

# Litigation – A Crouching Tiger?

Frank M Parker, III  
CIH, CSP, PE, DEE

Yuma Pacific Southwest AIHA  
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## Purpose

- What is litigation telling us about the current practice of IH?
- Where is this all going?
- Is litigation identifying important IH challenges that we are not recognizing?

## Lesson #1

- The Courts (Law) Trump OSHA.
- Law-All of society (old, young); OSHA-Work site only (healthy workers) & one day.
- It's important to comply with OSHA.
- Compliance with OSHA does not necessarily equal compliance with the law.
- The Judge is typically ambivalent about OSHA.
- The Jury typically does not believe OSHA protects the worker. They believe OSHA is in industry's "pocket".

## Requirements for a Lawsuit

- Injured Party (Damages)
- Violation of the law
- Solvent Defendant (s)

## Injured Party (Damages)

- Occupational Disease
  - Acute
  - Chronic
- Costs

## Chronic Occupational Diseases

- Cancer (s) are the most common occupational diseases litigated.
- Most litigation involves workers diagnosed after they leave the work force (ages >60)
- More and more cases involve family members exposed via contamination brought home by a worker. (Asbestos, Heavy Metals)

## Lesson #2

- Are we focusing on the wrong segment of the work force?
- Should we focus on the most sensitive members of the work force?
- Should we adjust our exposure standards for latency periods >40 years. (60, 80,?)

## Costs

- Occupational disease is not free; someone has to pay.
- Medical costs alone for cancer easily run \$500,000 to \$1,000,000 and will get much higher in the future.
- Workers Compensation grossly inadequate for occupational diseases.
- Costs can only be accepted or transferred not eliminated.
- Transaction costs also very high.
- Payer of last resort is the government.

## Lesson #3

- The court, with or without Congress, will decide who pays.
- Even dismissal means someone pays.
- No injured party (plaintiff or defendant) can resist going to court to obtain or deny compensation or shift responsibility (all or part) to some other party.

## Violation of the Law

- Failure to Warn
- Inadequate Training
- Health & Safety Standards
  - Walsh-Healy (1942-1970)
  - OSHA (1979-Present)
  - Entire Standards not just TLV/PEL/REL
- State of Art and knowledge

## Lesson #4

- We need to completely rethink warnings.
- Substantially all plaintiffs have had inadequate or no warnings.
- MSDS not the answer.
- Law basically requires:
  - What are the hazards?
  - How do I know when I'm at risk?
  - How do I protect myself?
  - What are the things I shouldn't do?

## Warnings

- “No advice or instructions to workmen subjected to an insidious hazard is worth the energy required to enunciate it, or the paper on which it is written, unless it is interpreted by intelligent demonstration at the site of the hazard, and implemented by suitable and adequately maintained equipment, and reinforced by the medical supervision that will detect the early evidences of inadequacies in preventive measures or departures therefrom.”

Robert A Kehoe, 1951

## Lesson # 5

- Training not being done and/or it is inadequate.
- Training not IAW national standards.
- Workplace practices are inconsistent with training.
- Trained behavior not enforced.
- It takes lots of training time to change or instill behavior.

## H&S Standards

- Official exposure standards are always behind state of knowledge; usually by decades.
- Exposure histories tend to be those of intense peak exposures, not the classic 40 year TWA.
- Litigation (IH's?) tends to ignore/play down peak exposures.
- Most IH data in epi studies is peak data; not TWA.
- Exposure data in most epi studies scientifically inadequate.
- Most epi studies underestimate exposures. (Mulhousen & Hewett)

## Lesson #6

- We can't rely on official exposure standards to prevent occupational diseases at the level society (law) expects.
- Should we focus on peak exposures instead of TWAs?
- Standards are based on "Risk"; the Court is interested in "Cause".

## Exposure Data

- Developing exposure data has very low priority among IH's, employers, manufacturers etc.
- In most cases there is little if any exposure data that can be associated with the plaintiff's exposure or the defendant's operations.
- Where data exists it is almost always inadequate or of poor quality.
- Most IH's rely on "professional judgment" not data.
- "Professional judgment" consistently under estimates exposure concentrations. (Hewett & Mullhausen)



## State of Knowledge

- Litigation has seriously impaired research and promulgation of national standards.
- Don't expect any reasonable exposure standards in the foreseeable future.
- Few or no epi studies will be done in the US.
- Most epi studies will be from the developing world – China
- Lawyers seem to be major source of exposure research funding.

## Lesson #7

- State of knowledge more important than national standards regardless of the origins of the knowledge.
  - What do we know, or should know, and when did we know it.
- Can't wait for OSHA, ACGIH, NIOSH to act.
- Professional IH needs to concentrate on the gap between OSHA and State of Knowledge

## Solvent Defendant (s)

- Manufacturers
- Suppliers
- Other Employers/Contractors on site
- Design Professionals (Engineers etc)
- Premise Owners
- Employers

## Lesson #8

- Someone will pay.
- Many defendants in or anticipating bankruptcy.
- Direct employers appear to be the next best (easiest) target.
- If we don't curb occupational disease then ultimately we all will pay via the government in some form.

## Conclusions

- Litigation here to stay.
- If we are to meet society's expectations we have to get passed OSHA.
- We have to devise ways to implement current knowledge into programs ahead of, or in spite of, promulgated standards.
- We can't wait for scientific certainty before we act. (Anticipation)