E. HERBERT HERLIHY
F. GEORGE HERLIHY
K. A. STOLL
THOMAS E. RYAN
JOHN F. McLAUGHLIN
E. H. KENDIG, JR.
RAY B. CUMMING

CABLE ADDRESS
HERANDHER

HERLIHY & HERLIHY
ATTORNEYS AT LAW
SUITE 516 PARK CENTRAL BUILDING
412 WEST SIXTH STREET
LOS ANGELES 14, CALIFORNIA
TELEPHONE TRINITY 4911

April 29, 1952

NOTED
V. B.

Johns-Manville Products Corporation
Lompoc, California

Attention: E. T. Legge, Director of Industrial Relations

Re: Howard Winn
Claim LA 120-530

COPY

Dear Sirs:

The above captioned matter came up for trial before Referee George Martinelli of the California Industrial Accident Commission at Santa Barbara General Hospital, April 15, 1952. The applicant was represented by Attorney L. C. Grossman of Lompoc, California and your Company was represented by this firm, Mr. E. H. Herlihy appearing.

Based upon the records of Johns-Manville Products Corp., and information obtained by the Industrial Accident Commission from its own files of former pneumoconiosis claims involving Johns-Manville, the following insurance coverage appears to be correct and will be accepted as such by the Commission unless proof to the contrary can be shown:

Mr. Winn was employed by Johns-Manville from September 7, 1933, until January 22, 1940. During the period of December 1, 1932 until December 1, 1933 the employer was insured by Pacific Indemnity Company under policy EC 69341, and again for the period December 31, 1933 until December 31, 1934 under policy EC 74009. Apparently the Company was uninsured for a period of one month between December 1, 1933 and December 31, 1933.

The Company was then insured by Employers Liability Assurance Corporation, Ltd. of London, England commencing December 31, 1934 through December 31, 1935, policy number not indicated, and again under policy WC 673827 for the period December 31, 1935 through December 31, 1936 and again under policy WC 68136 for the period December 31, 1936 through December 31, 1937, all three policies being ex-medical. These policies, both those written by Pacific Indemnity Company and Employers Liability Assurance Corporation, may have been in the name of the predecessor companies, Celite Products Company, The Celite Company and Celite Corporation.

The hearing was conducted under some difficulty due to the fact that Mr. Winn was required to wear a mask and was required to rest frequently during the protracted examination.

His family and prior employment history were gone into thoroughly, but with the exception of his statement that he was employed for approximately six months during the year 1933 as a street sweeper at Lompoc, California, proved of little defense value. By street sweeper, he meant just that. His job required him to manually sweep the accumulated street debris in piles and then shovel it into a cart. Apparently, this information had never been clearly presented to any of the examining physicians. Based on this testimony, we raised the issue of Apportionment. His only other work prior to employment by Johns-Manville and the street sweeper job was that of general farm hand in the Lompoc area.

He was first employed by Johns-Manville on September 7, 1933 as a warehouseman and remained in that employment more or less continuously until May 25, 1942 when he quit upon the advice of an Army medical examiner who rejected him for military service and who told him that he had a lung condition and that he should not engage in any activity for at least six months. The nature of the lung condition was not definite at that time, but Mr. Winn acted upon the doctor's advice and remained at home for a period of six months. He applied for re-employment but was rejected by Johns-Manville because of his lung condition. However, he denied that either your Company or its physicians advised him that his lung condition could have been caused or aggravated by his employment.

His classification during the period 1933 to 1942 varied from warehouseman to fireman, tunnel inspector - brick plant, sac cleaner, dryer man, brick piler, car loader, control man, shipping laborer. All of the jobs were dusty, some more than others. Respirators were furnished on the car loading job, but not otherwise, and that even the respirators did not prevent the fine dust from getting into his nostrils and mouth; at the end of the day's work he was always covered with a fine white dust which was removed by an air hose furnished by the employer.

In 1946 he entered the General Hospital at Santa Barara as suspected Tuberculosis, where he remained until June 17, 1948. After a period of rest he re-entered the hospital on May 18, 1949. Upon this last return, he came under the care of Dr. T. B. Caldwell, During the period 1942-1946 he had several outside jobs, driving trucks for the Seaside Oil Distributors.

Mr. Winn referred to examinations and treatment by Dr. Holloway and Dr. Henderson of Lompoc. Both these doctors advised him that he had Tuberculosis, but it was not until the latter part of August 1950 in a conversation with Dr. Caldwell that he learned that he had silicosis caused by exposure to diatomaceous earth; that Dr. Caldwell advised him at that time of another former employee of Johns-Manville who was at the same hospital, Max Romero and whose case had been accepted by the Johns-Manville Company and therefore

he thought that Mr. Winn should also file a claim.

The foregoing testimony was elicited in connection with our issue of Statute of Limitations. This man has been under treatment since 1942 and it seems highly improbable that he was not advied by any of the local physicians, or anyone else, that he had pneumoconiosis and that same might be caused by exposure to diatomaceous earth. His application was filed August 4, 1951 and by placing the alleged conversation with Dr. Caldwell the latter part of August 1950, his claim comes within the jurisdictional period of one year. It is our opinion that the witness was not telling the truth as far as the date of his conversation with Dr. Caldwell is concerned.

Later on during the proceedings, we cross examined Dr. Caldwell, ostensibly on his report of December 10, 1951. We were primarily interested in ascertaining when he discussed this matter with Mr. Winn when he first told the applicant that his condition was due to, or aggravated by, exposure to diatomaceous earth. Dr. Caldwell seemed somewhat concerned with the implication that he was stirring up litigation against Johns-Manville, but after some evasion he finally testified that he believed he discussed the possibility of Mr. Winn's condition being due to his employment when Winn returned to the hospital on March 18, 1949. However, on re-direct examination, he stated that he could not be sure of the date and if Mr. Winn said it was the latter part of August 1950 it could have been that date. Dr. Caldwell admitted that Johns-Manville's acceptance of liability for the Max Romero case did change his views regarding these diatomaceous earth cases, and that prior to that time he never felt sure that the cases of former Johns-Manville employees which were being treated at the Santa Barbara General Hospital for Tuberculosis were necessarily industrially caused or aggravated.

We examined the records of the General Hospital and they failed to reveal any evidence that either Mr. Winn or the hospital connected his condition with exposure to diatomaceous earth and, to that extent, Dr. Caldwell's written report of December 10, 1950 was incorrect and he admitted it to be incorrect, but explained it by saying that he was giving a general report and not a copy of the hospital records, and therefore he was incorrect when he said that when Mr. Winn was admitted to the Sanitarium on March 28, 1946 the diagnosis on the admission was diatomaceous earth pneumoconiosis with superimposed pulmonary Tuberculosis.

We obtained medical authorization from the applicant to examine the records of Doctors Henderson and Holloway. We are forwarding these to Mr. Legge with the request that the records of the aforesaid physicians be closely studied and

that the doctors be questioned regarding whether or not they advised Mr. Winn that in their opinion the exposure to diatomaceous earth may have had something to do with his condition and the date of such advice if it was given. The defendants were granted fifteen days to obtain this further medical information.

In the meantime, the defendants have actually no medical reports on this case and we suggest that Dr. Walter Anderson be requested to prepare a report for filing with the Industrial Accident Commission. The Referee has also requested that the employer furnish it a payroll statement covering the last year of Mr. Winn's employment.

It is our opinion that the Commission will make a Decision in favor of Mr. Winn, finding that he is totally and permanently disabled as a result of pneumoconiosis with superimposed Tuberculosis caused by exposure to diatomaceous earth and that he will be entitled to medical care for the rest of his life. In view of the applicant's unrebutted testimony (other than the equivocal testimony of Dr. Caldwell) that he first learned of the industrial implications of his disease the latter part of August 1950, we do not believe that the Commission will find that the claim is barred by the Statute of Limitations.

We shall keep you advised of further developments.

Yours very truly,

HERLIHY & HERLIHY

By

EHH:bf
cc/ A. S. Eisenbast
Vandiver Brown
C. W. Hite