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OSHA ADOPTS BEST AVAILABLE SCIENTIFIC TESTS IN IDENTIFYING CARCINOGENS

Cancer is the second leading cause of death in the U.S., and it has been estimated that as much as 90 percent of all cancers are environmentally caused [See generally Man's Health and the Environment: Some Research Needs, Report of the Task Force on Research Planning in Environmental Health Science, National Institutes of Health, National Institute of Environmental Health Sciences (March 1970)]. Over one million people are under treatment for the disease, and each year over 900,000 new cases are diagnosed [42 Fed. Reg. 54148, 54150 (1977)]. Only about 3,000 of the two million known chemicals have been tested for cancerous properties with one third of those tested showing some sign of being carcinogenic [Dr. Umberto Saffiotti, Associate Director for Carcinogenesis of the National Cancer Institute, quoted in Wade, Control of Toxic Substances: An Idea Whose Time Has Nearly Come, 191 Science 541 (1976)]. The consequences in regard to the environment and, more importantly, human lives when dealing with improperly tested chemical substances are disastrous.

In 1970, the Occupational Safety and Health Act [Pub. L. 91-596, 84 Stat. 1590 (1970)] was enacted giving the Occupational Safety and Health Administration (OSHA) within the Department of Labor authority to establish and enforce standards, to provide training and educational programs and to set up an injury and illness reporting system. The act also empowers the National Institute for Occupational Safety and Health (NIOSH) under the Department of Health, Education and Welfare to conduct research and make recommendations for standards to OSHA.

OSHA's purpose and policy is to "assure so far as possible every workingman and woman in the nation safe and healthful working conditions and to preserve our human resources [Pub. L. 91-596, 84 Stat. 1590 (1970)]. The major activities involved in the implementation of this purpose are the promulgation of occupational safety and health standards regulating environmental hazards to health in the workplace, approval of state plans for the development and enforcement of standards, inspection of workplaces for compliance with applicable standards and enforcement proceedings where violations of standards are believed to exist. However, under OSHA progress has been slow in implementing new workplace standards. Using a case by case approach to the regulation of carcinogens, OSHA has only completed four sets of exposure standards since 1970 under Section 6 (b). Those four rule-making proceedings in the health area dealt with the asbestos standard in 1971, the carcinogen standard regulating fourteen substances in January 1974, the vinyl chloride standard in October 1974, and the coke over emissions standard in October 1976 [See the asbestos standard, 40 Fed. Reg. 47652 (1975); the carcinogen standard, 39 Fed. Reg. 3758 (1974), aff'd, Synthetic Organic Chemical Manufacturers Assn. v. Brennan, 503 F.2d 1155 (3rd Cir., 1974); the Vinyl Chloride Standard, 39 Fed. Reg. 35892 (1974), aff'd, The Society of the Plastic Industry v. OSHA, 509 F.2d 1301 (2nd Cir.) cert. den., 421 U.S. 992 (1975); and the coke over emissions standard, 41 Fed. Reg. 46742 (1976)].

In order to bring internal consistency in regulating carcinogens, as well as to effectuate swifter action on the agency's part, OSHA proposed a new general regulation in October 1977 [29 CFR Part 1990, 42 Fed. Reg. 54148 (1977)]. This new general regulation, concerning the identification, classification and regulation of toxic substances in American workplaces that may pose a carcinogenic risk to workers [Id.] is really a cancer policy statement, rather than being legislature, identifying a (whole) series of issues that have cropped up in

promulgating exposure standards and indicating OSHA's policy determinations of these issues. The statement recognized at the outset that OSHA has only completed regulatory activity for 17 substances although NIOSH identified some 1,500 to 2,000 agents as being "suspect carcinogens."

In general, OSHA proposes "to rely on evidence from human epidemiological studies, adequately designed and conducted animal studies, or both [Id. at 54148]." With the exception of arsenic, which is still under experimental study, all the chemical substances known to cause cancer in man have also proven to be carcinogenic in test animals [Id. at 54152].

The Occupational Safety and Health Administration feels that carcinogenicity in laboratory test animals can be extrapolated to man since it is sufficient to establish a substantial likelihood that harm will result. This was based in part on a study sponsored by the National Cancer Institute which disproved the theory that sufficiently large doses of any chemical will cause cancer in test animals. Relying on this fact and the fact that two characteristics of cancer are its general irreversibility and its long latency period from 5 to 40 years, OSHA was prompted in finding that "a toxic substance, determined as a carcinogen in a mammalian test animal system, as defined, is to be treated as a policy matter as posing a carcinogenic risk to humans [Id. at 54148] [emphasis in original]."

Thus, OSHA will be able to better protect the workingman or workingwoman by preventing the use of a potential carcinogen through use of best available and generally accepted scientific knowledge. Now OSHA will be able to use its comprehensive regulatory power to its full potential and it will be better able to protect the public before exposure rather than post facto, after epidemiological studies in man have been completed.