

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,

and

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

Petitioners,)

V.

Respondent.)

No. 81-1687

BRIEF FOR RESPONDENT
AMERICAN CYANAMID COMPANY

Donald L. Morgan
Charles F. Lettow
Mark N. Duvall
W. Richard Bidstrup
CLEARY, GOTTLIEB, STEEN & HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

Counsel for
American Cyanamid Company

January 24, 1983

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,	)	
	)	No. 81-1687
Petitioners,	)	
	)	
v.	)	
	)	
AMERICAN CYANAMID COMPANY,	)	
	)	
Respondent.	)	
	)	
	)	

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 Respondent American Cyanamid Company, certifies that the following listed parties appeared below: the Secretary of Labor, complainant; American Cyanamid Company, respondent; Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW"), authorized employee representative; and the Coalition for the Reproductive Rights of Workers ("CRROW"), non-party intervenor.

American Cyanamid Company has no parent company. The following is a list of its affiliates and subsidiaries:

Agustin A. Balaguer & Cia., Ltda.
 Andora, S. A.
 Arizona Chemical Company
 Arizona Chemical Overseas Corporation
 Arizona Chemical Service Corp.
 Auxiliary Carrier, Inc.
 Bartley Coaters Limited
 B.T.I. Chemicals (Estates) Limited
 B.T.I. Chemicals Limited
 Berdan Associates, Inc.
 Berdan Enterprises Co., Ltd.
 B. Braun--Dexon GmbH
 B. Braun--Dexon S.A.
 John H. Breck (Bermuda) Limited
 Brewster Phosphates (a Partnership)
 Burden Properties, Inc.
 Burford Fertilizers Limited
 The Catalyst Company (a Partnership)
 Ceresdale Fertilizers Limited
 Chemacryl Plastics Limited
 Jacqueline Cochran, Inc.
 Colfax Laboratories (India) Private Limited
 Consort Laminates Limited
 Cyanamid Agricultural de Puerto Rico, Inc.
 Cyanamid Agricultural Research Foundation, Inc.
 Cyanamid Australia Pty. Limited
 Cyanamid B.V.
 S. A. Cyanamid Benelux N. V.
 Cyanamid Borinquen Corporation
 Cyanamid Canada Inc.
 Cyanamid Chimica Italiana S.r.l.
 Cyanamid de Argentina S. A.
 Cyanamid de Argentina S.A.I.C.
 Cyanamid de Colombia, S. A.
 Cyanamid de Mexico, S. A. de C. V.
 Cyanamid de Venezuela, C. A.
 Cyanamid (Far East) Limited
 Cyanamid Finance N. V.
 Cyanamid Fothergill Limited
 Cyanamid Foundation for Agricultural Development
 Cyanamid Ges.mbh
 Cyanamid GmbH
 Cyanamid GmbH & Co. Grundstucks KG
 Cyanamid Holdings Limited
 Cyanamid Iberica S. A.
 Cyanamid India Limited
 Cyanamid Inter-American Corporation
 Cyanamid International Corporation
 Cyanamid International Sales Corporation
 Cyanamid Italia S.p.A.
 Cyanamid (Japan) Ltd.

Cyanamid-Ketjen Katalysator B. V.
 Cyanamid-Korea, Inc.
 Cyanamid-Lederle, Inc.
 Cyanamid Metals Corporation
 Cyanamid Nordiska AB
 Cyanamid of Great Britain Limited
 Cyanamid of New Zealand Limited
 Cyanamid Overseas Corporation
 Cyanamid (Pakistan) Limited
 Cyanamid Peruana S. A.
 Cyanamid Philippines, Inc.
 Cyanamid Plastics, Inc.
 Cyanamid (Portugal) Limited
 Cyanamid Quimica do Brasil Ltda.
 Cyanamid Realty Corporation
 Cyanamid S. A.
 Cyanamid Specialties Corporation
 Cyanamid Taiwan Corporation
 Cyanamid Thailand Limited
 Cyanamid Transnational Corporation
 Cyanamid Unterstutzungshasse GmbH
 Cyanamid Verwaltungs GmbH
 Cyanamire S.r.l.
 Cyankenka S. A.
 Cyminex Corporation
 CYRO Industries (a Partnership)
 Cysol (a Partnership)
 Davis & Geck Australia Pty. Limited
 Davis & Geck, Inc.
 Decorative Boards (Proprietary) Limited
 Delta Explosives Ltd.
 DIA Holdings Ltd.
 Dimminaco A.G./S.A./Ltd.
 Dumas Milner Commercial e Industrial, Limitada
 Dumas Milner de Venezuela, S. A.
 Dumas Milner International, Inc.
 Epoque Distributors, Inc.
 FLK Holdings, Inc.
 Societe Anonyme Formica
 Formica (Asia) Limited
 S. A. Formica Belgium N. V.
 Formica Corporation
 Formica Espanola S. A.
 Formica GmbH & Co. KG (a limited partnership)
 Formica Holdings Limited
 Formica Limited
 Formica Maghreb
 Formica (Nederland) B. V.
 Formica New Zealand Limited
 Formica of Canada (1972) Limited
 Formica Plastics A. G.
 Formica Plastics Pty. Limited

Formica Scandinavia A. B.
 Fortec A. G.
 General Insurance Co. Limited
 Glendale Optical Co., Inc.
 Hopewell International Company Ltd.
 Kent County Fertilizers Limited
 Koch Processes, Ltd.
 La Prairie, Inc.
 Laboratoires La Prairie, S. A.
 Laboratoires Lederle S.A.
 Laboratorios Layre Limitada
 Laminate Industries (Proprietary) Limited
 Lederle (Japan), Ltd.
 Lederle Laboratories (Pty.) Limited
 Lederle Limited
 Lederle Manufacturing Company, Inc.
 Lederle Nederland B. V.
 Lederle (Nigeria) Limited
 Lederle Parenterals, Inc.
 Lederle Pharmaceuticals, Inc.
 Lederle Piperacillin, Inc.
 Les Engrais Chimeques Levis Limitee
 (Levis Chemical Fertilizers Limited)
 Les Engrais Chimiques Victoria Limitee
 (Victoria Chemical Fertilizers Limited)
 Les Engrais Ideal Limitee
 (Ideal Fertilizers Limited)
 Les Engrais Paysan Limitee
 (Country Fertilizers Limited)
 Les Engrais Saint-Gregoire Inc.
 Maelstrom Properties, Inc.
 Mitsui-Cyanamid Limited
 Molecular Genetics, Inc.
 Nitine, Inc.
 Nitine Limited
 North American Medical Research Corporation
 Parfums Francais S.r.l.
 Parfums de Prestige International
 Porcelain and Metal Holdings Limited
 Porcelain and Metal Products Limited
 Prestige Perfumes International Proprietary Limited
 Rainbow Chemicals Limited
 Ralph Dale Fertilizers Limited
 Reservoir Properties, Inc.
 Scotch Fertilizers (Glencoe) Limited
 Sherkat Sahami Cyanamid - KBC
 Shulton Africa Limited
 Shulton (Australia) Proprietary Limited
 Shulton B. V.
 Shulton Canada Inc.
 Shulton Cosméticos do Brasil Ltda.
 Shulton de Mexico, S.A.

Shulton de Venezuela, S. A.
Shulton (Far East) Private Limited
Shulton GmbH
Shulton GmbH & Co. OHG
Shulton (Great Britain) Limited
Shulton, Inc.
Shulton Limitada
Shulton (New Zealand) Limited
Shulton Panama S. A.
Shulton (Philippines) Inc.
Compania Comercial e Industrial Shulton
Sociedad Anonima
Shulton Services Pty. Limited
Shulton South Africa (Proprietary) Limited
Shulton (Thailand) Limited
Skyway Fertilizers Limited
Sociedad Industrial, Comercial
Cyanamid Chile Limitada
Societe Anonyme des Produits Industriels Formica
Societe des Aiguilles Suturex (S.A.R.L.)
Societe des Sutures Chirurgicales Robert &
Carriere-Lederle
South African Cyanamid (Proprietary) Limited
Sutumex, S. A. de C. V.
Takeda Italia, S.p.A.
TDF Tiofine B. V.
Tiofine Pigmente GmbH
Toiletries, Inc.
United Insurance Company
Wasco Consolidated S. A.
YuHan-Cyanamid, Inc.

Petitioner OCAW takes the position that the order under review should be reversed, as does CRROW, which has been given leave to file a brief as amicus curiae. Respondent American Cyanamid Company takes the position that the order under review should be affirmed, as does the Washington Legal Foundation, which has today filed a motion for leave to file a brief as amicus curiae. The Secretary of Labor has declined to take a position with respect to the merits of the order under review.

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

Donald L. Morgan (und)

DONALD L. MORGAN

Attorney of record for Respondent
American Cyanamid Company

TABLE OF CONTENTS

	<u>Page</u>
RULE 8(c) STATEMENT.....	i
TABLE OF AUTHORITIES.....	viii
STATEMENT OF ISSUE PRESENTED.....	xv
RULE 8(b) STATEMENT.....	xvi
REFERENCE TO PARTIES AND RULINGS.....	xvi
STATEMENT OF THE CASE.....	1
A. Introduction.....	1
B. The Citation.....	2
C. Statement of Facts and Circumstances.....	6
1. The Fetus Protection Policy.....	6
2. Material facts here.....	18
D. Proceedings Below.....	21
SUMMARY OF ARGUMENT.....	24
ARGUMENT.....	25
I. THE EXCLUSION OF WOMEN OF CHILDBEARING CAPACITY FROM CERTAIN JOBS IS NOT ADDRESSED BY THE OSH ACT.....	25
A. The Act Is Not Infinite in Its Scope.....	26
B. The Allegations of the Citation Would Be Significant Only Under A Different Statute.....	36
II. IT IS UNREASONABLE TO CONCLUDE THAT THE ACT BARRED THE COMPANY FROM PROTECTING THE FETUS FROM EXCESS EXPOSURE TO LEAD.....	42
CONCLUSION.....	50
STATUTORY APPENDIX.....	following conclusion

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
A. Prokosch & Sons Sheet Metal, Inc., 8 O.S.H. Cas. (BNA) 2077 (Rev. Comm. 1980).....	50
AFL-CIO v. Marshall, 187 U.S. App. D.C. 121, 570 F.2d 1030 (1978).....	27
AFL-CIO v. Marshall, 199 U.S. App. D.C. 54, 617 F.2d 636 (1979).....	28
American Cyanamid Co., 1980 O.S.H. Dec. (CCH) ¶ 24,828 (ALJ 1980).....	10, 18, 49
American Smelting & Refining Co. v. OSHRC, 501 F.2d 504 (8th Cir. 1974).....	12
American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981).....	14, 26
Amoco Oil Co. v. EPA, 163 U.S. App. D.C. 162, 501 F.2d 722 (1974).....	7
Baltimore & Ohio Railroad Co. v. OSHRC, 179 U.S. App. D.C. 97, 548 F.2d 1052 (1976).....	33
Baroid Div. of NL Industries, Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981).....	49
Bloomfield Mechanical Contracting, Inc. v. OSHRC, 519 F.2d 1257 (3d Cir. 1975).....	3
Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082 (7th Cir. 1975).....	3
Brisk Waterproofing Co., 1 O.S.H. Cas. (BNA) 1263 (Rev. Comm. 1973).....	50
C.R. Burnett & Sons, Inc., 9 O.S.H. Cas. (BNA) 1009 (Rev. Comm. 1980).....	33, 34, 35
Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913 (3d Cir. 1980).....	33
* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).....	31, 32, 33

Doerr v. B.F. Goodrich Co., 484 F. Supp. 320 (N.D. Ohio 1979).....	37
Dravo Corp., 3 O.S.H. Cas. (BNA) 1085 (Rev. Comm. 1975).....	4
Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978).....	45
Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 541 F.2d 1 (en banc), cert. denied sub nom. E.I. du Pont de Nemours & Co. v. EPA, 426 U.S. 941 (1976).....	7
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980).....	29
Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).....	30
Howard Electric Co., 6 O.S.H. Cas. (BNA) 1518 (Rev. Comm. 1978).....	4
Koppers Co., 2 O.S.H. Cas. (BNA) 1354 (Rev. Comm. 1974).....	26
Lead Industries Ass'n, Inc. v. EPA, 208 U.S. App. D.C. 1, 647 F.2d 1130, cert. denied, 449 U.S. 1042 (1980).....	7
Montana Power Co. v. FPC, 144 U.S. App. D.C. 263, 445 F.2d 739 (1970) (en banc), cert. denied, 400 U.S. 1013 (1971).....	30
National Petroleum Refiners Ass'n v. FTC, 157 U.S. App. D.C. 83, 482 F.2d 672 (1973), cert. denied, 415 U.S. 951 (1974).....	29
National Realty & Construction Co. v. OSHRC, 160 U.S. App. D.C. 133, 489 F.2d 1257 (1973).....	13, 50
OCAW v. OSHRC, ___ U.S. App. D.C. ___, 671 F.2d 643, cert. denied sub nom. American Cyanamid Co. v. OCAW, 102 S. Ct. 2230 (1982).....	2
Organized Migrants in Community Action, Inc. v. Brennan, 172 U.S. App. D.C. 147, 520 F.2d 1161 (1975).....	44
PBR, Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981).....	33

Southern Ohio Building Systems, Inc. v. OSHRC, 649 F.2d 456 (6th Cir. 1981).....	50
Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).....	32
Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976).....	33
Sugar Cane Growers Cooperative of Florida, 4 O.S.H. Cas. (BNA) 1320 (Rev. Comm. 1976).....	33, 35
Ted Wilkerson, Inc., 9 O.S.H. Cas. (BNA) 2012 (Rev. Comm. 1981).....	49
Thomas A. Galante & Sons, Inc., 7 O.S.H. Cas. (BNA) 2232 (ALJ 1979).....	4
U.S. Air, Inc. v. OSHRC, 689 F.2d 1191 (4th Cir. 1982).....	33
United States Lines, Inc. v. Baldrige, ____ U.S. App. D.C. ____, 677 F.2d 940 (1982).....	29
United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975).....	3
* United Steelworkers of America, AFL-CIO-CLC v. Marshall, 208 U.S. App. D.C. 60, 647 F.2d 1189 (1980), cert. denied sub nom. Lead Industries Ass'n, Inc. v. Donovan, 453 U.S. 913 (1981).....	6, 7, 10 11, 43
Wean United, Inc., 7 O.S.H. Cas. (BNA) 2086 (ALJ 1979).....	4
Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).....	30
* Wright v. Olin Corp., 30 Fair Empl. Prac. Cas. (BNA) 889 (4th Cir. Dec. 23, 1982).....	14, 37, 45
Zuniga v. Kleberg County Hospital, 30 Fair Empl. Prac. Cas. (BNA) 650 (5th Cir. Dec. 6, 1982).....	37, 45

Statutes:

Atomic Energy Act of 1954

Section 103(b), 42 U.S.C. § 2133(b)..... 45

Civil Rights Act of 1964, Title VII, 42 U.S.C.

§ 2000e et seq..... 23, 29

Federal Insecticide, Fungicide and Rodenticide Act,

7 U.S.C. § 136 et seq..... 44

National Labor Relations Act..... 23

Occupational Safety and Health Act

Section 2, 29 U.S.C. § 651..... 27

Section 2(b), 29 U.S.C. § 651(b)..... 27, 50

Section 2(b)(1), 29 U.S.C. § 651(b)(1)..... 28

Section 2(b)(4), 29 U.S.C. § 651(b)(4)..... 28

Section 2(b)(6), 29 U.S.C. § 651(b)(6)..... 28

Section 4(b)(1), 29 U.S.C. § 653(b)(1)..... 22, 23

Section 5(a)(1), 29 U.S.C. § 654(a)(1)..... 2, 6

Section 6(b)(5), 29 U.S.C. § 655(b)(5)..... 28

Section 9(c), 29 U.S.C. § 658(c)..... 3, 23

Section 11(c), 29 U.S.C. § 660(c)..... 16

Section 12(a), 29 U.S.C. § 661(a)..... 37

Section 17(k), 29 U.S.C. § 666(j)..... 28

Section 20(a)(2), 29 U.S.C. § 669(a)(2)..... 49

Section 22(c)(1), 29 U.S.C. § 671(c)(1)..... 49

Pregnancy Discrimination Act, 42 U.S.C § 2000e(k)..... 29

Regulations:

29 C.F.R. § 1603.2(d)(3).....	41
29 C.F.R. § 1603.2(d)(8).....	41
29 C.F.R. § 1604.10(a).....	43
29 C.F.R. § 1903.14(a).....	3
29 C.F.R. § 1910.5(f).....	49
29 C.F.R. § 1910.1000(b)(1).....	7
29 C.F.R. § 1910.1025.....	7
29 C.F.R. § 1910.1025(k).....	14

Federal Register:

40 Fed. Reg. 799 (January 3, 1975).....	49
43 Fed. Reg. 47780 (October 17, 1978).....	45
43 Fed. Reg. 52952 (November 14, 1978).....	7, 8, 10, 12 13, 14, 35, 39
43 Fed. Reg. 54354 (November 21, 1978).....	7, 8, 9 13, 15, 40
44 Fed. Reg. 11111 (February 27, 1979).....	45
44 Fed. Reg. 23804 (April 20, 1979).....	45
44 Fed. Reg. 66558 (November 19, 1979).....	49
45 Fed. Reg. 7514 (February 1, 1980).....	7, 41, 42
45 Fed. Reg. 45362 (July 3, 1980).....	47
46 Fed. Reg. 3916 (January 16, 1981).....	42
46 Fed. Reg. 6134 (January 21, 1981).....	11
46 Fed. Reg. 7836 (January 23, 1981).....	49
46 Fed. Reg. 60758 (December 11, 1981).....	11
47 Fed. Reg. 46884 (October 21, 1982).....	46

Legislative History:

Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5228.....	3
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 4749.....	29
S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5177.....	30

EEOC Decisions:

EEOC Dec. (CCH) ¶ 6443 (October 29, 1974).....	41
EEOC Dec. (CCH) ¶ 6442 (November 14, 1974).....	41

Miscellaneous:

EEOC, Statement on Hazardous Substances and Equal Employment Opportunity (April 21, 1978).....	40
In the Matter of an Arbitration between Local 194, Association of Western Pulp and Paper Workers, and Georgia-Pacific Corporation (Pulp), Case No. 133-1979 (Oct. 16, 1980).....	40
Letter of Eula Bingham addressed to "Dear Corporate Medical Director" (May 1, 1978).....	39
NIOSH, Recommended Occupational Health Standard for the Manufacture of Synthetic Polymer from Vinyl Chloride (1974).....	47
OSHA Industrial Hygiene Manual, O.S.H. Rep. (BNA) Reference File 77:8001.....	35
OSHA Instruction CPL 2.50 (March 17, 1982) O.S.H. Rep. (BNA) Reference File 21:8279.....	35, 49, 50
6 Chem. Reg. Rep. (BNA) 1077 (1982).....	46
3 O.S.H. Rep. (BNA) 170 (1973).....	37
4 O.S.H. Rep. (BNA) 1586 (1975).....	40

7 O.S.H. Rep. (BNA) 1732	
(1978).....	40
9 O.S.H. Rep. (BNA) 384 (1979).....	40

* Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF THE ISSUE PRESENTED

Whether the Occupational Safety and Health Review Commission correctly held that a citation alleging maintenance of an employment policy of excluding women employees of child-bearing capacity from jobs where they would be exposed to lead at levels harmful to the fetus, which policy allegedly might have encouraged potential women employees to decide to have themselves medically sterilized so as to become eligible for those jobs, failed to state a violation cognizable under the general duty clause of the Occupational Safety and Health Act of 1970, 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. OCAW v. OSHRC, 671 F.2d 643 (D.C. Cir.), cert. denied sub nom. American Cyanamid Co. v. OCAW, 102 S. Ct. 2230 (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 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 Review Commission's decision is reported at 9 O.S.H. Cas. (BNA) 1596 and is reprinted in the Joint Appendix ("JA") at pp. 504-16.

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.)

No. 81-1687

BRIEF FOR RESPONDENT
AMERICAN CYANAMID COMPANY

STATEMENT OF THE CASE

A. Introduction

This case involves a petition for review of a decision by the Occupational Safety and Health Review Commission ("OSHRC" or the "Review Commission") dismissing a citation issued by the Secretary of Labor (the "Secretary") to respondent American Cyanamid Company ("American Cyanamid" or the "Company"). The petition for review is not brought by the Secretary, who has not challenged the Review Commission's decision, but rather by an intervenor in the proceedings before the Review Commission, petitioners Oil, Chemical and Atomic Workers International Union and

its Local 3-499, Oil, Chemical and Atomic Workers ("OCAW").^{1/}

The citation is facially ambiguous. The Secretary's statements in the proceedings below, however, clarified that the citation should be construed to charge that American Cyanamid violated the general duty clause of the Occupational Safety and Health Act of 1970 (the "OSH Act" or the "Act") by maintaining a policy of excluding women employees of childbearing capacity from jobs where they would be exposed to lead at levels harmful to the fetus, which policy allegedly might have led potential women employees to decide to have themselves medically sterilized so as to become eligible for these jobs. The Administrative Law Judge ("ALJ") vacated the citation upon the Company's motion for summary judgment and the Review Commission affirmed, on the ground that the citation failed to allege a violation cognizable under the Act. OCAW, but not the Secretary, chose to petition for review of the Review Commission's decision.

B. The Citation

On October 9, 1979 the Occupational Safety and Health Administration ("OSHA") issued to American Cyanamid the citation which is the subject of this case. JA 1. It alleged that the Company had violated section 5(a)(1) of the Act (i.e., the general duty clause, 29 U.S.C. § 654(a)(1)) during an OSHA inspection of

^{1/} This Court dismissed American Cyanamid's objection that OCAW is not a proper party to petition for review of the Review Commission's order. OCAW v. OSHRC, 671 F.2d 643 (D.C. Cir.), cert. denied sub nom. American Cyanamid Co. v. OCAW, 102 S. Ct. 2230 (1982).

its plant at Willow Island, West Virginia. Specifically, the citation provided:

The violations described in this citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: 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

The alleged violation was to be corrected "immediately". It was classified as "willful" and a penalty of \$10,000 was proposed. The citation also indicated that the inspection date was "1/4 - 4/13/79", and that the date of issuance of the citation was "10/9/79".

Section 9(c) of the Act establishes a six-month statute of limitations for violation of the Act.^{2/} Thus, the period

^{2/} Section 9(c), 29 U.S.C. § 658(c), provides: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." OSHA's regulations contain a parallel provision. See 29 C.F.R. § 1903.14(a). The legislative history of section 9(c) demonstrates that the provision is a statute of limitations and that citations for alleged violations that occurred more than six months before issuance of the citation are barred. See Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. 38 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5228, 5234. The courts of appeals have regarded section 9(c) as an absolute bar with respect to violations occurring more than six months prior to issuance of the citation. See, e.g., Bloomfield Mechanical Contracting, Inc. v. OSHRC, 519 F.2d 1257, 1261-62

(Footnote continued)

covered by the citation includes only the five-day period from April 9, 1979 (the first day of the six-month period prior to the date the citation issued) through April 13, 1979 (the last day of the OSHA inspection during which the alleged violation is said to have occurred). This circumstance is important for an understanding that all material facts pertaining to the citation concern this five-day period and not any period prior thereto. In their briefs OCAW and amicus curiae the Coalition for the Reproductive Rights of Workers ("CRROW") allege various unsubstantiated facts concerning actions that occurred in late 1977 and early 1978, more than a year before the period covered by the citation. While American Cyanamid vigorously disputes the facts alleged by OCAW and CRROW, those disputes need not be resolved because those issues of fact are not material to this case, which necessarily concerns only the allegations of the citation.

The citation refers to but mischaracterizes American Cyanamid's Fetus Protection Policy. This employment policy was adopted in 1977 and implemented in 1978.^{3/} It precluded women

(Footnote continued from previous page)

(3d Cir. 1975); Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082, 1084 (7th Cir. 1975); United States v. Dye Construction Co., 510 F.2d 78, 82-83 (10th Cir. 1975). The Review Commission has vacated citations on the basis that section 9(c) barred the citation. See Thomas A. Galante & Sons, Inc., 7 O.S.H. Cas. (BNA) 2232, 2233 (ALJ 1979); Wean United, Inc., 7 O.S.H. Cas. (BNA) 2086 (ALJ 1979); Dravo Corp., 3 O.S.H. Cas. (BNA) 1085 (Rev. Comm. 1975); cf. Howard Electric Co., 6 O.S.H. Cas. (BNA) 1518, 1519 n.5 (Rev. Comm. 1978).

^{3/} See Letter from Donald L. Morgan to Michael S. Berger (March 20, 1980) at 2-11, attached as Exhibit C to Appendix B of the Memorandum of the Secretary in Opposition to Respondent's

(Footnote continued)

employees aged 16 to 50 of presumed childbearing capacity from being assigned to, bidding into, or holding production jobs at the Company's Willow Island plant where they would be occupationally exposed to certain toxic substances at levels considered unsafe for a fetus. Its potentially exclusive effect was reduced by a provision that an employee of presumed childbearing capacity could avoid exclusion by showing that her ability to become pregnant had been precluded by surgical means.^{4/} During the period covered by the citation it is undisputed that the only toxic material covered by the policy at the Willow Island plant was lead;^{5/} that the only area of the plant affected by the policy was the Inorganic Pigments Department;^{6/} and that no women of childbearing capacity were then employed in the Inorganic Pigments Department.^{7/}

(Footnote continued from previous page)

Motion for Summary Judgment filed with the ALJ, JA 439-52 (hereinafter "Morgan Letter").

4/ See ALJ decision at 4-5, JA 456-57; Commission decision at 1597, JA 505.

5/ The ALJ found that the "certain toxic substance" referred to in the citation was lead. ALJ decision at 3 n.6, JA 455. See id. at 4, JA 456; Commission decision at 1597, JA 505; Tr. 110, JA 258.

6/ See Commission decision at 1597, JA 505. The citation is restricted by its own terms to the Inorganic Pigments Department, Buildings No. 85 and 86. There American Cyanamid manufactured lead chromate pigments, among other products.

7/ See Commission Decision at 1597, JA 505; ALJ decision at 7, JA 459.

C. Statement of Facts and Circumstances^{8/}

1. The Fetus Protection Policy

The Court may take judicial notice that during the 1970's, American women entered the industrial workforce in large numbers for the first time, other than temporarily during World War II. This influx of women presented a novel occupational health issue: the potential presence of a fetus in a workplace where it may be seriously harmed by the mother's exposure to toxic materials. The risk of harm to the fetus was substantial, since it is well-established that a fetus is far more sensitive to many toxic materials than is an adult.

American Cyanamid adopted and implemented an exclusionary employment policy to address this risk of harm to the fetus,^{9/}

^{8/} American Cyanamid offers this statement of facts and circumstances not because it believes that each fact is material; on the contrary, the material facts are few and undisputed. Rather, the Company offers this statement to provide the Court with background so that it may understand how this highly unusual citation came to be issued, what this case really concerns, and why the only material facts are undisputed. Because of the procedural history of this case, not all of the facts were developed in detail in the proceedings before the Review Commission.

^{9/} Employers are morally obligated to protect unborn children potentially in their workplaces. In addition, employers are arguably required to protect the fetus under the general duty clause of the Act, section 5(a)(1), 29 U.S.C. § 654(a)(1), which 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.

This Court has indicated that the protections of the Act extend to a fetus carried by an employee:

We find OSHA's contention that it has statutory author-

(Footnote continued)

as did a number of other employers.^{10/} As indicated above, during the period covered by the citation, at the Willow Island plant the Company's Fetus Protection Policy applied only to lead.^{11/}

American Cyanamid's concern with the fetal effects of lead was well-founded, as the record in this proceeding shows.^{12/} Among other things, the preamble to the lead standard, 43 Fed.

(Footnote continued from previous page)

ity to protect the fetuses of lead exposed working mothers to be unassailable. Harm to fetuses, as OSHA contends, is a material impairment of the reproductive system of the parents.

United Steelworkers of America, AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1256 n.96 (D.C. Cir. 1980), cert. denied sub nom. Lead Industries Ass'n, Inc. v. Donovan, 453 U.S. 913 (1981) (hereinafter "Steelworkers"). That case concerned OSHA's "new" lead standard, 29 C.F.R. § 1910.1025 (hereinafter referred to as the "lead standard"), which replaced OSHA's "old" lead standard, 29 C.F.R. § 1910.1000(b)(1).

^{10/} In 1980 the Equal Employment Opportunity Commission ("EEOC") declared that it had become "aware of the increasing number of employers and contractors who are initiating policies excluding all women of childbearing capacity from certain jobs because of exposure to hazardous substances or conditions." 45 Fed. Reg. 7514 (February 1, 1980), copy attached as Attachment 5 to Respondent's Brief filed with the Review Commission, JA 495.

^{11/} See note 5, supra.

^{12/} This Court has previously reviewed on at least four occasions large administrative records concerning the hazards lead poses to adults, children, and the fetus. See Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied sub nom. E.I. du Pont de Nemours & Co. v. EPA, 426 U.S. 941 (1976); Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); Steelworkers, supra, 647 F.2d 1189 (D.C. Cir. 1980). In Steelworkers, for example, this Court found, inter alia, that "[t]he rulemaking produced ample evidence confirming the grave danger lead poses to prospective mothers and fetuses." 647 F.2d at 1256.

Reg. 52952 (November 14, 1978), and its attachment, 43 Fed. Reg.

54354 (November 21, 1978),^{13/} state:

"There is conclusive evidence that lead crosses the placenta of pregnant women and enters the fetal tissues; lead levels in the mother's blood are comparable to concentrations in the umbilical cord blood at birth OSHA . . . believes the fetus is highly vulnerable whatever the stage of development. The fetus is particularly susceptible to neurological damage. In addition, there may also be heme synthesis impairment and renal damage in the fetus." 43 Fed. Reg. at 52965-66, JA 335-36.

"Given the available data OSHA concludes that in order to protect the fetus and newborn from the effects of lead on the nervous system, blood lead levels must be kept below 30 ug/100g [micrograms of lead per 100 grams of whole blood]." 43 Fed. Reg. at 52960, JA 333.

"OSHA cannot guarantee that 30 ug/100 g is a 'no effect' level but it would provide marked protection to the fetus" 43 Fed. Reg. at 54422.

See generally 43 Fed. Reg. at 52959-60 (JA 332-33), 52965-67 (JA 334-36), 54386-98, 54421-24.

The lead standard preamble further established that elevated blood lead levels do not decline to a level of 30 ug/100g

^{13/} The Secretary has stipulated to the accuracy of the statements on the hazards lead poses to the fetus which appear in the preamble and attachment to the lead standard. See Commission decision at 1597 n.3, JA 505; Tr. 31-32, 35-36, 85, 100 (JA 179-80, 183-84, 233, 248); Complainant's Proposed Findings of Fact With Respect to the Adverse Effects of Lead on the Female and Male Reproductive Systems, JA 331-36; Respondent's First Request for Admissions by Complainant (hereinafter "Request for Admissions") at 2-4, JA 41-42; Complainant's Response to Respondent's Request for Admissions (hereinafter "Complainant's Admissions") at 1-3, JA 312-14.

immediately upon removal of an employee from exposure to lead, but rather require an extensive period of removal.^{14/}

The OSHA preamble also cited evidence, primarily a study by Dr. Iona Lancranjan, that lead may affect the reproductive capabilities of men. 43 Fed. Reg. at 54389. OSHA conceded that the Lancranjan study "engendered much criticism during the lead hearings." Id. at 54392. At most the study suggests that at blood lead levels significantly above those at which fetal effects can occur, male fertility may be temporarily reduced. (Dr. Lancranjan speculated in her testimony at the lead standard hearings that birth defects could occur from malformed sperm, but provided no support for this hypothesis.) This suspected temporary reduced fertility in men is clearly far less serious than, and different from, the severe permanent effects low levels of exposure to lead can cause in the fetus.

The Secretary has also stipulated^{15/} to the accuracy of the statements on the fetal effects of lead made by his own expert

^{14/} See 43 Fed. Reg. at 54468-69. OSHA estimated that a long-term lead worker would on average excrete lead at a rate of 3 ug/100g per month, assuming that the employee received absolutely no additional occupational exposure to lead. Individual rates of excretion could be much slower, and OSHA recognized that some employees would require 18 months or more to reduce their blood lead levels to 40 ug/100g, which is still 10 ug/100g greater than the maximum level acceptable for a fetus. This means that a woman employee occupationally exposed to lead might have a blood lead level substantially above 30 ug/100g during her entire pregnancy, even if she received no additional lead exposure after she realized she was pregnant.

^{15/} See Tr. 97, JA 245; Request for Admissions at 4-8 and Attachments 3-5, JA 43-47, 57-77.

witness, Dr. Edward L. Baker, in a related Review Commission proceeding.^{16/} Under cross examination by petitioner OCAW, Dr. Baker testified that lead is a fetal toxin, and that the fetal effects of lead begin at blood lead levels as low as 30 ug/100g, but that adverse effects of lead do not appear in adults until blood lead levels of 40 ug/100g or higher.^{17/}

The means of protecting the fetus from lead which OCAW suggested below as alternatives to the Fetus Protection Policy, Tr. 46-47, 54-59, 77-81, 113 (JA 194-95, 202-07, 225-29, 261), would have been infeasible or ineffective. For example, reducing ambient air lead levels to the point where employee blood lead levels would not exceed 30 ug/100g was infeasible.^{18/} Respirator

^{16/} OSHRC Docket No. 78-2438, which arose out of the same inspection as did this proceeding, was concerned with the Company's compliance at the Inorganic Pigments Department with the "old" lead standard and certain other OSHA requirements. See ALJ decision at 5 n.10, JA 457; American Cyanamid Co., 1980 O.S.H. Dec. (CCH) ¶ 24,828 (ALJ 1980) (review pending before the Review Commission). Dr. Baker appeared as the Secretary's expert witness on the hazards of lead. Tr. 8, 100 (JA 156, 248). Dr. Baker's curriculum vitae is Attachment 4 to Request for Admissions, JA 71-75. A partial transcript of Dr. Baker's testimony appears at JA 59-69, 325-29.

^{17/} Dr. Baker's testimony on this point is summarized in Attachment 5 to Request for Admissions, JA 77, a diagram in the handwriting of the OCAW representative.

^{18/} In OSHRC Docket No. 79-2438, the ALJ found that reduction of ambient air lead levels at the Inorganic Pigments Department of the Willow Island plant to 200 ug/m³ was economically infeasible. American Cyanamid Co., supra. The lead standard preamble predicted that air lead levels of 200 ug/m³ would result in 83.8 percent of blood lead levels above 40 ug/100g at any one time. 43 Fed. Reg. at 52963; see Steelworkers, 647 F.2d at 1250. Even an ambient air lead level of 50 ug/m³ would lead to an expected 29.3 percent of blood lead levels above 40 ug/100g at any one time, i.e., at least 10 ug/100g above the 30 ug/100g maximum level considered acceptable by

(Footnote continued)

usage to reduce employee blood lead levels to 30 ug/100g would have been, in OSHA's words, "ineffective, unreliable and unsafe."^{19/} A sophisticated medical surveillance program would

(Footnote continued from previous page)

OSHA for the fetus. Id. In Steelworkers this Court found that OSHA had failed to establish that reduction of ambient air lead levels to 50 ug/m³ was technologically feasible for the lead pigment manufacturing industry; the Court did not even reach the question of economic feasibility.

After reopening the rulemaking record for additional comment, OSHA initially concluded in January 1981 that it then had evidence that it was feasible for the lead pigment manufacturing industry to achieve a 50 ug/m³ ambient air lead level through the use of engineering and work practice controls. 46 Fed. Reg. 6134, 6176-82 (January 21, 1981). OSHA reached this initial conclusion despite its recognition that

[m]ost plants [in the industry] are old and retrofitting may not be effective in many cases. The industry, as a whole, is not close to compliance with either the PEL or the interim level in most operations and will require major renovation in plant and equipment to achieve either 100 or 50 ug/m³.

Id. at 6179 (emphasis in original). OSHA's primary recommendation was that the industry demolish existing plants and rebuild from scratch. Id. at 6182.

Upon further reflection, however, OSHA chose to retract its finding of feasibility for the lead pigment manufacturing industry and certain other industries. 46 Fed. Reg. 60758, 60768 (December 11, 1981). OSHA took this action because it was

not satisfied at this time that application of conventional control technology is capable of reducing lead exposures in these industries . . . because exposure levels are particularly high, e.g., pigment manufacture [E]ach industry may face significant technological or economic problems in achieving compliance, and hence most of these industries must expend far larger capital sums to install equipment which may not reduce exposures to below the PEL.

Id. at 60761.

^{19/} In the lead standard preamble OSHA referred to respiratory protection as "an ineffective, unreliable, and unsafe method

(Footnote continued)

have protected the fetus.^{20/} Regulating exposure to lead according to the family planning practices of individual employees would have been an unwarranted invasion of the legitimate privacy interests of workers.^{21/}

Another hypothetical alternative, allowing each employee of childbearing capacity to determine whether the risk to the

(Footnote continued from previous page)

of reducing employee exposure . . . which depend[s] upon the vagaries of human behavior", and noted that respirators "are generally not capable of providing the protection required, and create additional hazards by interfering with vision, hearing, and mobility." 43 Fed. Reg. at 52990.

The Company already had a respiratory protection program in effect in the Inorganic Pigments Department that adequately protected adults, but the program had proven unable to protect the fetus by reducing blood lead levels to 30 ug/100g. (The parties have stipulated to what the blood lead levels were for employees in the Inorganic Pigments Department. See Tr. 6-7, JA 154-55; Request for Admissions at 26 and Attachment 20 thereto, JA 54, 104-47; Complainant's Admissions at 11-12, JA 322-23. It is undisputed that these levels generally exceeded 30 ug/100g.)

^{20/} In the lead standard preamble OSHA criticized medical surveillance as a basis for regulating exposure to lead. 43 Fed. Reg. at 52971. See also American Smelting & Refining Co. v. OSHRC, 501 F.2d 504, 515 (8th Cir. 1974).

^{21/} As OSHA stated in its attachment to the lead standard preamble:

Health in general is an intensely personal matter, and this is particularly true with respect to lead medical surveillance due to the adverse effects of lead on male and female reproduction. Absent some compelling justification, OSHA is extremely hesitant to mandate detailed inquiries into the most private aspects of the lives of American workers.

43 Fed. Reg. at 54450-51. In addition, the Court may take judicial notice that family planning practices are not always effective and do sometimes fail to prevent unplanned pregnancies.

fetus she potentially carried required her voluntary exclusion from the Inorganic Pigments Department, would have been ineffective and unreliable.^{22/} It could also arguably have been contrary to the Act. The key point of the Act, and the general duty clause in particular, is that it places responsibility for ensuring employee safety and health on the employer, not the employee.^{23/} This responsibility cannot be discharged through operation of the assumption of risk doctrine. American Cyanamid could still arguably have been legally as well as morally responsible for permitting exposure of a fetus to the recognized hazard of lead at levels likely to cause serious physical harm even if the potential mother had chosen to work in the Inorganic Pigments Department.^{24/}

^{22/} As shown in note 14, supra, a woman employee who chose to remain in the Inorganic Pigments Department until she realized she was pregnant and then chose removal could well have blood lead levels substantially above the maximum 30 ug/100g level considered acceptable for the fetus during her entire pregnancy.

^{23/} OSHA asserted in the lead the lead preamble that "[t]he OSH Act places the primary burden of compliance on the employer, and to shift it to the employee . . . is . . . inappropriate and is contrary to established OSHA policy." 43 Fed. Reg. at 52990.

^{24/} As this Court has recognized, "[a]n employer has a duty to prevent and suppress hazardous conduct by employees, and this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence." National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973). Moreover, the employer's responsibility arguably runs to the fetus as well as to the employee, so that in any case the employee's assumption of risk or contributory negligence could not be imputed to the fetus. Cf. Wright v. Olin Corp., 30 Fair Empl. Prac. Cas. (BNA) 889, 903 n.25 (4th Cir. Dec. 23, 1982) (distinguishing under Title VII of the 1964 Civil Rights Act between a woman's right to make her own choices

(Footnote continued)

Another alternative would have been to shut down the Inorganic Pigments Department. Shutting down would have protected the fetus, but at the cost of the jobs of all employees assigned to that Department. Congress did not intend for the Act to protect employees by putting their employers out of business.^{25/}

The infeasibility or ineffectiveness of alternative means of protecting the fetus from occupational lead exposure through the mother leads to the conclusion that only an exclusionary employment policy would adequately protect the fetus.^{26/}

(Footnote continued from previous page)

respecting workplace hazards and a putative right to make the same choices on behalf of her unborn children).

^{25/} See American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 513 n.31 (1981), quoting Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974). In this case, however, American Cyanamid later was forced by economic reasons to shut down the Inorganic Pigments Department. See ALJ decision at 4 n.8, JA 456; Tr. 121, JA 269.

^{26/} In the lead standard preamble OSHA similarly concluded that exclusion may be necessary. After acknowledging that even a PEL of 50 ug/m³ would not protect the fetus, OSHA suggested that there may be a need to "remove workers who may wish to plan pregnancies or who are pregnant" under the medical removal protection ("MRP") provision, 29 C.F.R. § 1910.1025(k). 43 Fed. Reg. at 52966, JA 335. With respect to a pregnant employee OSHA stated:

[I]n many cases it would be unacceptable for a pregnant employee having an elevated blood lead level to continue to experience substantial lead exposure during the pregnancy [P]hysical removal of the [pregnant] employee from all significant lead exposure might be imperative

43 Fed. Reg. at 54462. The MRP provision differs most significantly from the Fetus Protection Policy in the economic considerations involved with a removal.

In November 1977, prior to implementing the Fetus Protection Policy at the Willow Island plant, Company officials discussed the policy with officials of OSHA and the National Institute for Occupational Safety and Health ("NIOSH"), who made no statement to the effect that the Company should not implement its policy.^{27/}

In January and February 1978 management at the Willow Island plant met with representatives of OCAW and with all female production workers of presumed childbearing capacity to discuss implementation of the Fetus Protection Policy. Management encouraged female production employees of childbearing potential working in certain Departments to request transfers to other Departments by April 24, 1978. These women were told that if they remained in the prohibited Departments after May 1, 1978 they would be removed from those Departments. The Company extended the May 1, 1978 date several times, each time informing an OCAW representative and the affected female production employees in advance. In September 1978 they were informed that the date had been extended to October 2, 1978, that the only Department affected was the Inorganic Pigments Department, Buildings 85 and 86, and that the only material covered by the policy was lead.^{28/}

Between February and July 1978, five female production workers then employed in the Inorganic Pigments Department chose

^{27/} See Tr. 118, JA 266; Morgan Letter at 3-4, JA 442-43; Request for Admissions at 22-23, JA 50-51.

^{28/} See Morgan Letter at 5-10, JA 444-49; Request for Admissions at 23, JA 51.

to seek voluntary medical sterilization at a hospital not connected with the Company, for which surgery they signed consent forms, allegedly in order to rebut the presumption that each of them was of childbearing capacity.^{29/}

On October 2, 1978, the only two women employees then of childbearing capacity in the Inorganic Pigments Department were reassigned to the utility pool. This action completed the implementation of the Fetus Protection Policy. The rates of pay of the transferred women were continued at their former levels for 90 days, after which time the pay rates became those of the jobs they held or transferred into. After October 2, 1978, no woman employee of presumed childbearing capacity held a production job in the Inorganic Pigments Department.^{30/}

Although informed of every development in the implementation of the Fetus Protection Policy from January 1978 onward, OCAW raised no objection to the policy until after the October 2 transfer of the two employees. On October 5, 1978 OCAW filed a grievance with the Company under the collective bargaining agreement asking only that these two employees be restored to their former job classifications and rates of pay, and otherwise be made whole. By December 1978 the grievance had passed through four

^{29/} See ALJ decision at 5, JA 457; Commission decision at 1597, JA 505; Tr. 109, JA 257; Morgan Letter at 11, JA 450; Request for Admissions at 24, JA 52.

^{30/} See Commission decision at 1597, JA 505; Tr. 109-10, JA 257-58; Morgan Letter at 12, JA 451; Request for Admissions at 23, JA 51; Complainant's Admissions at 10, JA 321.

steps of the grievance procedure set forth in the collective bargaining agreement without resolution, and OCAW had requested arbitration. On December 27, 1978, OCAW filed with OSHA a discrimination complaint under section 11(c) of the Act, 29 U.S.C. § 660(c), alleging that women employees were forced to undergo sterilization to work in the Inorganic Pigments Department, and a separate complaint alleging that the presence of toxic materials at the Willow Island plant presented an imminent danger to the health of employees. OSHA later dismissed OCAW's 11(c) complaint.

The foregoing strongly suggests that OCAW's motivation in requesting an OSHA inspection was to strengthen its collective bargaining position with respect to the labor-management issues of mandatory transfers, possible wage rate reductions, and possible layoffs. Thus, this case involves essentially labor-management issues, not occupational safety and health issues.

OSHA conducted a full inspection of the Willow Island plant from January 4 through April 13, 1979. JA 1. As a result of this inspection, OSHA issued a series of citations to the Company alleging various violations of specific standards, including the "old" lead standard, and of the general duty clause. These citations were the subject of OSHRC Docket Nos. 79-1936, 79-2438, and 79-4876. None of these citations addressed the Company's Fetus Protection Policy. Not until October 9, 1979, did OSHA issue the vaguely-worded citation in this case, OSHRC Docket No. 79-5762.

As noted earlier, the issues in OSHRC Docket No. 79-2438 concerned exposure of employees to lead in the Inorganic

Pigments Department. Every aspect of the Company's compliance with OSHA's standards relating to lead was thoroughly explored in the proceeding.^{31/} The Company has substantially prevailed before the ALJ in that case. See American Cyanamid Co., supra, 1980 O.S.H. Dec. (CCH) ¶ 24,828 (1980).

In January 1980, three months after OSHA issued the citation which is the subject of this proceeding, the Company permanently closed its lead pigment manufacturing operation at the Willow Island plant. See note 25 supra.

In summary, during the period covered by the citation, American Cyanamid maintained its Fetus Protection Policy at the Willow Island plant in order to preclude fetal exposure to the recognized hazard of lead. Alternative means of protecting the fetus, such as those suggested by OCAW, would have been infeasible, ineffective, or achievable only by shutting down the Inorganic Pigments Department at the cost of jobs. The Company chose the responsible course, excluding women of childbearing capacity.

2. Material facts here

While the foregoing recitation was provided to assist the Court in understanding the background of the citation in this case, the material facts are few. Before examining them, however, the Court may find it helpful to review what is not material.

^{31/} The prehearing discovery involved thousands of pages of interrogatory answers and documents. The evidentiary hearing took eight days in December 1979 and March 1980. Twenty-two witnesses appeared, and 129 exhibits were admitted into evidence. The transcript totalled 1,587 pages.

By virtue of its terms and the operation of section 9(c) of the Act, the citation concerns only a five-day period in April 1979, six months before the citation was issued. By that time more than a year had passed since the Company had adopted the Fetus Protection Policy. More than a year had also passed since the meetings in January and February 1978 of Company representatives with the women employees about which OCAW and CRROW assert the need for discovery. The sterilizations occurred between February and July, 1978, some nine to fourteen months prior to the period covered by the citation, and fourteen to twenty months before the citation was issued. The transfer of two women employees out of the Inorganic Pigments Department occurred in October 1978, six months prior to the period covered by the citation, and twelve months before the citation was issued. It is undisputed that during the period covered by the citation the Fetus Protection Policy applied at the Willow Island plant only to lead, and no woman of childbearing capacity held a production job in the only area of the plant then affected by the policy, the Inorganic Pigments Department. Thus, all occurrences before April 1979 and all substances other than lead are immaterial to this proceeding, as the ALJ found. Tr. 107, 119-21, 142-43 (JA 255, 267-69, 290-91).

Also immaterial is whether American Cyanamid could have adequately protected the fetus through alternatives to excluding women production workers of childbearing capacity, such as by reducing ambient air lead levels through engineering and administrative controls and a more effective respiratory protection

program. Those allegations were the subject of OSHRC Docket No. 79-2438. Tr. 18-19, 46-47, 51-53, 79 (JA 166-67, 194-95, 199-201, 227). Similarly, allegations that lead adversely affects the reproductive capacity of men are also immaterial to this proceeding as the ALJ found, Tr. 139-40, JA 287-88. OSHRC Docket No. 79-2438 was concerned, inter alia, with the harmful effects of lead on adult employees.

Thus, most broadly construed, the citation alleges no more than that in April 1979 the Company maintained a policy at the Willow Island plant of excluding women employees of childbearing capacity from production jobs involving exposure to lead at levels harmful to a fetus, and that women might choose to ask physicians to sterilize them so that they would be eligible to bid into or be assigned to the Inorganic Pigments Department.^{32/} As to these facts there is no dispute.

Identification of the material facts in this case makes clear that this case presents legal issues only, and was therefore properly disposed of by the ALJ and the Review Commission on

^{32/} While the sterilizations that occurred in 1978 are immaterial here, they do show that the so-called sterilization requirement alleged by the citation did not involve the presence of sterilizing chemical agents in the workplace, but rather the chance that women affected by the Fetus Protection Policy might choose to have themselves medically sterilized in a hospital for social and economic reasons (including eligibility for a production job in the Inorganic Pigments Department). The Secretary has conceded that the sterilizations that occurred in 1978 were not physically coerced by the Company, Tr. 16, 67-68 (JA 164, 215-16), that they were performed in a hospital, id., and that they were performed with the consent of the employees involved. Complainant's Admissions at 10-11, JA 321-22.

summary judgment. The key legal issue before the Court is whether the citation alleges a "hazard" as Congress used that term in passing the Act.

D. Proceedings Below

In proceedings before the ALJ, the Secretary sought massive discovery concerning details of the development and implementation of the Fetus Protection Policy in 1977 and 1978. At no time did the Secretary seek discovery of any facts alleged to have occurred after October 1978, when the two employees were transferred.

In part to resolve OSHA's request for burdensome discovery and to determine what, if any, genuine issues of material fact were in dispute, the ALJ held a lengthy pre-hearing conference on April 1, 1980. This conference sufficiently clarified the issues so that American Cyanamid was able to file a motion for summary judgment.

The ALJ granted the Company's motion on two grounds. First, recognizing that the citation's terms and the Secretary's allegations and discovery requests all concerned the 1977-78 period during which the Fetus Protection Policy was developed and implemented, the ALJ held that the citation was barred by the six-month statute of limitations set forth in section 9(c) of the Act. ALJ decision at 8, JA 460. Second, the ALJ found that the citation does not allege a violation cognizable under the Act:

If Respondent's Fetus Protection Policy can legally be held accountable for "requiring" female sterilization as a "condition of employment" in its Pigment Department, two other laws speak to such an issue, 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.

ALJ decision at 9, JA 461 (emphasis in original, footnotes omitted). This conclusion is consistent with the ALJ's statements during the pre-hearing conference:

"The thing[] that's hit my eye about this whole case, I think we're under the wrong law here. I really do. I don't see where Congress had any thought whatever in passing the OSHA Act in treating the female as opposed to the male segment of the working force.

"They were talking about employees across the board. Now, if the Secretary can make out a discrimination case, he's not going to make it out under the OSHA Act. There's a law that covers this, and it's not the Occupational Safety and Health Act." Tr. 47-48, JA 195-96.

"Now again, it would seem to me that we are operating under the wrong law here. There is the National Labor Relations Act and other labor laws to prevent employers from engaging in unfair labor practices. This is perhaps a matter of collective bargaining." Tr. 61, JA 209.

"And your view is that the recognized hazard is a sterilization. And you have got a really difficult burden, Mr. Berger [counsel for the Secretary]. Because I have seen nothing in the law, in the legislative history or of any case decided under section 5A1, that could be convoluted to include sterilization under the situation that we face here as a recognized hazard. No way." Tr. 76, JA 224.

See also Tr. 2, 14-15, 49, 87-89, 119-120, 123, 130, 132-33, 143-44, 149-50 (JA 150, 162-63, 197, 235-37, 267-68, 271, 278, 280-81). The ALJ ultimately relied on section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), finding that either the EEOC or the National Labor Relations Board ("NLRB"), or both, have exercised statutory authority governing the hazard alleged in the citation.

ALJ decision at 11, JA 463. His remarks during the pre-hearing conference show, however, that he believed that the citation failed to allege a violation arising under the Act, although the citations may allege a violation cognizable under either the National Labor Relations Act ("NLRA") or Title VII of the Civil Rights Act of 1964 ("Title VII").

The Review Commission directed the ALJ's decision for review and affirmed per curiam. In doing so the Review Commission followed the reasoning of the ALJ's second ground for decision, without reaching the issue of whether either section 4(b)(1) or section 9(c) also required dismissal of the citation. Commission decision at 1601 n.27, JA 509. The Review Commission considered sufficient for dismissal the failure of the citation to allege a violation cognizable under the Act. In particular, the Review Commission found as a matter of law that the hazard alleged by the Secretary--the circumstance that because of the stated policy an employee might decide "to undergo sterilization in order to gain or retain employment"--was in no way comparable to the kind of hazard to which Congress referred in the Act. Commission decision at 1600, JA 508. The Review Commission concluded:

[I]t is clear that Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.

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 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.

Id. (footnote omitted).

Commissioner Cottine dissented from the per curiam Review Commission decision.^{33/} He asserted that the hazard here--medical sterilization at the request of an employee in order to become eligible for a job--was comparable to the risk of involuntary sterilization from occupational exposure to excessive levels of certain chemicals in the workplace. Id. at 1603, JA 511.

The Secretary chose not to petition for judicial review of the dismissal of its citation. OCAW filed the petition for review now before the Court.

^{33/} American Cyanamid had previously asked Commissioner Cottine to recuse himself, on the ground that his impartiality might reasonably be questioned. See Respondent's Application for Recusal by Commissioner Cottine, JA 15-17; Respondent's Conditional Motion for Voir Dire of Commissioner Cottine, JA 18-20. Commissioner Cottine had formerly acted as counsel for OCAW in proceedings before the Review Commission, sometimes along with Steven Wodka, OCAW's representative in the Review Commission proceedings in this case. See, e.g., Koppers Co., 2 O.S.H. Cas. (BNA) 1354 (Rev. Comm. 1974). Commissioner Cottine appended to his dissent a memorandum opinion explaining why he had denied the Company's motions. In the course of that opinion he noted that he had represented OCAW in various administrative and judicial proceedings as recently as April 1977. Commission decision at 1606, JA 514.

SUMMARY OF ARGUMENT

The ALJ and the Review Commission correctly held that the citation fails to allege a violation cognizable under the OSH Act. Congress intended the Act to provide for the protection of employees from physical hazards, whether in the workplace or arising from materials, equipment, services, or facilities supplied by an employer. The Act cannot be contorted to apply to the circumstance that an employee excluded from a particular job might decide to seek a medical sterilization in order to become eligible for that job.

Instead of raising issues cognizable under the OSH Act, the citation alleges a case of sex discrimination in employment or of unfair labor practices. The citation improperly attempts to address under the OSH Act issues cognizable only other statutes, such as Title VII of the Civil Rights Act of 1964 or the National Labor Relations Act.

The only hazard involved in this case which is covered by the Act is the risk that lead poses to the fetus. The OSH Act may not properly be construed to prohibit employer actions to protect the fetus potentially in the workplace from excess exposure to lead. Questions of whether alternative means of protecting the fetus could have been used are irrelevant to this case.

ARGUMENT

I. THE EXCLUSION OF WOMEN OF CHILDBEARING CAPACITY FROM CERTAIN JOBS IS NOT ADDRESSED BY THE OSH ACT

This case was brought under the wrong statute. If American Cyanamid acted contrary to law in adopting and implementing its Fetus Protection Policy, which the Company vigorously denies, then the offense arises under Title VII, the NLRA, or tort law. The ALJ and the Review Commission correctly found that Congress never intended the OSH Act to apply to the circumstance that an employee excluded from a particular job might decide to seek a medical sterilization in order to become eligible for that job. Nor may Congress' silence in the OSH Act with respect to this circumstance be contorted to a reason for now interpreting the Act to embrace it.

Congress intended the Act to apply only to those kinds of physical hazards, such as toxic materials and harmful physical agents, which are present in the workplace itself or which arise from materials, equipment, services, or facilities supplied to employees by their employer. This intent is apparent from the Act's provisions, its legislative history, cases interpreting and applying the Act, and OSHA's own interpretation of the Act.

A. The Act Is Not Infinite in Its Scope

The Act does not apply to every conceivable aspect of employer-employee relations. As the Supreme Court has held:

Congress gave OSHA the responsibility to protect worker health and safety [T]he Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated

to achievement of health and safety goals Whatever methods [the Act] authorize[s] OSHA to apply, it is clear that such methods must be justified on the basis of their relation to safety or health.

American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 538, 540 (1981).^{34/} Although within its proper scope the Act may properly be read broadly, the citation here improperly attempts to stretch the Act beyond the bounds established by Congress to address social and economic concerns independent of health and safety goals.

"It is a well-known canon of construction that the language of a statute is the best indication of legislative intent." AFL-CIO v. Marshall, 570 F.2d 1030, 1036 (D.C. Cir. 1978). Here the language of the statute establishes Congress' intent to limit the Act to physical hazards, either in the workplace or arising from materials, equipment, services, or facilities supplied by the employer, not to the circumstances alleged by the citation.

The proper scope of the Act is apparent from the Congressional statement of findings and declaration of purpose and policy in section 2 of the Act, 29 U.S.C. § 651. Section 2(a) provides:

^{34/} There the Supreme Court partially reversed this Court's decision in AFL-CIO v. Marshall, 617 F.2d 636, 674-75 (D.C. Cir. 1979), and struck down a provision of OSHA's cotton dust standard which guaranteed the wages and other employment benefits of employees transferred out of the workplace because of inability to wear a respirator. OSHA had stated that the goal of the provision was to minimize the economic impact on employees of inability to wear a respirator. Similarly, this case involves only social and economic motivations for voluntary sterilizations.

The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce

(Emphasis added.) Section 2(b) reads in part:

The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to pre-serve our human resources

(Emphasis added.) References to "safe and healthful working conditions" also appear in sections 2(b)(1), 2(b)(2), and 2(b)(4). Section 2(b)(6) refers to "connections between diseases and work in environmental conditions", and section 2(b)(13) refers to "injuries and diseases arising out of employment". Similar references appear throughout the Act.^{35/} These provisions establish that Congress intended the Act to apply to physical hazards present in the workplace or arising from materials, equipment, services, or facilities supplied by the employer. Nowhere does the Act purport to apply to exclusionary employment policies which

^{35/} For example, section 6(b)(5), 29 U.S.C. § 655(b)(5), refers to "toxic materials or harmful physical agents". Section 17(k), 29 U.S.C. § 666(j), speaks of

a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. . . .

(Emphasis added.) This provision is similar to the Review Commission's limitation of occupational hazards to

processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.

Commission decision at 1600, JA 508 (footnote omitted).

allegedly could lead women to seek medical sterilizations in order to become eligible for certain jobs.^{36/}

The legislative history provides a fuller enumeration of the kinds of hazards which Congress intended to include within the scope of the Act. For example, the "background" section of the Senate Report, which describes the circumstances prompting the introduction of this occupational safety and health legislation, refers to "industrial accidents"; persons "disabled on the job"; "occupational diseases"; "industrial poisons such as lead and

^{36/} This "legislative silence" reflects "considered abstention from regulation . . . [which must] temper judicial creativity . . . [in] embellishing upon the regulatory scheme." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). See United States Lines, Inc. v. Baldrige, 677 F.2d 940, 944 (D.C. Cir. 1982). Congress had no need to address the circumstances alleged by the citation, because only six years earlier it had enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). As the legislative history of the Pregnancy Discrimination Act, Pub. L. No. 95-555, shows, Congress meant Title VII to "apply to all aspects of employment--hiring, reinstatement, termination . . . and other conditions of employment . . . concerning the childbearing process." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 4-5 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4752-53.

Even if this Court should find that the Congressional silence reflects a lack of prescience instead of "considered abstention", however, it is clear that where Congress did not specifically address itself to an issue, the court must project "fair and reasonable" corollaries of the known legislative intent. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974); Montana Power Co. v. FPC, 445 F.2d 739, 746 (D.C. Cir. 1970) (en banc), cert. denied, 400 U.S. 1013 (1971). The projection that OCAW asks the Court to make here is neither fair nor reasonable, because it involves a concern of an entirely different kind from that actually considered by Congress. See Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 n.16 (1968) ("statutes should not be stretched to apply to new situations not fairly within their scope").

mercury"; "respiratory diseases"; "toxic effects"; "carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides"; "chronic diseases--cancer, respiratory ailments, allergies, heart disease, and others"; "asbestos, ionizing radiation, chromates, and certain dye intermediaries, among others . . . directly involved in the genesis of cancer"; "occupational . . . illnesses"; "harmful physical agents, such as severe noise or vibration"; "toxic materials"; "lung disease"; "byssinosis"; "shortness of breath, chronic cough and total disablement"; "asbestos"; "pulmonary cancer and mesothelioma"; "lung cancer"; "pesticides, herbicides and fungicides"; "organophosphates"; "headache, fever, nausea, convulsions, long-term psychological effects, or death"; "chlorinated hydrocarbons"; "mutations, sterilization,^{37/} and death"; "betanaphthylamine"; "bladder cancer"; and "the chemical and physical hazards which characterize modern industry".^{38/}

While by no means a complete catalogue of the particular occupational hazards which the Act was intended to cover,^{39/} this

^{37/} It should be noted that the reference to "sterilization" is in the context of occupational exposure to hazardous chemicals, not in the context of voluntary employee decisions to seek surgical sterilization outside the workplace.

^{38/} S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970) 2-4, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5178-80.

^{39/} Also see, e.g., the citations to the legislative history set forth by the Supreme Court in Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-12 n.16 (1980), and the citations included by the Review Commission in its opinion in this case, Commission decision at 1599-600, JA 507-08. That not all of these hazards are discussed in the context of the general duty clause is irrelevant, contrary to OCAW's assertion. OCAW Br. at 30 n.78. The general duty clause cannot be broader in

(Footnote continued)

litany nevertheless shows memorably the kinds of hazards that Congress had in mind in drafting this legislation. Of the items included in this list, perhaps most illuminating is the last, the reference to "the chemical and physical hazards which characterize modern industry". This phrase aptly distills a distinguishing aspect of hazards within the scope of the Act, such as lead, in contrast to the circumstance alleged here--neither a chemical nor a physical agent, nor a safety hazard, but a voluntary decision by an employee to seek medical sterilization in order to be eligible for a particular job.

While Congress did not explicitly define the terms "hazard" or "safe and healthful working conditions", the courts have defined them. Their opinions further establish that the Act does not apply to the hazard alleged here.

The Supreme Court has authoritatively construed the meaning of the terms "hazard" and "working conditions" as used by Congress in the industrial context to refer to elements such as toxic chemicals or fumes and other physical hazards. In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), a case under the Equal Pay Act of 1963, the Court rejected a contention that the term "working conditions" includes a wide variety of aspects of employment, including the time of day during which employees work a shift. First the Court recognized that Congress had used

(Footnote continued from previous page)

scope than the Act itself, and these examples illustrate the intended scope of the Act.

technical words or terms of art in the statute, and ruled that the words must be interpreted in light of their technical meanings.

It then stated:

While a layman might well assume that time of day worked reflects one aspect of a job's "working conditions," the term has a different and much more specific meaning in the language of industrial relations [T]he element of working conditions encompasses two subfactors: "surroundings" and "hazards." "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of "working conditions" is . . . well accepted across a wide range of American industry.

Nowhere in any of these definitions is time of day worked mentioned as a relevant criterion. The fact of the matter is that the concept of "working conditions," as used in the specialized language of job evaluation systems, simply does not encompass shift differentials.

417 U.S. at 202 (emphasis added, footnotes omitted). Similarly, while Congress clearly intended the OSH Act to apply to "elements such as toxic chemicals or fumes" and "physical hazards", nowhere does the Act or its legislative history mention exclusionary employment policies which allegedly may encourage women employees to choose voluntary medical sterilizations. The concepts of "hazard" and "working conditions" as used in the specialized language of the Act simply do not encompass the circumstances alleged by the citation.

Corning Glass has been explicitly applied to the OSHA context. In Southern Pacific Transportation Co. v. User, 539

F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977), the Fifth Circuit stated:

We think the term "working conditions" [as used in section 4(b)(1) of the Act] plainly refers to something more limited than every aspect of an entire industry. The term has a technical meaning in the language of industrial relations; it encompasses both a worker's "surroundings" and the "hazards" incident to his work. Corning Glass Works v. Brennan, 417 U.S. 188, 202, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974).

The Fourth Circuit also relied on Corning Glass in another case arising under section 4(b)(1) of the Act. Southern Railway Co. v. OSHRC, 539 F.2d 335, 339 (4th Cir.), cert. denied, 429 U.S. 999 (1976). There the court rejected on the basis of Corning Glass a claim that "working conditions" "means 'the aggregate of circumstances of the employment relationship--that is, the employment itself.'" Id. (footnote omitted). These two cases have in turn been relied on by this Court and by the Third Circuit explicitly because of their analysis of the term "working conditions". Baltimore & Ohio Railroad Co. v. OSHRC, 548 F.2d 1052, 1053-54 (D.C. Cir. 1976); Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913, 916-17 n.8 (3d Cir. 1980). See also U.S. Air, Inc. v. OSHRC, 689 F.2d 1191, 1192-93 (4th Cir. 1982); PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 896 (1st Cir. 1981).

Accordingly, this Circuit and several others have acknowledged that the Supreme Court's definitions in Corning Glass of "working conditions" and "hazard" apply to the OSH Act, and that these phrases refer to physical hazards rather than to all aspects of the employment relationship. These definitions,

albeit broad, necessarily exclude the circumstances alleged in the citation from coverage by the Act.

Even the Review Commission cases cited by OCAW to the contrary, OCAW Br. at 34-36, support this position. C.R. Burnett & Sons, Inc., 9 O.S.H. Cas. (BNA) 1009 (Rev. Comm. 1980), and Sugar Cane Growers Cooperative of Florida, 4 O.S.H. Cas. (BNA) 1320 (Rev. Comm. 1976), both involved physical hazards of the kind included within the scope of the term "working conditions" as defined in Corning Glass. Those cases stand for the proposition that

an employer must fulfill its job safety and health responsibilities with respect to a service, be it housing, transportation, or the like, when the provision of that service is directly beneficial, convenient, or advantageous to the employer.

9 O.S.H. Cas. (BNA) at 1018 (footnote omitted).^{40/} As illustrated by those cases, an employer's "job safety and health responsibilities" extend to protecting employees from physical hazards, whether in the workplace or arising from materials, equipment, services, or facilities supplied by the employer. Unlike those cases, however, this case involves no allegation that American Cyanamid provided its women employees of childbearing capacity a

^{40/} OCAW has misrepresented the holdings in those cases to suggest that they stand for the proposition that any condition of employment is subject to the Act; yet the Review Commission rejected a "condition of employment" test as a touchstone for determining the coverage of the Act. 9 O.S.H. Cas. (BNA) at 1018 n.25; 4 O.S.H. Cas. (BNA) at 1321. In its opinion in this case the Review Commission expressly noted that C.R. Burnett and Sugar Cane could not be strained to support a finding that the Act applied to the circumstances alleged here. Commission decision at 1600 and n.23, JA 508.

service or facility which involved exposure to physical hazards. On the contrary, it is the Company's policy of excluding these employees from places of employment which presented physical hazards that is the subject of the citation.

It is also significant that prior to issuing the citation in this case, OSHA itself had never construed the Act to apply to hazards fundamentally different in kind from those referenced in the Act itself and enumerated in the legislative history. As the Review Commission noted in its opinion:

In the ten years of the Act's existence, the Secretary has not, to our knowledge, cited an employer for a condition or practice that did not operate directly upon employees engaged in work or work-related activities.

Commission decision at 1600 n.22, JA 508.^{41/} OSHA's statements of enforcement policy are similarly limited to such conditions or practices. For example, OSHA's Industrial Hygiene Manual limits its discussion to "environmental conditions present in the workplace which may cause illness or death." OSHA Industrial Hygiene Manual, Chap. I., § A.1, O.S.H. Rep. (BNA) Reference File 77:8001. OSHA's own guidelines on the general duty clause provide that "[i]n general, a 'hazard' within the meaning of Section

^{41/} Commissioner Cleary, who joined in the per curiam decision, has been a member of the Review Commission since 1973. See 3 O.S.H. Rep. (BNA) 170 (1973) (reporting Cleary's swearing-in and noting his remark that the President of the International Union of Operating Engineers and then-Secretary of Labor Brennan were the "bulwark" of his support for the position). Members of the Review Commission are "persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission". Section 12(a), 29 U.S.C. § 661(a).

5(a)(1) is a dangerous condition or a harmful situation". OSHA Instruction CPL 2.50 (March 17, 1982), § H.2.a., O.S.H. Rep. (BNA) Reference File 21:8279. And in the lead standard preamble, OSHA stated its position that exclusionary policies were not required, but nowhere asserted that such exclusionary policies were prohibited by the Act. See, e.g., 43 Fed. Reg. at 52966, JA 335.

In summary, the Act itself, its legislative history, cases interpreting the Act decided by the courts and the Review Commission, and OSHA's own policy statements establish that the Act applies to physical hazards, whether in the workplace or arising from materials, equipment, services, or facilities provided by the employer. The citation here deals with an entirely different concern, that an employee of childbearing capacity might voluntarily seek a medical sterilization in order to become eligible for a particular job. This alleged concern involves not physical effects, but social and economic influences on the decisionmaking of an employee with respect to her own body. Such a concern is not substantially comparable to the physical hazards covered by the Act. Accordingly, the ALJ and Review Commission correctly found that the citation fails to allege a violation cognizable under the Act.

B. The Allegations of the Citation Would Be Significant Only Under a Different Statute

This case involves allegations of unfair labor practices or sex discrimination in employment in the guise of an OSHA citation. While American Cyanamid strongly denies that its Fetus Protection Policy violated either Title VII or the NLRA, the Court

should recognize that these statutes provided the inspiration for the citation here, not the OSH Act.^{42/}

The ALJ recognized that the allegations of the citation may raise issues cognizable under the NLRA, but certainly not the Act.^{43/} This conclusion finds support in the undisputed fact that OCAW invoked OSHA's jurisdiction only after having failed to resolve a grievance with the Company after two months of negotiations. It is noteworthy that other employment policies similar to the Fetus Protection Policy have in a number of instances been

^{42/} That the allegations of the citation may raise issues cognizable under Title VII or the NLRA in no way means that the Company violated those statutes. As the Fourth Circuit recently declared in a Title VII case based on similar allegations:

[W]e hold that under appropriate circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on employment opportunity that are reasonably required to protect the health of unborn children of women workers against hazards of the workplace.

Wright v. Olin Corp., supra, 30 Fair Empl. Prac. Cas. (BNA) at 904 (footnote omitted). That case involved a "female employment and fetal vulnerability" policy which restricted employment opportunities for women in work areas involving exposure to lead and certain other substances. See also Doerr v. B.F. Goodrich Co., 484 F. Supp. 320 (N.D. Ohio 1979) (denying a preliminary injunction under Title VII where the plaintiff alleged that she was contemplating having herself sterilized as a response to an employer policy excluding women employees of childbearing capacity from jobs in which they would be exposed to vinyl chloride, another fetotoxin). But cf. Zuniga v. Kleberg County Hospital, 30 Fair Empl. Prac. Cas. (BNA) 650 (5th Cir. Dec. 6, 1982) (holding that an employment policy requiring a pregnant x-ray technician to resign in order to protect the fetus from radiation violated Title VII because less discriminatory alternatives existed).

^{43/} ALJ decision at 9, 11 (JA 461, 463).

treated as labor-management matters appropriate for arbitration.^{44/}

The ALJ also found that the allegations of the citation may raise issues cognizable under Title VII.^{45/} He was not alone in reaching this conclusion. OCAW is presently a party plaintiff to a suit brought against American Cyanamid alleging that the Company's adoption and implementation of the Fetus Protection Policy violated Title VII.^{46/} Moreover, during the prehearing conference, counsel for the Secretary admitted that an exclusionary policy would probably give rise to claims under Title VII instead of the OSH Act. He called the Fetus Protection Policy a "sterilization policy" instead of an exclusionary policy, however.^{47/} The Review Commission found that the Secretary had mischaracterized the Fetus Protection Policy and that it was more accurately described as an exclusionary policy.^{48/}

^{44/} See, e.g., In the Matter of an Arbitration between Local 194, Association of Western Pulp and Paper Workers, and Georgia-Pacific Corporation (Pulp), Case No. 133-1979 (Oct. 16, 1980); 9 O.S.H. Rep. (BNA) 384 (1979); 4 O.S.H. Rep. (BNA) 1586 (1975). Cf. 7 O.S.H. Rep. (BNA) 1732 (1978) (transfer to lower-paying job to avoid health hazard approved).

^{45/} ALJ decision at 9-10, JA 460-61 (also quoting relevant provisions of Title VII and the Pregnancy Discrimination Act).

^{46/} Tr. 124, JA 272. The case, Christman et al. v. American Cyanamid Company, Civ. No. 80-0024-P (N.D.W. Va., filed January 29, 1980), is presently scheduled for trial beginning September 21, 1983).

^{47/} Tr. 74-75, JA 222-23. In addition, the OCAW representative stated "If we had had an exclusionary policy here that had not resulted in any sterilization . . . , we would not be here." Tr. 130, JA 278. See also Tr. 112, JA 260.

^{48/} The Review Commission stated in its opinion:

(Footnote continued)

OSHA itself has repeatedly characterized exclusionary employment policies such as the Fetus Protection Policy as Title VII matters. In a May 1, 1978 letter addressed to "Dear Corporate Medical Director",^{49/} the head of OSHA, Eula Bingham, wrote:

I am writing to ask for your help in the developing national problem of employment discrimination which is related to occupational exposure to hazardous substances. Reports to the Occupational Safety and Health Administration from workers indicate that a number of major corporations are either adopting or expanding policies which require that women of childbearing age and pregnant women be excluded from jobs involving potential exposure to certain toxic substances

The purpose of this letter is to urge rational decision-making and dedication both to protecting worker health and to assuring equal employment opportunity for each and every worker in this country.

(Emphasis added.) A few months later, in the lead standard preamble and attachment thereto OSHA referred several times to exclusionary policies as raising "equal employment opportunity considerations":

"During the hearings there was considerable testimony on reproductive effects in relation to the PEL and equal employment opportunity considerations. No topic was covered in

(Footnote continued from previous page)

Inasmuch as it is impossible for an employer literally to compel employees to undergo sterilization, we believe it is more accurate to describe the policy as one excluding women of childbearing capacity from certain employment.

Commission decision at 1599 n.14, JA 507 (emphasis added).

^{49/} Copy attached as Attachment 10 to Request for Admissions, JA 79-81. See Request for Admissions at 13-14, JA 48-49; Complainant's Admissions at 7, JA 318.

greater depth or from more vantage points than the subject of women in the lead industry." 43 Fed. Reg. at 52960, JA 333 (emphasis added).

"There was extensive discussion on the issue of equal employment for women in the lead industry." 43 Fed. Reg. at 54388 (emphasis added).

See also 43 Fed. Reg. at 54422, 54463.

The EEOC has also regarded exclusionary policies similar to the Fetus Protection Policy to raise issues under Title VII. It gave four of the women who chose to have themselves sterilized right-to-sue letters, enabling them to file suit against the Company under Title VII.^{50/} Since at least 1974 the EEOC has regarded employer policies similar to the Fetus Protection Policy to raise Title VII issues.^{51/} For example, on April 21, 1978 the EEOC issued a "Statement on Hazardous Substances and Equal Employment Opportunity"^{52/} in which it stated, inter alia, that

EEOC will continue the vigorous enforcement of Title VII as to all employment practices or policies that unlawfully exclude women of childbearing capacity and any other persons from the workplace or otherwise adversely affect the economic opportunities of any individuals protected by Title VII.

^{50/} Letters attached as Attachment 6 to Respondent's Brief filed before the Review Commission, JA 500-03.

^{51/} In 1974 the EEOC twice found reasonable cause to believe that an employer had violated Title VII by excluding pregnant employees from workplaces where they would be exposed to radiation or X-rays at levels considered harmful to the fetus. EEOC Dec. (CCH) ¶ 6443 (October 29, 1974); EEOC Dec. (CCH) ¶ 6442 (November 14, 1974). Copies of these decisions are attached as Attachments 1 and 2 to Respondent's Brief filed before the Review Commission, JA 477-83.

^{52/} This statement is Attachment 3 to Respondent's Brief filed with the Review Commission, JA 485-86.

In 1980, after consulting with OSHA, the EEOC issued proposed interpretative guidelines on employment discrimination and reproductive hazards.^{53/} These proposed guidelines directly addressed exclusionary policies such as the Fetus Protection Policy, but noted that "the proposed guidelines do not attempt to implement or enforce federal policies related to health and safety." 45 Fed. Reg. at 7514, JA 495. The proposed guidelines would have allowed facially neutral policies which excluded pregnant women if the policies were non-discriminatory, as determined by reference to several considerations; these considerations included whether the employer had investigated the reproductive effects of the hazard in men, and whether the employer had adequately investigated alternatives to excluding women. Proposed 29 C.F.R. §§ 1603.2(d)(3) and (8), JA 497-98. These are two of the considerations about which OCAW claims the need for discovery,

^{53/} 45 Fed. Reg. 7514 (February 1, 1980). The proposed guidelines are attached as Attachment 5 to Respondent's Brief filed with the Review Commission, JA 495-98. The EEOC later withdrew the proposed interpretative guidelines following receipt of over one hundred comments, many of them highly critical of the proposed guidelines. 46 Fed. Reg. 3916 (January 16, 1981).

The EEOC had previously adopted guidelines interpreting the Pregnancy Discrimination Act which provided in part:

A written or unwritten employment policy or practice which excludes from employment opportunities applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

29 C.F.R. § 1604.10(a), 44 Fed. Reg. 23804, 23805 (April 20, 1979) (attached as Attachment 4 to Respondent's Brief filed with the Review Commission, JA 488-93).

further establishing that it seeks to establish a violation of Title VII instead of a violation of the OSH Act.^{54/}

In summary, it is clear that in bringing the citation at issue here, OSHA sought to redress what it regarded as an instance of sex discrimination. OCAW's participation is explained by its interest in obtaining a favorable resolution of a labor-management problem arising under the NLRA, and to advance its Title VII case against the Company. Both OSHA and OCAW have attempted to use the Act for purposes never intended for it by Congress. Congress established potential remedial routes in the NLRA and Title VII, and OCAW has been pursuing both of these avenues. The ALJ and the Review Commission both correctly ruled that the OSH Act need not and may not be used as an additional pathway. Because the citation only raises issues arising under statutes other than the Act, the citation was properly dismissed.

^{54/} See, e.g., OCAW Br. at 40-41. Cf. Wright v. Olin Corp., supra, 30 Fair Empl. Prac. Cas. (BNA) at 904 n.27 (holding that in establishing the business necessity defense an employer with an exclusionary policy must show that the hazard to the fetus is "substantially confined" to maternal exposure) and at 905 (allowing rebuttal of the business necessity defense by a showing that feasible alternatives to the exclusionary policy existed); Zuniga v. Kleberg County Hospital, supra, 30 Fair Empl. Prac. Cas. (BNA) at 654 (without deciding whether an exclusionary policy could be justified by the business necessity defense, holding that less discriminatory alternatives existed).

II. IT IS UNREASONABLE TO CONCLUDE THAT THE ACT BARRED
THE COMPANY FROM PROTECTING THE FETUS FROM EXCESS
EXPOSURE TO LEAD

The preceding sections established that the circumstances alleged by the citation are not addressed by the OSH Act. The only hazard cognizable under the Act which is conceivably involved in this case is lead. It is undisputed that that hazard was likely to cause serious harm to any fetus carried by an employee in the Inorganic Pigments Department. Yet the citation in effect alleges that American Cyanamid violated the Act by protecting the fetus from this recognized hazard. But to construe the Act to mean that protection of the fetus of an employee is a violation is to turn the Act on its head, since its sole purpose is to protect employees (and their unborn children) from occupational hazards.^{55/} Accordingly, the citation fails to allege a violation of the Act, as the ALJ and the Review Commission found.

This Court has upheld OSHA's determination that the protections of the Act extend to the fetus of an employee, and that lead poses a grave danger to the fetus. Steelworkers, supra, 647 F.2d at 1256 and n.96. Accordingly, under the general duty clause, an employer such as American Cyanamid is required to furnish employment and places of employment which are free of recognized hazards, such as lead, that are causing or are likely to

^{55/} Cf. Wright v. Olin Corp., supra, 30 Fair Empl. Prac. Cas. (BNA) at 904:

But we cannot believe that Congress meant by Title VII absolutely to deprive employers of the right to provide any protection for . . . potential members of workers' families.

cause death or serious physical harm to its employees, or to a fetus potentially carried by an employee. For American Cyanamid to have allowed an employee of childbearing capacity (who may have been pregnant without knowing it) to work in the Inorganic Pigments Department would arguably have violated the general duty clause, because a potential fetus would have been exposed to a recognized hazard, lead, at levels likely to cause serious harm to the fetus.^{56/}

Other federal agencies, in fulfilling their statutory responsibilities for protecting occupational safety and health within their special jurisdictions, have similarly required or advised the exclusion of pregnant workers or workers of childbearing capacity from places of employment posing hazards to the fetus. Their exclusionary policies, designed to fulfill occupational safety and health goals, further establish that the citation here fails to allege a violation cognizable under the Act.

This Court has determined that the Environmental Protection Agency ("EPA") has statutory authority to protect the health and safety of employees occupationally exposed to pesticides. Organized Migrants in Community Action, Inc. v. Brennan, 520 F.2d 1161, 1165-66 (D.C. Cir. 1975). On several occasions EPA has acted under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq., as amended, to

^{56/} The blood lead level measurements for the employees in the Inorganic Pigments Department appear at JA 104-47. It is undisputed that on average the blood lead levels were significantly above the 30 ug/100g maximum level considered acceptable by OSHA for protecting the fetus.

prohibit "women of child-bearing age" from applying a pesticide known to be harmful to the fetus at low levels of exposure.^{57/}

The Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., provides for occupational safety and health protection of employees of licensees. 42 U.S.C. § 2133(b). In 1974 the Atomic Energy Commission ("AEC") issued a notice proposing to implement

^{57/} In 1978 EPA issued an opinion and order under section 18 of FIFRA allowing restricted use of the pesticide Ferriamicide for control of fire ants in Mississippi, subject to several conditions. Two of the conditions were that "[w]omen of child-bearing age are prohibited from applying Ferriamicide" and that "[a]ll labels shall contain the following statement in bold-face type, above the Caution statement: 'Not to be Used by Women of Child-bearing Age.'" 43 Fed. Reg. 47780, 47786 (October 17, 1978) (Attachment 13 to Request for Admissions, JA 87).

The opinion and order was later remanded for additional procedures, but the court merely noted the conditions discussed above without commenting on them. Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 655 (D.D.C. 1978). On remand EPA reaffirmed its prohibition on application of the pesticide by women of childbearing age, despite the arguments of the Environmental Defense Fund that exposure to male applicators could also cause adverse reproductive effects. 44 Fed. Reg. 11111, 11114-15, 11117 (February 27, 1979) (Attachment 15 to Request for Admissions, JA 89-93).

In 1982 EPA again granted specific exemptions for Ferriamicide on the condition that "[w]omen of child-bearing age are prohibited from loading/applying Ferriamicide." 47 Fed. Reg. 46884, 46885 (October 21, 1982). EPA later rescinded these exemptions at the request of the applicants. 6 Chem. Reg. Rep. (BNA) 1077 (1982).

See also 45 Fed. Reg. 45362, 45368-69 (July 3, 1980) (proposed label for pesticide lindane would provide: "Women of child-bearing age should not be involved in the mixing, loading, or application of this product. Exposure to lindane during pregnancy must be avoided"); 44 Fed. Reg. 66558, 66561 (November 19, 1979) (proposed label for pesticide dimethoate would provide: "WARNING TO FEMALE WORKERS USING AIR BLAST EQUIPMENT . . . Exposure to this product during pregnancy should be avoided").

the intent of a recommendation by the National Council on Radiation Protection and Measurements ("NCRP") that "fertile women . . . should be employed only in situations where the annual dose accumulation is unlikely to exceed 2 or 3 rems"58/ In 1975 the AEC's successor agency, the Nuclear Regulatory Commission ("NRC"), issued a regulatory guide for the use of licensees concerning prenatal radiation exposure in which the NRC advised licensees to inform their employees of the NCRP's recommendations.59/

In 1981 EPA published proposed recommendations for federal radiation guidance for occupational exposures which proposed an alternative of excluding women of childbearing capacity from certain jobs.60/

58/ 40 Fed. Reg. 799 (January 3, 1975) (Attachment 16 to Request for Admissions, JA 95-96). The notice reported that NCRP had originally made its recommendation in 1971. In 1974 it had reexamined this recommendation "in light of questions concerning sex discrimination in employment of women" and reaffirmed its recommendation. Id. The AEC stated, id. at 800:

The Commission recognizes the potential for impact of a change in the radiation dose limits for women on continued employment in certain jobs usually filled by women, such as medical and laboratory technicians and nurses, and on consideration of women for employment in certain jobs involving radiation exposure that are now usually filled by men.

At the same time, the Commission considers that the evidence of greater radiosensitivity of the embryo and fetus, and the concern expressed by both the ICRP and NCRP over the possible adverse effects on the human embryo and fetus, should be taken into account.

59/ Regulatory Guide 8.13, Revision 1 (November 1975) (copy attached as Attachment 17 to Respondent's First Request for Admissions from Complainant, JA 98-102).

60/ 46 Fed. Reg. 7836 (January 23, 1981). The notice stated, id. at 7839-40:

(Footnote continued)

Another such recommendation was premised on the OSH Act itself. In 1974 OSHA's scientific advisor, NIOSH, recommended that OSHA adopt a standard for vinyl chloride, a feto-toxin, which would have excluded pregnant women from jobs involving exposure to vinyl chloride.^{61/}

These federal agency recommendations, similar to the Fetus Protection Policy, recognize equal employment opportunity

(Footnote continued from previous page)

It is difficult to provide for protection of the unborn without affecting the rights of women to equal job opportunities. This difficulty is compounded because the critical period for most harm to the unborn occurs soon after conception--during the second and third month after conception, when a woman may not know that she is pregnant. Based on our assessments of the risks and the other factors noted above, we believe that the maximum dose to the unborn should be a factor of ten below the maximum permitted adult workers in any year. This is also the current recommendation of the National Council on Radiation Protection and Measurements. In Recommendation 8 we propose four alternatives which would, with varying degrees of certainty, achieve this objective.

. . . The third alternative insures protection of all unborn throughout gestation by making the voluntary requirements of the second mandatory. It would bar women of child-bearing capacity from those few jobs which involve high dose rates.

^{61/} NIOSH, Recommended Occupational Health Standard for the Manufacture of Synthetic Polymer from Vinyl Chloride (1974). In section 3.h.(vii) NIOSH stated:

In view of the preliminary results of animal toxicology studies, it is recommended that no woman who is pregnant should be employed in vinyl chloride monomer operations.

In issuing this recommendation NIOSH was fulfilling its responsibilities under sections 20(a)(2) and 22(c)(1) of the Act, 29 U.S.C. §§ 669(a)(2) and 671(c)(1). NIOSH later purported to withdraw this aspect of its recommended standard.

concerns of exclusionary policies, but nevertheless conclude that occupational safety and health concerns for the fetus potentially in the workplace require exclusion of women workers from workplaces where they would be exposed to hazards harmful to the fetus. These recommendations further establish that the OSH Act, whose only purpose is to protect the occupational safety and health of employees, cannot be construed to prohibit, on the basis of equal employment opportunity concerns, an exclusionary policy designed to protect the fetus.

OCAW argues, however, that American Cyanamid violated the general duty clause because it could have protected the fetus potentially in the Inorganic Pigments Department by other means. Aside from the infeasibility or ineffectiveness of OCAW's proposed alternatives,^{62/} this argument fails for several reasons.

First, it is clear from the face of the citation that American Cyanamid is not charged with failure to implement feasible alternatives to the Fetus Protection Policy. The description of the alleged violation makes no reference to alternatives, and the citation requires that the alleged violation be corrected "immediately". "Immediate" abatement could only consist of rescinding the Fetus Protection Policy and allowing women of childbearing capacity to work in the Inorganic Pigments Department, regardless of whether or not feasible alternatives had been implemented to protect the fetus. It is clear that OCAW misconstrues OSHA's citation by reading it to require implementation of alternatives.

^{62/} See pages 10-14, supra.

Second, it is clear that the general duty clause does not mandate particular means of abating a hazard, here the risk of harm that lead poses to the fetus. Any feasible means of abatement will satisfy the general duty clause.^{63/}

Third, the thrust of OCAW's proposed alternatives is that American Cyanamid did not comply with specific applicable standards governing control of ambient air lead levels and use of respirators. These allegations are the subject of a separate proceeding, OSHRC Docket No. 79-2438.^{64/} It is well established that the general duty clause is preempted where, as here, specific standards apply.^{65/}

And fourth, to the extent that OCAW's arguments are based on its belief that the then-existing standards were

^{63/} See, e.g., Baroid Div. of NL Industries, Inc. v. OSHRC, 660 F.2d 439, 446-47 (10th Cir. 1981); Ted Wilkerson, Inc., 9 O.S.H. Cas. (BNA) 2012, 2016-17 (Rev. Comm. 1981); OSHA Instruction CPL 2.50 (March 17, 1982) § H.2.a., O.S.H. Rep. (BNA) Ref. File 21:8279, 8281 ("It must be emphasized that Section 5(a)(1) does not mandate a particular abatement measure; it only requires an employer to render the workplace free of certain hazards by some feasible means.").

^{64/} See American Cyanamid Co., 1980 O.S.H. Dec. (CCH) ¶ 24,828 (ALJ 1980). The ALJ found that the question of feasible alternatives was the subject of OSHRC Docket No. 79-2438. Tr. 18-19, 46-47, 51-53 (JA 166-67, 194-95, 199-201).

^{65/} See, e.g., 29 C.F.R. § 1910.5(f); Southern Ohio Building Systems, Inc. v. OSHRC, 649 F.2d 456, 460-61 (6th Cir. 1981); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973); A. Prokosch & Sons Sheet Metal, Inc., 8 O.S.H. Cas. (BNA) 2077, 2081-82 (Rev. Comm. 1980); Brisk Waterproofing Co., 1 O.S.H. Cas. (BNA) 1263, 1264 (Rev. Comm. 1973); OSHA Instruction CPL 2.50 (March 17, 1982) § G.1.a., O.S.H. Rep. (BNA) Ref. File 21:8279, 8280 ("Section 5(a)(1) may not be used if an OSHA standard applies to the hazardous working condition.").

insufficient (the "new" lead standard did not take effect until after the period covered by the citation), and accordingly that the Company should have done more than the "old" lead standard and other applicable standards required, the argument fails because the general duty clause may not be used to impose requirements more protective than those of an applicable standard.^{66/}

Since the citation required abatement "immediately", and alternative means of protecting the fetus are legally irrelevant, the citation would require American Cyanamid to permit fetuses potentially in the workplace to be exposed to lead at harmful levels. This in fact is precisely what OCAW demanded with respect to the two women who were transferred from the Inorganic Pigments Department. Such a result is manifestly contrary to the Act, whose purpose is "to assure so far as possible every working man and woman [and fetus of such a woman] in the Nation safe and healthful working conditions and to preserve our human resources." Section 2(b), 29 U.S.C. § 651(b). Since the citation requires a construction of the Act which is clearly at odds with the Act's purpose, the citation fails to allege a violation cognizable under the Act.^{67/}

^{66/} See, e.g., Cornell & Co., 10 O.S.H. Cas. (BNA) 1393, 1394 (Rev. Comm. 1982); A. Prokosch & Sons Sheet Metal, Inc., supra; OSHA Instruction CPL 2.50 (March 17, 1982) § G.1.b., O.S.H. Rep. (BNA) Ref. File 21:8279, 8280 ("Section 5(a)(1) May Not Be Used To Impose a Stricter Requirement Than That Required by the Standard.").

^{67/} Statutes are to be interpreted to effectuate rather than to frustrate the legislative purposes, and interpretations producing absurd results are to be avoided. See, e.g., United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940); City of Los Angeles v. Adams, 556 F.2d 40, 47 n.9 (D.C. Cir. 1977).

CONCLUSION

The ALJ and the Review Commission correctly found that the circumstances alleged in the citation were not encompassed by the OSH Act. The circumstances raise legal issues, if at all, under one or more other statutes. The ALJ and Review Commission therefore properly granted summary judgment for American Cyanamid on the ground that the citation failed to allege a violation cognizable under the Act.

For the foregoing reasons, OCAW's petition for review should be DENIED and the Review Commission's order dismissing the citation should be AFFIRMED.

Respectfully submitted,

Donald L. Morgan

Donald L. Morgan
Charles F. Lettow
Mark N. Duvall
W. Richard Bidstrup
CLEARY, GOTTlieb, STEEN & HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

Counsel for
American Cyanamid Company

Date: January 24, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 1983 I caused copies of the foregoing Brief of Respondent to be mailed, first class postage prepaid, to the following persons:

George H. Cohen, Esq.
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Sarah Wunsch, Esq.
Center For Constitutional Rights
853 Broadway
New York, New York 10003

Nicholas E. Calio, Esq.
Washington Legal Foundation
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006

Dennis K. Kade
Associate Counsel for Appellate Litigation
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210



Mark N. Duvall

Counsel for
American Cyanamid Company

January 24, 1983

STATUTORY APPENDIX

The text of pertinent provisions of relevant statutes appear below.

1. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.

Section 2, 29 U.S.C. § 651:

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, 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--

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions; . . .

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety; . . .

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

Section 4(b)(1), 29 U.S.C. § 653(b)(1):

Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Section 5(a), 29 U.S.C. § 654(a):

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;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

Section 9(c), 29 U.S.C. § 658(c):

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Section 12(a), 29 U.S.C. § 661(a):

The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

2. Title VII of Civil Rights Act of 1964, 42 U.S.C.
§ 2000e et seq.

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 701(k), 42 U.S.C. § 2000e(k),
added by the Pregnancy Discrimination Act,
Pub. L. No. 95-555, § 1:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

