IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 17 1970
JAMES R. COONEY, CLERK
BY DEPUTY Evelyn G. Walker

CLARENCE BOREL, PLAINTIFF	)	
V.	)	CIVIL ACTION NO. 6449
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL., DEFENDANTS	)	

SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION

Defendant, Owens-Corning Fiberglas Corporation, urges that judgment be granted in its favor under Rule 56 upon an additional ground, other than those heretofore set forth. That ground is bottomed upon the Arizona and Illinois equivalents of the provisions of the Workmen's Compensation Act of Texas[1] that an employee waives his common law or statutory right of action when he is under said Act, and that such Act becomes his exclusive remedy.

It is undisputed in this case that the decedent, Clarence Borel, was an employee of defendant, Owens-Corning Fiberglas Corporation, on at least two occasions, once in

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[1]Article 8306, Sec. 3, 3a, V.A.C.S.

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1953 or 1954 on a chemical plant job in Tuskolee, Illinois, (Borel Dep., pg. 80; also Borel Dep., list of employers), and then in 1959 on the Motorola plant job in Phoenix, Arizona, (Borel Dep., list of employers). During both of these periods of time, defendant was a subscriber under the Workmen's Compensation and Occupational Disease Acts of both Illinois and Arizona.[2] It is plaintiffs' contention, inter alia, that during this period of time Clarence Borel was injuriously exposed to asbestos dust w hile working as an asbestos insulation worker, resulting in his contracting the occupational disease, asbestosis, which eventually brought about his incapacity and death. Cf. Plaintiffs' Amended Complaint. It would, therefore, seem that this defendant is insulated under both the Illinois and Arizona Acts from common law liability as asserted against it by the plaintiffs herein.

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[2]Affidavit of H. G. Harter attached hereto marked Exhibit "A".

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As in the Texas case of MIDDLETON V. TEXAS POWER & LIGHT CO., 108 Tex. 96, 185 S.W. 556 (1916), the Illinois Courts have held that when an employer becomes a subscriber under the Illinois Workmen's Compensation Act, he is exempt from all common law or other statutory liability for personal injuries suffered by employees in his service. ILLINOIS PUBLISHING & PRINTING CO. V. INDUSTRIAL COMMISSION, 299 Ill. 189, 132 N.E. 511; McNAUGHT V. HINES, 300 Ill. 167, 133 N.E. 53.

Although no court interpretation can likewise be found concerning the Illinois Workmen's Occupational Disease Act adopted in 1951, its close similarity in this respect with Illinois' Workmen's Compensation Act would indicate a like holding if passed upon byan Illinois appellate court.

Turning then to Illinois' Workmen's Occupational Disease Act, Section 1(d) defines "occupational disease" to mean "a disease arising out of and in the course of the employment." Actually, there should be no quarrel that the disease of asbestosis comes within the Illinois Act. In fact, plaintiffs' counsel indicates as much in regard

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to certain interrogatories propounded in this action to the defendants.

Under the Illinois Workmen's Occupational Disease Act in effect when Clarence Borel was working in Illinois for Owens-Corning, we find at Section 5(a) thereof:

> "There shall be no liability of any employer for compensation or damages for or on account of any injury to health, disease, or death therefrom, other than for the compensation herein provided * * * * *."

Section 11 of said Act further provides:

> "The compensation herein provided for shall be the full, complete and only measure of the liability of the employer bound by election under this Act and such employer's liability for compensation and medical benefits under this act shall be exclusive and in place of any and all other civil liability whatsoever, at common law or otherwise, to any employee or his legal representative on account of damage, disability or death caused or contributed to by any disease contracted or sustained in the courseof the employment." (Emphasis supplied)

Since Borel also worked for Owens-Corning in Arizona in 1959, a study of the Arizona Occupational Disease Disability Act should be made. First, we note

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that asbestosis is specifically named therein at Section 23-1102, Arizona Revised Statutes, 1956, as amended.[3]

Furthermore, Section 23-1222, A.R.S., says:

> "The right to recover compensation pursuant to the provisions of this chapter for occupational diseases sustained by an employee and arising out of or in the course of his employment, whether or not resulting in death, shall be the exclusive remedy therefor against the employer, * * * * *."

The following cases are representative of the many which hold workmen's compensation to be the exclusive remedy in Arizona. CORRAL V. OCEAN ACCIDENT & GUARANTEE CORP., 42 Ariz. 213, 23 P. 2d 934; LOWERY V. UNIVERSAL MATCH CORP., 6 Ariz. App. 98, 430 P. 2d 444; WILLIAMS V. MAGMA COPPER CO., 5 Ariz. App. 236, 425 P. 2d 138.

In conclusion, this defendant submits that Motion for Summary Judgment, insofar as it is concerned, should be granted if for no other reason than because it is insulated under both the Illinois Workmen's Occupational Disease Act and Arizona Occupational Disease Disability Act from common law liability so far as its employees such as Borel are concerned.

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[3]Hereinafter referred to simply as A.R.S.

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Probably the most telling indication of the correctness of this defendant's position is that plaintiffs have not seen fit to sue all of the many employers that the decedent worked for during his lengthy working life. Certainly, if able counsel for the plaintiffs in his wildest dreams thought that he could recover against said employers, they would be defendants, in this action here, now! And if this defendant's position is not well taken, the plaintiffs receive carte blanche to make as additional parties defendant all such employers of the deceased. This the plaintiffs should not be able to do in view of the compensation acts of the various states where Clarence Borel worked as an insulator.

Respectfully submitted,

KING, SHARFSTEIN & RIENSTRA

BY: _____

707 Beaumont Savings Building
Beaumont, Texas 77701
ATTORNEYS FOR DEFENDANT,
OWENS-CORNING FIBERGLAS
CORPORATION

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A true copy of the above and foregoing motion for summary judgment was on this the 17th day of December, 1970, served upon counsel for the plaintiffs by depositing the same in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed to Honorable Ward Stephenson, Attorney at Law, Stephenson Building, Orange, Texas, 77630, and also a true copy served on all other interested counsel of record.

ATTORNEY FOR DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION

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THE STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

BEFORE the undersigned, Robert L. Logan, Jr., a notary public in and for the State of Ohio, on this day personally appeared H. G. Harter, who, being by me here and now duly sworn, upon his oath says:

I am over the age of twenty-one years and am employed by Owens-Corning Fiberglas Corporation in the capacity of Manager of Corporate Insurance in which capacity I have been employed for twenty (20) years.

As a matter of personal knowledge, I know that Owens-Corning Fiberglas Corporation was a subscriber under the Arizona Workmen's Compensation Act and Arizona Occupational Disease Act in 1959 covering employees of Owens-Corning Fiberglas Corporation working at the Motorola Plant, Phoenix, Arizona.

Furthermore, as a matter of personal knowledge, I know that all employees of Owens-Corning Fiberglas Corporation employed in the State of Illinois during the years 1953 and 1954 were covered under the Illinois Workmen's Compensation Act and Illinois Occupational Disease Act, inasmuch as Owens-Corning Fiberglas Corporation was a subscriber under both said Illinois Acts.

Furthermore, as a matter of personal knowledge, I know that Owens-Corning Fiberglas Corporation was a subscriber under both the California Workmen's Compensation Act and California Occupational Disease Act so as to cover its employees working at Spreckles Sugar Refinery in Mendota, California, during that year.

Finally, as a matter of personal knowledge, I know that Owens-Corning Fiberglas Corporation was a subscriber under the Texas Workmen's Compensation Act in 1967 covering all of its employees working in the State of Texas.

H. G. Harter

H. G. Harter

SUBSCRIBED AND SWORN TO BEFORE ME by the said H. G. Harter, this 25th day of August, 1970, to certify which witness my hand and seal of office.

Robert L. Logan, Jr., Atty.
Notary Public—State of Ohio
My Commission has no Expiration Date
Section 147.03 O. R. C.

Robert L. Logan, Jr.

EXHIBIT "A"

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SUPPLEMENTAL MOTION FOR
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KING, SHARFSTEIN & RIENSTRA
ATTORNEYS AT LAW
707 BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS 77701