Ill. Legislation

M E M O R A N D U M October 21, 1936

RE.

CLAIMS PENDING BEFORE ILLINOIS INDUSTRIAL COMMISION WHICH WERE FILED PRIOR TO OCTOBER 1, 1936

There are thirteen (13) claims against Johns-Manville Products Corporation which are now pending before the Illinois Industrial Commission for injuries of an occupational disease character incurred prior to October 1, 1936 when the new Act became effective. The right of recovery in all of these cases depends upon whether they fall within Section 2 of the old Illinois Occupational Diseases Act (repealed by the new Act), as this Section was construed in the so-called Burns case. In order for them to be covered by this Section 2, there would have to be a holding that the substance causing the disease was "poisonous". Up to the present, there has been no holding as to whether silica or asbestos constitute a "poison" within the meaning of Section 2, as construed in the Burns decision. Neither is any case pending which will provide a test of this question.

The question which we have to decide is whether to settle these pending claims or to contest them. If we should adopt thelatter course it would be necessary that we carry a test case to the Illinois Supreme Court.

Our problem was discussed with Mr. Heth and with Mr.

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Clarke in Chicago and it is their opinion we should settle. I concur in this opinion and this memorandum will set forth the reasons therefor.

The thirteen pending claims are the following (last names only):

(1) Sarounas
(2) Yakobich
(3) Coleman
(4) Taraban
(5) Lozovick
(6) Kotz
(7) Pool
(8) Brown
(9) Bojko
(10) Oglesby.

(All of the foregoing are represented by Sol Andrews.)

(11) Vogel (represented by Messrs. Berg and Tarpey
(12) Anastasia Perez (represented by Rasoff)
(13) Giurukis (represented by Robert L. Brody).

Mr. Heth believes that the cases can all be settled for not in excess of $4,000 for the entire thirteen. He estimates one test case would cost us in excess of that sum for legal fees, expenses and for the testimony of physicians, scientists and other experts who might have to be called as witnesses to establish that the materials to which the claimants were exposed were non-poisonous. Mr. Heth stated that if we had a hundred cases pending against us he might entertain a different opinion and be more inclined to recommend we test the jurisdiction of the Commission. In this connection, however, he advised me that Libbey-Owens-Ford Glass Company had more than one hundred cases pending against them but that their lawyers and executives, after con-

siderable vacillation, had finally decided to settle all of them.

The statute of limitations on claims under Section 2 of the old law does not begin to run until the employee learns of his disability (this is established by the Wedron Silica case). However, the forty some odd employees who brought action against us in the courts and from whom we would, in the ordinary course of events, have most reason to fear would bring actions before the Industrial Commission in the event we settled the pending claims, are effectually barred from bringing claims at this date on other grounds. The old Occupational Diseases Act required that the Commission be notified within one month after disability and that an action be commenced within one year. The bringing of the action at law by these forty former employees conclusively established that they knew they were "disabled" since the complaints filed contained allegations that they were disabled. In the meantime, a year has elapsed in each case since action was brought. Accordingly, none of the forty odd employees can institute an action at this date under the old law.

It is, of course, conceivable that employees released two, three, five and even ten or more years ago might bring an action before the Commission under the old law alleging that they had just learned of their disability and that it was attributable to the inhalation of "poisonous" dust while in our employ. Everyone with whom I discussed this question agreed

that the possibility of any such claims being made, or of any considerable number being made, was so remote as to be negligible. The bait which prompted the lawyers constituting the silicosis ring to incite employees to bring these actions has disappeared. Recoveries are relatively small before the Commission and the Commission fixes the attorneys' fee. This fee is usually a modest figure and does not approach the 50-50 split which characterizes the retainer in the typical negligence action.

Mr. Clarke concurred in the foregoing reasoning and in the conclusion that we should settle these claims. He advanced the further idea that we were very fortunate in having this opportunity to settle these pending claims for such a relatively negligible sum. His thought was that such paltry settlements would effectually dissipate the illusions which some of our employees might have as a result of the claims advanced by the silicosis ring and their runners to the effect that great sums of money could be obtained from the employer through the bringing of law suits or the filing of claims before the Commission alleging silicosis or other dust disease contracted during the course of employment.

If settlement of the cases is not effected there will be involved not only the cost of testing the issues which we will desire to raise as to the applicability of Section 2 of the old Act but also the possibility that the Supreme Court

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will give us an adverse decision, that is, hold that the dust causing the claimant's condition is a "poison" and that the Industrial Commission has jurisdiction. Following such an adverse ruling, the figure we would have to pay for settling the cases would be many times greater than that for which they can be settled at the present time.

By settling the cases we reduce the possibility of a holding that asbestos dust is a poison as it is unlikely there are other cases pending involving that type of dust. I am advised that there are no cases of this type pending against Union Asbestos & Rubber Company. On the other hand, if a decision should be handed down in some case other than ours to the effect that asbestos dust is a poison for the purposes of Section 2 of the old Act, or if there should be a similar holding in respect to silica dust which might have indirect bearing on the character of asbestos dust, we all feel the resulting situation would have no serious aspects so far as we are concerned. The Health and Safety Act does not contain any specific requirements as to precautions to be taken by an employer where poisons are involved. It merely gives the Industrial Commission the power to prescribe what these precautions shall be. It is the consensus that even though asbestos or silica should be regarded as a "poison" for the purposes of giving the Commission jurisdiction over the type of claims under consideration, the Commission would, in pre-

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scribing the precautions to be taken where employees were exposed to these dusts, differentiate between poisons in the ordinary sense of the word and these materials which had been judicially construed as "poisons" although not generally so regarded.