

FOR BINDING

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,

and .

LOCAL 3-499, OIL, CHEMICAL AND
ATOMIC WORKERS,

Petitioners,

v.

AMERICAN CYANAMID COMPANY,

Respondent.

United States Court of Appeals
For the District of Columbia Circuit
NO. 81-1687

FILED FEB 8 1983

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CLERK

BRIEF FOR PETITIONERS

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	)	

CERTIFICATE REQUIRED BY RULE 8(c) OF THE
GENERAL RULES OF THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Petitioners Oil, Chemical and Atomic Workers and its Local 3-499, certifies that the following listed parties appeared below:

The Secretary of Labor, United States Department of Labor, complainant; American Cyanamid Company, respondent; Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW"), authorized employee representative electing party status pursuant to 29 U.S.C. § 659(c); and the Coalition for the Reproductive Rights of Workers ("CRROW"), "nonparty intervenor."

OCAW, the petitioner herein, takes the position that the order under review should be reversed, as does CRROW, which has moved to participate as amicus curiae herein. American Cyanamid Company takes the position that the order under review

should be affirmed. The Secretary of Labor took the same position as OCAW below, but is not a party to this review proceeding.

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

George H. Cohen (JAC)
GEORGE H. COHEN

Attorney of record for Petitioners
Oil, Chemical and Atomic Workers
International Union and its
Local 3-499

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STATEMENT OF THE ISSUE PRESENTED

Whether the Occupational Safety and Health Review Commission erred in holding, on a motion for summary judgment, that an employer policy which required, as a condition of employment in certain areas of the plant, that female employees undergo surgical sterilization in order to retain their jobs, and which resulted in five employees undergoing such sterilization, was not a hazard cognizable under the "general duty clause" of the Occupational Safety and Health Act, 29 U.S.C § 654(a)(1).

RULE 8(b) STATEMENT

This case has not previously been before this Court under any different number, nor has it been before any other court. However, this Court has previously ruled on several motions in this case, in a decision styled Oil, Chemical & Atomic Workers v. OSHRC, 671 F.2d 643 (D.C. Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3287 (October 12, 1982).

Counsel is not aware of any other related case either presently pending in this Court or in any other court, or that may be presented to this Court or to any other court in the future.

REFERENCE TO PARTIES AND RULINGS

This is a petition for review of a decision and order of the United States Occupational Safety and Health Review Commission issued on April 27, 1981 in the matter of Secretary of Labor v. American Cyanamid Company, OSHRC Docket No. 79-5762. The Commission's decision is reported at 9 BNA OSHC 1596 and is reprinted in the Joint Appendix at pp. 504-516.

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Respondent.	)	
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	)	

BRIEF FOR PETITIONERS

STATEMENT OF THE CASE

A. Introduction

This case concerns a policy adopted and implemented by respondent American Cyanamid Company ("Cyanamid" or "the Company") at its Willow Island, West Virginia plant, which required, as a condition of employment in certain areas of the plant, that women under the age of 50 undergo surgical sterilization in order to retain their jobs, and which resulted in five female employees undergoing surgical sterilization.

The Secretary of Labor ("Secretary") issued a citation charging that Cyanamid's adoption and implementation of this policy violated the "general duty clause" of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. § 654(a)(1). The

Company moved for summary judgment, and the Occupational Safety and Health Review Commission ("the Review Commission") granted the motion, holding that the sterilization policy at issue "is not a hazard cognizable under [the Act]." This petition for review was thereupon filed by the Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW"), the authorized collective bargaining representative for affected employees at the Willow Island plant and a party to the proceedings before the Review Commission.

B. Statement of Facts¹

1. The Nature of Cyanamid's Sterilization Policy, and the Announcement of the Policy

In early 1978, management at Cyanamid's Willow Island plant issued a new policy providing that female employees under

¹ The Commission decided this case on a motion for summary judgment. Under the Commission's rules, the provisions of Rule 56 of the Federal Rules of Civil Procedure are applicable to the resolution of such a motion. See 29 C.F.R. § 2200.2(b); Order Granting Motion For Summary Judgment, pp. 1-2 and nn. 2, 3 (JA 453-454). Accordingly, in determining whether summary judgment was properly granted to Cyanamid, the Court "must accept [OCAW's] version of the facts" (Bishop v. Wood, 426 U.S. 341, 347 (1976)), and the evidentiary material submitted by the parties must be viewed in the light most favorable to OCAW. United States v. Diebold, Inc., 369 U.S. 654 (1962). See also Adickes v. Kress & Co., 398 U.S. 144, 157-161 (1970); Poller v. Columbia Broadcasting System, 368 U.S. 464, 467-473 (1962). Each of the facts that follows is directly supported by evidentiary material submitted to the Administrative Law Judge of the Review Commission by the Secretary, as indicated. Consequently, for purposes of determining whether summary judgment was properly entered in favor of Cyanamid, these facts must be taken as true even to the limited extent that they were disputed by Cyanamid.

the age of 50 would be required to be surgically sterilized in order to retain jobs in most areas of the plant.² To announce this new policy Glen Mercer, the plant Director of Industrial Relations, conducted a series of meetings in January and February of that year, each of which was attended by a group of approximately three to five female employees.³

In those meetings Mercer told the employees that there were "hundreds" of chemicals in use at the plant, including lead, that were harmful to unborn fetuses, and Mercer declared that Cyanamid had decided to exclude women of "childbearing capacity" from all of the departments of the plant where such chemicals were used: specifically, these women would be permitted to work only in the janitorial pool or the Surfactants and Aureomycin departments.⁴ Mercer further stated that any woman under the age of 50 would be deemed by the Company to be of "childbearing capacity" unless the Company were provided

² See the Statements of the following employees (Appendix A to the Memorandum Of The Secretary In Opposition To Respondent's Motion For Summary Judgment) (JA 405-438): Betty J. Moler, Lola Rymer, Donna Lee Martin, Iris V. Braden, Barbara Jane Cantwell, Denise Jo Cline, Mary Lynn Carpenter, Linda Sue Matheny, and Nancy Rae Murphy. Hereinafter, the statement of each of these employees is identified by the employee's last name (e.g., "Moler Statement"). Each of these statements was given under oath.

³ See the statements cited in note 2 supra (JA 405-438).

⁴ Moler Statement, p. 1 (JA 406); Rymer Statement, p. 1 (JA 410); Martin Statement, p. 1 (JA 414); Braden Statement, p. 1 (JA 419).

with proof that she had been surgically sterilized.⁵ When employees asked whether it would be sufficient under the Company's policy to show that they were using contraceptive methods to avoid pregnancy, Mercer said that this would not be sufficient; only surgical sterilization in the form of a tubal ligation or hysterectomy would enable a woman to retain a job in the affected areas of the plant.⁶ Indeed, Mercer explained that under the Company's new rule even Betty Moler, whose husband was sterile as a result of a vasectomy, would be required to undergo surgical sterilization in order to retain the job she presently occupied, because her husband's sterility was not an absolute guarantee that she would not become pregnant.⁷

⁵ Matheny Statement, pp. 1-2 (JA 430-431); Martin Statement, p. 2 (JA 415); Moler Statement, p. 2 (JA 407); Rymer Statement, pp. 1-2 (JA 410--411); Braden Statement, p. 1 (JA 419); Cantwell Statement p. 1 (JA 421). Cyanamid admitted in its Answer that its policy "defined 'childbearing potential' with reference to women between the ages of 16 and 50 years whose ability to become pregnant had not been precluded by surgical means." (JA 9).

⁶ Matheny Statment, pp. 1-2 (JA 430-431); Martin Statement, p. 2 (JA 415); Moler Statement, p. 2 (JA 407); Braden Statement, p. 1 (JA 419); Cantwell Statement, p. 1 (JA 421).

⁷ Moler Statement, p. 1 (JA 406); Rymer Statement, p. 2 (JA 411); Martin Statement, p. 2 (JA 415); Braden Statement, p. 1 (JA 419); Cantwell Statement, p. 1 (JA 421); Murphy Statement, p. 3 (JA 436). According to Cyanamid's own account, Mercer further stated: "The Company realizes that it is a very personal and private matter whether or not a woman cannot become pregnant because of surgical procedures. It must be pointed out, however, that this very personal matter will no longer be private if you are permitted,

(Continued)

In the meetings, Mercer was accompanied by a company doctor and nurse. They "inform[ed] the women on how simple such 'button hole surgery' was, and that there were several places where such surgery could be attained locally."⁸

Mercer emphasized that sterilization "was an uninvolved procedure requiring a small cut on the abdomen and no pain or discomfort."⁹ He went on to state that medical insurance provided by the Company would pay for the procedure,¹⁰ and that sick leave would be provided to female employees who underwent the surgery.¹¹

Approximately thirty (30) women were employed throughout the Willow Island plant. Mercer informed the female employees

7 (cont'd)

and choose, to remain in one of the Departments [other than Surfactants, Janitors and Aureomycin]." Letter from Donald L. Morgan, Esq. to Michael S. Berger, Esq., dated March 20, 1980, p. 7 (Exh. C to App. B to the Memorandum Of The Secretary In Opposition To Respondent's Motion For Summary Judgment) (hereinafter "Morgan letter") (JA 446). (The letter from Mr. Morgan, who represents Cyanamid in this matter, sets forth Cyanamid's version of the facts at issue. OCAW, which was denied discovery with respect to these matters (see pp. 13-14 infra), does not accept the Morgan letter as a complete and accurate recital of the pertinent facts; but the letter contains certain admissions that support OCAW's position, and we cite the Morgan letter in that limited respect. See note 1 supra.)

⁸ Rymer Statement, p. 2 (JA 411); Moler Statement, p. 2 (JA 407); Martin Statement, p. 2 (JA 415).

⁹ Martin Statement, p. 2 (JA 415).

¹⁰ Moler Statement, p. 2 (JA 407); Rymer Statement, p. 2 (JA 411); Martin Statement, p. 2 (JA 415); Cantwell Statement, p. 1 (JA 421).

¹¹ Cantwell Statement, p. 1 (JA 421).

that there would only be about seven (7) jobs for them in the three areas of the plant where fertile women would thereafter be allowed to work, and that aside from those seven positions, female employees who did not undergo surgical sterilization by April 1978 "would be terminated ('out the gate')."12

Mercer sought to enhance the sterilization program in the eyes of the female employees by suggesting first that the federal government approved of the Company's policy,¹³ and second, that other companies were adopting similar rules, such that "he anticipated in the near future that women (of child bearing potential) would not be able to work in any division of American Cyanamid, or in any other chemical company in the United States."¹⁴

When employees asked to see a list of the chemicals to which Mercer referred, he refused to provide it or to identify the chemicals involved, other than lead.¹⁵ "He stated that they (the chemicals) were 'too numerous to mention' and that

12 Moler Statement, p. 2 (JA 407); Rymer Statement, pp. 1-2 (JA 410-411). In this connection, Mercer informed the female employees that they would not be permitted to "bump" male employees already working, regardless of their seniority. Moler Statement, p. 2 (JA 407).

13 Carpenter Statement, p. 1 (JA 427); Martin Statement, p. 3 (JA 416); Cantwell Statement, p. 1 (JA 421).

14 Rymer Statement, p. 2 (JA 411); Moler Statement, pp. 1-2 (JA 406-407); Cantwell Statement, p. 1 (JA 421).

15 Moler Statement, p. 2 (JA 407); Rymer Statement, p. 2 (JA 411); Martin Statement, p. 3 (JA 416); Cantwell Statement, p. 2 (JA 422).

[the female employees] would not understand the list if he did show it to [them]."¹⁶

2. The Implementation of the Policy, the Sterilizations that Resulted, and the Company's Failure to Consider Alternatives

Although Cyanamid originally announced that the sterilization policy would apply to "hundreds" of chemicals and to most departments at the plant, the Company soon began to have doubts as to whether the policy would be implemented in areas other than the Pigments department, where employees were exposed to lead.¹⁷ Thus, in late February, Mercer told a group of female employees that the Company was unsure whether the sterilization rule would apply to chemicals other than lead and departments other than Pigments. However, "Mr. Mercer went on to say that ... [even] those women not subject to lead exposure should consider surgical sterilization to preclude the possibility of adverse personnel actions in the future should the company expand upon the list of dangerous chemicals."¹⁸ And in subsequent meetings, "Mr. Mercer advised [female employees] that [personnel] actions based on female reproductive hazards would most likely affect all the women at the plant in the near future, and that [the female employees] should all strongly consider surgical sterilization"¹⁹

¹⁶ Martin Statement, p. 3 (JA 416).

¹⁷ Morgan letter (note 7 supra), pp. 5, 7-8 (JA 444, 446-447).

¹⁸ Murphy Statement, p. 2 (JA 435).

¹⁹ Id., p. 3 (JA 436).

The deadline for female employees to submit proof of surgical sterilization in order to retain their jobs was extended by the Company from April to October; and as finally effectuated, the sterilization requirement applied only to the Pigments department. (The Company indicated, however, that the requirement might be extended to other areas in the future.²⁰)

Cyanamid's policy achieved its predictable result. Between February and June of 1978, five women employed in the Pigments department²¹ -- Betty Moler, Lola Rymer, Donna Lee Martin, Iris Braden and Barbara Cantwell -- underwent surgical sterilization. Each did so solely because under the Company's rule surgical sterilization was the only way to retain her job. As Lola Rymer put it, "Mr. Mercer made it perfectly clear that my choice was between sterilization and termination I would never have considered such sterilization procedure had my job not been on the line."²² In at least one case --

²⁰ Morgan letter, note 7 supra, pp. 8-11 (JA 477-450).

²¹ See Respondent's Brief to the Review Commission, p. 6.

²² Rymer Statement, p. 3 (JA 412). Barbara Cantwell similarly stated: "I was afraid of losing my job, pure and simple. I have two children to support." Cantwell Statement, pp. 2, 3 (JA 422, 423). The other three employees underwent sterilization so as not to be terminated or transferred to lower-paying jobs. See Moler Statement, p. 2 (JA 407); Martin Statement, pp. 2, 5 (JA 415, 418); Braden Statement, p. 2 (JA 420). Cyanamid's counsel admitted in the pre-hearing conference conducted by the ALJ that "the women who became sterilized decided that in order to maintain their existing jobs, they decided to undergo the sterilization." Transcript of Pre-Hearing Conference on April 1, 1980 (hereinafter "Tr.", p. 114 (JA 262)).

that of Barbara Cantwell -- the operation involved medical complications; Ms. Cantwell had planned only a tubal ligation, but due to complications an ovary was removed as well.²³

Two female employees in the Pigments department did not undergo sterilization. They were both transferred to other jobs, suffering a loss of pay.²⁴

The levels of toxic lead in the Pigments department at the time the sterilization policy was adopted and implemented were "concededly high."²⁵ Faced with the Company's plan to apply a sterilization policy as the "solution" to these high exposure levels, employees on several occasions asked Company representatives "if the company was going to do anything to help alleviate some of the exposure to the hazardous chemicals in question, and the reply was always 'no,' that there was too much money involved in any such abatement."²⁶ Exposure to

²³ Cantwell Statement, p. 2 (JA 422).

²⁴ Cline Statement, p. 2 (JA 425); Carpenter Statement, p. 2 (JA 428). Cline lost \$70 per week; Carpenter lost \$40-\$50 per month. Ibid. As has been indicated, depending on the number of women who underwent sterilization, it was anticipated that many who declined would be terminated, rather than transferred to other jobs. See pp. 5-6, 8, supra.

²⁵ Order Granting Motion For Summary Judgment, p. 5 (JA 457). The actual levels of airborne lead, as well as employee blood lead levels, are in the record as Exhs. B and C to App. B to the Memorandum Of The Secretary In Opposition To Respondent's Motion For Summary Judgment.

²⁶ Moler Statement, p. 3 (JA 408). See also Murphy Statement, p. 4 (JA 437) (Mercer stated "that the work area was as clean as it could (would) be, and it would cost the company too much money to improve the situation any more"); Cline Statement, p. 3 (JA 426).

lead in the Pigments department remained "just as bad" after the sterilization rule was implemented;²⁷ in fact, even those employees who did not work in the Pigments department were exposed to high concentrations of lead, because all the female employees shared the same locker room, and "lead dust particles and pigments are all over the locker room"²⁸ Thus, the record contains no indication that the Company "investigate[d] any other alternative to this situation [of lead exposure] other than sterilization."²⁹

The Pigments department was closed in early 1980.³⁰

²⁷ Martin Statement, p. 5 (JA 418).

²⁸ Ibid. See also Moler Statement, p. 4 (JA 409); Carpenter Statement, p. 2 (JA 428).

²⁹ Cline Statement, p. 3 (JA 426). See also Rymer Statement, p. 3 (JA 412): "To the best of my knowledge, the company has not actively explored reduction of the chemical exposure involved or any alternative methods of ameliorating the problems which gave rise to the company [sterilization] policy." According to the recital prepared by Cyanamid's attorney, before determining the areas in which the sterilization rule would apply, Cyanamid designated specific exposure limits for various chemicals which it regarded as posing a risk to fetuses, and the Company declared "that work areas in which the listed agents were used would be evaluated and practical controls introduced as required where feasible." Morgan letter, note 7 supra, pp. 3, 4 (JA 442, 443). The sterilization rule was to be applied where such controls did not result in reducing exposures to the levels designated by the Company. Because the Secretary's request for discovery was denied, the record is silent as to such matters as (i) the actual exposure limits designated by the Company for lead and other substances, (ii) the criteria by which the Company determined what kinds of exposure controls would be regarded as "practical," "required" and "feasible," and (iii) the steps, if any, that Cyanamid took to reduce exposures at Willow Island.

³⁰ Order Granting Motion For Summary Judgment, p. 4, n. 8 (JA 456).

C. Proceedings Below

Following an inspection of the Willow Island plant by the Occupational Safety and Health Administration, the Secretary issued a citation³¹ alleging that Cyanamid had violated § 5(a)(1) of the Act (the "general duty clause"³²) as follows:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:

The employer adopted and implemented a policy which required women employees to be sterilized in order to be eligible to work in those areas of the plant where they would be exposed to certain toxic substances:

(a) Inorganic Pigment Department-Buildings No. 85 and No. 86.³³

The citation classified the violation as "willful," declared that it should be abated immediately, and proposed a penalty of \$10,000.³⁴

Cyanamid notified the Secretary of its "intention to contest the citation[], abatement dates and/or proposed

³¹ The procedure governing the issuance of citations is set forth in § 9 of the Act, 29 U.S.C. § 658.

³² Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

Each employer --

(1) 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.

³³ JA 1.

³⁴ Ibid. An employer who "willfully" violates the Act may be assessed a penalty of up to \$10,000 for each such violation. Section 17(a), 29 U.S.C. § 666(a).

assessments of penalties" for the alleged violation.³⁵ The case was thereupon docketed at the Review Commission and assigned to an Administrative Law Judge ("ALJ") for adjudication.³⁶ OCAW, the union representing affected employees at the willow Island plant, exercised its statutory right to participate as a party to the proceedings.³⁷

³⁵ JA 2. See § 10(a) of the Act, 29 U.S.C. § 659(a).

³⁶ Section 10(c) of the Act, 29 U.S.C. § 659(c), provides in pertinent part as follows:

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance.

* * * *

The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

With respect to the functions of the Review Commission and its ALJ's, see also § 12, 29 U.S.C. § 661.

³⁷ See § 10(c) of the Act, 29 U.S.C. § 659(c) (final sentence), quoted in note 36 supra.

On January 14, 1980 the Secretary filed a "Motion For Leave To Submit Interrogatories And Take Depositions Pursuant To Rule 53" of the Commission's Rules of Procedure.³⁸ The proposed discovery inquired into such matters as the details of the Company's sterilization policy,³⁹ the reasons for adopting it, and the nature of the discussions held with employees with respect to both the policy itself and the sterilizations that ensued.⁴⁰

At a pre-hearing conference conducted by the ALJ on April 1, 1980, the representatives of the Secretary and of OCAW explained their need for discovery.⁴¹ In particular, both of those parties expressed their belief that Cyanamid could have implemented a number of alternatives for dealing with the perceived threat to fetal health posed by exposure to lead, short of requiring surgical sterilization; OCAW and the Secretary explained that the Company's failure to explore such other methods would be an important aspect of the proposed discovery.⁴² OCAW and the Secretary also explained that discovery would confirm the manner in which the formulation

³⁸ Rule 53(a), 29 C.F.R. § 2200.53(a), provides that discovery by means of depositions and interrogatories may only be taken upon order of the Commission or the ALJ.

³⁹ The policy had never been made available in writing to OCAW, the employees or the Secretary.

⁴⁰ Secretary's Interrogatories (JA 25-35).

⁴¹ See, e.g., JA 192, 194, 211-216, 255-256, 264-265.

⁴² See, e.g., JA 192, 194-195, 202-207, 221, 226-229.

and implementation of the Company's policy led inexorably to the sterilizations that took place.⁴³

Cyanamid's attorney, who had sent to the parties and to the ALJ a letter dated March 20, 1980, setting forth the Company's version of the facts, opposed the requested discovery and announced his intention to file a motion for summary judgment.⁴⁴ The ALJ suggested to OCAW and the Secretary that they should rely on Cyanamid's letter and forego discovery;⁴⁵ but OCAW and the Secretary declined to do so, noting that the Company had refused even to provide the documents that were identified in Cyanamid's letter as pertaining to the adoption and implementation of the sterilization rule.⁴⁶

The ALJ ruled that discovery would not be allowed, at least at that stage in the proceeding. Instead, the parties were directed to submit stipulations, statements of disputed facts and, if possible, a motion for summary judgment. The ALJ stated that after he had reviewed those submissions he would determine whether any discovery should be permitted.⁴⁷

⁴³ See JA 215-216, 265, 273-274.

⁴⁴ JA 220, 277. The letter is referred to in note 7 supra.

⁴⁵ JA 211, 255, 265.

⁴⁶ JA 211-214, 254-255.

⁴⁷ JA 293-298. The Secretary sought interlocutory review by the Commission of the ALJ's refusal to permit discovery to proceed, but the Commission denied review. See Secretary's Petition for Interlocutory Appeal and Motion For Stay, dated April 23, 1980 (JA 301); Commission's Order dated May 12, 1980 (JA 337). Interlocutory appeals to the Commission are governed by 29 C.F.R. § 2200.75.

On May 6, 1980, the Company filed a motion for summary judgment. The motion was accompanied only by a Memorandum Of Points and Authorities. Nonetheless, the memorandum contained a number of factual assertions concerning the adoption and implementation of the sterilization policy, without citing any evidentiary support by way of affidavits or otherwise. In general, the assertions in the memorandum tracked Cyanamid's Answer and the letter prepared by its attorneys.

On May 15 the Secretary submitted a proposed Stipulation of Facts,⁴⁹ to which Cyanamid never responded. On June 30 the Secretary submitted a Memorandum In Opposition To Respondent's Motion For Summary Judgment, supported by extensive evidentiary material including the sworn statements of numerous female employees affected by the sterilization policy.⁵⁰

On July 15, 1980, the ALJ issued a decision granting Cyanamid's motion for summary judgment on two grounds, neither of which is the subject of this review. First, the ALJ concluded that the citation was barred by the six-month statute of limitations set forth in § 9(c) of the Act, 29 U.S.C. § 658(c).⁵¹ Second, the ALJ held that the citation should be dismissed on the ground that "two other laws speak to such an

⁴⁹ JA 339-354.

⁵⁰ JA 355-438.

⁵¹ Order Granting Motion for Summary Judgment, pp. 4-8 (JA 456-460).

issue [as the Willow Island sterilization policy], the National Labor Relations Act (NLRA) as an alleged unfair labor practice and/or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as an alleged impermissible 'sex based' discrimination issue."⁵²

On review pursuant to § 12(j) of the Act, 29 U.S.C. § 661(i), the Commission affirmed the ALJ's decision, but on a different ground. Expressly declining to address the two issues on which the ALJ had ruled,⁵³ the Commission held, by a 2-1 vote, that the citation should be vacated because "the [sterilization] policy is not a hazard cognizable under section 5(a)(1)."⁵⁴

At the outset of its analysis the Commission rejected the argument that the Company had advanced on that point. The Company had contended that the sterilization rule should be deemed exempt from § 5(a)(1) simply because the act of surgical sterilization itself is not performed "in the workplace."⁵⁵

⁵² Id., p. 9 (JA 461). In granting summary judgment on this basis, the ALJ relied on § 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), which provides:

Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

⁵³ See the Commission's Decision, 9 OSHC 1596, 1601 n. 27 (JA 509).

⁵⁴ Id. at 1597 (JA 505).

⁵⁵ Id. at 1598 (JA 506).

The Commission rejected that proposition, stating:

In our view, the critical point is not that the physical impact of the policy on employees, reduced functional capacity due to surgical sterilization, was ultimately achieved outside the workplace. We agree ... that it is employer implementation of the policy that is at issue here and to that extent the policy is a condition of employment within the meaning of the Act.⁵⁶

Nonetheless, the Commission concluded that "due to its unique characteristics this condition of employment is not a hazard within the meaning of the general duty clause."⁵⁷ The Commission reached that conclusion in two steps.

First, turning to the legislative history of the Act, the Commission stated that the hazards that were mentioned in the congressional debates all involved "processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities."⁵⁸ The Commission contrasted this case:

The fetus protection policy is of a different character altogether. It is neither a work process nor a work material, and it manifestly cannot alter the physical integrity of employees while they are engaged in work or work-related activities. An employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or

⁵⁶ Id. at 1599 (JA 507).

⁵⁷ Ibid.

⁵⁸ Id. at 1600 (JA 508).

controls work processes and materials. For these reasons we conclude that the policy is not a hazard within the meaning of the general duty clause.

It is true, as the Secretary points out, that the Act is broad in scope and may be fairly described as intended to protect employees from reduced functional capacity as a result of the work experience. However, it does not follow that the general duty clause applies to an employment policy whose physical impact on employees is indirect and derives not from work processes and materials but from social and economic factors outside the workplace.⁵⁹

Second, recognizing that a sterilization rule of the sort at issue here was simply "unknown at the time of enactment" of the statute, and that the absence of any legislative history with respect to such a hazard can therefore hardly be construed as an affirmative determination to exempt this hazard from the reach of the Act, the Commission stated its understanding of the rules of statutory construction that apply in such a situation. The Commission acknowledged that in some instances "a statute can operate prospectively so as to include circumstances unknown at the time of enactment . . .," but declared that the test to be applied is whether the "unforeseen circumstance . . . is 'substantially comparable' to those actually contemplated by Congress."⁶⁰ And, the Commission parsed that test to mean that the circumstances must be "comparable . . . in substantially

⁵⁹ Ibid. (footnote omitted).

⁶⁰ Ibid.

all respects."⁶¹ In this case, the Commission concluded that its test was not met: "[t]he definition of hazard proposed by the Secretary is not, under any fair reading of the legislative history, substantially comparable to the concept of hazard entertained by Congress in passing the ... Act"⁶² On that basis the Commission held, over the dissent of Commissioner Cottine, that the citation "fails to allege a violation cognizable under the general duty clause;" and the Commission vacated the citation.⁶³

This petition for review was thereupon timely filed by OCAW. The Commission was named as the respondent. Cyanamid moved to intervene, and moved to dismiss the petition for review, arguing that OCAW was not a proper petitioner and that the Commission was not a proper respondent. This Court denied the motion to dismiss, and granted OCAW's motion to amend the caption to dismiss the Commission and to add Cyanamid as a party respondent. Oil, Chemical & Atomic Workers v. OSHRC, 671 F.2d 643 (D.C. Cir. 1982), cert denied, ___ U.S. ___, 51 U.S.L.W. 3287 (October 12, 1982).

⁶¹ Ibid., and note 25 thereat.

⁶² Id. at 1600-1601 (JA 508-509).

⁶³ Ibid.

ARGUMENT

THE COMMISSION ERRED IN DETERMINING, AT THE SUMMARY JUDGMENT STAGE, THAT CYANAMID'S STERILIZATION POLICY IS EXEMPT FROM THE COVERAGE OF THE ACT.

Introduction and Summary of Argument

The general duty clause 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 likely to cause death or serious harm to his employees." 29 U.S.C. § 654(a)(1). In the proceeding under review the Commission held, by a 2-1 vote, that Cyanamid's sterilization policy did not fall within the purview of the Act. In this submission we show that the Commission's decision should be reversed. Our presentation proceeds in four parts.

In part A, we first establish that the Company's sterilization policy falls within the plain meaning of the statutory language. Pp. 24-26, infra. It is clear that the policy bears directly upon "employment." And, just as a chemical which induces sterilization would be termed a "hazard," so too this policy, which has the same effect, is a "hazard." Cyanamid failed to provide employment "free from" the hazard of the sterilization policy; and that hazard was "recognized," as that term is used in § 5(a)(1), since the evidence strongly suggests Cyanamid's own awareness that its new rule would likely -- indeed almost certainly -- cause

employees to undergo surgical sterilization. It is manifest that the Company's policy was "causing or likely to cause . . . serious harm to . . . employees." Thus, each of the elements of a violation of the general duty clause, as set out in the plain language of the clause, is present in this case.

We next turn in part B to consider the basis on which the Commission concluded that the policy is nevertheless outside the scope of the Act. Pp. 26-31, infra. In reaching that conclusion the Commission did not rely on the language of the statute; instead, the Commission relied on its perception that the sterilization policy is not "substantially comparable" to the particular hazards that were mentioned in the congressional debates, which involved "work processes and materials." As we show, the Commission's attempt to "confine[] [the general duty clause] to the 'particular application[s] . . . contemplated by the legislators'" violates established tenets of statutory construction. Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980). Both the language of § 5(a)(1) and its legislative history -- which shows that the general duty clause was intended to require employers "to bring no adverse effects to the life and health of their employees throughout the course of their employment"⁶⁴ -- "fairly bring[] [the sterilization policy] within [the] statute." Barr v. United States, 324 U.S. 83, 90 (1945). The fact that the legislative history contains references to hazards involving work processes and materials, but not to sterilization policies, does not reflect a decision

⁶⁴ S. Rep. No. 91-1282, 91st Cong., 2d Sess. 9 (1970); H. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970).

to exclude the latter from the scope of the Act, particularly given the fact that sterilization policies were "unknown at the time of enactment" of the statute.⁶⁵ There is no basis for concluding that "had [such a practice] been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act." People of Puerto Rico v. Shell Co., 302 U.S. 253, 257 (1937). To the contrary, the Congress that enacted the general duty to ensure that employers would "bring no adverse effects to the life and health of their employees throughout the course of their employment" would surely have condemned Cyanamid's policy. Thus, the Commission's attempt to confine the general duty clause to "work processes and materials" is unfounded.

We next demonstrate in part C that the distinction drawn by the Commission between the hazard at issue here and hazards involving "work processes and materials" cannot withstand analysis even on its own terms. Pp. 31-38, infra. The Commission's assertion that the injury caused by the sterilization policy "grows out of economic and social factors" which "the employer neither controls nor creates"⁶⁶ simply ignores the nature of Cyanamid's role in the promulgation and implementation of the policy. Moreover, even if the Commission's assertion were well-founded, it would not provide

⁶⁵ 9 OSHC at 1600 (JA 508).

⁶⁶ 9 OSHC at 1600 (JA 508).

a principled distinction between this case and a case involving exposure to a sterilizing chemical (i.e., a "work material"). In both cases employees are confronted with a "choice" between their livelihood and their health. To the extent that the choice is affected by "economic and social factors," it is so affected in both cases. The critical point common to both cases is that the "choice" is inimical to the policies of the Act. Pp. 31-33, infra. What is more, the Commission's attempt to confine the general duty clause to "work processes and materials" is contrary to the Commission's own recent caselaw (pp. 34-35, infra), and would, if accepted, unjustifiably exempt a number of serious occupational hazards from the reach of the Act. Pp. 35-38, infra.

These considerations amply demonstrate that the Commission erred in granting summary judgment to Cyanamid, and that its order should be set aside. As a final matter (in Part D at pp. 38-42), we recognize that Cyanamid has maintained that its sterilization policy was adopted for the purpose of protecting potential fetuses, and that an issue may therefore arise on remand as to whether such a purpose can immunize a policy that would otherwise violate the Act. However, while it is extremely unlikely that Cyanamid could ever prevail on such a contention in this case, this issue was not addressed by the Commission, and the facts on which it depends are in dispute. Consequently, the issues as to any possible justification for Cyanamid's policy are not before the Court. The order of the Commission should therefore be reversed and the case remanded for further proceedings.

A. The Sterilization Policy Falls Within the Plain Meaning of the General Duty Clause.

The general duty clause 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 likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).⁶⁷

The sterilization rule at issue in this case falls within the plain meaning of that statutory language. First, it is clear that the rule bears directly upon "employment." Indeed, the Company promulgated and implemented the sterilization policy as a "condition of employment" -- a fact which the Commission expressly acknowledged.⁶⁸

Second, just as a chemical which induces sterilization would be termed a "hazard," so too this policy, which had the same effect of harming the functional capacity of female Willow Island employees, was a "hazard" to those employees.

Third, Cyanamid obviously failed to furnish employment "free from" the hazard of the sterilization policy;⁶⁹ and

⁶⁷ The clause thus "plac[es] on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary." Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980).

⁶⁸ 9 OSHC at 1599 (JA 507).

⁶⁹ Construing the word "free" as it appears in § 5(a)(1), this Court has held that the general duty clause is not violated by "unpreventable" hazards, because an employer cannot possibly provide employment that is "free" of such hazards. National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1265-1267 (D.C. Cir. 1973); Whirlpool Corp. v. OSHRC, 645 F.2d 1096, 1098 (D.C. Cir. 1981). Here, the Company deliberately adopted the challenged sterilization rule. It cannot be claimed that the adoption of the rule was somehow "unpreventable."

the hazard was "recognized," as that term is used in § 5(a)(1). "A hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." St. Joe Minerals v. OSHRC, 647 F.2d 840, 845 (8th Cir. 1981). See also National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 and n. 32 (D.C. Cir. 1973). That test has been met here. The evidence strongly suggests Cyanamid's own awareness that its new rule would cause employees to undergo surgical sterilization; at the very least, the record does not permit a contrary conclusion at the summary judgment stage.

Finally, it appears to be conceded, as it must be, that surgical sterilization constitutes "serious physical harm."⁷⁰ And, on this record, it is evident that Cyanamid's policy was "causing or likely to cause" that harm. The circumstances surrounding the promulgation and implementation of the policy make clear that the policy was "likely" -- indeed, almost certain -- to cause employees to undergo surgical sterilization;⁷¹ and the sworn statements of female employees establish

⁷⁰ Cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing that sterilization constitutes "irreparable injury"). In addition to the loss of a vital function that is inherent in sterilization itself, the surgery can involve serious complications, as was true in the case of employee Barbara Cantwell. See pp. 8-9, supra.

⁷¹ See pp. 3-9, supra.

that the policy did in fact produce that result in five instances.⁷²

Thus, each of the elements of a violation of the general duty clause, as set out in the plain language of the clause, is present in this case.

B. Nothing in the Legislative History Exempts the Sterilization Policy from the Reach of the General Duty Clause.

The Commission did not directly confront the foregoing analysis. It concluded nonetheless that Cyanamid's sterilization policy was not a "hazard" within the meaning of the Act, because, in its view, the Act was intended to apply only to "processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities."⁷³ In the Commission's shorthand phrase, only "work processes and materials" are within the purview of the Act.⁷⁴ As we now show, the limitation which the Commission engrafted upon the Act cannot be sustained.

The Commission did not purport to find that limitation in the language of § 5(a)(1), or in any explicit legislative history. Instead, the Commission fashioned a rule of statutory

⁷² Even if Cyanamid had disputed these points, which it did not, they would have to be taken as true in ruling on Cyanamid's motion for summary judgment. See note 1, supra.

⁷³ 9 OSHC at 1600 (JA 508).

⁷⁴ Ibid.

construction under which § 5(a)(1) would be confined to the particular types of hazards that were mentioned in the debates preceding the enactment of the statute, and other hazards "substantially comparable" to them.⁷⁵ Applying that approach, the Commission prepared a catalogue of the various hazards that were mentioned in the debates, and noted that those hazards involved "work processes and materials."⁷⁶ Since Cyanamid's sterilization policy is not a work process or material, the Commission concluded that the policy is not "substantially comparable" to the hazards mentioned in the debates, and is thus, under the Commission's rule of construction, outside the reach of § 5(a)(1).

The approach followed by the Commission is contrary to established tenets of statutory construction. "[The Supreme] Court frequently has observed that a statute is not to be confined to the 'particular application[s] ... contemplated by the legislators.'" Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980), citing Barr v. United States, 324 U.S. 83, 90 (1945); Browder v. United States, 312 U.S. 335, 339 (1941); People of Puerto Rico v. Shell Co., 302 U.S. 253, 257 (1937). Rather, "if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." Barr, supra, 324 U.S. at 90. Thus, where the

⁷⁵ Id. at 1600-1601 (JA 508-509).

⁷⁶ Id. at 1599-1600 (JA 507-508).

language of a statute is broad enough to embrace a situation that Congress did not foresee, the statute will be applied to that situation unless it can be concluded that "had [the situation] been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act." People of Puerto Rico, supra, 302 U.S. at 257.

As we have already shown, the language of § 5(a)(1) "fairly brings [the sterilization policy] within [the] statute" (Barr, supra). See pp. 24-26, supra. In § 5(a)(1) Congress spoke of all hazards arising from "employment and . . . place[s] of employment," not only those involving work processes and materials.⁷⁷ And, contrary to the Commission's supposition, the legislative history leads to the same point as the statutory language. Far from limiting the reach of § 5(a)(1), the committee reports confirm that the general duty clause was meant to apply as broadly as its language suggests:

⁷⁷ Similarly, the Act defines an occupational safety and health standard as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." § 3(8), 29 U.S.C. § 652(8) (emphasis added). Other provisions of the Act likewise speak broadly of harms "arising out of employment" (§ 2(b)(13), 29 U.S.C. § 651(b)(13)) or "as a result of [an employee's] work experience" (§ 2(b)(7), 29 U.S.C. § 651(b)(7)), or "out of work situations" (§ 2(a), 29 U.S.C. § 651(a)), or "working conditions" (§ 2(b)(1), (2), (4), 29 U.S.C. § 651(b)(1), (2), (4)). The purpose of the Act is stated in equally broad terms: "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." (§ 2(b), 29 U.S.C. § 651(b).)

Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The Committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. [S. Rep. No. 91-1282, 91st Cong., 2d Sess. 9 (1970); H. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970) (emphasis added).]

Thus, "[i]n the OSH Act Congress invested a new agency with extremely broad jurisdiction to prevent all types of safety and health hazards throughout American industry." United Steelworkers of America v. Marshall, 647 F.2d 1189, 1232 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981) (emphasis added).

To be sure, particular hazards were mentioned from time to time in the debates, and as the Commission notes, those hazards

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The Commission, pointing out that the word "hazard" is not defined in the Act, seemingly viewed that circumstance as providing a license to read restrictions into the Act. See 9 OSHC at 1599 (JA 507). But the fact that Congress did not provide a definition of "hazard" simply indicates that Congress intended that the term be given its ordinary meaning; it in no way suggests a need to search the legislative history for some more limited meaning. "The subject-matter provisions of the ... law have been cast in broad terms to fulfill the ... statutory goal Broad general language is not necessarily ambiguous when congressional objectives require broad terms." Diamond v. Chakrabarty, supra, 447 U.S. at 315. Thus, broad statutory language provides no warrant for courts or agencies to "read into the ... laws limitations and conditions which the legislature has not expressed." Id. at 308, quoting United States v. Dubilier Condenser Corp., 289 U.S. 178, 199 (1933). To the contrary, as the Supreme Court has noted of this very statute, "safety legislation is to be liberally construed to effectuate the congressional purpose." Whirlpool Corp. v. Marshall, supra, 445 U.S. 1, 13 (1980).

involved "work processes and materials." But there is not a word in the legislative history to suggest that any of the legislators was purporting to provide an all-inclusive catalogue of the kinds of hazards covered by the general duty clause, or to indicate that the clause should be limited to "work processes and materials."⁷⁸ No one would deny that most hazards of employment involve work processes and materials. The fact that the legislators mentioned such hazards but not others such as that at issue here is hardly surprising, particularly given the fact, acknowledged by the Commission, that the kind of practice

⁷⁸ A review of the snippets of legislative history cited by the Commission (9 OSHC at 1599-1600, nn. 17-21 (JA 507-508) will reveal that none of the cited statements purports to define the precise contours of the general duty clause, and none can fairly be read to suggest that the clause is limited to work processes and materials. In virtually every case the context of the statements is such that the speaker was, at most, simply mentioning one or two obvious kinds of hazards that would be covered by the Act. Indeed, in many of the cited passages the speaker was not even addressing the coverage of § 5(a)(1) or any other substantive provision of the Act. To take a typical example, at footnote 18 of its opinion the Commission cites the following statement of Senator Saxbe, presumably because it uses the word "accident":

In this bill there is, for the first time, an effort to study the various and differing workmen's compensation laws of the several states, to see if they provide adequate benefits, because at the present time many States have very good benefits, and others have deplorable benefits, where an accident at work literally puts the family on relief or at least makes it a public charge at some time in the future. [Sen. Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, pp. 319-320 (Comm. Print 1970).]

It cannot plausibly be maintained that such statements in the debates shed any light on the question presented here.

at issue in this case was "unknown at the time of enactment" of the statute."⁷⁹

Thus, "Congress has made a choice of language which fairly brings [the challenged sterilization policy] within [the] statute" (Barr, supra, 324 U.S. at 90); and nothing in the legislative history suggests that if Congress had foreseen the precise hazard at issue here, it "would have so varied its comprehensive language as to exclude it from the operation of the act." People of Puerto Rico, supra, 302 U.S. at 257. To the contrary, the Congress that enacted the general duty clause for the purpose of ensuring that employers would "bring no adverse effects to the life and health of their employees throughout the course of their employment" (p. 29, supra) would surely have condemned a practice that causes employees as a condition of retaining their jobs to surrender their functional capacity to bear children by submitting to surgical sterilization.

- C. The Commission's Attempt to Confine the General Duty Clause to "Work Processes and Materials" is Unsound Even on Its Own Terms, is Inconsistent With the Commission's Prior Cases, and, if Accepted, Would Frustrate the Objectives of the Statute.

The distinction drawn by the Commission between Cyanamid's sterilization policy and "work processes and materials" cannot withstand analysis even on its own terms. The Commission

⁷⁹ 9 OSHC at 1600 (JA 508).

asserts that "an employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials."⁸⁰ Consequently, in the Commission's view, the "physical impact [of the sterilization policy] on employees is indirect and derives not from work processes and materials but from social and economic factors outside the workplace."⁸¹ It was "[f]or these reasons" that the Commission viewed the sterilization policy as "of [such] a different character" from "work processes and materials" as to be outside the scope of the general duty clause.⁸² But the Commission's reasons are unsound.

1. In the first place, to suggest, as the Commission does, that the Company had no "control" over the factors that caused its five employees to undergo sterilization is to ignore the fact that Cyanamid designed and implemented its policy so as to maximize the likelihood that the employees would undergo sterilization. See pp. 3-9, supra. In particular, it was Cyanamid that determined precisely what the economic consequences would be if an employee did not undergo sterilization. Thus, to assert that this case concerns "economic . . . factors . . . [which] [t]he employer neither controls nor creates" is

⁸⁰ 9 OSHC at 1600 (JA 508).

⁸¹ Ibid.

⁸² Ibid.

simply wrong. What is more, even if the impact of the sterilization rule could properly be said to depend on "social and economic factors outside the workplace," that point would be of no significance. In this case, employees had in effect two choices: to undergo sterilization, or to quit.⁸³ That such a "choice" offends the Act can be seen from the fact that if, instead of a sterilization policy, the hazard at issue in this case had consisted of exposure to a sterilizing chemical, employees would have had the same choices: to undergo sterilization, or to quit. To whatever extent "social and economic factors outside the workplace" would influence the choice in the one case, they would do so equally in the other. As Commissioner Cottine noted in dissent,⁸⁴ the Commission would not suggest that the presence of such factors would remove the sterilizing chemical from the ambit of the Act, and there is no logical basis for suggesting that the presence of such factors should remove the sterilization policy from the ambit of the Act. In either case, the "choice" between one's livelihood and one's physical integrity is inimical to the policies of the statute. Cf. Whirlpool Corp. v. Marshall, supra.⁸⁵

⁸³ In this regard see especially p. 8 and note 22, supra.

⁸⁴ 9 OSHC at 1603 (JA 511).

⁸⁵ That the Act does not permit an employer to justify a health hazard by contending that employees have made an economic choice to endure the hazard was also recognized by this Court in United Steelworkers of America v. Marshall, supra, 647 F.2d at 1237-1238. The Court there approved a provision of OSHA's Lead Standard which requires employers to

2. What is more, the Commission's attempt to confine the general duty clause to "work processes and procedures" is inconsistent with its own recent case law. See C.R. Burnett and Sons, Inc., 9 OSHC 1009 (1980). There, the question was whether conditions at temporary labor camps where employers provided housing to migrant farm workers were within the scope of the Act. The workers were not required by their employers to reside in the camps; nor did they perform work in the camps. And the violations for which the employers were cited did not involve work processes or materials; they involved the adequacy of the shelters that were provided in the camps, and the conditions of the open areas surrounding the shelters.⁸⁶

In determining whether the Act applied to the conditions at issue in C.R. Burnett, the Commission did not confine the ambit of the Act to work processes or materials. Instead, the Commission stated that the question to be decided was "whether a particular condition bears a sufficient nexus to employment to permit enforcement of the Act."⁸⁷ The Commission held that such a nexus can be found whenever a hazard constitutes a

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protect the wages and seniority rights of employees who are required to be removed from their jobs as a result of high blood-lead levels. The Court held that the provision was needed in order to assure that employees who might "h[o]ld job security more dear than their health" would not be dissuaded by a potential loss of earnings from undergoing examinations that might result in a medically necessary transfer.

⁸⁶ 9 OSHC at 1010, n. 1.

⁸⁷ Id. at 1018.

"condition of employment."⁸⁸ And, going further, the Commission held that even where, as in C.R. Burnett, the cited hazard was not strictly a condition of employment, the Act applies if the hazard "bears a 'direct relationship to employment.'"^{88a}

Thus, the Commission's express holding in C.R. Burnett cannot be reconciled with its conclusion in this case that the Act applies only to "work processes and materials." What is more, under the test adopted in C.R. Burnett ("direct relationship to employment"), it is clear that the hazard at issue in this case is cognizable under the Act. Indeed, the same result would follow even under the test that the Commission rejected as unduly stringent ("condition of employment").⁸⁹

3. As this discussion indicates, the Commission's attempt to narrow the reach of the Act to "work processes and materials"

⁸⁸ Ibid. In the case of a temporary labor camp, the Commission stated that the "condition of employment" test would be met "if employees are expressly or, by circumstance, constructively required to live in the camp." Ibid.

^{88a} Ibid.

⁸⁹ C.R. Burnett involved a specific standard, 29 C.F.R. § 1910.142, rather than the general duty clause. But standards, like hazards that are cited under the general duty clause, must be directed to "employment and places of employment." Compare § 3(8), 29 U.S.C. § 652(8), with § 5(a)(1), 29 U.S.C. § 654(a)(1). Thus the holding in C.R. Burnett is fully applicable here. And, as the Commission noted in C.R. Burnett, the construction of the Act articulated in that case had previously been adopted in Sugar Cane Growers Cooperative of Florida, 4 OSHC 1320 (1976), in which the Commission held that the general duty clause required an employer to protect the safety of farm workers while they were driven to and from the fields in employer-provided trucks. See C.R. Burnett, 9 OSHC at 1014-1015, 1018.

would, if accepted, seriously undermine the ability of the statute to achieve the purpose set by Congress. To be sure, the vast majority of employment hazards do involve work processes and materials. But there are significant employment hazards that do not fit into that mold. To take only one example, serious hazards have frequently been found to be present in worksite facilities such as lavatories, lunchrooms and shower rooms. These do not involve "work processes and materials," yet we expect even Cyanamid would concede that such hazards are within the scope of the Act. Indeed, they are the subject of a specific standard that has been adopted by the Secretary. See 29 C.F.R. § 1910.141.⁹⁰

This case presents another type of hazard which, albeit fortunately less common, is as insidious as any "work process or material" -- an attempt by an employer to "control" exposure to a chemical by tampering with employees' bodies. In addition to the sterilization policy at issue in this case, such "control" techniques have been implemented by certain employers in at least one other related context, which provides an apt illustration of the kinds of practices that might be exempt from the reach of the Act if the Commission's new doctrine of "work processes and materials" were to be upheld.

⁹⁰ Similarly, even outside the workplace, certain facilities or services provided by the employer, which employees are expected to use, can present serious hazards that the Commission has acknowledged to be within the scope of the Act, such as the housing provided in C.R. Burnett and the transportation provided in Sugar Cane Growers, supra note 89.

In promulgating the standard regulating occupational exposure to lead, the Secretary learned that numerous employers were engaging in the practice of "prophylactic chelation," whereby chemical agents were routinely administered to employees in order to keep their blood lead levels from rising, despite the fact that the chelating agents produced severe side effects such as nervousness, nausea and increased blood pressure, and despite the consensus of medical experts that prophylactic chelation is an unacceptable procedure. See 43 Fed. Reg. 53001-53004 (Nov. 14, 1978). Confronted with this grave problem, the Secretary determined that employers should be prohibited from having prophylactic chelation performed, "whatever the setting," be it at the workplace or in a hospital. Id. at 53002.⁹¹ The Secretary therefore promulgated in the lead standard a provision which requires that "[t]he employer shall assure that any person whom he retains, employs, supervises or controls does not engage in prophylactic chelation of any employee at any time." 29 C.F.R. § 1910.1025 (j)(4)(i).

Like the sterilization policy at issue here, the chelation practices prohibited by the lead standard (i) do not involve "work processes and materials," (ii) generally take place outside the workplace, and (iii) generally involve employee "consent" given in order to retain one's job. Not even the

⁹¹ Although chelation was performed in some workplaces, it was often performed at a physician's office or in a hospital. See id. at 53002, 53004.

lead industry, in its broad-scale assault on the lead standard in this Court, suggested that the Act could not apply to such practices. See United Steelworkers v. Marshall, supra. Yet if the Commission's attempt to narrow the scope of the Act to "work processes and materials" were to prevail, OSHA's ability to regulate practices such as prophylactic chelation would be severely impeded.

Thus, the construction of the Act announced by the Commission in this case is not only without foundation in the statute (pp. 24-31, supra), but is based on an unsound analysis, is inconsistent with prior Commission decisions, and is pernicious in its ramifications. It should be rejected.

D. Cyanamid's Attempt to Justify the Sterilization Policy As a Means of Protecting Potential Fetuses Is Not Before the Court for Consideration At This Time.

We have shown that the Commission erred in granting summary judgment to Cyanamid and in vacating the citation at issue here. One further point warrants discussion.

We recognize that Cyanamid seeks to defend its sterilization requirement as a "Fetus Protection Policy." The Commission and the courts have held that in some cases an employer can defend against a citation by showing that abatement of the cited hazard would result in a greater hazard. See, e.g., Russ Kaller, Inc. (Surfa-Shield), 4 OSHC 1758 (R.C. 1976); Greyhound Lines-West v. Marshall, 575 F.2d 759, 762

(9th Cir. 1978); PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 895 (1st Cir. 1981). It is unsettled whether the burden of proof on that issue in a general duty clause case rests with the Secretary or the employer.⁹² Nor do we know of any case that addresses the question whether an employer-created hazard to employees can ever be justified under the Act by a showing that the challenged practice reduces a potential hazard to fetuses. The critical point to be made, however, is that it is not necessary to address those thorny issues here, because they are not presented at this stage in the litigation.

⁹² In Royal Logging Co., 7 OSHC 1744, 1751 (1979), the Commission stated:

[E]vidence concerning hazards created by a proposed abatement method in a case arising under [the general duty clause] . . . is relevant in determining feasibility [of abatement] but is properly part of [the employer's] case in rebuttal. That is, [the Secretary] need only prove that an abatement method exists that would provide protection against the cited hazard. The burden then shifts to the employer to produce evidence showing or tending to show that use of the method or methods established by [the Secretary] will cause consequences so adverse as to render their use infeasible.

On appeal the Ninth Circuit, while stating that it agreed with the Commission's approach, described the burden of proof in different terms: "the Secretary bears the burden of showing that the proposed safety measure will not result in a greater hazard as part of his obligation to demonstrate feasibility." Donovan v. Royal Logging Co., 645 F.2d 822, 830 (9th Cir. 1981). Although we believe that the burden of proof with respect to such issues should lie with the employer, we do not address that issue here, nor do we address the question whether the Commission and/or the Ninth Circuit properly conceptualized the role that proof of a "greater hazard" should play in a case under the general duty clause; for, as we explain in the text, such issues are not presented for review in this case.

Although the Company argued to the ALJ that its policy should be upheld on the merits as "an appropriate method of preventing exposure to a recognized hazard [to fetuses] in the workplace,"⁹³ neither the ALJ nor the Commission ruled on the question whether the policy's alleged protection of fetuses would render the policy lawful if it otherwise fell within the sanctions of the Act. Instead, the ALJ and the Commission held as a threshold proposition that the policy was not cognizable as a violation of the Act irrespective of its purpose or its effect on the protection of fetuses.

What is more, the issues relating to the "appropriateness" of Cyanamid's policy are not ripe for resolution in any event, because the pertinent facts are in dispute. For example, OCAW and the Secretary have strongly maintained that in adopting the sterilization policy "Cyanamid chose the easy way out" of dealing with any potential harm to fetuses that might result from exposure to lead.⁹⁴ Specifically, OCAW and the Secretary have maintained that in no circumstances should the Company have required employees to undergo surgical sterilization, because any risk to potential fetuses could have been adequately reduced by a number of other control techniques, such

⁹³ Respondent's Motion For Summary Judgment, p. 13.

⁹⁴ See Tr. 81 (JA 229) (statement of OCAW representative Steven Wodka). With respect to the Company's failure to explore alternatives other than its sterilization requirement, see also pp. 9-10, supra.

as reducing the concentrations of lead in the workplace⁹⁵ and implementing medical surveillance and training programs⁹⁶.

If the Company wishes to dispute these contentions, it will have to do so at an evidentiary hearing; the present state of the record certainly does not provide a basis for resolving such matters in the Company's favor.⁹⁷

⁹⁵ In the preamble to the 1978 Lead Standard, OSHA had this to say with respect to industry arguments that exclusion of fertile women is the only way to protect fetal health where lead is present in the workplace:

The lead industry . . . did not believe a standard could or should be promulgated which would protect the fetus. The [industry] disregards, however, the role that the standard's special protective measures can play in protecting reproductive capacity consistent with continued employment of all people. The impact of the typical industry approach would ultimately lead to the exclusion of women of childbearing age from the workplace.

OSHA disagrees with the [industry] conclusions and believes that the final standard can protect reproductive capacity of the parent, which in turn will protect the fetus. The agency has endeavored to set a comprehensive standard which will maximize protection to the male and female worker, to the fetus and to the offspring of workers. OSHA recognizes that not all risk can be entirely eliminated given the constraints of feasibility, but the final standard does effectively minimize reproductive risks. With this in mind, OSHA asserts that an employer who fully complies with this standard has no rational basis for the exclusion of women of childbearing age from the workplace. [43 Fed. Reg. 54424 (Nov. 21, 1978); see also id. at 52966.]

⁹⁶ See, e.g., JA 192, 194-195, 202-207, 221, 226-229.

⁹⁷ The justification asserted by Cyanamid for its policy is further clouded by the fact that OSHA has found that exposure of males to certain levels of lead can affect the sperm in such a way as to cause harm to the fetus. See 43 Fed. Reg. 52959-52960 (Nov. 14, 1978). Yet Cyanamid's sterilization policy only applies to women.

We are hard-pressed to comprehend how the facts in this case could ever support a conclusion that Cyanamid's sterilization policy is statutorily protected because of its alleged benefits to potential fetuses. At the very least, however, the record does not permit the factual findings upon which any such conclusion could possibly be based.

CONCLUSION

For the reasons set forth above, the petition for review should be granted, the Commission's order should be set aside, and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief for
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