the Department of Labor has issued an interpretation of the Act which deals with this issue. See 29 C. F. R. § 1977.12 (1979). In support of its contention, the plaintiff relies heavily on this regulation, which reads in pertinent part as follows:

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> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.
>
> 19 C. F. R. § 1977.12 (1979).

Paragraph (2) of subsection (b) has been the subject of considerable litigation in which employers have argued that flat-out refusal to perform allegedly unsafe work is not a right specifically afforded by the Act and that this regulation, by seeking to make it such a right, is invalid and an unwarranted extension of the Act by the Secretary. In *Marshall v. Daniel Constr. Co.*, 563 F. 2d 707 (5th Cir. 1977), cert. denied, 439 U. S. 880 (1978), the Fifth Circuit Court of Appeals agreed with the position of the employer and held that 29 C. F. R. § 1977.12(b)(2) was invalid and not enforceable. In so holding, the Fifth Circuit wrote as follows:

> The Secretary's regulation before the court today is designed to achieve an end consistent with the purposes of the Act. Yet it expressly confers upon employees a right that Congress deliberately chose not to grant to Osha inspectors: the right to determine *in fact* that an employment practice or condition presents "a real danger of death or physical injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory procedures." 29 C. F. R. § 1977.12((b)(2) (1976). Moreover, by permitting employees to refuse work upon making such a determination, the regulation provides them authority equivalent to that of an OSHA inspector when issuing an administrative stop work order —a right which Congress also deliberately withheld from OSHA inspectors. A worker's abuse of the authority afforded under the regulation could disrupt or cripple an employer's business. The legislative history is manifest that Congress feared such a result. We hold that the regulation exceeds the Secretary's scope of authority to promulgate regulations as granted under the Act. *Marshall v. Daniel Constr. Co., supra*, 563 F. 2d at 714-15.

In this case, the three men took it upon themselves to determine that the weather protection work was too dangerous and, thus, refused to perform the work. Consequently, they were discharged by NIC. A violation of Section 11(c)(1) occurs where an employee is discharged for exercising a "right afforded by the Act." Since the Fifth Circuit in *Daniel* held that a refusal to work is not a "right afforded by the Act," it is clear that the discharge of the three men by NIC would not, under the decision in *Daniel*, be a violation of Section 11(c)(1).

However, in *Marshall v. Whirlpool Corp.*, 593 F. 2d 715 (6th Cir. 1979), the Sixth Circuit Court of Appeals refused to follow the decision in *Daniel*. Instead, the *Whirlpool* court found that the regulation was a valid exercise of the Secretary's broad rule-making authority and was consistent with the stated purposes of the Act and its legislative history. Thus, the court held that where an employee refused to do an assigned task which he determined to be dangerous and subsequently was subjected to retaliatory measures by the employer, such measures would be violative of the Act, upon the Secretary proving on behalf of such employee each of the following conditions:

1. That the conditions of the employment were, by objective tests, in fact, dangerous;

2. That the employee's refusal was in good faith;

3. That the employee had no reasonable alternative to refusing;

4. That the employee's apprehension of death or serious injury was based on circumstances then facing him which would cause a reasonable person to reach the same conclusion;

5. That the urgency of the situation provided insufficient time to eliminate the danger by resort to regular statutory enforcement channels; and

6. That the employee, where possible, sought from his employer, and was unable to obtain, correction of the dangerous condition.

Marshall v. Whirlpool Corp., supra, 593 F. 2d at 734-35; see C. F. R. § 1977.12(b).

At this point, it would seem that this Court, in light of the conflict between the two circuits,[2] would have to decide as to which of the two decisions it should follow, in order to make a determination herein. However, the Court does not believe that this choice must be made, since a consideration of the evidence in this case, in light of the conditions which the Secretary must prove as set forth in the Regulation and the *Whirlpool* decision, convinces the Court that the Secretary has failed to sustain his burden.

The evidence shows that Brainard clearly understood how the plastic sewing work was to be done. The day before he was assigned to do the work, he had seen Baker and Jones sitting on the cross-beams pulling the sheets of plastic down and around the operating floor. He knew how the plastic had to be taken off the roll, overlapped to form the seams, and then secured temporarily for the night on the operating floor. He also knew the project rule that when any work was to be done on the open steel, where there were no safety lines, a lanyard was to be wrapped around the steel beam and attached to his safety belt. [Tr. 18:18-21:19].

However, although Brainard thought the plastic sewing work was unsafe, he never mentioned this in his conversations with Ericson or Gross. In other words, at no time did Brainard, despite his feelings about the job, bring up any question or suggest any corrective measures he thought were needed with respect to the work he was directed to perform.

During the approximate period of two hours that he was supposed to be doing the plastic sewing work, Brainard said nothing to Ericson regarding the lack of longer lanyards or the need for someone to lower the plastic to the cross-beams from the operating deck above. He claimed that he did not know that longer lanyards were available. Yet, Zierlein had obtained one at Ericson's print table that morning and testified that he had used it in the same work area. [Tr. 102:2-20]. In fact, Ericson had told Brainard that the shorter lanyards that Brainard had brought back from the tool shop would not work, but Brainard said nothing in response. Instead, after receiving his assignment, Brainard went part way out on one of the beams which connected to the cross-beams from which he was to do the job, with a regular length lanyard attached to his safety belt. He never went out on the beam where he would be working or used the regular lanyard to see if it would work, but merely came back and told Ericson he would have to "chicken out."

Moreover, on the morning of November 11, 1976, only Brainard was assigned the task of lacing together the plastic seams from the cross-beams below. Long admitted that he was assigned to work on the plastic on the operating floor decking where his fear of heights would not interfere with his work. Zierlein stated that has was not expressly assigned by Ericson to do the plastic sewing work on the cross-beams, but he thought he should help out. While he did go out on the steel twice, in general he busied himself with other work. [Tr. 92:21-95:14; 106:19-107:5].

However, despite the fact that these two men were never assigned the plastic sewing work, after the confrontation between Brainard and Ericson, they jumped into the situation and stated that if Ericson was going to fire Brainard, he would have to also fire them. Accordingly, Zierlein and Long were not in good faith refusing to perform the plastic sewing work they thought was unsafe, since they had never been asked to perform that work.[3]

But even more dispositive of plaintiff's claim is the overwhelming evidence to the effect that the real reason these men refused to do the work was not because they felt it to be unsafe, but because they wanted more money.

At trial, both Brainard and Zierlein denied that the question of pay ever arose in their conversation with Gross or in their subsequent conversation in the personnel office with Roberts and Wilson, except that Zierlein finally acknowledged that pay might have been mentioned at the end of the conversation in the personnel office "just as an after-thought and as we were going out the door." [Tr. 238:9-17]. However, Long himself confirmed Gross' testimony that the subject of higher pay had been discussed in the conversation between the three men and Gross. [Tr. 77:6-11]. Moreover, Roberts testified that safety and not pay was discussed when he first talked to the men in the office, but when he returned with Wilson after having heard from both Wilson and Gross that the refusal to do the work stemmed from pay and not safety, the men admitted that they had talked about wages to Gross. Even more significant was the uncontroverted testimony of Mrs. Birchfield that during Roberts' absence she overheard Zierlein say to the other two men "that if they would put him to work at $9.18 an hour, they would go back to work," to which Brainard and Long nodded in agreement.

Thus, the evidence undisputedly shows that the real reason these three men refused to perform the work was because they wanted higher pay, not because they believed that the job was unsafe. Accordingly, in view of this evidence, it is clear that the refusal by the three men to do the work was not in good faith.

Finally, the Court questions whether the conditions of the job were, by objective tests, in fact dangerous or that a reasonable person would conclude that performing the plastic sewing work would present a real and urgent danger of death or serious injury.

Two days previous to the day on which Brainard was assigned the plastic sewing work, Zierlein had asked Ericson about the possibility of having a safety line or lines erected at the level of the cross-beams, which could then be hooked onto an employee doing the plastic sewing work using a regular lanyard. Ericson considered the suggestion and decided that the use of safety lines in doing this work was not feasible. He testified that there would have had to be four or five safety lines, one for each cross-beam. The south end of each line would have had to be secured to a rockbolt drilled into the concrete of the turbine pedestal. The turbine pedestal concrete was a high stress area because of the enormous weight it would ultimately bear. Thus, it was not to be weakened in any way. Ericson concluded that any drilling into the concrete of the turbine pedestal would have weakened its integrity. In addition, before any drilling into the concrete could be attempted, it was necessary to get permission from both the Nebraska Public Power District, for whom the project was being built, and Stearns Rogers, the construction managers. [Tr. 190:1-192:3].

Accordingly, since the erection of safety lines was not feasible, the June, 1976, agreement between NIC and the OSHA representatives came into effect. [Tr. 5:15-6:1]. Pursuant to this agreement, the work of sewing together the plastic seams was to be accomplished by Brainard or any other NIC employee by sitting on the cross-beams with their feet resting on the bottom flange of the beam. The employee would wrap a longer lanyard around the beam and back to his safety belt, to minimize the risk of injury from falling. Then, the employee would slide along the beam in a sitting position with his feet on the lower flange of the beam, reaching up to the plastic being lowered from above and sewing the seams together as he slid along.

That the work, by being performed in this manner, did not present a real and urgent danger of death or serious injury is clear from the evidence. The beams on which the employee was to move along had flanges top and bottom 12 to 18 inches wide and 2 to 3 feet deep. [Tr. 176:23-25]. Certainly, they were large enough to provide a secure position on which Brainard could sit and rest his feet. The plastic could be lowered so that the seams to be laced together could be reached by an employee from a sitting position. Both Long and Baker agreed with the testimony of Ericson [Tr. 175:6-21], that the plastic could have been lowered within the reach of Brainard. [Tr. 80:25-82:5; 137:11-17]. Finally, the record indicated that longer lanyards were available and could be obtained by merely requesting them.

Indeed, it is undisputed that after the three men were discharged the work was completed in just this manner with no untoward consequences. [Tr. 186:1-189:4; 208:15-210:10]. When viewed objectively, it is questionable whether the plastic sewing work that Brainard was assigned to do, was to be done in a manner that a reasonable person would conclude that the performing of such work presented a real and urgent danger of death or serious injury.

In sum, the Court finds that the conditions set forth in 29 C. F. R. § 1977.12(b) and the *Whirlpool* opinion that justify an employee's refusal to perform work for an employer and immunizes the employee from discharge by the employer for such refusal have not been met by the evidence presented in this case. Accordingly, since the Secretary has failed to prove that the conditions have been satisfied, the dis-

[2] Recently, the Supreme Court granted certiorari in the *Whirlpool* decision to resolve the conflict between the Fifth and Sixth Circuits. *Marshall v. Whirlpool Corp.*, 593 F. 2d 715 (6th Cir. 1979), *cert. granted*, 48 U. S. L. W. 3188 (October 2, 1979) (No. 78-1870).

[3] While Long testified that he and Zierlein thought that they would be next employees asked to do the plastic sewing work because they were the only ones left [Tr. 41:7-11], this overlooks the fact that Ron Ericson of the same crew, with the assistance of another employee from Jim Hunt's crew, ultimately did the work. [Tr. 207:15-210:4].

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charges of these men by NIC were not violative of the Act.[4]

An order shall be issued contemporaneously with this Memorandum Opinion.

[¶ 24,333] Scotia Coal Mining Co.

Text of Federal Mine Safety and Health Review Commission decision dated March 31, 1980. FMSHRC Docket Nos. BARB 78-306 through 78-333, BARB 78-609-P, BARB 78-609-P(B), 78-610-P.

Mine Safety—Stay of Administrative Proceedings—Criminal Charges. The Judge properly denied the parties' joint request for an order staying 20 to 28 withdrawal order and penalty cases pending the outcome of criminal proceedings in Federal District Court against the operator. A criminal indictment was handed down against the operator as a result of two mine explosions, and 28 withdrawal orders were issued. The operator contested the withdrawal orders and the Secretary initiated penalty cases which were consolidated with the withdrawal order cases. Stays had already been granted during the Justice Department's investigation and after the grand jury handed down its indictment. In this instance, the Judge agreed to stay only eight of the 28 cases and placed the remainder—not factually related to the criminal charges—on the active trial docket.

The Judge ruled that pre-trial publicity would not necessarily be harmful to the criminal defendants, and federal courts have the means to reduce the effect of any adverse publicity. Discovery problems rising from differences in criminal and Commission Discovery rules could be resolved by the issuance of protective orders during the administrative proceedings. There is a substantial public interest in the prompt resolution of penalty cases.

Back reference: ¶ 5986.

Robert I. Cusick for the employer. Thomas A. Mascolino, Page H. Jackson and Ronald E. Meisburg for the Secretary.

[Text of Review Commission]

We granted interlocutory review to determine whether the administrative law judge abused his discretion when he denied the parties' motion for a stay of all proceedings until completion of a trial of criminal charges against Scotia Coal Mining Company in federal district court.

Scotia has sought Commission review of twenty-eight withdrawal orders, and the Secretary has sought the assessment of penalties for the alleged violations associated with the withdrawal orders. The violations are apparently alleged to have occurred in February and March of 1976. The withdrawal orders were issued under the Federal Coal Mine Health and Safety Act of 1969,[1] in March of 1978 as a result of an investigation and inspection precipitated by two explosions at Scotia's Mine in Ovenfork, Kentucky, in March of 1976. In August of 1978, the Secretary of Labor initiated the penalty cases and they were consolidated with the withdrawal order cases the next month.

On September 8, 1978, the Secretary filed a motion with the administrative law judge to stay proceedings during the Justice Department's investigation of the mine accidents. The judge granted a stay until February 1, 1979. On January 31, 1979, the Secretary filed a motion to continue the stay because the U. S. Attorney had informed him that a grand jury would be convened to investigate the Scotia disaster. The stay was extended until June 1, 1979, and again until July 15, 1979. After the grand jury handed down an indictment, the judge granted another extension of the stay until October 15, 1979. The judge found that only five of the twenty-eight administrative cases are directly related to the allegations in the indictment, but was "reluctantly persuaded" that the stay of all proceedings should be continued. He noted the criminal trial was expected to begin between September 15 and October 15, 1979.

On October 10, 1979, the Secretary again moved for an extension of the stay. Scotia joined this motion on October 24, 1979. On October 25, 1979, the judge issued an order staying eight of the cases, but returning twenty to the active trial docket. The judge first determined that only eight administrative cases are "factually related" to the criminal charges. He noted that the grand jury had completed its work and the administrative proceedings could not be used to assist the grand jury. He found that problems centering on the right to avoid self-incrimination under the Fifth Amendment will not arise in the criminal case since no natural persons had been indicted. The judge also stated that procedural devices such as particularized requests for a stay of discovery are available to the parties to protect their interests and ensure fairness of both the administrative and criminal proceedings. Finally, the administrative law judge noted that pretrial publicity, if it occurred, would not necessarily be prejudicial to the criminal defendants.

The parties then filed petitions for interlocutory review of the judge's ruling. We granted the petitions on November 30, 1979, and suspended all proceedings.[2]

The parties have presented several arguments that the judge abused his discretion. Both express concern that problems in the criminal proceedings could arise from pretrial publicity. The parties fear that publicity stemming from the administrative cases may, if they are heard first, jeopardize Scotia's right to a fair criminal trial. The parties have overlooked that the federal district courts have the tools to mitigate any prejudicial effects of any publicity. See *DeVita v. Sills*, 422 F. 2d 1172 (3rd Cir. 1970). In addition, the administrative law judge can take preventive measures short of a complete stay.

Both parties argue that the judge should have stayed the cases because differences in criminal discovery rules and Commission discovery rules will cause confusion, and possibly improper access to information by the prosecutor and defendants in the criminal case. The administrative law judge stated in his order:

> It is not apparent from the face of the charges or the parties' pleadings that the other 20 violations [those not stayed] present such an identity of issues and evidence with the criminal charges that any discovery problems may not, upon seasonable application by either party, be dealt with by the issuance of appropriate protective orders.

It is clear from the judge's order that he carefully considered the points presented by the parties. Neither party at this time has offered any evidence of actual harm to the criminal proceedings and the judge stands ready to meet those problems if they do become concrete.

Further, the parties have failed to consider the public interest in the expeditious resolution of penalty cases. This oversight on the Secretary's part is especially unfortunate,[3] and prevents us from according his views the deference to which they might otherwise be entitled.[4] Congress has forcefully expressed its desire for the expeditious adjudication of penalty cases, and its dissatisfaction with the length of time between the occurrence of violations and the payment of penalties under the 1969 Act.[5] As the judge recognized, there is a substantial public interest in the expeditious determination of whether penalties are warranted.

Finally, we reject the parties' contentions that the administrative law judge acted arbitrarily and capriciously in refusing to continue to stay all proceedings in the absence of circumstances substantially different from when he issued his stay of all cases until October 15, 1979. The administrative law judge's order indicates he carefully reviewed the facts before him at the time of the motion and concluded that returning twenty cases to the active trial docket was appropriate and would not interfere with the criminal proceedings.[6]

The administrative law judge carefully weighed the parties' interests and the public interest. We cannot say that he abused his discretion and we therefore leave his order undisturbed.

Accordingly, the case is remanded to the administrative law judge. Our order of November 30, 1979, suspending the proceedings, is vacated.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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[4] In light of this opinion, the Court finds it unnecessary to reach the issue of whether Long's complaint was filed in a timely manner.

[1] 30 U. S. C. § 801 *et seq.* (1976) (amended 1977) ["the 1969 Act"].

[2] The judge thereafter filed a "Supplement and Errata" to his order. We grant Scotia's motion to strike the supplemental material. We did not consider that material during our interlocutory review.

[3] The Secretary in his brief states, "The Secretary, prosecutor of the administrative cases, desires that the twenty-eight alleged violation [sic] and civil penalty cases be stayed. Balanced with this is Scotia's like desire to stay those cases. *There are no countervailing factors balanced on the other side.*" (Emphasis added.) Br. at 12.

[4] *Old Ben Coal Company*, 1 FMSHRC 1480, 1484-1485, 1 BNA MSHC 2177, 2179-2180, 1979 CCH OSHD ¶ 23,969 (1979); and *Helen Mining Company*, 1 FMSHRC 1796, 1798-1801, 1 BNA MSHC 2193, 2194-2196, 1979 CCH OSHD ¶ 24,045 (1979).

[5] See S. Rep. No. 95-181, 95th Cong., 1st Sess. at 15-16 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 603-604 (1978). The Senate Committee that drafted the bill from which the Federal Mine Safety and Health Act of 1977 was largely derived stated that "to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." S. Rep. at 16, 1977 *Legis. Hist.* at 604.

[6] The Secretary raised an argument in his brief that was not raised in his petition for interlocutory review or before the judge. He claims that harm may come to the administrative penalty cases if all are not heard together. Br. at 19-26. Since he did not present this argument to the administrative law judge, we do not pass upon it. See *Ora Mae Coal Co.*, 1 FMSHRC 1963, 1 BNA MSHC 2258, 1979 CCH OSHD ¶ 24,126 (1979). We also intimate no view whatsoever on the matter discussed in footnote 10 of the Secretary's brief.

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is specific evidence of an existing violation or that reasonable legislative or administrative standards for conducting an inspection have been satisfied with respect to Steves Sash and Door Co., Inc.

It is therefore ORDERED that the Inspection Warrant issued on the 6th day of November, 1979 by the Honorable Frank J. Baskin, United States Magistrate, be and the same is hereby set aside and that a new warrant be issued authorizing and directing the U. S. Department of Labor to inspect the premises described as follows:

The workplace of Steves Sash and Door Co., Inc. located at 203 Humble Avenue, San Antonio, Bexar County, Texas.

for the limited purpose of ascertaining whether or not Steves Sash and Door Co., Inc. has accomplished the seven requirements set out in Paragraph 4 of the Settlement Agreement dated January 10, 1979 signed by Steves Sash and Door Co., Inc. and the U. S. Department of Labor.

[¶ 24,109] Richard Rothbard, Inc.

Digest of Judge's decision filed with the Commission December 26, 1979. OSHRC Docket No. 79-2283. Richard DeBenedetto, Judge.

Review Commission—Hearings—Employer's Failure to Appear—Mitigating Circumstances—Reinstatement. A default decision was entered despite the employer's request that the hearing be reinstated, because no request for postponement had been made, and the employer's counsel had not returned two phone calls from the Secretary prior to the hearing. The employer's counsel mistakenly believed that the hearing had been postponed. A repeated nonserious housekeeping violation with a $120 penalty was affirmed, as well as a notification of failure to correct violations of requirements for stair treads and means of egress, with penalties totaling $2,100.

The decision was directed for review.

David Pleva for the employer. Baruch A. Fellner and F. V. LaRuffa for the Secretary.

[¶ 24,110] Babcock & Wilcox

Text of opinion of the United States District Court for the District of Michigan, Southern Div., dated December 12, 1979. Docket No. CA 4-72290. The District Court's prior opinoins are at ¶ 21,330 and ¶ 21,423 , 1976-1977 OSHD.

Employee Discrimination—Health and Safety Complaint—Work Refusal—Employer's Motive for Firing. The Secretary's complaint against the employer alleging discriminatory firing of an employee who refused to work under a 65-ton dust collector unit (hopper assembly) held two and one-half feet off the ground by steel cable attached to the permanent structure of the building and complained about the condition to OSHA, was dismissed. The employee was found to have been fired for refusing to work after the allegedly unsafe condition was corrected by the addition of cribbing and the crew was assured by the union steward and the union safety director that the job was safe.

Although rigging blocks transferred the weight of the assembly to the building structure, it appeared to be hanging from the hoist, and it was reasonable for the worker to be apprehensive about the safety of working under what appeared to be a suspended load because no one explained to the employees how the rigging operated, its capacity, or why it was safe. However, his refusal to work after the cribbing was installed by the company at some delay to the job was unreasonable. The employee knew that the cribbed assembly no longer apparently violated the rule against working under suspended loads and that individuals with no motive other than the workers' safety believed the job posed no threat. The employee was not dismissed because he made three calls to OSHA during the negotiations and cribbing installation. The discharge was initiated by the union steward after the employee refused his job assignment, and another employee, who did not contact OSHA, was fired at the same time for refusing to work under the assembly.

Back reference: ¶ 573.

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[¶ 24,111] Kelley Steel Erectors, Inc.

Digest of Judge's decision filed with the Commission November 13, 1979. OSHRC Docket No. 79-25. Cecil L. Cutler, Judge.

Multi-employer Worksites—Responsibility of Subcontractor—Knowledge of Hazard—Ground-Fault Protection—Guarding of Floor Openings—Citations—Delay in Issuance—Construction Standards—Personal Protective Equipment—Safety Belts—Safety Nets—Stairway Railings. A five-month delay between the date of inspection and the issuance of two citations was justified because of the magnitude of the inspection of 38 subcontractors and prime contractors constructing an electrical generating plant, initiated by the collapse of a cooling tower scaffold at the site. The inspection began in June 1978 and was completed August 1, after which closing conferences were held with each employer. The employer, a steel erector, had its conference October 26 and the citations were issued December 5. The employer's motion to dismiss the citations alleging four serious and eight nonserious violations with penalties totaling $3,065 because they were not promptly issued was denied.

Two items of a serious citation for failure to require safety belts or to provide safety nets as required by § 1928.28(a) and § 1926.105(a) were vacated because it was unclear whether an employee, observed tightening bolts without a safety belt, had just moved or was about to move at the time he was observed, and it was not established that he was working at a height of more than 25 feet.

A § 1926.400 charge of failing to provide ground-fault circuit interrupters for an electrical distribution panel was vacated because the prime contractor was responsible for furnishing electricity and maintaining the panel box in operating order, and the employer, which had no electrical license and employed no electricians, had no way of knowing about the hazard. The § 1926.500(b)(1) requirement that floor openings be guarded was not violated because the employer, which had not created the hazard, was in the process of repairing the hole when the inspection took place.

A charge of serious failure to provide stairway railings for a five-riser stairway as required by § 1926.500(e)(1)(iii) was reduced to nonserious for lack of evidence that death or serious injury would result from a fall. Six items of the nonserious citation were affirmed with no penalties and two were vacated.

Harold T. Quick for the employer. Marshall H. Harris for the Secretary.

[¶ 24,112] Cowin and Company

Text of opinion of the United States Court of Appeals for the Fourth Circuit dated December 28, 1979. Docket No. 78-1825.

Mine Safety—1969 Coal Act—Liability of Independent Contractor—Scope of Personal Liability Provision. The case was remanded to the Commission for amendment of the charge and further proceedings under § 109(a) [§ 110(a) of the 1977 Mine Act] on grounds the cited § 109(c) [§ 110(c)] was designed to subject corporate officers to personal liability for violations and was inapplicable to independent contractors acting as agents of an operator. Section 109(a) was applicable because it imposed civil liability on both coal mine operators and independent contractors engaged in mining-related activities. The independent construction company was charged with failing to properly inspect, test, and use equipment for raising and lowering a work platform in an air intake shaft, and had been assessed $74,000 in penalties. Three employees were killed and three injured in a 100-foot fall when the wire supporting-ropes broke.

The contractor argued that it could not be held liable under § 109(c) as an "agent" of the operator. The amendment to a § 109(a) charge was not prejudicial because the contractor had notice of the alleged violations from the beginning and asserted its defenses on the same facts in the administrative hearing. Nevertheless, the case was ordered reopened for the submission of additional evidence and arguments.

Back references: ¶ 6405.

William H. Howe for the employer. J. Phillip Smith for the Secretary.

[Text of Opinion]

Cowin & Company, Inc., an independent construction company, was employed in the construction of an air intake shaft for Ranger Fuel, Inc., a coal mine operator, at its Beckley, No. 1 coal mine near Bolt, West Virginia. On January 7, 1974, three Cowin employees were killed and three in-

Since Congress has explicitly established an obligation to provide the more protected forms of evidence, it would seem curious had it chosen not to impose an obligation to produce a form of evidence tradition has found it less important to protect.[14]

[8, 9] As we have emphasized in other cases dealing with § 7602 proceedings, the summoned party is entitled to challenge the issuance of the summons in an adversary proceeding in federal court prior to enforcement, and may assert appropriate defenses. See *Bisceglia, supra*, 420 U.S., at 151, 95 S.Ct., at 921. The Service must also establish compliance with the good-faith requirements recognized by this Court, *United States v. LaSalle National Bank*, 437 U.S. 298, 318, 98 S.Ct. 2357, 2368, 57 L.Ed.2d 221 (1978), and with the requirement of § 7605(b) that "No taxpayer shall be subjected to unnecessary examination or investigations . . . ." These protections are quite sufficient to lead us to refuse to strain to imply additional ones from the neutral language Congress has used in § 7602.

We accordingly reverse the judgment of the Court of Appeals refusing enforcement of the summons.

Reversed.

corrected through the adversary process of trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts." *Ibid.*

14. *Palmer v. United States*, 530 F.2d 787 (CA8 1976), similarly construed 28 U.S.C. § 1826(a). That statute authorizes the imposition of contempt on witnesses who refuse to "testify or provide other information." The statute does not explicitly authorize contempt sanctions for refusal to execute handwriting exemplars. The Court found that the legislative history indicated that Congress had intended, through the use of the language employed in the statute, to "codify present civil contempt practice." Since that practice had included the power to punish a witness for refusing to create a handwriting exemplar, the Court reasoned that Congress must have thought this phrasing adequate to cover production of handwriting samples.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL and Mr. Justice STEVENS join, dissenting.

The Internal Revenue Service, unlike common-law courts, has only such authority as Congress gives it. Cf. *United States v. LaSalle National Bank*, 437 U.S. 298, 307, 98 S.Ct. 2357, 2362, 57 L.Ed.2d 221 (1978) (validity of Service summonses depends on "whether they were among those authorized by Congress."). Congress has granted the Service authority to summon individuals "to appear before the Secretary . . . at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . ." 26 U.S.C. § 7602. The Court holds today that this authority to compel "testimony" includes authority to compel the creation of handwriting exemplars.[1] The Court, however, is unable to point to anything in the statutory language or legislative history that even suggests that the obligation to "give testimony" includes an obligation to *create* a handwriting exemplar. Indeed, the Court concedes, as it must, that a handwriting exemplar is a kind of *nontestimonial* physical evidence.[2] Certainly, Congress has the power to authorize the Service to compel the creation of exemplars, but it has not chosen to do so in § 7602.[3] Accordingly, I dissent.

1. The Court also places some reliance on the word "appear," which the Court suggests "necessarily entails an obligation to display physical features to the summoning authority." *Ante*, at 879. Plainly "appear" adds nothing to the authority of the Service. The word is used only to indicate that the person summoned must deliver the requested testimony or documents at the designated time and place.

2. The Court's use of the label "nontestimonial" is meaningful, for "[t]estimony properly means only such evidence as is delivered by a witness . . . , (either orally or in the form of affidavits or depositions." Black's Law Dictionary 1324 (5th ed. 1979). Testimony is a statement of knowledge or belief by a witness as opposed to the mere display of a physical characteristic.

Mr. Justice MARSHALL, dissenting.

In my view, the Fifth Amendment's privilege against compulsory self-incrimination prohibits the Government from requiring a person to provide handwriting exemplars. As I stated in my dissenting opinion in *United States v. Mara*, 410 U.S. 19, 33, 93 S.Ct. 774, 782, 35 L.Ed.2d 99 (1973), "I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect." The Fifth Amendment privilege is rooted in "the basic stream of religious and political principle[,] . . . reflects the limits of the individual's attornment to the state," *In re Gault*, 387 U.S. 1, 47, 87 S.Ct. 1428, 1454, 18 L.Ed.2d 527 (1967), and embodies the "respect a government—state or federal—must accord to the dignity and integrity of its citizens," *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966). I continue to believe, then, that "[i]t is only by prohibiting the Government from compelling an individual to cooperate affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that 'the inviolability of the human personality' is assured." *United States v. Mara, supra*, 410 U.S., at 34–35, 93 S.Ct., at 782–83 (dissenting opinion) (quoting *Miranda v. Arizona, supra*, 384 U.S., at 460, 86 S.Ct., at 1620).

In order to avoid this constitutional problem, I agree with my Brother BRENNAN, see *ante*, that 26 U.S.C. § 7602 should be construed not to permit Internal Revenue Service personnel to compel the production of handwriting exemplars. Accordingly, I dissent.

3. Even if I thought the statute were ambiguous, I would reach the same result because I strongly believe that "until Congress has stated otherwise, our duty to protect the rights of the individual should hold sway over the interest in more effective law enforcement." *Dalia v. United States*, 441 U.S. 238, 263, 99 S.Ct. 1682, 1696, 60 L.Ed.2d 177 (1979) (STEVENS, J., dissenting).

WHIRLPOOL CORPORATION,
Petitioner,

v.

Ray MARSHALL, Secretary of Labor.

No. 78–1870.

Argued Jan. 9, 1980.

Decided Feb. 26, 1980.

The United States District Court for the District of Ohio, Don J. Young, J., and the United States District Court for the Southern District of Ohio ruled that regulation promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act was invalid, and appeals were taken. The Court of Appeals, Sixth Circuit, 593 F.2d 715, reversed, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that regulation promulgated by the Secretary of Labor providing that, among other rights protected by the Occupational Safety and Health Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, was promulgated by the Secretary in the valid exercise of his authority under the Act, and constitutes a permissible gloss on the Act, in light of the Act's language, structure and legislative history.

Judgment affirmed.

See also, D.C., 416 F.Supp. 30.

1. Labor Relations ⇐9.5

Regulation promulgated by the Secretary of Labor providing that, among other

rights protected by the Occupational Safety and Health Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, was promulgated by the Secretary in the valid exercise of his authority under the Act, and constitutes a permissible gloss on the Act, in light of the Act's language, structure and legislative history. Occupational Safety and Health Act of 1970, §§ 2 et seq., 11(c), (c)(1), 29 U.S.C.A. §§ 651 et seq., 660(c), (c)(1).

2. Labor Relations ⇐9.5

Regulation promulgated by the Secretary of Labor, acting under the Occupational Safety and Health Act, was entitled to deference unless it could be said not to be a reasoned and supportable interpretation of the Act. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

3. Labor Relations ⇐9.5

Secretary of Labor's regulation providing that, among other rights protected by the Occupational Safety and Health Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, clearly conforms to the Act's fundamental objective of preventing occupational deaths and serious injuries; moreover, it is an appropriate aid to full effectuation of the Act's "general duty" clause, and the regulation thus on its face appears to further the Act's overriding purpose and rationally compliments its remedial scheme. Occupational Safety and Health Act of 1970, §§ 2 et seq., 5(a)(1), 11(c), (c)(1), 29 U.S.C.A. §§ 651 et seq., 654(a)(1), 660(c), (c)(1).

4. Statutes ⇐235

Safety legislation is to be liberally construed to effectuate the congressional purpose.

5. Labor Relations ⇐9.5

Fact that Congress, at time it was considering passage of the Occupational Safety and Health Act, rejected so-called "strike with pay" provision and also rejected a provision that would give the Labor Department, in imminent danger situations, the power temporarily to shut down all or part of an employer's plant, did not indicate a congressional intent incompatible with an administrative interpretation of the Act such as was embodied in Secretary of Labor's regulation providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. Occupational Safety and Health Act of 1970, §§ 2 et seq., 11(c), (c)(1), 29 U.S.C.A. §§ 651 et seq., 660(c), (c)(1).

6. Labor Relations ⇐9.5

In contrast to the "strike with pay" provision that was rejected by Congress at the time it was considering passage of the Occupational Safety and Health Act, the regulation in question, providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, does not require employers to pay workers who refuse to perform assigned tasks in the face of imminent danger, but simply provides that in such case the employer may not "discriminate" against the employees involved. Occupational Safety and Health Act of 1970, §§ 2 et seq., 11(c), (c)(1), 29 U.S.C.A. §§ 651 et seq., 660(c), (c)(1).

7. Labor Relations ⇐9.5

An employer "discriminates" against an employee only when he treats that employee less favorably than he treats others similarly situated.

8. Labor Relations ⇐9.5

In contrast to the "shutdown" provision which was rejected by Congress at the time it was considering passage of the Occupational Safety and Health Act, the Secretary of Labor's regulation, providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available, accords no authority to government officials but simply permits private employees to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition. Occupational Safety and Health Act of 1970, §§ 2 et seq., 11(c), (c)(1), 29 U.S.C.A. §§ 651 et seq., 660(c), (c)(1).

Syllabus *

Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (Act) prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act. Respondent Secretary of Labor promulgated a regulation providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. Claiming that a suspended wire mesh screen in petitioner's manufacturing plant used to protect employees from objects occasionally falling from an overhead conveyor was unsafe, two employees of petitioner refused to comply with their foreman's order to perform their usual maintenance duties on the screen. They were then ordered to punch out without working or being paid for the remainder of their shift, and subsequently received written reprimands, which were placed in their employment files. Thereafter, respondent brought suit in Federal District Court, alleging that petitioner's actions against the two employees constituted discrimination in violation of § 11(c)(1) of the Act, and seeking injunctive and other relief. While finding that the implementing regulation justified the employees' refusals to obey their foreman's order, the District Court nevertheless denied relief, holding that the regulation was inconsistent with the Act and therefore invalid. The Court of Appeals reversed and remanded, agreeing that the employees' actions were justified under the regulation but disagreeing with the conclusion that the regulation was invalid.

Held: The regulation in question was promulgated by respondent in the valid exercise of his authority under the Act, and constitutes a permissible gloss on the Act, in light of the Act's language, structure, and legislative history. Pp. 888–895.

(a) The regulation clearly conforms to the Act's fundamental objective of preventing occupational deaths and serious injuries. Moreover, the regulation is an appropriate aid to the full effectuation of the Act's "general duty" clause, which requires an employer to furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees. The regulation thus on its face appears to further the Act's overriding purpose and rationally complements its remedial scheme. Pp. 890–891.

(b) The facts that Congress, at the time it was considering passage of the Act, rejected a so-called "strike with pay" provision (whereby an obligation would be imposed on employers to continue to pay employees who absented themselves from work for reasons of safety), and also rejected a provision that would have given the Labor Department, in imminent-danger sit-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

uations, the power temporarily to shut down all or part of an employer's plant, do not indicate a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue. In contrast to the "strike with pay" provision, the regulation does not require employers to pay workers who refuse to perform assigned tasks in face of imminent danger, but simply provides that in such case the employer may not "discriminate" against the employees involved. And in contrast to the "shutdown" provision, the regulation accords no authority to Government officials but simply permits private employees to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition. Pp. 891–895.

1. Pub.L. 91–596, 84 Stat. 1590 (1970), as amended by Pub.L. 95–251, 92 Stat. 183 (1978), 29 U.S.C. §§ 651 *et seq.*

2. Section 11(c)(1) of the Act, 29 U.S.C. § 660(c)(1), provides in full:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter."

3. The regulation, 29 CFR § 1977.12, 38 Fed.Reg. 2681, 2683 (1973), as corrected 38 Fed.Reg. 4577 (1973), provides in full:

"(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise 'of any right afforded by this Act.' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

593 F.2d 715, affirmed.

Robert E. Mann, for petitioner.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for respondent.

Mr. Justice STEWART delivered the opinion of the Court.

The Occupational Safety and Health Act of 1970 (Act)[1] prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act.[2] The Secretary of Labor (Secretary) has promulgated a regulation providing that, among the rights that the Act so protects, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.[3] The question presented

"(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

"(b)(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

in the case before us is whether this regulation is consistent with the Act.

I

The petitioner company maintains a manufacturing plant in Marion, Ohio, for the production of household appliances. Overhead conveyors transport appliance components throughout the plant. To protect employees from objects that occasionally fall from these conveyors, the petitioner has installed a horizontal wire mesh guard screen approximately 20 feet above the plant floor. This mesh screen is welded to angle-iron frames suspended from the building's structural steel skeleton.

Maintenance employees of the petitioner spend several hours each week removing objects from the screen, replacing paper spread on the screen to catch grease drippings from the material on the conveyors, and performing occasional maintenance work on the conveyors themselves. To perform these duties, maintenance employees usually are able to stand on the iron frames, but sometimes find it necessary to step onto the steel mesh screen itself.

In 1973 the company began to install heavier wire in the screen because its safety had been drawn into question. Several employees had fallen partly through the old screen, and on one occasion an employee had fallen completely through to the plant floor below but had survived. A number of maintenance employees had reacted to these incidents by bringing the unsafe screen conditions to the attention of their foremen. The petitioner company's contemporaneous safety instructions admonished employees to step only on the angle-iron frames.

On June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger mesh had not yet been installed.[4] Following this incident, the petitioner effectuated some repairs and issued an order strictly forbidding maintenance employees from stepping on either the screens or the angle-iron supporting structure. An alternative but somewhat more cumbersome and less satisfactory method was developed for removing objects from the screen. This procedure required employees to stand on power-raised mobile platforms and use hooks to recover the material.

On July 7, 1974, two of the petitioner's maintenance employees, Virgil Deemer and Thomas Cornwell, met with the plant maintenance superintendent to voice their concern about the safety of the screen. The superintendent disagreed with their view, but permitted the two men to inspect the screen with their foreman and to point out dangerous areas needing repair. Unsatisfied with the petitioner's response to the results of this inspection, Deemer and Cornwell met on July 9 with the plant safety director. At that meeting, they requested the name, address, and telephone number of a representative of the local office of the Occupational Safety and Health Administration (OSHA). Although the safety director told the men that they "had better stop and think about what [they] were doing," he furnished the men with the information they requested. Later that same day, Deemer contacted an official of the

4. As a result of this fatality, the Secretary conducted an investigation that led to the issuance of a citation charging the company with maintaining an unsafe walking and working surface in violation of 29 U.S.C. § 654(a)(1). The citation required immediate abatement of the hazard and proposed a $600 penalty. Nearly five years following the accident, the Occupational Safety and Health Review Commission affirmed the citation, but decided to permit the petitioner six months in which to correct the unsafe condition. *Whirlpool Corp.*, [1979] 3 CCH Empl. Safety & Health Guide ¶ 23,552 (May 11, 1979). A petition to review that decision is pending in the United States Court of Appeals for the District of Columbia Circuit.

regional OSHA office and discussed the guard screen.[5]

The next day, Deemer and Cornwell reported for the night shift at 10:45 p. m. Their foreman, after himself walking on some of the angle-iron frames, directed the two men to perform their usual maintenance duties on a section of the old screen.[6] Claiming that the screen was unsafe, they refused to carry out this directive. The foreman then sent them to the personnel office, where they were ordered to punch out without working or being paid for the remaining six hours of the shift.[7] The two men subsequently received written reprimands, which were placed in their employment files.

A little over a month later, the Secretary filed suit in the United States District Court for the Northern District of Ohio, alleging that the petitioner's actions against Deemer and Cornwell constituted discrimination in violation of § 11(c)(1) of the Act.[8] As relief, the complaint prayed, *inter alia*, that the petitioner be ordered to expunge from its personnel files all references to the reprimands issued to the two employees, and for a permanent injunction requiring the petitioner to compensate the two employees for the six hours of pay they had lost by reason of their disciplinary suspensions.

Following a bench trial, the District Court found that the regulation in question[9] justified Deemer's and Cornwell's refusals to obey their foreman's order on July 10, 1974. The court found that the two employees had "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm," that the danger presented had been "real and not something which [had] existed only in the minds of the employees," that the employees had acted in good faith, and that no reasonable alternative had realistically been open to them other than to refuse to work. The District Court nevertheless denied relief, holding that the Secretary's regulation was inconsistent with the Act and therefore invalid. *Usery v. Whirlpool Corp.*, 416 F.Supp. 30, 32–34.

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. *Marshall v. Whirlpool Corp.*, 593 F.2d 715. Finding ample support in the record for the District Court's factual determination that the actions of Deemer and Cornwell had been justified under the Secretary's regulation, *id.*, at 719, n. 5,[10] the appellate court disagreed with the District Court's conclusion that the regulation is invalid. *Id.*, at 721–736. It accordingly remanded the case to the District Court for further proceedings. *Id.*, at 736. We granted certiorari, —— U.S. ——, 100 S.Ct. 43, 62 L.Ed.2d 29, because the decision of the Court of Appeals in this case conflicts with those of two other Courts of Appeals on the important question in issue. See *Marshall v. Daniel Construction Co.*, 563 F.2d 707 (CA5 1977); *Marshall v. Certified Welding Corp.*, (CA10 1978). That question, as stated at the outset of this opinion, is whether the Secretary's regulation authorizing employee "self-help" in some circumstances, 29 CFR § 1977.12(b)(2), is permissible under the Act.

II

The Act itself creates an express mechanism for protecting workers from employ-

5. The record does not disclose the substance of this conversation beyond the fact that it concerned the safety of the guard screen.

6. This order appears to have been in direct violation of the outstanding company directive that maintenance work was to be accomplished without stepping on the screen apparatus.

7. Both employees apparently returned to work the following day without further incident.

8. See n. 2, *supra*.

9. See n. 3, *supra*.

10. In its petition for certiorari, the petitioner did not cite this aspect of the Court of Appeals' decision as raising a question for review. Accordingly, the issue of whether the regulation covers the particular circumstances of this case is not before the Court. Sup.Ct.R. 23(c); *General Pictures Co. v. Electric Co.*, 304 U.S. 175, 177–179, 58 S.Ct. 849, 850–51, 82 L.Ed. 1273.

ment conditions believed to pose an emergent threat of death or serious injury. Upon receipt of an employee inspection request stating reasonable grounds to believe that an imminent danger is present in a workplace, OSHA must conduct an inspection. 29 U.S.C. § 657(f)(1). In the event this inspection reveals workplace conditions or practices that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the Act,[11] 29 U.S.C. § 662(a), the OSHA inspector must inform the affected employees and the employer of the danger and notify them that he is recommending to the Secretary that injunctive relief be sought. 29 U.S.C. § 662(c). At this juncture, the Secretary can petition a federal court to restrain the conditions or practices giving rise to the imminent danger. By means of a temporary restraining order or preliminary injunction, the court may then require the employer to avoid, correct, or remove the danger or to prohibit employees from working in the area. 29 U.S.C. § 662(a).[12]

To ensure that this process functions effectively, the Act expressly accords to every employee several rights, the exercise of which may not subject him to discharge or discrimination. An employee is given the right to inform OSHA of an imminently dangerous workplace condition or practice and request that OSHA inspect that condition or practice. 29 U.S.C. § 657(f)(1).[13] He is given a limited right to assist the OSHA inspector in inspecting the workplace, 29 U.S.C. §§ 657(a)(2), (e) and (f)(2), and the right to aid a court in determining whether or not a risk of imminent danger in fact exists. See 29 U.S.C. § 660(c)(1). Finally, an affected employee is given the right to bring an action to compel the Secretary to seek injunctive relief if he believes the Secretary has wrongfully declined to do so. 29 U.S.C. § 662(d).

In the light of this detailed statutory scheme, the Secretary is obviously correct when he acknowledges in his regulation that, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace."[14] By providing for prompt notice to the employer of an inspector's intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger. And in the few instances where this does not occur, the legislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition at the worksite.

As this case illustrates, however, circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement does not sufficiently protect him from death or serious

11. These usual enforcement procedures involve the issuance of citations and imposition of penalties. When an OSHA inspection reveals a violation of 29 U.S.C. § 654 or of any standard promulgated under the Act, the Secretary may issue a citation for the alleged violation, fix a reasonable time for the dangerous condition's abatement, and propose a penalty. 29 U.S.C. §§ 658(a), 659(a), 666. The employer may contest the citation and proposed penalty. 29 U.S.C. § 659(a), (c). Should he do so, the effective date of the abatement order is postponed until the completion of all administrative proceedings initiated in good faith. 29 U.S.C. §§ 659(b), 666(d). Such proceedings may include a hearing before an administrative law judge and review by the Occupational Safety & Health Review Commission. 29 U.S.C. §§ 659(c), 661(i).

12. Such an order may continue pending the consummation of the Act's normal enforcement proceedings. 29 U.S.C. § 662(b).

13. Should the Secretary determine that "there are no reasonable grounds to believe that a violation or danger exists he shall notify the employee[ ] . . . of such determination." *Ibid.*

14. See n. 3, *supra*.

injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.

Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 U.S.C. § 657(g)(2) and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer.

[1, 2] The question before us is whether this interpretative regulation [15] constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140, 65 S.Ct. 161, 164, 89 L.Ed. 124. See *Ford Motor Credit Co. v. Milhollin*, —— U.S. ——, 100 S.Ct. ——, 62 L.Ed.2d ——; *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318.

A

[3] The regulation clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries.[16] The Act, in its preamble, declares that its purpose and policy is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to *preserve* our human resources . . . ." 29 U.S.C. § 651(b). (Emphasis added.)

To accomplish this basic purpose, the legislation's remedial orientation is prophylactic in nature. See *Atlas Roofing Co. v. Occupational Safety Comm'n*, 430 U.S. 422, 444–445, 97 S.Ct. 1261, 1263–1264, 51 L.Ed.2d 464. The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Moreover, the Secretary's regulation can be viewed as an appropriate aid to the full effectuation of the Act's "general duty" clause. That clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). As the legislative history of this provision reflects,[17] it was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary. Since OSHA inspectors cannot be present around the clock in every workplace, the Secretary's regulation ensures that employees will in all circumstances enjoy the rights afforded them by the "general duty" clause.

[4] The regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme.[18] In the absence of some contrary indication in the legislative history, the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose. *United States v. Bacto-Unidisk*, 394 U.S. 784, 798, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 762; *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486, 63 S.Ct. 347, 351, 87 L.Ed. 411.

B

In urging reversal of the judgment before us, the petitioner relies primarily on two aspects of the Act's legislative history.

1

[5] Representative Daniels of New Jersey sponsored one of several House bills that led ultimately to the passage of the Act.[19] As reported to the House by the Committee on Education and Labor, the Daniels bill contained a section that was soon dubbed the "strike with pay" provision.[20] This section provided that employ-

15. The petitioner has raised no issue concerning whether or not this regulation was promulgated in accordance with the procedural requirements of the Administrative Act (APA), 5 U.S.C. § 553. Thus, we accept the Secretary's designation of the regulation as "interpretative," and do not consider whether it qualifies as an "interpretative rule" within the meaning of the APA, 5 U.S.C. § 553(b)(A).

16. The Act's legislative history contains numerous references to the Act's preventive purpose and to the tragedy of each individual death or accident. See, e. g., S.Rep.No.1282, 91st Cong., 2d Sess., 2 (1970), Leg.Hist. 142; 116 Cong.Rec. 37628 (1970), Leg.Hist. 516–517 (Sen. Nelson); 116 Cong.Rec. 37628, 37630 (1970), Leg.Hist. 518, 522 (Sen. Cranston); 116 Cong.Rec. 37630 (1970), Leg.Hist. 522–523 (Sen. Randolph); H.R.Rep.No.1291, 91st Cong., 2d Sess., 14, 23 (1970), Leg.Hist. 844, 853; 116 Cong.Rec. 38366 (1970), Leg.Hist. 978 (Rep. Young); 116 Cong.Rec. 38367–38368 (1970), Leg.Hist. 981 (Rep. Anderson); 116 Cong.Rec. 38386 (1970), Leg.Hist. 1031, 1032 (Rep. Dent); 116 Cong.Rec. 42203 (1970), Leg.Hist. 1210 (Rep. Daniels). As stated by Senator Yarborough, a sponsor of the Senate bill:

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact." 116 Cong.Rec. 37625 (1970), Leg.Hist. 510.

House and Senate debates are reprinted, along with the House, Senate, and Conference Reports, in a one-volume Committee Print entitled Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited *supra* and hereafter as Leg.Hist.).

17. See S.Rep.No.1282, 91st Cong., 2d Sess., 9–10 (1970), Leg.Hist. 149–150; H.R.Rep.No. 1291, 91st Cong., 2d Sess., 21–22 (1970), Leg. Hist. 851–852.

18. It is also worth noting that the Secretary's interpretation of 29 U.S.C. § 660(c)(1) conforms to the interpretation that Congress clearly wished the courts to give to the parallel antidiscrimination provision of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.* The legislative history of that provision, 30 U.S.C. § 815(c)(1), establishes that Congress intended it to protect "the refusal to work in conditions which are believed to be unsafe or unhealthful." S.Rep.No. 181, 95th Cong., 1st Sess., 35 (1977). See *id.*, at 36; 123 Cong.Rec. S10287–S10288 (daily ed. June 21, 1977) (remarks of Sen. Church, Sen. Williams, Sen. Javits).

19. H.R.16785, 91st Cong., 2d Sess. (1970), Leg. Hist. 893–976 (1970) (bill as reported to the House). See H.R.Rep.No.1291, 91st Cong., 2d Sess. (1970), Leg.Hist. 831.

20. Section 19(a)(5) of H.R.16785, *supra*, Leg. Hist. 969–970 (as reported to the House floor) provided in relevant part:

"The Secretary of Health, Education, and Welfare shall publish . . . a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless

ees could request an HEW examination of the toxicity of any materials in their workplace. If that examination revealed a workplace substance that had "potentially toxic or harmful effects in such concentration as used or found," the employer was given 60 days to correct the potentially dangerous condition. Following the expiration of that period, the employer could not require that an employee be exposed to toxic concentrations of the substance unless the employee was informed of the hazards and symptoms associated with the substance, the employee was instructed in the proper precautions for dealing with the substance, and the employee was furnished with personal protective equipment. If these conditions were not met, an employee could "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

The Committee Report explained the provision as follows:

"There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay. . . . Nothing herein restricts the right of the employer, except as he is obligated under other agreements, to assign a worker to other non-prohibited work during this time. This should eliminate possible abuse by allowing the employer to avoid payment for work not performed." H.R.Rep.No.1291, *supra*, at 30, Leg.Hist. 860.

21. H.R.19200, 91st Cong., 2d Sess. (1970), Leg. Hist. 763–830 (bill as originally introduced). See H.Res. 1218, 91st Cong., 2d Sess. (1970), Leg.Hist. 977.

22. 116 Cong.Rec. 38376, 38377–38378, 38707 (1970), Leg.Hist. 1004, 1005, 1008–1009, 1071 (Rep. Daniels). See 116 Cong.Rec. 38369 (1970), Leg.Hist. 986 (Rep. Perkins). Representative Daniels explained to the House why he was proposing his amendment:

"The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm." 116 Cong.Rec. 38377–38378 (1970), Leg.Hist. 1009.

This provision encountered stiff opposition in the House. Representative Steiger of Wisconsin introduced a substitute bill containing no "strike with pay" provision.[21] In response, Representative Daniels offered a floor amendment that, among other things, deleted his bill's "strike with pay" provision.[22] He suggested that employees instead be afforded the right to request an immediate OSHA inspection of the premises, a right which the Steiger bill did not provide. The House ultimately adopted the Steiger Bill.[23]

The bill that was reported to and, with a few amendments, passed by the Senate never contained a "strike with pay" provision.[24] It did, however, give employees the means by which they could request immediate Labor Department inspections.[25] These two characteristics of the bill were underscored on the floor of the Senate by Senator Williams, the bill's sponsor.[26]

23. 116 Cong.Rec. 38715 (teller vote), 38723–38724 (roll call vote) (1970), Leg.Hist. 1091, 1112–1115.

Representative Daniels' proposed amendments were never acted upon. His original bill was voted down in favor of the Steiger bill. See 116 Cong.Rec. 38704–38705, Leg.Hist. 1064 (the Chairman and Rep. Perkins); 116 Cong. Rec. 38707, Leg.Hist. 1072 (Rep. O'Hara).

24. S.2193, 91st Cong., 2d Sess. (1970), Leg.Hist. 204–295 (bill as reported to Senate by Senate Committee on Labor and Public Welfare). See S.Rep.No.1282, 91st Cong., 2d Sess. (1970), Leg.Hist. 141.

25. See S.2193, *supra*, § 8(f)(1), Leg.Hist. 252–253.

26. "[D]espite some wide-spread contentions to the contrary, . . . the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." 116 Cong.Rec. 37326 (1970), Leg.Hist. 416.

After passage of the Williams bill by the Senate, it and the Steiger bill were submitted to a conference committee. There, the House acceded to the Senate bill's inspection request provisions.[27]

The petitioner reads into this legislative history a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue in this case. The petitioner argues that Congress' overriding concern in rejecting the "strike with pay" provision was to avoid giving employees a unilateral authority to walk off the job which they might abuse in order to intimidate or harass their employer. Congress deliberately chose instead, the petitioner maintains, to grant employees the power to request immediate administrative inspections of the workplace which could in appropriate cases lead to coercive judicial remedies. As the petitioner views the regulation, therefore, it gives to workers precisely what Congress determined to withhold from them.

We read the legislative history differently. Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury. The remedy which the rejected provision furnished employees could have been invoked only after 60 days had passed following HEW's inspection and notification that improperly high levels of toxic substances were present in the workplace. Had that inspection revealed employment conditions posing a threat of imminent and grave harm, the Secretary of Labor would presumably have requested, long before expiration of the 60-day period, a court injunction pursuant to other provisions of the Daniels bill.[28] Consequently, in rejecting the Daniels bill's "strike with pay" provision, Congress was not rejecting a legislative provision dealing with the highly perilous and fast-moving situations covered by the regulation now before us.

It is also important to emphasize that what primarily troubled Congress about the Daniels bill's "strike with pay" provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section.[29] It is instructive that virtually every time the issue of an employee's right to absent himself from hazardous work was discussed in the legislative debates, it was in the context of the employee's right to continue to receive his usual compensation.[30]

27. H.R.Rep.No.1765, 91st Cong., 2d Sess., 37–38 (1970), Leg.Hist. 1190–1191. See 29 U.S.C. § 657(f).

28. See H.R.16785, *supra*, § 12(b), Leg.Hist. 956 (bill as reported to House).

29. Congress' concern necessarily was with the provision's compensation requirement. The law then, as it does today, already afforded workers a right, under certain circumstances, to walk off their jobs when faced with hazardous conditions. See 116 Cong.Rec. 42208 (1970), Leg.Hist. 1223–1224 (Rep. Scherle) (reference to Taft-Hartley Act). Under Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, employees have a protected right to strike over safety issues. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298. Similarly, Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143, provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike." The effect of this section is to create an exception to a no-strike obligation in a collective-bargaining agreement. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 385, 94 S.Ct. 629, 640, 38 L.Ed.2d 583.

The existence of these statutory rights also make clear that the Secretary's regulation does not conflict with the general pattern of federal labor legislation in the area of occupational safety and health. See also 29 CFR § 1977.18.

30. See 116 Cong.Rec. 37326 (1970), Leg.Hist. 416 (Sen. Williams); 116 Cong.Rec. 38369 (1970), Leg.Hist. 986 (Rep. Perkins); 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1005, 1009, 1071 (Rep. Daniels); 116 Cong.Rec. 38379 (1970), Leg. Hist. 1011 (Rep.

[6, 7] When it rejected the "strike with pay" concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety. But the regulation at issue here does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger. It simply provides that in such cases the employer may not "discriminate" against the employees involved. An employer "discriminates" against an employee only when he treats that employee less favorably than he treats others similarly situated.[31]

2

The second aspect of the Act's legislative history upon which the petitioner relies is the rejection by Congress of provisions contained in both the Daniels and the Williams bills that would have given Labor Department officials, in imminent danger situations, the power temporarily to shut down all or part of an employer's plant.[32] These provisions aroused considerable opposition in both Houses of Congress. The hostility engendered in the House of Representatives led Representative Daniels to delete his version of the provision in proposing amendments to his original bill.[33] The Steiger bill that ultimately passed the House gave the Labor Department no such authority.[34] The Williams bill, as approved by the Senate, did contain an administrative shutdown provision, but the conference committee rejected this aspect of the Senate bill.[35]

The petitioner infers from these events a congressional will hostile to the regulation in question here. The regulation, the petitioner argues, provides employees with the very authority to shut down an employer's plant that was expressly denied a more expert and objective United States Department of Labor.

As we read the pertinent legislative history, however, the petitioner misconceives the thrust of Congress' concern. Those in Congress who prevented passage of the administrative shutdown provisions in the Daniels and Williams bills were opposed to the unilateral authority those provisions gave to federal officials, without any judicial safeguards, drastically to impair the operation of an employer's business.[36] Congressional opponents also feared that the provisions might jeopardize the Government's otherwise neutral role in labor-management relations.[37]

[8] Neither of these congressional concerns is implicated by the regulation before us. The regulation accords no authority to government officials. It simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.

C

For these reasons we conclude that 29 CFR § 1977.12(b)(2) was promulgated by the Secretary in the valid exercise of his authority under the Act. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

UNITED STATES, Appellant,

v.

Patricia Ilene CLARK, Guardian for Shawn D. Clark and Tricia D. Clark.

No. 78-1513.

Argued Oct. 31, 1979.

Decided Feb. 26, 1980.

Mother filed suit in the Court of Claims on behalf of her children, asserting that the

Randall); 116 Cong.Rec. 38391 (1970), Leg. Hist. 1046 (Rep. Feigham); 116 Cong.Rec. 38714 (1970), Leg.Hist. 1089 (Rep. Horton).

The petitioner cites two passages in the legislative debates that, at first blush, appear to suggest that Congress was also concerned with employee walkouts not accompanied by pay. One is a statement by Representative Cohelan, a supporter of the Daniels bill, that "a comprehensive occupational safety and health program . . . must permit the worker to leave his post whenever and wherever conditions exist that endanger his health or safety." 116 Cong.Rec. 38375 (1970), Leg.Hist. 1001. The other is a statement by another Member that the Daniels bill did not authorize "strikes without pay." 116 Cong.Rec. 38708 (1970), Leg.Hist. 1075. Read in context, however, it is clear that both statements were referring to the "strike with pay" provision contained in the Daniels bill.

31. Deemer and Cornwell were clearly subjected to "discrimination" when the petitioner placed reprimands in their respective employment files. Whether the two employees were also discriminated against when they were denied pay for the approximately six hours they did not work on July 10, 1974, is a question not now before us. The District Court dismissed the complaint without indicating what relief it thought would have been appropriate had it upheld the Secretary's regulation. The Court of Appeals expressed no view concerning the limits of the relief to which the Secretary might ultimately be entitled. On remand, the District Court will reach this issue.

32. The version contained in the Daniels bill would have authorized the Secretary to issue a shutdown order of no more than 5 days' duration. See H.R.16785, *supra*, § 12(a), Leg.Hist. 955–956 (bill as reported to the House); H.R. Rep.No.1291, *supra*, at 25, Leg.Hist. 855.

As reported to the Senate, the version contained in the Williams bill limited the permissible duration of the administrative order to 72 hours and required that a Regional Director of the Labor Department concur in the order. S.2193, *supra*, § 11(b), Leg.Hist. 263–264. See S.Rep.No.1282, *supra*, at 12–13, Leg.Hist. 152–153; S.Rep.No.1282, *supra*, at 56–57, Leg.Hist. 195–196 (individual views of Sen. Javits). On the floor of the Senate, amendments were adopted that would have required the Labor Department official authorizing the inspector's actions to be an official appointed with the advice and consent of the Senate and that would have mandated that the employer be given prior notice of the reasons for the shutdown. 116 Cong.Rec. 37621–37622 (1970), Leg.Hist. 499–500; 116 Cong.Rec. 37624–37625 (1970), Leg.Hist. 508–509. See S.2193, *supra*, § 12(b), Leg.Hist. 562–563 (bill as passed by Senate).

33. 116 Cong.Rec. 38372, 38376, 38378, 38707 (1970), Leg.Hist. 993, 1005, 1009–1010, 1011, 1071 (Rep. Daniels). As Representative Daniels explained:

"[B]usiness groups have expressed great fears about the potential for abuse. They believe that the power to shut down a plant should not be vested in an inspector. While there is no documentation for this fear, we recognize that it is very prevalent. The Courts have shown their capacity to respond quickly in emergency situations, and we believe that the availability of temporary restraining orders will be sufficient to deal with emergency situations. Under the Federal rules of civil procedure, these orders can be used *ex parte*. If the Secretary uses the authority that he is given efficiently and expeditiously, he should be able to get a court order within a matter of minutes rather than hours." 116 Cong.Rec. 38378, Leg. Hist. 1009–1010.

34. H.R.19200, *supra*, § 12, Leg.Hist. 796–798.

35. H.R.Rep.No.1765, *supra*, at 40, Leg.Hist. 1193.

36. See 116 Cong.Rec. 35607, 37602 (1970), Leg. Hist. 299, 452–453 (Sen. Saxbe); 116 Cong.Rec. 37338 (1970), Leg.Hist. 425 (Sen. Dominick); 116 Cong.Rec. 37602 (1970), Leg.Hist. 453–454 (Sen. Schweiker); 116 Cong.Rec. 41763 (1970), Leg.Hist. 1149 (Sen. Prouty); H.R.1291, *supra*, at 55–57, Leg.Hist. 885–887 (minority report); 116 Cong.Rec. 38368 (1970), Leg.Hist. 983 (Rep. Anderson); 116 Cong.Rec. 38372, 38702 (1970), Leg.Hist. 992, 1058 (Rep. Steiger); 116 Cong.Rec. 38378–38379 (1970), Leg.Hist. 1011–1012 (Rep. Randall); 116 Cong.Rec. 38393 (1970), Leg.Hist. 1050 (Rep. Michel); 116 Cong. Rec. 38394 (1970), Leg.Hist. 1052 (Rep. Broomfield); 116 Cong.Rec. 38704 (1970), Leg.Hist. 1062 (Rep. Sikes); 116 Cong.Rec. 38713 (1970), Leg.Hist. 1087 (Rep. Robison); 116 Cong.Rec. 42203 (1970), Leg.Hist. 1210 (Rep. Daniels).

37. See 116 Cong.Rec. 37346 (1970), Leg.Hist. 448 (Sen. Tower); H.R.1291, *supra*, at 55–57, Leg.Hist. 885–887 (minority report); 116 Cong. Rec. 38393 (1970), Leg.Hist. 1050 (Rep. Michel). Some of these Members of Congress expressed particular fears over the possible pressures which might be brought to bear on an inspector during a strike.

a welder to an excessive concentration of fluoride compounds were affirmed as serious with a $700 penalty. The Court had remanded for findings of fact on the classification of the violation and for a determination of whether the welder's single exposure was sufficient to establish a serious violation. In stating "we need not reach the question of whether the substantive requirements of the standards were violated if such violations may not be characterized as serious," the Court misstated the rule followed by the Commission and reviewing courts that the first question faced by a trial judge is whether a violation existed. The second question is the appropriate classification.

The Commissioners' ruling in *Scullin Steel Company* (1978 OSHD ¶ 22,835) established that a single exposure to excessive fluoride levels may be the basis for a violation. In *Standard Glass and Supply Company* (1971-1973 OSHD ¶ 15,689), the Commissioners ruled that the probability that death or serious physical injury could result from an accident, plus the employer's knowledge of the violation and the possibility of an accident's occurrence are all the elements necessary to categorize a violation as serious. The employer knew or should have known of the violative conditions in that it assigned a welder to perform his job in a confined space without adequate ventilation where the fluoride levels exceeded permissible levels. The Secretary's expert testified that exposure to excessive levels of fluorides is harmful to the respiratory, gastro-intestinal, skeletal and neurological systems. The original Judge's decision contained a finding that fluorides present in the welding rods were released into the air to produce a 5.3 mg/M$_3$ concentration in the work area containing 239.768 cubic feet of air space.

The Court vacated a § 1910.1000(a)(2) charge in the erroneous belief that the charge had been withdrawn, when in fact the Secretary had requested that the citation be amended to allege alternative violations of § 1910.252(f)(4) and (f)(5). The Judge had made specific findings that § 1910.1000(a)(2) was violated.

Review was directed on whether the Judge erred in finding the employer in serious violation of § 1910.252(f)(4) and (f)(5) and § 1916.31(a) and (b) based on employee exposure to fluorides for an eight-hour time-weighted average of 5.3 mg/M$_3$.

Back references: ¶ 1177; 2206; 4092.

Jack D. Shoffner for the employer. Murphy M. Thornton, President Local Union No. 33, Industrial Union to Marine and Shipbuilding Workers of America for the employees. Baruch A. Fellner and Marshall H. Harris for the Secretary.

[¶ 24,956] Whirlpool Corp.

Text of opinion of the United States District Court for the Northern District of Ohio, Western Division dated October 31, 1980. Docket No. C 74-359. Don J. Young, District Judge.

Employee Discrimination—Refusal to Perform Dangerous Work—Appropriate Relief—Retraction of Written Reprimands—Payment of Lost Wages—Injunction to Prevent Further Violations. On remand from the District of Columbia Appeals Court for a determination of appropriate relief for two employees sent home from the job after refusing to work on a 20-foot-high wire mesh screen through which a co-worker had fallen to his death, the employer was ordered to expunge written reprimands placed on the employees' files and to pay six hours' lost wages. The award of lost wages did not constitute "pay" for a "strike" because the employer's retaliatory conduct deprived the employees of their opportunity to perform safe alternative work. The Secretary's request for injunctive relief to prevent the employer from further acts of employee discrimination was denied on grounds such discrimination is already prohibited by the Act and there was no need for the continued Court supervision required by an injunctive order.

The Court had previously found the employer in violation of § 1977.12(b) (1976-1977 OSHD ¶ 20,911) but denied compensation on grounds the regulation was invalid due to improper promulgation. The Sixth Circuit Appeals Court determined the regulation was valid (1979 OSHD ¶ 23,334), and this finding was upheld by the Supreme Court (1980 OSHD ¶ 24,249).

The employer was not allowed to reopen the question of whether the Secretary established that the urgency of the situation provided insufficient time to eliminate the danger through regular statutory enforcement channels. The issue was originally decided in favor of the Secretary and affirmed by the Appeals Court.

Back reference: ¶ 573.

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[Text of Opinion]

YOUNG, J.:

In its original judgment in this case, this Court found that the defendant had violated the subject regulation, 29 CFR § 1977.12, but denied relief because the regulation was invalid due to lack of statutory support. *Usery v. Whirlpool Corp.*, 416 F. Supp. 30 (N. D. Ohio 1976). The United States Court of Appeals reversed this Court's judgment on the question of the validity of § 1977.12 and remanded the case for appropriate remedy. *Marshall v. Whirlpool Corp.*, 593 F. 2d 715 (6th Cir. 1979). The judgment of the Court of Appeals was affirmed by the United States Supreme Court in *Whirlpool Corp. v. Marshall*, 100 S. Ct. 883 (1980).

Pursuant to the remand by the Court of Appeals, this Court requested that the parties submit proposed additional findings of fact and conclusions of law on the issue of the applicable relief in this matter. Having received counsel's memoranda, this Court herein undertakes to resolve the question of appropriate relief.

In its proposed additional findings of fact, the defendant Whirlpool attempts to reopen the question of whether it violated 29 CFR § 1977.12. Defendant contends that the United States Court of Appeals established an additional criterion which was not considered by this Court in resolving the factual question of whether § 1977.12 was violated. Defendant argues that the plaintiff has not met its burden of establishing one of the requirements of a violation of § 1977.12, i. e., that the urgency of the situation provided "insufficient time . . . to eliminate the danger by resort to regular statutory enforcement channels." Accordingly, defendant requests that this Court find no violation of § 1977.12.

This Court finds that these arguments on the liability aspect of this lawsuit are not well taken for the reason that this factual issue has already been decided by this Court and was affirmed by the Court of Appeals. In its original decision in this case, this Court, after an evidentiary hearing, found that the regulation § 1977.12 had been violated by the defendant. *Usery v. Whirlpool Corp.*, 416 F. Supp. at 32-33. This Court, however, denied relief because of its belief that the regulation was invalid. The Court of Appeals reversed that judgment on the question of the validity of the regulation in question. However, the Court specifically affirmed this Court's factual finding that § 1977.12 had been violated. The Court of Appeals stated:

> The District Judge's fact finding appears at 416 F. Supp. 30, 32 (N. D. Ohio 1976). In No. 76-2144, the Whirlpool Corporation cross-appeals, claiming that the District Judge's findings of fact were clearly erroneous regardless whether the regulation was valid. Our examination of the record, however, reveals ample support for his conclusion that the employees declined to do their work because they reasonably feared for their lives.

Marshall v. Whirlpool Corp., 593 F. 2d at 719 n. 5. The factual determination of the Court of Appeals was not questioned in the Supreme Court. See *Whirlpool Corp. v. Marshall*, 100 S. Ct. 883, 888 n. 10.

Thus, this Court will not permit the defendant to reopen the question of whether § 1977.12 had been violated as a matter of fact. The only question remaining on remand is that of appropriate relief.

Three types of relief are requested by plaintiff. First, plaintiff seeks a retraction of the written reprimands which were placed in the employment files of complainants Deemer and Cornwell. Second, plaintiff seeks lost wages for the six-hour period during which each complainant was allegedly denied the opportunity to work due to the exercise of their protected right. Finally, plaintiff requests an injunction to prevent any further violations of 29 U. S. C. § 660(c).

Both parties agree, assuming liability is found, that expungement of the written reprimands would be an appropriate remedy. Thus, an order to that effect will be included as a final remedy.

Defendant objects to an award of lost wages on the ground that such an award would amount to a "strike with pay" situation. Defendant argues that the complainants Deemer and Cornwell are not entitled to lost wages since they refused to cooperate by performing safer, alternative work.

This Court agrees with the defendant that back pay should not be awarded in the typical "strike with pay" situation. It makes sense that an employee who refuses to perform hazardous work should be required to perform safe alternative tasks if they are available. However, recovery of lost wages is appropriate where the evidence shows that the denial of pay was a result of discrimination prohibited by 29 C. F. R. § 1977.12. See *Whirlpool Corp. v. Marshall*, 100 S. Ct. 883, 894 n. 31; *Marshall v. N. L. Industries*, No. 78-2289 (7th Cir. April 7, 1980).

In the present case, the facts show that the complainants Deemer and Cornwell were not given an opportunity to perform safe alternative work. The testimony adduced at the evidentiary hearing showed that, upon refusing to climb on the screen, complainants were given written reprimands

and ordered to punch out without working or being paid for the remaining six hours of the shift. *Usery v. Whirlpool Corp.*, 416 F. Supp. 30, 32; *Whirlpool Corp. v. Marshall*, 100 S. Ct. 883, 888. The evidence also showed that the complainants were sent home because of their refusal to perform the work they perceived to be unreasonably dangerous. Thus, the facts are clear that it was defendant's own retaliatory and discriminatory conduct, unlawful under § 1977.12, which deprived the employees of their opportunity to render any further services. Under these circumstances, this Court finds that an award of lost wages is entirely justified.

Finally, plaintiff seeks injunctive relief to prevent defendant from engaging in any further violations of 29 U. S. C. § 660(c). In support of its request, plaintiff cites the "irresponsible" nature of defendant Whirlpool's conduct in connection with the discipline incident and Whirlpool's continued insistence that its conduct was proper therein.

This Court finds no compelling reason to issue an injunction preventing defendant from further violations of OSHA's retaliatory action statute. The conduct sought to be proscribed thereby is already prohibited by law. This Court sees no necessity for the continued supervision by this Court which would accompany such an injunctive order.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that defendant expunge the written reprimands placed in the employment files of complainants Deemer and Cornwell in connection with the incident which is the subject of this lawsuit; and it is

FURTHER ORDERED that the complainants Deemer and Cornwell each recover from the defendants their lost wages in an amount equal to six hours of wages at their regular rate of pay in effect in July, 1974, with eight percent (8%) interest thereon; and it is

FURTHER ORDERED that plaintiff's request for injunctive relief be, and it hereby is, DENIED.

[¶ 24,957] Whirlpool Corp.

Text of Review Commission decision dated November 5, 1980. OSHRC Docket Number 9224. The Judge's decision appears at 1974-1975 OSHD ¶ 19,834. The first Review Commission decision appears at 1977-1978 OSHD ¶ 21,659. The Judge's decision on remand appears at 1977-1978 OSHD ¶ 22,073. The second Review Commission decision appears at 1979 OSHD ¶ 23,552.

Inspections—Effect of Post-Citation Abatement—Overhead Screen Work Surface. On remand from the District of Columbia Appeals Court, a general duty charge and $600 penalty for failure to provide a safe walking/working surface were affirmed despite the employer's replacement of an unsafe wire mesh overhead with heavy duty wire during the litigation process. Replacement of the screen panels simply fulfilled the employer's abatement obligation resulting from Commission's order affirming the citation. Post-citation abatement neither negates nor excuses an employer's initial failure to comply with the Act.

The citation was issued following the death of a maintenance employee who had fallen through the 20-foot-high guard screen installed below a system of overhead conveyors to catch falling material. Maintenance employees used the screen as a work surface when repairing the screen or conveyor or removing parts from the screen. The Commissioners had reversed a Judge's decision and affirmed a general duty citation on grounds it was possible to abate the hazard by using heavy duty wire to strengthen the screen. In the penalty assessment process, the employer was specifically credited for its good faith in replacing nearly one-third of the deficient screens before the issuance of the citation. On review, the Appeals Court remanded for further consideration in light of the employer's virtual completion of the screen replacement.

Back reference: ¶ 4201.

Robert E. Mann for the employer. Baruch A. Fellner and William S. Kloepfer for the Secretary.

[Text of Review Commission Decision]

Before CLEARY, Chairman; BARNAKO and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia. *Whirlpool Corp. v. OSHRC*, No. 79-1692 (D. C. Cir. June 25, 1980). Whirlpool Corporation, Respondent, had installed a guard screen below a system of overhead conveyors to protect employees on the work floor from falling appliances and parts. Although the screen was designed primarily to catch material falling from the conveyors, maintenance employees used it as a work surface when repairing the screen or the conveyor as well as when it became necessary to remove parts and appliances from the screen.

A compliance officer of the Occupational Safety and Health Administration ("OSHA"), Department of Labor, inspected Whirlpool's Marion, Ohio plant on July 1, 1974, in response to the reported death of a maintenance employee who had fallen through the guard screen. As a result of the inspection, the Secretary of Labor ("the Secretary") cited Whirlpool for a serious violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U. S. C. § 654(a)(1),[1] for failing "to provide a safe walking and working surface on the screens under the conveyor." The Secretary ordered immediate abatement and proposed a $600 penalty. Administrative Law Judge David H. Harris vacated the citation based on his determination that the Secretary should have cited Whirlpool under a specific scaffolding standard, 29 C. F. R. § 1910.28(a)(1), rather than section 5(a)(1) of the Act, the general duty clause. On review, the Commission held the scaffolding standard to be inapplicable and remanded the case to Judge Harris for further proceedings on the section 5(a)(1) violation. *Whirlpool Corp.*, 77 OSAHRC 36/C11, 5 BNA OSHC 1173, 1977-78 CCH OSHD ¶ 21,659 (No. 9224, 1977). In his decision on remand from the Commission, the judge vacated the citation because he found that the Secretary had failed to demonstrate the feasible abatement measures Whirlpool could have adopted to avoid the citation. The Secretary again petitioned the Commission for review of the judge's decision. This time the Commission reversed the judge's decision and affirmed the citation finding that the Secretary had shown that it was feasible to abate the hazard and thus avoid citation by using heavy duty wire to strengthen the screen. After a review of the record evidence pertinent to the time necessary for Whirlpool's compliance, the Commission set a six month abatement period. It also assessed a $600 penalty. In arriving at an appropriate penalty, the Commission specifically credited Whirlpool for its good faith as evidenced by replacement of nearly one-third of the deficient screens prior to the issuance of the citation.[2] *Whirlpool Corp.*, 79 OSAHRC 032/A14, 7 BNA OSHC 1356, 1979 CCH OSHD ¶ 23,552 (No. 9224, 1979).

Whirlpool appealed the Commission's decision to the United States Court of Appeals for the District of Columbia. In its remand order, the court notes: "At oral argument, counsel for Petitioner [Whirlpool] represented to the court that the Petitioner has completed or is about to complete full replacement of the panels in the guard screen at its Marion, Ohio, plant." The court further states that the citation was issued because Whirlpool had "replaced only approximately one-third of the screen". Thus, the court remanded this matter to the Commission "for further consideration" in light of the "changed circumstances" described at oral argument.

After careful consideration we reaffirm our decision and order of May 11, 1979, despite Whirlpool's asserted correction of the hazardous condition in question. Abatement following the issuance of a citation neither negates nor excuses an employer's failure to comply with the Act.[3] It is therefore appropriate to affirm a citation even though an employer abates a violative condition during the course of litigation before the Commission or a circuit court of appeals. See *Noranda Aluminum, Inc. v. OSHRC*, 593 F. 2d 811 (8th Cir. 1979). Subsequent to our order affirming the citation, Whirlpool aserted that it had accomplished abatement of the hazardous condition in question. The completion of that compliance effort is simply fulfillment of Whirlpool's abatement obligation resulting from the Commission's order affirming the citation.

Accordingly, we reaffirm our May 11, 1979 order affirming the serious violation of section 5(a)(1) and assessing a $600 penalty.[4] SO ORDERED.

---

[1] Section 5(a)(1) of the Act provides that each employer ". . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

[2] Section 17(j) of the Act provides that:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

[3] Prompt correction of a cited hazardous condition is essentially an indication of good faith and may be considered in penalty assessment under section 17(j) of the Act, 29 U. S. C. § 666(j). In assessing the $600 penalty here we considered Whirlpool's good faith manifested by its replacement of one-third of the defective screens before the first hearing.

[4] An employer may be penalized in an amount up to $1000 for a serious violation of the Act. 29 U. S. C. § 666(b).

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Rules as Proposed

Chapter Eighteen:
Access to Employee Exposure and Medical Records

8 MCAR S 1.7230 Purpose and scope. Federal Occupational Safety and Health Standard 1910.20, "Access to Employee Exposure and Medical Records," 29 Code of Federal Regulations, Section 1910.20 (1980) is adopted by reference.

8 MCAR S 1.7231 Modified definition. The terms "Assistant Secretary of Labor for Occupational Safety and Health" and "assistant secretary" as used in 29 Code of Federal Regulations, Section 1910.20 shall mean the Commissioner of the Department of Labor and Industry for the purpose of 8 MCAR S 1.7230.

8 MCAR S 1.7232 Conforming amendments. Revisions to 29 Code of Federal Regulations, Section 1910, Subpart T (Commercial Diving Operations) and Subpart Z (Toxic and Hazardous Substances) adopted by the Federal Occupational Safety and Health Administration on May 23, 1980 and published at 45 Federal Register, Volume 45, 35281-35284 are adopted by reference.

Chapter Nineteen:
Discrimination Against Employees

8 MCAR S 1.7240 Authority and background. Minn. Stat. SS 182.654, subd. 9, and 182.669 prohibit discrimination against an

employee because the employee exercised any rights granted under the act on the employee's behalf or on behalf of others. Any employee who believes that he or she has been discharged or discriminated against by any person because the employee exercised any right authorized by the act as described in 8 MCAR S 1.7242, may file a discrimination complaint with the Commissioner of the Department of Labor and Industry.

8 MCAR S 1.7241 Purpose and scope. The rules in this chapter implement Minn. Stat. S 182.669 of the act and set forth general policies for enforcement of the discrimination provisions of Minn. Stat. S 182.669.

8 MCAR S 1.7242 Definition. For the purpose of 8 MCAR SS 1.7240-1.7247 "act" means the Minnesota Occupational Safety and Health Act of 1973.

8 MCAR S 1.7243 Protected activities.

A. Occupational safety and health complaints. An employee or authorized employee representative may file a complaint about unsafe or unhealthful working conditions with an employer and may request personal protective equipment from the employer. An employee or authorized employee representative may also file a written complaint about unsafe or unhealthful working conditions with the Commissioner of the Department of Labor and Industry. Written complaints may be given to an occupational safety and health investigator prior to or during an inspection of the place of employment.

B. Refusal to work under unsafe conditions.

1. Unless provided by 8 MCAR SS 1.7240-1.7247 there is no right granted by the act for employees to leave the job because of potentially unsafe conditions at the workplace. Initially an employer should be notified of hazardous conditions. If corrections are not accomplished or if a dispute arises about the existence of a hazard, the employee or authorized employee representative may request an occupational safety and health inspection of the workplace by giving notice to the commissioner

of the hazardous condition.

2. If an employee has a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition in the workplace, an employee acting in good faith may refuse to work if there is no reasonable alternative. The condition must be so hazardous that a reasonable person would conclude that there is a real danger of death or serious injury and that there is insufficient time to eliminate the danger through enforcement procedures. The employee must, where possible, request the employer to correct the hazardous condition. An employer may not discharge or discipline an employee who refuses to perform assigned tasks under these conditions. However, an employer is not required to pay employees for tasks not performed.

C. Inspection participation. The authorized employee representative may participate in the opening conference prior to the inspection and the closing conference following the inspection. The employer shall pay the authorized employee representative regular wages for time spent participating in the inspection and opening and closing conferences.

D. Testimony. An employee may not be discriminated against because the employee has testified or is about to testify in proceedings under or related to the act. This protection includes testifying in proceedings instituted by the employee or any statement or testimony given in judicial, quasi-judicial and administrative proceedings.

E. Contestation. An employee or authorized employee representative may file a written notice of contest with the Occupational Safety and Health Review Board contesting a citation, proposed assessment of penalty, type of violation, or the time fixed for abatement in a citation issued to an employer.

F. Informal conferences. An employee or authorized employee representative may participate in informal conferences held between the employee's employer and the Department of Labor and Industry.

8 MCAR S 1.7244 Unprotected activities.

A. Permitted discipline. That certain of an employee's activities are protected by the act does not protect an employee from discipline or discharge for other legitimate reasons including tardiness, unauthorized absences or poor workmanship.

B. Protected and unprotected activities combined. If participation in an activity protected by the act was a substantial reason for discharge or other adverse action by an employer, the employee's rights under the act have been violated. Whether a discharge or other adverse action was because of protected activity will be determined on the facts in each particular case.

8 MCAR S 1.7245 Claim procedures.

A. Who may file. A complaint alleging discrimination under Minn. Stat. S 182.669 may be filed by an employee or an authorized employee representative.

B. Time for filing. The complaint must be filed, either orally or in writing, with the Commissioner of the Minnesota Department of Labor and Industry within 30 days after the alleged discriminatory act occurred.

C. Form of filing. Verbal complaints must be reduced to written form by the Department of Labor and Industry and sent to the complainant for signature. The form must be signed and returned to the department within 15 days of receipt by the complainant. Upon receipt of the signed complaint, the commissioner will make an investigation as he deems appropriate. If the complainant fails to sign and return the written statement within the 15 days, the case shall be closed.

D. Notice of commissioner's determination. The commissioner shall notify the complainant of the commissioner's determination regarding the complaint within 90 days of receipt of a signed complaint.

8 MCAR S 1.7246 Other proceedings.

A. Deferral. The commissioner may defer action on a complaint filed concurrently with the Department of Labor and

Industry and another agency until a determination by the other agency has been made if the rights asserted in other proceedings are substantially the same as rights given under the act and the other proceedings will not violate the rights guaranteed by the act.

B. Accepting other decisions. The commissioner may accept the results of other proceedings as a final determination of a complaint if those proceedings dealt adequately with all factual issues; were fair, impartial and valid; and the outcome of the proceedings is not contradictory to the purpose of the act. If the other action is dismissed without proper hearing, the dismissal is not a final determination of the complaint filed with the commissioner.

8 MCAR S 1.7247 Enforcement proceedings.

A. Court action. Minn. Stat. S 182.669 authorizes the commissioner to bring an action against the employer in the district court in the county where the alleged discrimination occurred or in a county where the employer transacts business if it is determined that a discriminatory act has been committed against an employee.

B. Settlement. Upon completion of an investigation, the commissioner may decide upon a settlement acceptable to all concerned parties rather than proceeding with court action.

C. Complaint withdrawal. An employee may withdraw a discrimination complaint at any point following the initial submission.

D. Independent commissioner action. If an employee voluntarily withdraws a discrimination complaint, the commissioner may decide to proceed with an investigation on his own if he believes a discriminatory act has been committed.

Chapter Twenty-two:

Recording and Reporting

Occupational Injuries and Illnesses

8 MCAR S 1.7292 Log and summary of occupational injuries and illnesses.

A. Each employer shall maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment, except that under the circumstances described in paragraph B. of this section an employer may maintain the log and summary of occupational injuries and illnesses at a place other than the establishment. Each employer shall enter each recordable occupational injury and illness on the log as early as practicable but no later than 6 working days after receiving information that a recordable case has occurred. For this purpose OSHA Form No. ~~100~~ 200 or any private equivalent may be used. OSHA Form No. ~~100~~ 200 or its equivalent shall be completed in the detail provided in the form and the instructions contained in OSHA Form No. ~~100~~ 200. If an equivalent to OSHA Form No. ~~100~~ 200 is used, such as a printout from data-processing equipment, the information shall be as readable and comprehensible to a person not familiar with the data processing equipment as the OSHA Form ~~100~~ 200 itself.

8 MCAR S 1.7295 Annual summary.

A. Each employer shall ~~compile~~ post an annual summary of occupational injuries and illnesses for each establishment. Each annual summary shall ~~be based on the information~~ consist of a copy of the year's totals contained in the log and summary of occupational injuries and illnesses for the particular establishment. OSHA Form No. ~~102~~ 200 shall be used for this purpose, and shall be completed in the form and detail as provided in the instructions contained therein.

B. The summary shall be completed no later than one month after the close of each calendar year ~~beginning with calendar year~~.

C. Each employer, or the officer or employee of the employer who supervises the preparation of the ~~annual~~ log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or

employee of the employer, who supervises the preparation of the annual summary of occupational injuries and illnesses, ~~to the lower right-hand corner of the annual~~ at the bottom of the last page of the log and summary or by appending a separate statement to the ~~annual~~ log and summary certifying that the annual summary is true and complete.

8 MCAR S 1.7297 Access to records.

A. Access by departments. Records provided for in 8 MCAR S 1.7292, 8 MCAR S 1.7294, and 8 MCAR S 1.7295 shall be available for inspection and copying by authorized representatives of the Department of Labor and Industry and the Department of Health.

B. Access by employees. The log and summary of recordable occupational injuries and illnesses (OSHA Form No. 200) for any establishment in which the employee is or was employed provided for in 8 MCAR S 1.7292 shall, upon request, be made available by the employer to any employee, former employee, and their representatives for examination and copying in a reasonable manner and at reasonable times.

C. Bargaining for additional access. Nothing in this rule shall preclude employees and employee representatives from collectively bargaining for access to information relating to occupational injuries and illnesses in addition to the information made available under this rule.

D. Extent of access. Access to the log and summary provided under this rule shall pertain to all logs and summaries retained under the requirements of 8 MCAR S 1.7296.

8 MCAR S 1.7304 Small employers.

A. Exemption. An employer who had no more than ten (10) employees at any one time during the calendar year immediately preceding the current calendar year need not comply with any of the requirements of this chapter except 8 MCAR S 1.7298 concerning fatalities or multiple hospitalization accidents (i.e., he need not prepare the log, OSHA Form No. ~~100~~ 200; the Supplementary Record, OSHA Form No. 101; nor prepare or post the summary, OSHA Form No. ~~102~~ 200).

B. Limitation of exemption. Paragraph A. ~~of this section~~ shall not apply when an employer has been notified in writing by the Bureau of Labor Statistics that he has been selected to participate in a statistical survey of occupational injuries and illnesses. If selected, an employer will be required to maintain a log of occupational injuries and illnesses (OSHA Form No. ~~100~~ 200) in accordance with 8 MCAR S 1.7292 and to make reports in accordance with 8 MCAR S 1.7306 for the period of time which is specified in the notice.

STATE OF MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed
Adoption of Rules Governing
(A) Recording and Reporting
Occupational Injuries and
Illnesses, (B) Discrimination
Against Employees, and
(C) Access to Employee Exposure
and Medical Records.

ORDER ADOPTING RULE

Notice of the Commissioner's intent to adopt the above-entitled rules without a public hearing was published in the State Register on September 14, 1981 (6 S.R. 446) and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes section 15.0412, subdivision 4, on September 10, 1981. After affording interested and affected persons an opportunity to submit comments for 30 days after Notice, receiving fewer than seven written requests for a public hearing within the 30-day comment period, reviewing and considering the comments, and determining the need for and reasonableness of the above-captioned rules,

NOW, THEREFORE, IT IS ORDERED that these rules identified as 8 MCAR §§ 1.7230-1.7232; 8 MCAR §§ 1.7240-1.7247; 8 MCAR § 1.7292; 8 MCAR § 1.7295; 8 MCAR § 1.7297; and 8 MCAR § 1.7304 of the Department of Labor and Industry, Occupational Safety and Health Codes, are adopted this 3rd day of November, 1981, pursuant to authority vested in me by Minnesota Statutes Section 182.657 (1980).

STATE OF MINNESOTA

Russell B. Swanson

Russell B. Swanson
Commissioner of Labor and Industry

STATE OF MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Adoption of Rules Governing (A) Recording and Reporting Occupational Injuries and Illnesses, (B) Discrimination Against Employees, and (C) Access to Employee Exposure and Medical Records.

ORDER FOR NOTICE OF INTENT TO ADOPT RULES WITHOUT PUBLIC HEARING

IT IS ORDERED this 26th day of August, 1981 that a Notice of Intent to Adopt Rules Without Public Hearing in the above-entitled matter be given to all persons who have registered their names with the State Department of Labor and Industry for that purpose and be published in the State Register.

STATE OF MINNESOTA

Russell B. Swanson, Commissioner
Department of Labor and Industry

Department of Labor and Industry
Occupational Safety and Health Division

Proposed Amendments to and Adoption of Rules Governing: (A) Access to Employee Exposure and Medical Records; (B) Discrimination Against Employees; and (C) Recording and Reporting Occupational Injuries and Illnesses.

Notice of Intent to Amend and Adopt Rules Without a Public Hearing

Notice is hereby given that the Department of Labor and Industry proposes to amend and adopt the above-entitled rules without a public hearing. The commissioner has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, Subd. 4h (1980).

(A) New Chapter Eighteen (8 MCAR §§ 1.7230-1.7239) "Access to Employee Exposure and Medical Records" proposes to adopt by reference the Federal Occupational Safety and Health Standard published at 29 CFR Part 1910.20, "Access to Employee Exposure and Medical Records." This standard, adopted by Federal OSHA on May 23, 1980 (Federal Register, Volume 45, Number 102, dated May 23, 1980), provides for employees, designated employee representatives, and the Minnesota Department of Labor and Industry access to employer-maintained exposure and medical records relevant to employees exposed to toxic substances and harmful physical agents. Access is also assured to analyses or evaluations of this information conducted by the employer or medical professionals. The final

standard requires long-term preservation of these records, contains notice provisions informing employees of their rights under the standard, and includes provisions which are protective of trade secret information.

Federal OSHA made appropriate changes to Subpart T and Subpart Z of 29 CFR Part 1910 in order to make the recordkeeping and access to records provisions of these subparts consistent with 29 CFR Part 1910.20. Those changes are proposed for adoption by Minnesota OSHA in 8 MCAR § 1.7232.

(B) Proposed rules implementing the discrimination provisions of Minn. Stat. § 182.669 of the Minnesota Occupational Safety and Health Act of 1973 are included in new Chapter Nineteen (8 MCAR §§ 1.7240-1.7249) "Discrimination Against Employees." The proposed rules are similar to those enforced by Federal OSHA and govern protected and unprotected activities under the Act, claim procedures and enforcement proceedings.

(C) Proposed amendments to Chapter Twenty-Two (8 MCAR §§ 1.7290-1.7309) "Recording and Reporting Occupational Injuries and Illnesses," are necessary to correct several clerical errors, to provide employees an access to Occupational Safety and Health (OSH) summary records, and to make Minnesota Occupational Safety and Health Rules as effective as those enforced by the Federal Occupational Safety and Health Administration (Federal OSHA). Amendments to 8 MCAR §§ 1.7292, 1.7295, and 1.7304 are nonsubstantial changes deleting references to obsolete forms and inserting new form numbers and titles. Section 8 MCAR 1.7297, "Access to Records" is amended to allow employees, former employees, and employee representatives access to the log and summary of occupational injuries and illnesses;

Federal OSHA has enforced a similar regulation since August 1978.

Persons interested in these rules shall have 30 days to submit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed rules.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, Subds. 4-4f (1980).

Persons who wish to submit comments or a written request for a public hearing should submit such comments or requests to:

Ivan W. Russell, Director
Occupational Safety & Health Division
Department of Labor and Industry
444 Lafayette Road
St. Paul, Minnesota 55101
Telephone: (612) 296-4532

Authority for the adoption of these rules is contained in Minn. Stat. § 182.657 (1980). A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available from:

Ms. Patricia Lorentz
Occupational Safety & Health Division
Department of Labor and Industry
444 Lafayette Road
St. Paul, Minnesota 55101
Telephone: (612) 297-3254

If no hearing is required, the proposed rules, this Notice, the Statement of Need and Reasonableness, all written comments received, and the final rules as proposed for adoption will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to Ms. Lorentz at the above address.

Copies of this notice and the proposed rules are available and may be obtained by contacting Ms. Lorentz.

Russell B. Swanson
Commissioner of Labor & Industry

STATE OF MINNESOTA

COUNTY OF RAMSEY

DEPARTMENT OF LABOR AND INDUSTRY

OCCUPATIONAL SAFETY & HEALTH DIVISION

In the Matter of the Proposed Adoption of Rules Governing (A) Access to Employee Exposure and Medical Records; (B) Discrimination Against Employees; and (C) Recording and Reporting Occupational Injuries and Illnesses.

AFFIDAVIT OF MAILING

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

PATRICIA LORENTZ, being first duly sworn on oath, hereby deposes and says:

1. I am a Management Analyst with the Occupational Safety and Health Division, Minnesota Department of Labor and Industry.

2. On 10th day of September, 1981, I served the attached "Notice of Intent to Amend and Adopt Rules Without a Public Hearing" by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, and addressed to those persons on the Department of Labor and Industry list of persons interested in Occupational Safety and Health proposed rulemaking, a copy of which is attached.

Patricia Lorentz

Subscribed and sworn to before me this 11th day of September, 1981.

Jacalyn K. Brueggeman
Notary Public

JACALYN K. BRUEGGEMAN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires May 18 1983

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(THE MINNESOTA PROJECT-)

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STATE OF MINNESOTA

COUNTY OF RAMSEY

CERTIFICATE

In the Matter of the Proposed
Adoption of Rules Governing
(A) Recording and Reporting
Occupational Injuries and
Illnesses, (B) Discrimination
Against Employees, and
(C) Access to Employee Exposure
and Medical Records.

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minn. Stat. § 15.0412, subd. 4, that their names be placed on file with and maintained by the State Department of Labor and Industry for the purpose of receiving notice of the proposed adoption of rules by the Occupational Safety and Health Division is accurate and complete as of 8:00 a.m. this tenth day of September, 1981.

Joan Bailey

Department of Labor and Industry
Occupational Safety and Health Division

Proposed Amendments to and Adoption of Rules Governing Access to Employee Exposure and Medical Records; Discrimination against Employees; and Recording and Reporting Occupational Injuries and Illnesses

Notice of Intent to Amend and Adopt Rules without a Public Hearing

Notice is hereby given that the Department of Labor and Industry proposes to amend and adopt the above-entitled rules without a public hearing. The commissioner has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, subd. 4h (1980).

New Chapter Eighteen (8 MCAR §§ 1.7230-1.7239) "Access to Employee Exposure and Medical Records," proposes to adopt by reference the Federal Occupational Safety and Health Standard published at 29 CFR Part 1910.20, "Access to Employee Exposure and Medical Records." The standard, adopted by Federal OSHA on May 23, 1980 (*Federal Register*, Volume 45, Number 102, dated May 23, 1980), provides for employees, designated employee representatives, and the Minnesota Department of Labor and Industry access to employer-maintained exposure and medical records relevant to employees exposed to toxic substances and harmful physical agents. Access is also assured to analyses or evaluations of this information conducted by the employer or medical professionals. The final standard requires long-term preservation of these records, contains notice provisions informing employees of their rights under the standard, and includes provisions which are protective of trade secret information.

Federal OSHA made appropriate changes to Subpart T and Subpart Z of 29 CFR Part 1910 in order to make the recordkeeping and access to records provisions of these subparts consistent with 29 CFR Part 1910.20. Those changes are proposed for adoption by Minnesota OSHA in 8 MCAR § 1.7232.

Proposed rules implementing the discrimination provisions of Minn. Stat. § 182.669 of the Minnesota Occupational Safety and Health Act of 1973 are included in new Chapter Nineteen (8 MCAR §§ 1.7240-1.7249) "Discrimination Against Employees." The proposed rules are similar to those enforced by Federal OSHA and govern protected and unprotected activities under the Act, claim procedures and enforcement proceedings.

Proposed amendments to Chapter Twenty-Two (8 MCAR §§ 1.7290-1.7309) "Recording and Reporting Occupational Injuries and Illnesses," are necessary to correct several clerical errors, to provide employees an access to Occupational Safety and Health (OSH) summary records, and to make Minnesota Occupational Safety and Health Rules as effective as those enforced by the Federal Occupational Safety and Health Administration (Federal OSHA). Amendments to 8 MCAR §§ 1.7292, 1.7295, and 1.7304 are nonsubstantial changes deleting references to obsolete forms and inserting new form numbers and titles. Section 8 MCAR 1.7297, "Access to Records," is amended to allow employees, former employees, and employee representatives access to the log and summary of occupational injuries and illnesses; Federal OSHA has enforced a similar regulation since August 1978.

Persons interested in these rules shall have 30 days to sbumit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed rules.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, subds. 4-4f (1980).

Persons who wish to submit comments or a written request for a public hearing should submit such comments or requests to:

Ivan W. Russell, Director
Occupational Safety & Health Division
Department of Labor and Industry
444 Lafayette Road
St. Paul, Minnesota 55101
Telephone: (612) 296-4532

Authority for the adoption of these rules is contained in Minn. Stat. § 182.657 (1980). A statement of need and reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available from:

Ms. Patricia Lorentz
Occupational Safety & Health Division
Department of Labor and Industry
444 Lafayette Road
St. Paul, Minnesota 55101
Telephone: (612) 297-3254

If no hearing is required, the proposed rules, this notice, the statement of need and reasonableness, all written comments received, and the final rules as proposed for adoption will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to Ms. Lorentz at the above address.

Copies of this notice and the proposed rules are available and may be obtained by contacting Ms. Lorentz.

Russell B. Swanson
Commissioner of Labor & Industry

Rules as Proposed

Chapter Eighteen:
Access to Employee Exposure and Medical Records

8 MCAR § 1.7230 Purpose and scope. Federal Occupational Safety and Health Standard 1910.20, "Access to Employee Exposure and Medical Records," 29 Code of Federal Regulations, Section 1910.20 (1980) is adopted by reference.

8 MCAR § 1.7231 Modified definition. The terms "Assistant Secretary of Labor for Occupational Safety and Health" and "assistant secretary" as used in 29 Code of Federal Regulations, Section 1910.20 shall mean the Commissioner of the Department of Labor and Industry for the purpose of 8 MCAR § 1.7230.

8 MCAR § 1.7232 Conforming amendments. Revisions to 29 Code of Federal Regulations, Section 1910, Subpart T (Commercial Diving Operations) and Subpart Z (Toxic and Hazardous Substances) adopted by the Federal Occupational Safety and Health Administration on May 23, 1980 and published at 45 Federal Register, Volume 45, 35281-35284 are adopted by reference.

Chapter Nineteen:
Discrimination Against Employees

8 MCAR § 1.7240 Authority and background. Minn. Stat. §§ 182.654, subd. 9, and 182.669 prohibit discrimination against an employee because the employee exercised any rights granted under the act on the employee's behalf or on behalf of others. Any employee who believes that he or she has been discharged or discriminated against by any person because the employee exercised any right authorized by the act as described in 8 MCAR § 1.7242, may file a discrimination complaint with the Commissioner of the Department of Labor and Industry.

8 MCAR § 1.7241 Purpose and scope. The rules in this chapter implement Minn. Stat. § 182.669 of the act and set forth general policies for enforcement of the discrimination provisions of Minn. Stat. § 182.669.

8 MCAR § 1.7242 Definition. For the purpose of 8 MCAR §§ 1.7240-1.7247 "act" means the Minnesota Occupational Safety and Health Act of 1973.

8 MCAR § 1.7243 Protected activities.

A. Occupational safety and health complaints. An employee or authorized employee representative may file a complaint about unsafe or unhealthful working conditions with an employer and may request personal protective equipment from the employer. An employee or authorized employee representative may also file a written complaint about unsafe or unhealthful working conditions with the Commissioner of the Department of Labor and Industry. Written complaints may be given to an occupational safety and health investigator prior to or during an inspection of the place of employment.

B. Refusal to work under unsafe conditions.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

1. Unless provided by 8 MCAR §§ 1.7240-1.7247 there is no right granted by the act for employees to leave the job because of potentially unsafe conditions at the workplace. Initially an employer should be notified of hazardous conditions. If corrections are not accomplished or if a dispute arises about the existence of a hazard, the employee or authorized employee representative may request an occupational safety and health inspection of the workplace by giving notice to the commissioner of the hazardous condition.

2. If an employee has a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition in the workplace, an employee acting in good faith may refuse to work if there is no reasonable alternative. The condition must be so hazardous that a reasonable person would conclude that there is a real danger of death or serious injury and that there is insufficient time to eliminate the danger through enforcement procedures. The employee must, where possible, request the employer to correct the hazardous condition. An employer may not discharge or discipline an employee who refuses to perform assigned tasks under these conditions. However, an employer is not required to pay employees for tasks not performed.

C. Inspection participation. The authorized employee representative may participate in the opening conference prior to the inspection and the closing conference following the inspection. The employer shall pay the authorized employee representative regular wages for time spent participating in the inspection and opening and closing conferences.

D. Testimony. An employee may not be discriminated against because the employee has testified or is about to testify in proceedings under or related to the act. This protection includes testifying in proceedings instituted by the employee or any statement or testimony given in judicial, quasi-judicial and administrative proceedings.

E. Contestation. An employee or authorized employee representative may file a written notice of contest with the Occupational Safety and Health Review Board contesting a citation, proposed assessment of penalty, type of violation, or the time fixed for abatement in a citation issued to an employer.

F. Informal conferences. An employee or authorized employee representative may participate in informal conferences held between the employee's employer and the Department of Labor and Industry.

8 MCAR § 1.7244 Unprotected activities.

A. Permitted discipline. That certain of an employee's activities are protected by the act does not protect an employee from discipline or discharge for other legitimate reasons including tardiness, unauthorized absences or poor workmanship.

B. Protected and unprotected activities combined. If participation in an activity protected by the act was a substantial reason for discharge or other adverse action by an employer, the employee's rights under the act have been violated. Whether a discharge or other adverse action was because of protected activity will be determined on the facts in each particular case.

8 MCAR § 1.7245 Claim procedures.

A. Who may file. A complaint alleging discrimination under Minn. Stat. § 182.669 may be filed by an employee or an authorized employee representative.

B. Time for filing. The complaint must be filed, either orally or in writing, with the Commissioner of the Minnesota Department of Labor and Industry within 30 days after the alleged discriminatory act occurred.

C. Form of filing. Verbal complaints must be reduced to written form by the Department of Labor and Industry and sent to the complainant for signature. The form must be signed and returned to the department within 15 days of receipt by the complainant. Upon receipt of the signed complaint, the commissioner will make an investigation as he deems appropriate. If the complainant fails to sign and return the written statement within the 15 days, the case shall be closed.

D. Notice of commissioner's determination. The commissioner shall notify the complainant of the commissioner's determination regarding the complaint within 90 days of receipt of a signed complaint.

8 MCAR § 1.7246 Other proceedings.

A. Deferral. The commissioner may defer action on a complaint filed concurrently with the Department of Labor and Industry and another agency until a determination by the other agency has been made if the rights asserted in other proceedings are substantially the same as rights given under the act and the other proceedings will not violate the rights guaranteed by the act.

B. Accepting other decisions. The commissioner may accept the results of other proceedings as a final determination of a complaint if those proceedings dealt adequately with all factual issues; were fair, impartial and valid; and the outcome of the

proceedings is not contradictory to the purpose of the act. If the other action is dismissed without proper hearing, the dismissal is not a final determination of the complaint filed with the commissioner.

8 MCAR § 1.7247 Enforcement proceedings.

A. Court action. Minn. Stat. § 182.669 authorizes the commissioner to bring an action against the employer in the district court in the county where the alleged discrimination occurred or in a county where the employer transacts business if it is determined that a discriminatory act has been committed against an employee.

B. Settlement. Upon completion of an investigation, the commissioner may decide upon a settlement acceptable to all concerned parties rather than proceeding with court action.

C. Complaint withdrawal. An employee may withdraw a discrimination complaint at any point following the initial submission.

D. Independent commissioner action. If an employee voluntarily withdraws a discrimination complaint, the commissioner may decide to proceed with an investigation on his own if he believes a discriminatory act has been committed.

Chapter Twenty-two: Recording and Reporting Occupational Injuries and Illnesses

8 MCAR § 1.7292 Log and summary of occupational injuries and illnesses.

A. Each employer shall maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment, except that under the circumstances described in paragraph B. of this section an employer may maintain the log and summary of occupational injuries and illnesses at a place other than the establishment. Each employer shall enter each recordable occupational injury and illness on the log as early as practicable but no later than 6 working days after receiving information that a recordable case has occurred. For this purpose OSHA Form No. ~~100~~ 200 or any private equivalent may be used. OSHA Form No. ~~100~~ 200 or its equivalent shall be completed in the detail provided in the form and the instructions contained in OSHA Form No. ~~100~~ 200. If an equivalent to OSHA Form No. ~~100~~ 200 is used, such as a printout from data-processing equipment, the information shall be as readable and comprehensible to a person not familiar with the data processing equipment as the OSHA Form ~~100~~ 200 itself.

8 MCAR § 1.7295 Annual summary.

A. Each employer shall ~~compile~~ post an annual summary of occupational injuries and illnesses for each establishment. Each annual summary shall ~~be based on the information~~ consist of a copy of the year's totals contained in the log and summary of occupational injuries and illnesses for the particular establishment. OSHA Form No. ~~102~~ 200 shall be used for this purpose, and shall be completed in the form and detail as provided in the instructions contained therein.

B. The summary shall be completed no later than one month after the close of each calendar year ~~beginning with calendar year.~~

C. Each employer, or the officer or employee of the employer who supervises the preparation of the ~~annual~~ log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employee of the employer, who supervises the preparation of the annual summary of occupational injuries and illnesses, ~~to the lower right-hand corner of the annual~~ at the bottom of the last page of the log and summary or by appending a separate statement to the ~~annual~~ log and summary certifying that the annual summary is true and complete.

8 MCAR § 1.7297 Access to records.

A. Access by departments. Records provided for in 8 MCAR § 1.7292, 8 MCAR § 1.7294, and 8 MCAR § 1.7295 shall be available for inspection and copying by authorized representatives of the Department of Labor and Industry and the Department of Health.

B. Access by employees. The log and summary of recordable occupational injuries and illnesses (OSHA Form No. 200) for

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any establishment in which the employee is or was employed provided for in 8 MCAR § 1.7292 shall, upon request, be made available by the employer to any employee, former employee, and their representatives for examination and copying in a reasonable manner and at reasonable times.

C. Bargaining for additional access. Nothing in this rule shall preclude employees and employee representatives from collectively bargaining for access to information relating to occupational injuries and illnesses in addition to the information made available under this rule.

D. Extent of access. Access to the log and summary provided under this rule shall pertain to all logs and summaries retained under the requirements of 8 MCAR § 1.7296.

8 MCAR § 1.7304 Small employers.

A. Exemption. An employer who had no more than ten (10) employees at any one time during the calendar year immediately preceding the current calendar year need not comply with any of the requirements of this chapter except 8 MCAR § 1.7298 concerning fatalities or multiple hospitalization accidents (i.e., he need not prepare the log, OSHA Form No. ~~100~~ 200; the Supplementary Record, OSHA Form No. 101; nor prepare or post the summary, OSHA Form No. ~~102~~ 200).

B. Limitation of exemption. Paragraph A. ~~of this section~~ shall not apply when an employer has been notified in writing by the Bureau of Labor Statistics that he has been selected to participate in a statistical survey of occupational injuries and illnesses. If selected, an employer will be required to maintain a log of occupational injuries and illnesses (OSHA Form No. ~~100~~ 200) in accordance with 8 MCAR § 1.7292 and to make reports in accordance with 8 MCAR § 1.7306 for the period of time which is specified in the notice.

Department of Labor and Industry
Worker's Compensation Rehabilitation Services

Proposed Amendment of Rules for Rehabilitation of Work Related Injuries and Diseases

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Worker's Compensation Rehabilitation Services proposes to amend the above-entitled rules without a public hearing. Rehabilitation Services has determined that the proposed amendment of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, subd. 4h.

Persons interested in these rules shall have 30 days to submit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, subs. 4-4f. If a public hearing is requested, identification of the particular objection, the suggested modifications to the proposed language, and the reasons or data relied on to support the suggested modifications is desired.

Persons who wish to submit comments or a written request for a public hearing should submit such comments or requests to:

Gladys Westberg
Director of Rehabilitation Services
Department of Labor & Industry
444 Lafayette Road, 5th Floor
St. Paul, Mn. 55101
Telephone: (612) 297-2684

Authority for the adoption of these rules is contained in Minn. Stat. § 176.102, subd. 12 (1979).

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, all written comments received, and the final rules as adopted will be delivered to a designee of the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to receive a copy of the final rules as adopted should submit a written statement of such request to Ms. Westberg.

STATE OF MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed
Adoption of Rules Governing
(A) Recording and Reporting
Occupational Injuries and Illnesses,
(B) Discrimination Against
Employees, and (C) Access to
Employee Exposure and Medical
Records.

FINDINGS OF FACT
AND CONCLUSIONS

Notice of the Commissioner's intent to adopt the above-entitled rules without a public hearing was published in the State Register on September 14, 1981 (6 S.R. 446) and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minn. Stat. Section 15.0412, Subd. 4, on September 10, 1981. That notice afforded interested and affected persons an opportunity to submit comments and requests for hearing for 30 days after notice. Two comment letters were received:

Lynn R. Gruber, Director of the Department of Medical Services and Research, Minnesota Medical Association, was concerned with the interpretation of the word "records" as used in 8 MCAR § 1.7297 "Access to records" (Page 6, line 33). The Minnesota Medical Association is concerned with "maintaining the confidentiality of a person's medical history and current medical records" and feared that the word "records" may be interpreted to include such records. However, the intent of 8 MCAR § 1.7297 is to allow employees access to the Occupational Safety and Health (OSHA) injury records that employers are required to maintain under 8 MCAR §§ 1.7292, 1.7294 and 1.7295; specifically, the log of occupational injuries and illnesses, the supplementary record (or first report of injury), and the annual summary. Access to medical records is not covered by this rule. This explanation was presented to the Minnesota Medical Association by letter on October 23, 1981; ten days was allowed for rebuttal comments. No further comments have been received; therefore, no change is made in 8 MCAR § 1.7297.

Russell Trout, International Representative for the Oil, Chemical, and Atomic Workers (OCAW) International Union, discussed two areas of concern:

1) OCAW is concerned that an employee has the right to file a complaint with an Occupational Safety and Health Investigator during the course of an inspection as described in 8 MCAR § 1.7243 (Page 2, Lines 18-20). OCAW believes that all complaints should be filed through proper channels; specifically, in writing with this agency before an inspection is conducted. This employee right is established under Minn. Stat. Section 182.659, Subd. 4. The purpose of 8 MCAR § 1.7243 is to describe protected activities under the Minnesota Occupational Safety and Health Act; it does not establish any rights. Therefore, no change is made in this rule.

2) OCAW is also concerned about the language contained in proposed 8 MCAR § 1.7244; specifically, the inclusion of examples of activities for which employees are not provided protection under the Minnesota Occupational Safety and Health Act. After consideration of the arguments presented by OCAW, we agree that inclusion of these examples may be misleading. Therefore, the words, "including tardiness, unauthorized absences or poor workmanship" have been removed from 8 MCAR § 1.7244 A. (Page 3, Line 34).

No other comments have been received.

After affording interested persons an opportunity to present written data, statements and arguments, and after reviewing the comments received, I find that only one non-substantial change is necessary in the proposed rules; as discussed above, Line 34 has been removed from 8 MCAR § 1.7244 A.

George E. O'Connell

Dr. George E. O'Connell
Assistant Commissioner,
Labor and Industry

STATE OF MINNESOTA

DEPARTMENT OF LABOR & INDUSTRY

OCCUPATIONAL SAFETY & HEALTH DIVISIO

In the Matter of the Proposed
Adoption of Rules Governing
(A) Recording and Reporting
Occupational Injuries and Illnesses,
(B) Discrimination Against Employees,
and (C) Access to Employee Exposure
and Medical Records.

STATEMENT OF
NEED AND REASONABLENESS

On December 29, 1970, Congress passed the Williams-Steiger Occupational Safety and Health Act of 1970 for the purpose of assuring so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve human resources. Section 18 of that Act provided guidelines for states to assume responsibility for development and enforcement of Occupational Safety and Health Standards under an approved State Plan. One criteria that must be met for State Plan approval provides for the development and enforcement of safety and health standards which are at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under the Occupational Safety and Health Act of 1970.

Minnesota submitted a plan for the development and enforcement of state occupational safety and health standards to the Federal Occupational Safety and Health Administration (hereinafter "Federal OSHA") on November 9, 1972. The plan included provisions for making changes in Minnesota's occupational safety and health program to bring it into full conformity with the requirements of Section 18 of the Occupational Safety and Health Act of 1970. The Department of Labor and Industry was designated as the state agency to administer the plan. The Commissioner of Labor and Industry adopted Federal OSHA standards promulgated prior to October 1972 (effective in Minnesota in February 1973). The plan included a provision that the commissioner would continue to adopt Federal OSHA standards and retain those Minnesota standards not covered by Federal standards in accordance with Section 18 of the Act. The Minnesota Legislature passed the "Occupational Safety and Health Act of 1973" (Laws 1973, Chapter 732) on May 24, 1973.

Authority to promulgate the above-captioned rules is in Minn. Stat. § 182.657. This section requires the Commissioner of Labor and Industry to promulgate rules and regulations deemed necessary to carry out the responsibilities of Laws 1973, Chapter 732.

(A) Section 182.663, Subd. 2 of the Minnesota Occupational Safety and Health Act requires employers to make, keep and preserve records concerning activity under the Act in accordance with rules promulgated by the Commissioner of Labor and Industry. Those rules are contained in Chapter Twenty-Two (8 MCAR §§ 1.7290-1.7309), "Recording and Reporting Occupational Injuries and Illnesses." These rules, adopted by Minnesota OSHA on May 30, 1978 (2 S.R. 2122), are similar to the recordkeeping requirements of Federal OSHA. These rules require employers to maintain a log and summary of recordable occupational injuries and illnesses. "Recordable" injuries and illnesses are those injuries or illnesses that result in fatalities, lost workday cases or that result in transfer to another job, in termination of employment, or require medical treatment other than first aid. The employer must maintain the log on a yearly basis and, during the month of February, post a summary of those injuries and illnesses that occurred during the previous year. The OSHA record-keeping forms provided for this purpose have been revised and

streamlined to incorporate two forms into one. Also, Federal OSHA has adopted an amendment to their recordkeeping rules which allows employees, former employees and employee representatives access to the log and summary of occupational injuries and illnesses. Amendments to Chapter Twenty-Two are proposed at this time for two reasons: first, nonsubstantial changes are made to delete references to obsolete form numbers and titles and insert current form numbers and titles. Secondly, revisions to 8 MCAR § 1.7297 "Access to records" incorporate amendments made to the Federal OSHA standards in July 1978 (FEDERAL REGISTER, Volume 43, Number 141, July 21, 1978).

These amendments are necessary because 8 MCAR §§ 1.7292, 1.7295, and 1.7304 refer to obsolete form numbers and titles; the proposed amendments remove these references and insert current form titles and numbers. These changes are necessary to prevent confusion and misunderstanding on the part of employees, employers, and the general public.

These amendments are necessary to implement the requirements of Minn. Stat. § 182.654 which allows employees the basic right to know about workplace hazards. Since the log of occupational injuries and illnesses contains a record of each reported workplace injury and illness, allowing employees access to this information will more fully alert them to present and possible hazards in the workplace and thus significantly assist them in their efforts, under the Act, to protect themselves from hazards. The proposed amendment to 8 MCAR § 1.7297 includes this provision.

These amendments to existing rules are reasonable since they do not require the generation of additional reports or forms on the part of the employer; the employer must maintain the log and summary of occupational injuries and illnesses under the Act.

These amendments are reasonable since access to the log and summary by employees can be easily accomplished by allowing the employees to review the log and/or providing a copy of the log to the employee or employee representative.

These amendments are reasonable since access to this information will allow employees to use this information as the first step in tracing the nature and effects of toxic substances, as well as substances not known to be toxic, and in identifying patterns of injuries or symptoms which indicate need for further exploration.

These amendments are reasonable since they are similar to Federal OSHA rules adopted in July 1978 following review of approximately 260 written comments received from interested and affected parties. Adoption of this rule will attain an "as effective as" level of enforcement by Minnesota OSHA.

(B) New Chapter Nineteen (8 MCAR §§ 1.7240-1.7249) "Discrimination Against Employees" is proposed for two reasons: to implement the provisions of Minn. Stat. § 182.669 and to adopt rules similar to those currently enforced by Federal OSHA (29 CFR Part 1977) in order to attain an "as effective as" level of enforcement by Minnesota OSHA.

The Minnesota Occupational Safety and Health Act of 1973 affords employees certain rights; e.g., the right to bring unsafe or unhealthful working conditions to the attention of their employer and/or OSHA; the right to participate in an OSHA inspection of their workplace, etc. The purpose of Minn. Stat. § 182.669 is to protect employees who exercise any of their rights under the Act from being discriminated against by their employer. Under the provisions of Minn. Stat. § 182.669, any employee who believes that he/she has been discharged or otherwise discriminated against by any person because such employee has exercised any right authorized under the provisions of the Act may file a complaint with the Commissioner of Labor and Industry alleging such discriminatory act. The commissioner is mandated to conduct such investigation as he deems appropriate. Chapter Nineteen describes protected and unprotected activities under this statute, the claim procedures that must be followed,

enforcement proceedings, and other actions that may be taken by the employee and/or the commissioner. The rules in proposed Chapter Nineteen are similar to those enforced by Federal OSHA. (The Federal rules were published in the FEDERAL REGISTER, Volume 38, on January 29, 1973.)

The rules in new Chapter Nineteen are necessary to clarify the mandates of Minn. Stat. § 182.669 to assure that all affected parties are aware of their rights and responsibilities under this statute. The statute does not define "protected" or "unprotected" activities under the Act nor does it describe enforcement proceedings and claim procedures; therefore, it is necessary to promulgate these rules to accomplish this task.

These rules are necessary to protect employees, who in good faith exercise any of their rights under the Act, from harassment, discharge, or other discriminatory action on the part of their employer. Without this protection, employees may be reluctant to bring unsafe or unhealthful working conditions to the attention of their employer and/or the OSH Division because they fear harassment or possible loss of their jobs.

These rules are necessary to attain an "as effective as" level of enforcement by Minnesota OSHA.

These rules are reasonable since they conform to the Act's fundamental objective of preventing occupational deaths and serious injuries. These rules allow an employee to refuse to perform an assigned task which he/she, in good faith, believes would be a potential cause of serious injury or death. The Supreme Court, in Whirlpool vs. Marshall, upheld the validity of the Federal OSHA rule which allows an employee to refuse to perform an assigned task because of a reasonable apprehension of serious injury or death.

These rules are reasonable in that they do not require employers to pay workers who refuse to perform assigned tasks because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. The rules simply provide that in such cases, the employer may not discriminate against the employees involved.

These rules are reasonable in that they effectuate the Act's "general duty" clause which requires an employer to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to employees.

These rules are reasonable since they accord no authority to government officials to "shut down" an unsafe or unhealthful workplace, but simply permit private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition.

(C) Proposed new Chapter Eighteen (8 MCAR §§ 1.7230-1.7239) "Access to Employee Exposure and Medical Records" adopts by reference Federal Occupational Safety and Health Standard 29 CFR Part 1910.20, "Access to Employee Exposure and Medical Records." This standard was adopted by Federal OSHA on May 23, 1980 (FEDERAL REGISTER, Volume 45, Number 102, dated May 23, 1980). Based on experience, expertise, and the rulemaking record, Federal OSHA determined employee exposure and medical records are critically important to the detection, treatment, and prevention of occupational disease; and workers and their representatives need direct access to this information as well as to analyses of these records. Representatives of OSHA also need access to this information to fulfill responsibilities under the Occupational Safety and Health Act. Employee exposure records reveal the identity of, and extent of exposure to, toxic substances or harmful physical agents. Employee medical records contain individual health status information which may indicate whether or not an employee's health is being or has been impaired by exposure to toxic chemicals or harmful physical agents.

These rules are necessary if workers and their representatives are to play a meaningful role in detecting, treating, and preventing occupational disease. These rules provide employees and their designated representatives with the right and opportunity to learn what they are or were exposed to on the job, what are or were the levels of exposure, and what are or were the health consequences of these exposures. Access to this information will also enable an employee's personal physician to diagnose, treat, and possibly prevent permanent health impairment.

These rules are necessary to assure the effectiveness of employee rights established by the Minnesota Occupational Safety and Health Act of 1973. Access to this information is crucial to the effectiveness of Minn. Stat. § 182.654, Subd. 10 which affords employees, who have been exposed or are being exposed to toxic materials or harmful physical agents in concentrations at levelss in excess of that provided by any applicable standard, the right to know of these hazards, the relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Access to this information will also enhance employee and employee representative participation in OSHA inspections to identify where and how various toxic substances are used, which plant operations generate the greatest exposure, etc. In addition, access to this information will enable workers to better exercise their rights to contest the reasonableness of abatement periods proposed by OSHA and to participate in Review Board adjudicatory proceedings.

These rules are necessary to attain an "as effective as" level of enforcement for the Minnesota Occupational Safety and Health Program; Federal OSHA adopted similar rules in May 1980.

These rules are reasonable because they establish rights of access to basic information by employees, their designated representatives, and OSHA representatives, while at the same time affording appropriate privacy and confidentiality protection against uninvolved third parties.

These rules are reasonable since they are similar to Federal OSHA rules which were the subject of several public hearings in July 1978. The views of a wide range of employer, business, trade and medical associations; labor unions; physicians and other health professionals; legal experts; and public interest groups were presented at these hearings. These views and arguments raised for and against these proposed rules were reviewed and carefully evaluated by Federal OSHA. Based on these comments, the agency's expertise and experience, and the legal and practical context in which the standard will operate, the proposed rule was modified in a number of respects to: (1) assure that the direct release of medical records to an employee is accomplished in a professional manner which minimizes any potential for harm or misinterpretation; (2) access to medical records by a designated representative is the result of specific written employee consent rather than a blanket release; and (3) the potential for competitive harm resulting from an unauthorized release of trade secret information is minimized.

These rules are reasonable since they do not require the generation of additional employer records but only allow access to records the employer is already generating and maintaining. Employers who generate neither exposure nor medical records will experience little or no impact from this rule. Further, these rules provide employers with substantial flexibility in determining the method(s) they will use to preserve records subject to this rule and how these records will be made available to employees and their designated representatives.

In summary, the new rules and amendments to existing rules proposed for adoption are necessary to maintain an "as effective as" level of enforcement by Minnesota OSHA. The proposed rules are

similar to Federal OSHA rules. In all cases, Federal OSHA has previously proposed the rules by publication in the FEDERAL REGISTER; allowed a period for comment; and held public hearings, where necessary, before adopting the final rules. Therefore, holding a public hearing on the proposed rules by Minnesota OSHA would be superfluous. Failure to adopt these rules, however, will restrict employee rights as described in this Statement of Need and Reasonableness and may result in the withdrawal of the Minnesota State Plan for the enforcement of occupational safety and health by the Federal Occupational Safety and Health Administratior

# # # #

IVAN W. RUSSELL, Director
Occupational Safety & Health
Division
Minnesota Department of Labor
& Industry

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
444 LAFAYETTE ROAD
SAINT PAUL 55101

TELEPHONE:
(612) 296-6107

IN REPLY REFER TO

PHONE 296-4532

October 23, 1981

Lynn R. Gruber, Director
Department of Medical Services & Research
Health Association Center, Suite 400
2221 University Avenue S.E.
Minneapolis, Minnesota 55414

Dear Ms. Gruber:

Thank you for your October 6, 1981, letter discussing our proposal to adopt rules governing "Access to Employee Exposure and Medical Records." I appreciate your interest in these rules and the information you provided us.

I agree, as you suggest, that "maintaining the confidentiality of a person's medical history and current medical records is still highly valued in society today." You are absolutely correct, the intent of this section of the regulations is to provide access to OSHA injury records. I believe the specific references to 8 MCAR S 1.7292, S 1.7294, and S 1.7295, that is included in S 1.7297, is sufficient to limit this access to the OSHA log, the OSHA supplementary report, and the OSHA annual summary. Also, there is no reference in our proposed adoption to actual medical records. Therefore, I don't believe these regulations can be misinterpreted so I will not add a definition or revise the words as you suggested. However, I will delay this adoption ten days to allow you time to review this recommendation and make comments. My phone number is 296-4532.

This letter will serve as documentation of what my intention was when these standards were adopted.

Again, let me thank you for your interest in these standards, and the thoughts you provided.

Very truly yours,

DEPARTMENT OF LABOR AND INDUSTRY

Ivan W. Russell, Director
Occupational Safety and Health Division

IWR/mjj:fms

MINNESOTA MEDICAL ASSOCIATION

James F. Knapp, M.D. — CHAIRMAN OF THE BOARD
Charles J. McCarthy, M.D. — PRESIDENT
Severin H. Koop Jr., M.D. — PRESIDENT-ELECT
Harold W. Brunn — EXECUTIVE VICE PRESIDENT

Office of Executive Vice-President: Area 612 Phone 378-1875

October 6, 1981

RECEIVED
OCT 8 1981
OSH DIVISION

Mr. Ivan W. Russell, Director
Occupational Safety and Health Division
Minnesota Department of Labor and Industry
444 LaFayette Road
St. Paul, Minnesota 55101

Dear Mr. Russell:

This letter is being submitted to you on behalf of the physicians in the Minnesota Medical Association (MMA). It concerns the Department's "Proposed Amendments to and Adoption of Rules Governing Access to Employee Exposure and Medical Records; Discrimination Against Employees; and Recording and Reporting Occupational Injuries and Illnesses" which appeared in the September 14, 1981 State Register.

As a whole, the proposed rules are well done and necessary. There is one area that could be clarified, however. This is your present use of the word "records" in Proposed rule 8 MCAR §1.7297 "Access to Records". As I understand the entire set of proposed rules, and especially, 8 MCAR §1.7292, it is apparent that the "records" spoken of in 8 MCAR §1.7297 generally refer to the log and summary of all recordable occupational injuries and illnesses discovered in an establishment. It would be helpful to patients and physicians if the proposed rules could be clarified to indicate that not just anyone in the corporation has free access to an employee's complete medical records (medical history, etc.).

While the "sanctity" of maintaining confidentiality of a person's medical records has been slightly altered due to the involvement of third party payors, maintaining the confidentiality of a person's medical history and current medical records is still highly valued in society today.

We hope that a slight adjustment to the proposed rules will make it clear that the "medical records" which are referred to in 8 MCAR §1.7297 are not to be interpreted as an employee's personal medical records (usually contained by the personal physician), but merely refer to a log and summary "of all recordable occupational injuries and illnesses for that establishment..." You may wish to make the clarification by setting out specific definitions for the terms "medical records", "log", and "summary".

Thank you for considering these comments.

Sincerely,

Lynn R. Gruber

LRG:kar

Lynn R. Gruber, Director
Department of Medical Services
and Research

cc: John M. Burns, M.D.
James H. Sova

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
444 LAFAYETTE ROAD
SAINT PAUL 55101

TELEPHONE:
(612) 296-6107

IN REPLY REFER TO

PHONE 296-4532

October 23, 1981

Russell W. Trout, Sr.
International Representative, Districk 6
Oil, Chemical and Atomic Workers
International Union
Suite 115, Nalpak Building
333 Sibley
St. Paul, MN 55101

Dear Mr. Trout:

Thank you for your October 8, 1981 letter suggesting changes that should be made in adopting the access to records and discrimination regulations as proposed in the State Register on September 14, 1981. As we discussed on the telephone this morning, these discrimination regulations do not establish employee rights to file complaints with this office. The purpose of 8 MCAR S 1.7243 is to describe the protected activities so that information is clear in the discrimination portion of our regulations. The actual right is provided to employees in M.S. 182.659 subd. 4. which is not a subject of this announcement. Therefore, we will proceed to adopt this section as proposed.

Your second comment about the language contained in 8 MCAR S 1.7244 is really of a similar nature. The intent of this section was to furnish examples of unprotected activities. However, I agree with you that this language may be misleading and might suggest that these are the only "other legitimate reasons." Therefore, I have decided to eliminate line 5 as you suggested in your letter.

I appreciate your review of these regulations and the constructive comments you have made. I will be happy to discuss your thoughts about employee complaints and review with you the possibility of making revisions in the OSHA law to satisfy your needs.

Very truly yours,

DEPARTMENT OF LABOR AND INDUSTRY

Ivan W. Russell, Director
Occupational Safety & Health Division

IWR/mjj:fms

Oil, Chemical and Atomic Workers International Union

227-8361

RECEIVED
OCT 9 1981
OSH DIVISION

INTERNATIONAL REPRESENTATIVE

October 8, 1981

Mr. Ivan Russell, Director
Occupational Safety and Health Division
State of Minnesota
Department of Labor and Industry
444 Lafayette Road
St. Paul, MN 55101

Dear Mr. Russell:

I am in receipt of your letter of October 2, in which you indicate that you had received my letter requesting a public hearing on your proposed rule changes. I would like to suggest some changes be made in your proposed rules. On page two, lines 23, 24 and 25 should be deleted from that paragraph. It is my belief that complaints should be filed with your office prior to any health investigator making an inspection of the place of employment and these complaints should not be given to him during, or prior to, his inspection. I think the rest of the paragraph covers what the intent of the paragraph is without those three lines.

On page 4 of your report, line 5 should be completely deleted. That line is the province of labor, management negotiations, not a part of health and safety.

Should you see fit to make the corrections that I have suggested, I will be glad to withdraw my request for a public hearing.

Very truly yours,

Russell W. Trout, Sr.

RWT:ajs

Russell W. Trout, Sr., International Representative, District #6
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

cc:
L. E. Hunter, Director District #6

STATE OF MINNESOTA DEPARTMENT OF LABOR & INDUSTRY

In the Matter of the Proposed
Adoption of Rules Governing
(A) Recording and Reporting
Occupational Injuries and
Illnesses, (B) Discrimination
Against Employees, and
(C) Access to Employee Exposure
and Medical Records.

STATEMENT OF COMPLIANCE
WITH RULEMAKING PROCEDURES

I, Special Assistant Attorney General Steven M. Gunn, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedures Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Steven M. Gunn
Special Assistant
Attorney General

Dated: 12/2/81.

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Adoption of Rules Governing (A) Recording and Reporting Occupational Injuries and Illnesses, (B) Discrimination Against Employees, and (C) Access to Employee Exposure and Medical Records.

AFFIDAVIT OF MAILING NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Notice of the Commissioner's intent to adopt the above-entitled rules without a public hearing was published in the State Register on September 14, 1981 (6 S.R. 446) and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes section 15.0412, subdivision 4, on September 10, 1981. That notice informed interested persons who wished to be advised of the submission of the rule to the Attorney General to submit a written statement of such request to me at the address published in the notice.

No requests for notification of this submission have been received by this agency. The rule is submitted to the Attorney General on December 3, 1981 for final approval.

Patricia Lorentz

Subscribed and sworn to before me this 3rd day of December, 1981.

Jacalyn K. Brueggeman
Notary Public

JACALYN K. BRUEGGEMAN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires May 19 1983

SF-00006-01

STATE OF MINNESOTA

DEPARTMENT Labor and Industry - OSHD

Office Memorandum

TO : Judith Wehrwein
Legal Assistant
530 State Office Building

DATE: Dec. 3, 1981

FROM : Ivan W. Russell
Director
Occupational Safety & Health Division

PHONE: 6-4532

SUBJECT: Your File No. 746

I am resubmitting our Proposed Rules Governing Recording and Reporting Occupational Injuries and Illnesses, Discrimination Against Employees, and Access to Employee Exposure and Medical Records for final approval. I believe all documentation is now complete.

If you have any questions, please contact me.

IWR/pl

RECEIVED
DEC 11 1981
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

SF-00006-02

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : IVAN RUSSELL, Director
OSHA, Dept. of L & I
5th Floor, Space Center Bldg.

DATE: 11/24/81

FROM : JUDITH WEHRWEIN JVW
Legal Assistant
530 State Office Building

PHONE: 297-3471

SUBJECT: In the Matter of the Proposed Adoption of Rules Governing (A) Recording and Reporting Occupational Injuries and Illnesses, (B) Discrimination Against Employees, and (C) Access to Employee Exposure and Medical Records

As I advised you by telephone on November 20, 1981, the above-referenced rules are disapproved by this office for incomplete documentation.

Please find enclosed a copy of Attorney General's rule 1 MCAR § 1.203 which lists the documents constituting a complete submission.

I am returning all documents submitted to date. Upon resubmissio please reference our File No. 746.

If you have any questions on this matter, please feel free to call me.

JVW:sll

Encs.

cc: Ms. Kathy Burek
Ms. Ann Bateson

SF-00006-01

STATE OF MINNESOTA

DEPARTMENT Labor and Industry

Office Memorandum

TO : Mr. Jerry Anderson
Attorney General's Office
G18 Administration Building

DATE: Nov. 3, 1981

FROM : Ivan W. Russell, Director
Occupational Safety and Health Division

PHONE: 6-4532

RECEIVED
NOV 6 1981
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

SUBJECT: Request for Final Approval of Rules

On September 14, 1981, the Department of Labor and Industry, Occupational Safety and Health Division published in the State Register a "Notice of Intent to Amend and Adopt Rules Without a Public Hearing." Two comments have been received and have been responded to by the Division. Only one change has been made in the proposed rule--line 5, page 4, has been deleted as suggested by the comment letter received from the Oil, Chemical and Atomic Workers Union. The Division agrees that inclusion of these examples may be misleading and has, therefore, deleted the examples from this rule. No other changes have been made in the proposed rule.

In accordance with the requirements of Minn. Stat. § 15.0412, Subd. 4h, we are submitting the rule for review as to its legality and form. Enclosed are:

- a copy of the "Notice of Intent to Amend and Adopt Rules Without a Public Hearing" (6 S.R. 446)
- a copy of 29 CFR 1910.20 as published in the Federal Register on May 23, 1980 and adopted by reference in 8 MCAR § 1.7230 (Chapter Eighteen)
- the proposed rules approved as to form by the Revisor of Statutes
- the Statement of Need and Reasonableness
- Comment letter from the Minnesota Medical Association dated 10/6/81 and the Division's response dated 10/23/81
- Comment letter from the Oil, Chemical and Atomic Workers Union dated 10/8/81 and the Division's response dated 10/23/81

A copy of the rules is being submitted to the Revisor of Statutes Office as required by Minn. Stat. § 15.0412, Subd. 4h, with a request for final approval.

If you require additional information or wish to discuss these rules, please contact me.

IWR/pl
Enclosures