EXHIBIT P-802

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

NOVEMBER TERM, 1933.

BERNARD DUGAN,

Plaintiff,

vs. No._____

R. V. AYCOCK COMPANY,
AYCOCK CORPORATION, and
R. V. AYCOCK,

Defendants.

PETITION FOR DAMAGES.

Plaintiff states that defendant corporations are corporations organized and existing according to law, and at all times herein mentioned owned, operated and controlled an extensive retail, wholesale, asbestos construction and repair business in Kansas City, Missouri.

That defendant R. V. Aycock was at all times herein mentioned in direct charge of the repair and construction business of said companies, and inaugurated and directed their system and method of work as hereinafter mentioned, and plaintiff worked under his supervision and control.

That during the month of October, 1931, and for a long time prior thereto plaintiff was in the employ of defendants as a common laborer, assigned to repair and construction work, which included the mixing of asbestos with water to have it ready for use; that in the mixing process, fumes and particles of said asbestos would become detached and saturate the air adjacent to where plaintiff and other workmen would be employed, and through breathing said fumes and detached particles found lodgment in the lungs of plaintiff to such an extent as to cause damage and injury to his lungs; that the dangerous nature and character of asbestos fumes and particles was known to the defendants through their superior knowledge and long operation of said business, or in the

M-802

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exercise of ordinary care would have been known to them, but was unknown to the plaintiff.

Plaintiff further states that because of breathing in fumes and particles of asbestos in the conduct of his work, his lungs became surcharged therewith, causing him to become diseased and sick and permanently disabled from work.

Plaintiff further states that his injuries were directly caused by defendants, and each of them, in that R. V. Aycock, personally and as superintendent for his co-defendants, carelessly and negligently operated said work upon a negligent and dangerous method, in that they directed and required plaintiff, and other employees, to mix asbestos with water by placing his hands therein, requiring plaintiff to bend over a container in a stooping position, so that his nostrils and mouth were in close proximity to said asbestos fumes and particles, all of which made it reasonably likely that plaintiff's lungs would become surcharged with said asbestos particles and fumes to his damage and injury, all of which defendants knew, or by the exercise of ordinary care would have known.

Defendants and each of them were further negligent causing plaintiff's disability, injury and damage in that though defendants and each of them knew that said asbestos fumes and particles were likely to be breathed into plaintiff's lungs and to injure him as aforesaid, yet R. V. Aycock personally and as superintendent for his co-defendants negligently failed to warn plaintiff of the dangers thereof.

Defendants and each of them were further negligent causing plaintiff's disability in that though they knew of the danger of breathing particles and fumes of asbestos into the lungs, yet they carelessly and negligently failed to furnish any instrument, or device for the mixing of said ingredients with safety to plaintiff and other employees, or any mask, or device, or other protection to be used over his nostrils and mouth while said mixing process was going on, all of which made it reasonably likely that plaintiff

(2)

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would breath said fumes and particles and be injured thereby, all of which defendant knew, or by the exercise of ordinary care would have known.

Plaintiff states that his injuries as aforesaid do not fall within the terms of the Workmen's Compensation Act.

Plaintiff states that the aforesaid acts of negligence on the part of the defendants, and each of them, operated directly and concurrently to cause plaintiff's injuries, and that he has suffered injuries as follows:

His lungs fail to properly perform their natural and ordinary functions, all of which causes a general breaking down of plaintiff's physical system and rendering his respiratory, circulatory and assimilative functions to be greatly impaired, so that he is rendered permanently sick and disabled from performing labor; that all of said conditions render plaintiff extremely nervous, irritable and restless, unable to sleep, to get proper nourishment, causing him to feel stupid, with extreme lassitude, and causing him great mental anguish; that all of said conditions are permanent in their nature and character.

Plaintiff further states that because of said injuries he has been prevented and in the future will be prevented from earning money from his usual labor and occupation; that he has paid out, and will in the future pay and become liable to pay out large sums of money for medicine and medical attention, all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars, for which sum with costs he prays judgment.

Kennard & Graham.
Attorneys for Plaintiff.

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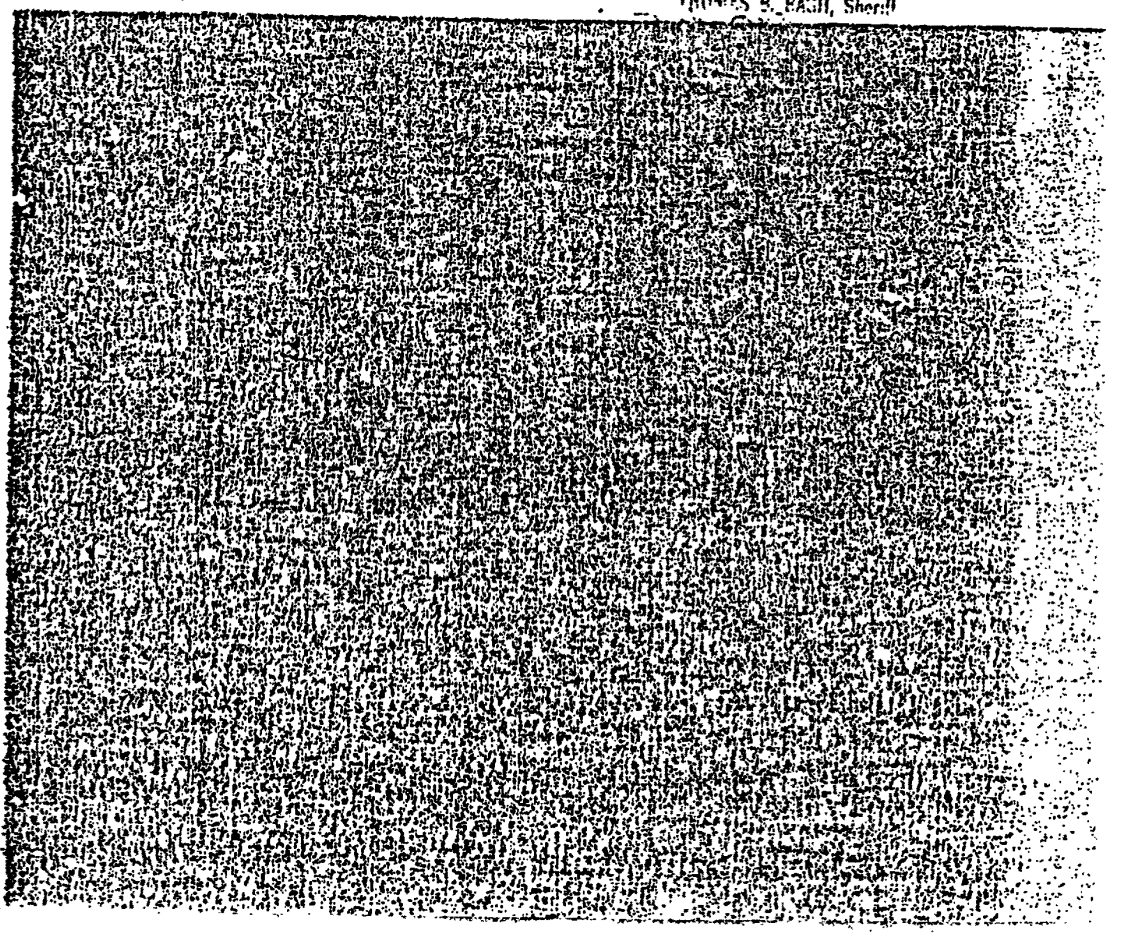
Executed this writ in Jackson County, Missouri, on the 26 day of October 1933, by leaving a copy of this writ, together with a copy of the petition as furnished by the Clerk, at a business office of the within named defendant corporation, R. V. Aycock Corporation

with D. V. Drew as Office Manager of the said defendant corporation, and person in charge of the said business office. The president or other chief officer of the said defendant corporation could not be found in Jackson County, Missouri, at the time of service.

Executed this writ in Jackson County, Missouri, on the 28 day of October 1933, by leaving a copy of this writ at a business office of the within named defendant corporation R. V. Aycock Company with D. V. Drew as Office Manager of the said defendant corporation, and person in charge of the said business office. The president or other chief officer of the said defendant corporation could not be found in Jackson County, Missouri, at the time of service.

Executed this writ in Jackson County, Missouri, on the 31 day of October 1933, by delivering a copy of this writ to the within named defendant R. V. Aycock

THOMAS B. BACH, Sheriff



CRMC-Motley1000-Subj-004252

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY.

BERNARD DUGAN,

Plaintiff,

vs.

R. V. AYCOCK COMPANY, AYCOCK CORPORATION, and R. V. AYCOCK,

Defendants.

No. 425,211.

SEPARATE ANSWER OF R. V. AYCOCK COMPANY AND R. V. AYCOCK.

Now come R. V. Aycock Company, a corporation, and R. V. Aycock, and for their separate answer to plaintiff's petition deny each and every allegation in said petition contained.

WHEREFORE, having fully answered, said defendants pray to be discharged with judgment for their costs.

WATSON, ESS, GRONER, BARNETT & WHITTAKER

By Earl E. Duggan

Attorneys for R. V. Aycock Company and R. V. Aycock.

CRMC-Motley1000-Subj-004253

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A MEETING OF THE BOARD OF DIRECTORS OF JOHNS-MANVILLE CORPORATION was held at the offices of the Corporation, No. 292 Madison Avenue, New York, N. Y., on Monday, the 27th day of June, 1932 at 4:30 o'clock in the afternoon.

The following Directors were present, constituting a quorum:

Messrs. Walter H. Aldridge
Lewis H. Brown
W. R. Seigle.

Mr. W. R. Seigle, Chairman of the Board, acted as Chairman of the meeting and presided thereat and Mr. E. M. Voorhees, Secretary of the Corporation, acted as Secretary of the meeting and kept the minutes thereof.

A notice of the meeting and affidavit of mailing was presented and, on motion, duly made, seconded and unanimously carried, was ordered filed with the records of the meeting.

The minutes of the meeting of the Board of Directors held on June 1, 1932 and of the meeting of the Executive Committee held on June 14, 1932 were read to the meeting and on motion, duly made, seconded and unanimously carried, were ratified and approved as recorded.

Statements were submitted to the meeting covering major projects, cash position and forecast, sales during the month of May and June sales to the latest date that figures were available.

The Chairman suggested that the regular meeting of the Board of Directors which would ordinarily be held on the last Monday in July be omitted; that the regular August meeting be held at the usual time and that the regular meeting for September be held on October 3rd rather than on September 26th.

Thereupon, on motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED that the Board of Directors omit the regular July meeting; that the regular August meeting be held on the usual date, namely, August 29th and that the regular September meeting be held on October 3rd rather than on September 26th.

The President discussed briefly the possibility of our selling asbestos fibre to Nicolet Asbestos Mines, Limited

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He stated that it was contrary to the policy of the Corporation to sell asbestos fibre but that the Nicolet mine was closed and would probably remain closed for some time and that if we should be able to make long term arrangements with them for furnishing them limited quantities of asbestos fibre, it might be well to depart from our policy in this regard.

After discussion, on motion, duly made and seconded, the following resolution was unanimously adopted:

> RESOLVED that the proper officers of the Corporation be, and they hereby are, authorized to negotiate with Nicolet Asbestos Mines, Limited for the sale to said Company of asbestos fibre in limited quantities, with authority to enter into such contract with said Nicolet Asbestos Mines, Limited as said officers, in the exercise of their sound discretion and upon advice of counsel, shall deem most desirable and for the best interests of the Corporation.

It was requested that the President cover this with the Executive Committee before proceeding.

The Treasurer stated that progress was being made toward consummating the proposed deal with R. V. Aycock Company which had been approved by the Executive Committee at its last meeting and that it looked as if a favorable transaction would be worked out at the expenditure of not more than $35,000 for good-will.

The meeting discussed certain pending negotiations with the Richardson Company and the American Sugar Company in regard to the purchase by those companies from the Corporation of diatomaceous earth products.

The Treasurer explained to the meeting a proposition being considered as a sales promotion project and in connection with the Corporation's Deferred Payment Plan which, if consummated, would result in the Corporation investing approximately $50,000 over a period of two or three years in selected second mortgages upon residential properties given as security for notes of the home owners endorsed, in each case, by high-class lumber dealers.

After discussion, on motion, duly made and seconded, the following resolution was unanimously adopted:

CRMC-Motley1000-Subj-004255

RESOLVED that the proper officers of the Corporation be, and they hereby are, authorized during the next three (3) years to invest such of the funds of the Corporation as they shall deem advisable, but not in excess of $50,000, in selected second mortgages upon residential properties given as security for promissory notes drawn by the owners of such properties and endorsed in each case by the lumber dealer from whom such home owner shall have purchased the materials going into the construction of his house.

It was requested that the President cover this with the Executive Committee before proceeding.

Various other matters of business were discussed. Where upon, on motion duly made, seconded and unanimously carried, the meeting adjourned.

E. M. Motley
Secretary

CRMC-Motley1000-Subj-004256

Not stated
I'm sure I must file Dugan
Aycock

A MEETING OF THE BOARD OF DIRECTORS OF JOHNS-MANVILLE CORPORATION was held at the offices of the Corporation, No. 292 Madison Avenue, New York, N. Y., on Monday, the 29th day of August, 1932 at 4:30 o'clock in the afternoon.

The following Directors were present, constituting a quorum:

Messrs. Walter H. Aldridge
Lewis H. Brown
W. R. Seigle
George Whitney
Clarence H. Woolley.

Mr. W. R. Seigle, Chairman of the Board, acted as Chairman of the meeting and presided thereat and Mr. E. H. Voorhees, Secretary of the Corporation, acted as Secretary of the meeting and kept the minutes thereof.

A notice of the meeting and affidavit of mailing was presented and, on motion, duly made, seconded and unanimously carried, was ordered filed with the records of the meeting.

The minutes of the meeting of the Board of Directors held on the 27th day of June, 1932 were read to the meeting and on motion, duly made, seconded and unanimously carried, were ratified and approved as recorded.

Statements were submitted to the meeting covering major projects, cash position and cash forecast to April 1, 1933, sales and net profit for July, 1932 and August sales to the latest date figures were available.

The meeting was advised that the purchase of certain assets of R. V. Aycock Company had been completed and final payment made therefor; that these assets had been transferred to two new subsidiaries of the Sales Corporation, namely, Aycock Corporation and Aycock Corporation of Texas which were now in operation.

The Russian asbestos fibre situation was discussed with particular reference to a further hearing before the Tariff Commission scheduled for September 26, 1932.

On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED that the resolution adopted at the meeting of the Board of Directors held on June 27, 1932 by the terms of which the officers of

CRMC-Motley1000-Subj-004257

the Corporation were authorized to invest the funds of the Corporation not in excess of $50,000 in selected second mortgages, be, and said resolution hereby is, repealed and rescinded.

Thereupon, on motion, duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED that a quarterly dividend of $1.75 per share be, and it hereby is, declared upon all of the 75,000 shares of the 7% Cumulative Preferred Stock of the Corporation now outstanding, said dividend to be payable October 1, 1932 to holders of said stock of record at the close of business on September 16, 1932; and

RESOLVED that the proper officers of the Corporation be, and they hereby are, authorized and directed to mail and deliver, or cause to be mailed and delivered, to the holders of record at the close of business on September 16, 1932 of Preferred Stock of the Corporation checks for the amount of dividends to which said stockholders are entitled in accordance with the foregoing resolution, and that said officers be, and they hereby are, authorized to do all other acts necessary or proper to carry out the intent and purpose of said resolution.

No action was taken in regard to a dividend on the Common Stock of the Corporation.

After discussion, on motion, duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED that the President or the Treasurer of the Corporation be, and each of them hereby is, authorized and empowered, in the name and on behalf of the Corporation, to guarantee First Bancredit Corporation and/or Commercial Investment Trust against loss upon notes, made by customers of Rehabilitation Corporation to cover the contract cost (including both labor and material) of work performed for said customers, when such

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notes are discounted by said Rehabilitation Corporation with said First Bancredit Corporation or with said Commercial Investment Trust, any such guarantee to be given only when materials of the Corporation or of its subsidiaries are purchased by such customers of Rehabilitation Corporation and in no case to exceed the applied or installed price of said materials; and

RESOLVED that any and all action heretofore taken in conformity with the foregoing resolution be, and the same hereby is, approved, authorized, ratified, confirmed and adopted.

After discussion, on motion, duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED that the hereinafter designated officers and employees of the Corporation be, and they hereby are, authorized and empowered to accept, on behalf of the Corporation and in connection with purchases made by the Corporation, that type of negotiable instrument known as a "trade acceptance";

Amended 3-29-37

RESOLVED that the acceptance of such instruments by the Corporation shall be evidenced, in each case, by the signature of the General Auditor, the Chief Accountant or the Assistant Chief Accountant together with the counter-signature of the President, any Vice-President, the Secretary, the Treasurer or any Assistant Secretary or Assistant Treasurer;

Repealed 6-17-38

RESOLVED that the hereinafter designated officers and employees of the Corporation be, and they hereby are, authorized and empowered, on behalf of the Corporation and in connection with sales made by the Corporation, to make or draw that type of negotiable instrument known as a "trade acceptance" for acceptance by the customers to whom such sales shall have been made, and to endorse and discount the same after acceptance with any bank, banker or trust company;

RESOLVED that the making, drawing or endorsing and discounting of said trade acceptances on

CRMC-Motley1000-Subj-004259

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behalf of the Corporation shall be evidenced, in each case, by the signature of the President, any Vice-President, the Secretary, the Treasurer or any Assistant Secretary or Assistant Treasurer of the Corporation;

RESOLVED that any of the aforementioned officers or employees of the Corporation be, and they hereby are, authorized to purchase said trade acceptances from any subsidiary company of the Corporation; and

RESOLVED that any and all action heretofore taken in conformity with the foregoing resolutions be, and the same hereby is, approved, authorized, ratified, confirmed and adopted.

Other matters of business were discussed. Whereupon, on motion duly made, seconded and unanimously carried, the meeting adjourned.

Secretary

CRMC-Motley1000-Subj-004260

No. 425211

Division No.

Jackson County Circuit Court
AT
KANSAS CITY

Dugan

VS.

R. V. Aycock

Date 12/21, 193 1

Received of Circuit Clerk, the following papers in the above entitled cause, and I agree to return same within three days.

To take out any original paper you must have the O. K. of the Court.

All Papers.
Copy of Petition.
Copy of Answer.
Copy of Reply.
Copy of Demurrer.
Copy of Motion to Sue as P. P.
Copy of Motion to Make More D. and C.
Copy of Amended Petition.
Copy of Amended Answer.
Copy of Motion for Security for Cost.
Copy of Answer to Cross Bill.
Copy of Stipulation
Mechanic's Lien.
Copy of Motion to be made Party Deft.
Copy of Motion to Strike Out.
Depositions.
Bill of Exceptions.
Copy of Motion for New Trial and Arrest of Judgment.
Copy of Affidavit.

Carl E. Engoe

Attorney for Deft

Eagle Ctg. Co.

? Missing from file.

CRMC-Motley1000-Subj-004261

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The State of Missouri,

To the Sheriff of Jackson County, Missouri, Greeting:

You are hereby commanded to summon

R. V. Aycock Company,

Aycock Corporation,

and

R. V. Aycock,

to appear in the Circuit Court of Jackson County, Missouri, at the County Court House in Kansas City, on the Second Monday in NOVEMBER next, and unless you, the said parties...so summoned, file your Answer within three days thereafter to the petition of

Bernard Dugan,

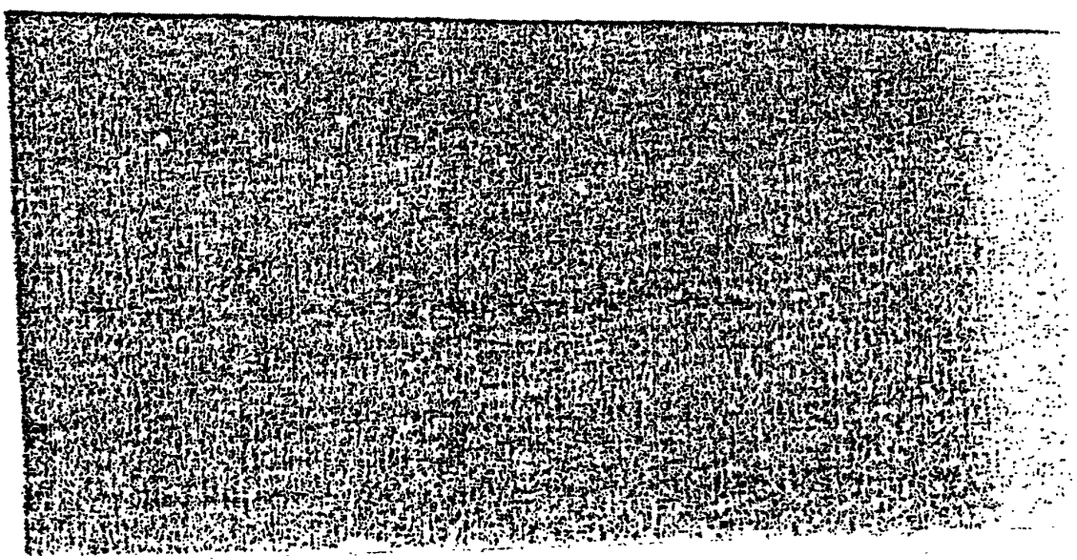
the same will be taken as confessed. And that you then and there have this writ, and that you certify how you execute the same.

Witness, LYNN G. BUFORD, Clerk of the Circuit Court with the seal thereof affixed, at office in Kansas City, Missouri, this...27th day of.....October,.....A. D. 1933.....

(Seal)

LYNN G. BUFORD, Clerk.

By M. Shaughnessy Deputy Clerk.



CRMC-Motley1000-Subj-004262

42,211

No. _____

IN THE CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, AT KANSAS CITY.

NOVEMBER TERM, 1933.

EDWARD DUGAN,

Plaintiff,

vs.

R. V. AYCOCK COMPANY,
AYCOCK CORPORATION, and
E. T. AYCOCK,

Defendants.

PETITION FOR DAMAGES.

FILED

HENLAND & GRESHAM,
Attorneys for Plaintiff,
723 Rialto Bldg.,
Kansas City, Mo.,
Victor 7861.

10-27 1933

BY

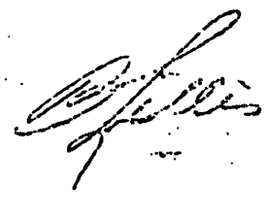
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BERNARD DUGAN -- Plaintiff,

vs.

R. V. AYCOCK COMPANY, AYCOCK CORPORATION, and R. V. AYCOCK, -- Defendants.



SEPARATE ANSWER OF R.V.AYCOCK COMPANY AND R. V. AYCOCK.

(original)

WATSON, ESS, GRONER, BARNETT & WHITTAKER
ATTORNEYS AND COUNSELLORS AT LAW
KANSAS CITY, MO.

CRMC-Motley1000-Subj-004267

The State of Missouri,

To the Sheriff of Jackson County, Missouri, Greeting:

You are hereby commanded to summon

Vaughan Investment Company,

to appear in the Circuit Court of Jackson County, Missouri, at the County Court House in Kansas City, on the Second Monday in MARCH next, and unless you, the the said party so summoned, file your Answer within three days thereafter to the petition of

Bernard Dugan,

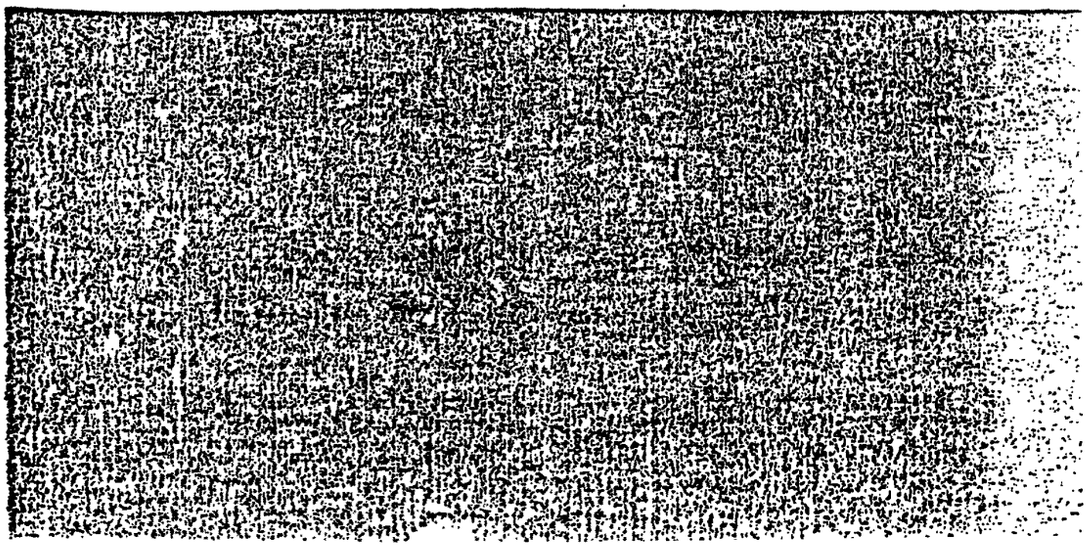
the same will be taken as confessed. And that you then and there have this writ, and that you certify how you execute the same.

Witness, LYNN G. BUFORD, Clerk of the Circuit Court with the seal thereof affixed, at office in Kansas City, Missouri, this 21st day of February A. D. 1934

(Seal)

LYNN G. BUFORD, Clerk.

By H. E. Shaughnessy Deputy Clerk.



CRMC-Motley1000-Subj-004269

Executed this writ in Jackson County, Missouri, on the 24 day of January 1933 by delivering a copy of this writ, together with a copy of the petition as furnished by the Clerk to

[illegible]

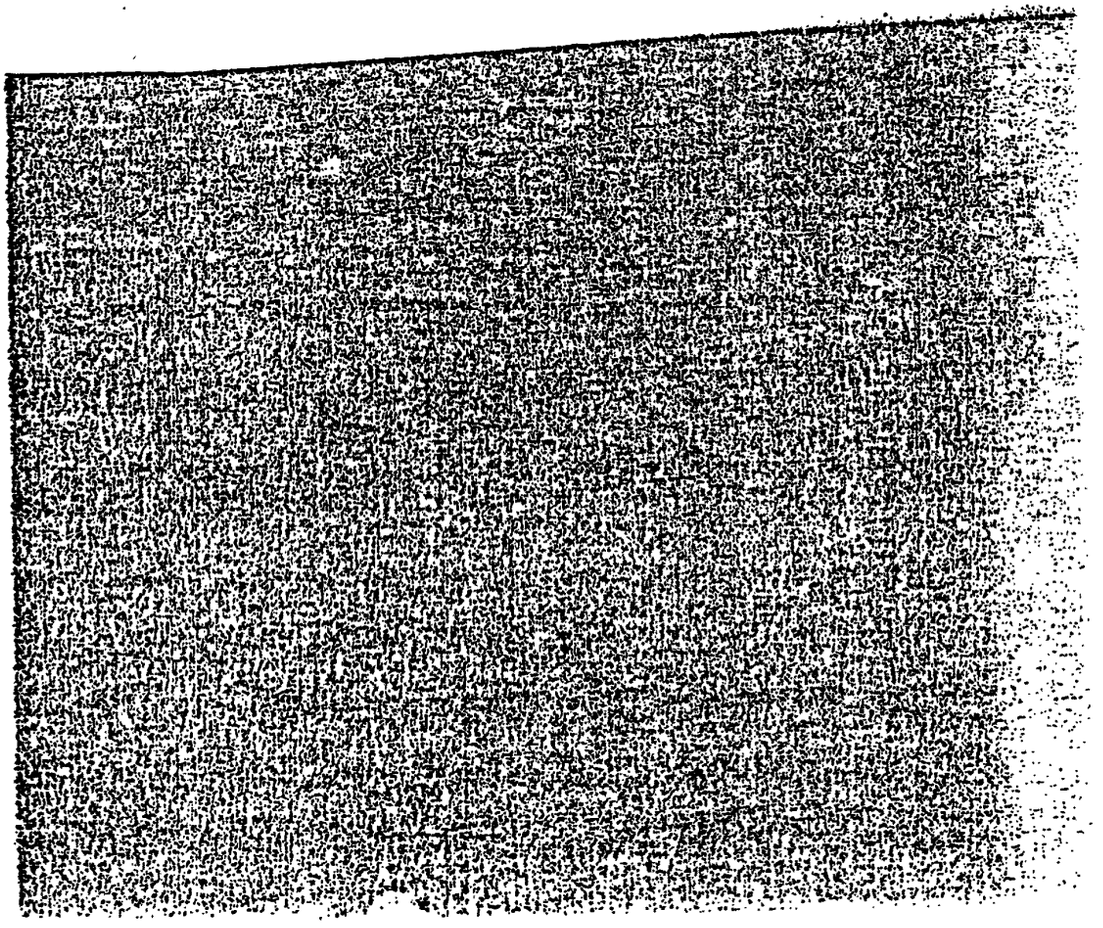
as president and chief officer of the within named defendant corporation

[illegible]

1421 / 0c

THOMAS B. BASH, Sheriff

By [illegible] Deputy



CRMC-Motley1000-Subj-004270

RECEIVED
FEB 23 1934
THOMAS B. BASH, Sheriff

No. 425,211

IN THE CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, AT KANSAS CITY

JANUARY TERM, 1934.

BERNARD DUGAN,

Plaintiff,

vs.

R. V. AYCOCK ROOFING and
(Virgin Interstate Corporation)
corporations, and H. T. Dale Mahan

Defendants.

FIRST AMENDED PETITION FOR

Maxwell Stinnett

Kenyon & Gressell,
Attorneys for Plaintiff,
723 Dielto Bldg.,
Kansas City, Mo.,
Victor 7611.

CRMC-Motley1000-Subj-004275

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY.

MARCH TERM, 1935.

WILLARD DUGAN, Plaintiff vs R. V. Aycock Company, and Wm. Lillibridge Company, Corporations and R. V. Aycock, Defendants	No. 42[illegible].

MOTION TO DISMISS

Come now the defendants and state to the court that a suggestion of death of plaintiff was filed in the above entitled cause on May 5, 1934 and that three terms of court have gone by and said cause has not been revived.

WHEREFORE defendants pray that the above entitled action be dismissed at the cost of plaintiff.

[illegible]

By [signature]
Attorneys for Defendants.

00086

CRMC-Motley1000-Subj-004284

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No. [illegible]

IN THE CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, AT KANSAS CITY,
MARCH TERM, 1954.

BERNARD DUGAN,

...Plaintiff

vs.

R. V. AYCOCK COMPANY and
VAUGHN INVESTMENT COMPANY,
corporations, AND R. V. AYCOCK,

...Defendants

SUGGESTION OF DEATH

FILED

[illegible]

WATSON, ESS, GROVER, KANET & SHINKER
ATTORNEYS AND COUNSELORS AT LAW
KANSAS CITY, MO.

CRMC-Motley1000-Subj-004285

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY.

MARCH TERM, 1935.

[illegible], Plaintiff

vs

No. [illegible]

R. V. AYCOCK COMPANY and
VAUGHN MOTOR CAR COMPANY,
Corporations, and
R. V. AYCOCK,

Defendants

N O T I C E

To the above named plaintiff or Kennard & Gresham, his attorneys of record:

You are hereby notified that defendants will, on Monday, May 6th, 1935, at nine o'clock in the forenoon or as soon thereafter as counsel may be heard, call up for hearing defendants Motion To Dismiss.

WATSON, ESS, GROVER, DAGNETT & PUTNEY

By _____
Attorneys for Defendants

Received copy of foregoing Notice and copy of Motion To Dismiss this 6th day of May, 1935.

_____
Attorneys for Plaintiff

CRMC-Motley1000-Subj-004286

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

JANUARY TERM, 1934.

BERNARD DUGAN,

Plaintiff,

vs. No. 425,211

R. V. AYCOCK COMPANY and VAUGHN INVESTMENT COMPANY, corporations, and R. V. AYCOCK,

Defendants.

FIRST AMENDED PETITION FOR DAMAGES.

Comes now plaintiff and by leave of court files this his first amended petition for damages and bring Vaughn Investment Company as new party defendant, and for cause of action states that during the month of October, 1931, and prior thereto defendant, R. V. Aycock Company, was a corporation organized and existing according to law, and engaged in the asbestos sales, repair and construction business in Kansas City, Missouri, and that plaintiff was at all the times herein complained of in the employ of said defendant as a common laborer; that since October, 1931, defendant Vaughn Investment Company has been duly organized according to law as a corporation and has taken over the assets, liabilities and business of R. V. Aycock Company, its co-defendant, and has been carrying on the same general line of business.

That defendant, R. V. Aycock, was at all times herein mentioned in direct charge of the repair and construction business of defendant, R. V. Aycock Company, and inaugurated and directed the system and method of work as herein mentioned, and plaintiff at all times worked under his direct supervision and control.

That during the month of October, 1931, and for a long time prior thereto plaintiff was in the employ of R. V. Aycock Company as a common laborer assigned to repair and construction work, which

CRMC-Motley1000-Subj-004287

also included the mixing of asbestos with water to have it ready for use; that in the performance of said work, fumes and particles of said asbestos would become detached and saturate the air where plaintiff and other workmen would be employed, and by breathing, said fumes, detached particles and fibers found lodgment in the bronchial tubes and lungs of plaintiff to such an extent as to cause him damage and injury.

That said asbestos was a compound of fine silk-like asbestos fibers consisting of silica, magnesia, sodium, potassium and other elements and ingredients unknown to plaintiff, but that all of said compound was poisonous and injurious to the mucous membranes of the bronchial tubes, lungs and the human body when breathed in excessive quantities; that all of said facts were known to defendants through their long use and experience in the handling of said compound, or by the exercise of ordinary care would have been known to them. That plaintiff was unacquainted with the constituent elements and the danger and nature of said compound.

Plaintiff further states that because of breathing in fumes and particles of said asbestos compound in the conduct of his work, his lungs became surcharged therewith, causing him to become diseased and sick and permanently disabled from work.

Plaintiff further states that his injuries were directly caused by the negligence of defendants, and each of them, in that R. V. Aycock, personally and as superintendent for his co-defendants, carelessly and negligently operated said work in a negligent and dangerous manner, in that they directed and required plaintiff, with other employees, to mix said compound with water by placing their hands therein, thus requiring plaintiff to bend over a container in a stooping position, so that his nostrils and mouth were in close proximity to said fumes and particles, all of which made it reasonably likely that plaintiff would breath in said

CRMC-Motley1000-Subj-004288

and his lungs would become surcharged therewith to his damage and injury, all of which defendants knew, or by the exercise of ordinary care would have known.

Defendants and each of them were further negligent causing plaintiff's disability, injury and damage in that though defendants and each of them knew that said asbestos fumes and particles were likely to be breathed into plaintiff's lungs and to injure him as aforesaid, yet R. V. Aycock, personally and as superintendent for his co-defendants, negligently ordered plaintiff to perform said work in said manner and negligently failed to warn plaintiff of the dangers thereof.

Defendants and each of them were further negligent causing plaintiff's disability in that though they knew of the danger of breathing particles and fumes of asbestos compound into the lungs, yet they carelessly and negligently failed to furnish any instrument, or device for the mixing of said ingredients with safety to plaintiff and other employees, or any mask, or device, or other protection to be used over his nostrils and mouth while working near said compound and while said mixing process was going on, all of which made it reasonably likely that plaintiff would breath said fumes and particles and be injured thereby, all of which defendants knew, or by the exercise of ordinary care would have known.

Plaintiff states that his injuries as aforesaid do not fall within the terms of the Workmen's Compensation Act..

Plaintiff states that the aforesaid acts of negligence on the part of the defendants, and each of them, operated directly and concurrently to cause plaintiff's injuries, and that he has suffered injuries as follows:

Plaintiff states that his lungs became filled with particles of said asbestos compound, causing a condition of silicosis and fibrosis in the tubes, cells and lobes of his lungs and bronchial tubes with inflammation and congestion therein; greatly impairing

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plaintiff's respiratory, circulatory and assimilative functions, rendering plaintiff permanently sick and disabled from performing labor; causing him to be extremely nervous, irritable and restless; causing him to feel stupid with extreme lassitude; causing him great suffering and mental anguish, and will ever after so cause him to suffer, that all of said conditions are permanent in their nature and character.

Plaintiff further states that because of said injuries he has been prevented and in the future will be prevented from earning money from his usual labor and occupation; that he has paid out, and will in the future pay and become liable to pay out large sums of money for medicine and medical attention, all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars, for which sum with costs he prays judgment.

Kennard & Kreshan
Attorneys for Plaintiff.

CRMC-Motley1000-Subj-004290

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI, AT
KANSAS CITY.

BERNARD DUGAN,

Plaintiff

vs.

R. V. AYCOCK Company, and
VAUGHN INVESTMENT COMPANY,
Corporations, and R. V.
AYCOCK,

Defendants

FILED

JOHN D. [illegible]

By [illegible]

MOTION TO DISMISS.

CRMC-Motley1000-Subj-004292

No. 425,211

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

JANUARY TERM, 1934.

BERNARD DUGAN,

Plaintiff,

vs.

R. V. AYCOCK COMPANY and VAUGHN INVESTMENT COMPANY, corporations, and R. V. AYCOCK,

Defendants.

FIRST AMENDED PETITION FOR

(COPY) FILED

FEB 21 1934

LYNN G. BUFORD, Clerk

By _____ DEPUTY

[illegible]
Attorneys for Plaintiff,
723 Rialto Bldg.,
Kansas City, Mo.,
Victor 7861.

CRMC-Motley1000-Subj-004299

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Executed this writ in Jackson County, Missouri, on the 24 day of January, 1933, by delivering a copy of this writ, together with a copy of the petition as furnished by the Clerk to

R. V. Aycock

the president and chief officer of the within named defendant corporation,

J. Hunting Investment Company

1.00

THOMAS B. BASH, Sheriff,
By Lloyd Allen Beard Deputy

CRMC-Motley1000-Subj-004301

1-24

Plaintiff

4/25/11

vs.

R. V. AYCOCK COMPANY, [illegible] and R. V. AYCOCK, [illegible]

Defendants

ORDER

Now on this 18 day of January, 1933, Defendants Motion to Remand in the above entitled cause coming on to be heard and the Court being fully advised in the premises and in all other respects pertaining thereto;

It is hereby Ordered, Adjudged and Decreed that said Motion to Remand shall be and the same is hereby sustained and this cause remanded to the Circuit Court of Jackson County, Missouri, at Kansas City.

Monnie G. O'Neal
Judge

Attest: A true copy.
A. A. ARNOLD, Clerk.
By E. O'Neal
Deputy

CRMC-Motley1000-Subj-004302

[illegible],

Plaintiff

vs. No. 4[illegible]

[illegible],

Defendant

PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT OF THE [illegible] DIVISION OF THE WESTERN DISTRICT OF MISSOURI, ON BEHALF OF R. V. AYCOCK CORPORATION

Comes now the defendant, Aycock Corporation, a corporation, [illegible] organized and existing according to the Laws of the State of Delaware, your petitioner herein, and appearing especially for the [illegible] use of this application and for no other purpose and not intending by this application to waive or confer jurisdiction over [illegible] the defendants and respectfully represents and shows that it is [illegible] of the defendants in the above entitled cause; that said cause was commenced and instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, on the 27th day of October, 1933 by the filing of a petition in the Office of the Clerk of the said Circuit Court of Jackson County, Missouri, at Kansas City; that summons was thereafter issued and service obtained on this defendant, said summons being returnable to the November, 1933 Term of the said Circuit Court not later than November 13, 1933.

That said defendant, Aycock Corporation, a corporation, was at the time of the filing of this suit and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware and was and is a citizen of such State; that the said defendant, Aycock Corporation, a corporation, is a non-resident [illegible] the State of Missouri.

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Your petitioner further represents and shows to the Court that at the time of the institution of this action, said plaintiff was and ever since has been and still is at this time a resident and citizen of the State of Missouri.

That a diversity of citizenship exists between this plaintiff and said defendant.

That there is in this suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to-wit: A controversy between plaintiff, Bernard Dugan, and your petitioner, Aycock Corporation; that the plaintiff was at the time of the commencement of this suit and still is a citizen of the State of Missouri and is a resident of said State and that your petitioner, Aycock Corporation, a corporation, is a citizen and resident of the State of Delaware, and was at the time of the commencement of this suit and still is at this time.

That this said controversy is of the following nature, to-wit: That plaintiff alleges that on or about October, 1951 and for a long time prior thereto he was in the employee of the named defendants including your petitioner and that the defendant, R. V. Aycock, at said times was acting as the foreman on behalf of your petitioner, [illegible] Aycock Corporation and as such foreman was directing and supervising [illegible] and working conditions of the plaintiff. Plaintiff [illegible] states in his petition that as a result of the negligent [illegible] on behalf of the defendant, R. V. Aycock and the other named [illegible] your petitioner herein, to furnish him with a [illegible] place in which to work that he was caused to sustain [illegible] of which he complained.

CRMC-Motley1000-Subj-004304

Your petitioner further states that in truth and in fact the Aycock Corporation, your petitioner herein, was not at the time complained of by the plaintiff in his petition, to-wit: October, 1941, in existence and that at said time the said defendant, R. V. Aycock, was not acting as the foreman or agent of the said Aycock Corporation and that at said times complained of the said plaintiff was not in the employ of the said Aycock Corporation, your petitioner.

From the foregoing facts and from the plaintiff's petition said plaintiff relies upon his allegation that R. V. Aycock was acting as the agent and superintendent for your petitioner, the Aycock Corporation herein, at the times complained in his petition; in order to confer or attempt to give the Circuit Court of Jackson County, Missouri, at Kansas City jurisdiction over your petitioner, the Aycock Corporation, and to prevent your petitioner from removing this cause to the United States District Court as herein prayed for. That in truth and in fact at the times complained of by the plaintiff in his petition, R. V. Aycock was not in any way acting for or in behalf of or as the agent or superintendent of your petitioner, the Aycock Corporation, nor was the said plaintiff, Bernard Dugan, in the employ of the said Aycock Corporation at the times complained of by him in his petition, nor was the said R. V. Aycock Company, co-defendant herein acting as the agent of your petitioner, Aycock Corporation, at the times complained of in the plaintiff's petition.

That a complete determination of said controversy can be had between the residue of the other defendants, R. V. Aycock or the R. V. Aycock Company named in this action and said other defendants are neither an indispensable or a necessary party to a

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that said plaintiff in his petition has fraudulently joined the said R. V. Aycock, an individual, and has fraudulently alleged that said R. V. Aycock, an individual, was at the time complained of in the said plaintiff's petition, to-wit: October, 1961, acting as the Superintendent and Agent of your petitioner herein, when, as hereinabove set forth your said petitioner, Aycock Corporation, was not in existence at the time complained of by the plaintiff; that in view of these facts the petition shows upon its face that the said joinder of this defendant, your petitioner, Aycock Corporation, with the other named defendants, or of the other named defendants with your petitioner, the Aycock Corporation, was fraudulent and intended solely to prevent the removal of this case as hereinabove set forth.

Your petitioner further presents and shows to the Court that said suit is a suit of a civil nature and that the matter and amount now in controversy therein exceeds, exclusive of interest and costs, the sum of THREE THOUSAND and no/100 ($3,000.00) DOLLARS. That is to say, the amount in controversy in this cause is FIFTY THOUSAND and no/100 ($50,000.00) DOLLARS.

Your petitioner further represents and shows to the court that on this 20th day of November, 1963 and before the filing of this petition and for removal herein, your petitioner caused a written notice of the filing of this petition for removal and also a copy of said petition for removal, hereinafter referred to, to be given to the plaintiff's attorney of record.

Your petitioner further alleges that the time has not elapsed for which petitioner is allowed under the practice and under the laws of Missouri and the rules of the said Circuit Court of Jackson County, Missouri, at Kansas City, to answer, plead

complete determination of said controversy between the [illegible]
the [illegible] plaintiff; that the petition filed by the [illegible]
stated under the facts as herein above set forth [illegible]
[illegible] cause of action against the [illegible]
still [illegible] and that there is a separable controversy between the
said defendants and your petitioner herein.

Your petitioner controverts all of the foregoing allegations
quoted from the plaintiff's petition and all other matters contained
in said plaintiff's petition.

Your petitioner further that as hereinabove more fully shown,
the joining of the defendant, R. V. Aycock and the R. V. Aycock
Company with your petitioner, the Aycock Corporation, is done on
behalf of the plaintiff to attempt to fraudulently prevent your
petitioner from removing this cause to the United States District
Court as hereinafter set forth; that said defendant, R. V. Aycock
is improperly and fraudulently joined as a defendant in this cause
by reason of the fact that he is an individual resident and citizen
of Jackson County, Missouri and is joined for the sole and only
[illegible] of attempting to defeat or prevent a removal of this cause
[illegible] your petitioner to the said United States District Court of the
[illegible] Division of the Western District of Missouri, at Kansas City;
[illegible] will more fully appear upon an inspection of the pleadings
[illegible] the plaintiff in this cause, and from the facts as set forth by
[illegible] petitioner herein, said defendant, R. V. Aycock, and the R. V.
[illegible], are now and were [illegible] necessary or proper
[illegible] in this cause so as to adjudicate the controversy existing between
[illegible] Kansas Corporation, and your petitioner, Aycock Corporation

CRMC-Motley1000-Subj-004307

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STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Geo. L. Gordon, being first duly sworn on my oath, do state that I am attorney and agent for the Aycock Corporation, a corporation, one of the defendants in the above entitled cause; that I am authorized to and do make this Affidavit for and on behalf of this defendant; that I have read the foregoing petition and know the contents thereof, and that statements contained therein are true as I verily believe.

Geo. L. Gordon

Subscribed and sworn to before me this 15th day of November, [illegible].

Notary Public

My commission expires My Commission Expires Nov. 27, 1972

CRMC-Motley1000-Subj-004308

Dugan, to answer said petition.

Your petitioner presents herewith and offers bond with good and sufficient surety for the entering, by it in the United States District Court for the Western Division of the Western District of Missouri, at Kansas City, within 30 days of the filing of the petition and bond for Removal herein, a certified copy of the record in this cause and for paying all costs that may be awarded against this defendant by the said United States District Court, if said court shall hold that this cause is wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that the court proceed no further herein except to make the Order of Removal thereon to the said United States District Court for the Western Division of the Western District of Missouri, at Kansas City as prayed for and as required by law and to approve said bond which is herewith filed and cause the records herein to be removed within 30 days from the filing of this petition into the United States District Court for the Western Division of the Western District of Missouri, at Kansas City.

Attorney for Defendant,
Aycock Corporation

CRMC-Motley1000-Subj-004309

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CRMC-Motley1000-Subj-004310

No. [illegible]

IN THE CIRCUIT COURT OF JACKSON COUNTY, [illegible] AT [illegible] CITY.

BERNARD DUGAN ... Plaintiff,

vs.

R. V. AYCOCK COMPANY, A CLOSE CORPORATION, and R. V. AYCOCK, ... Defendants.

FILED

NOV 26 1979

[illegible]

SEPARATE ANSWER OF R. V. AYCOCK COMPANY AND R. V. AYCOCK

(original)

WATSON, ESS, GRONER, BURNETT & WHITTAKER

ATTORNEYS AND COUNSELLORS AT LAW

KANSAS CITY, MO.

CRMC-Motley1000-Subj-004312

11-3.

[illegible] Dugan,

Plaintiff

vs.

R. V. AYCOCK COMPANY, [illegible], and R. V. AYCOCK,

Defendants

N O T I C E

TO THE ABOVE NAMED PLAINTIFF, or KENNARD & CRESHAM, his Attorneys of Record:

You are hereby notified that defendant, Aycock Corporation, a corporation, will, on the 15th day of November, 1933, file a petition and bond for Removal in the above entitled cause to the United States District Court for the Western Division of the Western District of Missouri, at Kansas City.

Geo. L. Gordon
Attorney for Defendant,
Aycock Corporation

Received copy of the above Notice, together with copy of the Petition and Bond for Removal in the above mentioned cause this 15 day of November, 1933.

Attorney for Plaintiff

CRMC-Motley1000-Subj-004313

CHAPTER 11
Occupational Diseases

SEC.
42-11-10. "Occupational disease" defined.
42-11-20. "Disablement" and "disability" defined.
42-11-30. Presumption that heart or respiratory diseases occurring in fire fighters arose out of and in course of employment.
42-11-40. Occupational diseases shall be treated as injuries by accident.
42-11-50. Limitation on compensation payable to employee disabled by both injury and occupational disease.
42-11-60. Requirements for compensation for pulmonary diseases.
42-11-70. Time in which disease must have been contracted.
42-11-80. Wilful misrepresentation by employee as to absence of disease; waivers.
42-11-90. Amount of compensation when noncompensable cause or disease affects occupational disease.
42-11-100. Amount of compensation payable for disability; exceptions.
42-11-110. No presumptions; misconception of remedy.
42-11-120. Procedure for determining claims; reference of medical question to medical board.
42-11-130. Membership of medical board.
42-11-140. Fees and expenses of medical board.
42-11-150. Procedure before medical board.
42-11-160. Decisions on questions by medical board.
42-11-170. Membership of medical advisory panel.
42-11-180. Compensation of members of medical advisory panel.
42-11-190. Promulgation of rules, regulations and schedules.
42-11-200. Rejection of chapter.

§ 42-11-10. "Occupational disease" defined.

The words *"occupational disease"* mean a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions thereof.

No disease shall be deemed an occupational disease when:

(1) It does not result directly and naturally from exposure in this State to the hazards peculiar to the particular employment;

(2) It results from exposure to outside climatic conditions;

(3) It is a contagious disease resulting from exposure to fellow

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employees or from a hazard to which the workman would have been equally exposed outside of his employment;

(4) It is one of the ordinary diseases of life to which the general public is equally exposed, unless such disease follows as a complication and a natural incident of an occupational disease or unless there is a constant exposure peculiar to the occupation itself which makes such disease a hazard inherent in such occupation;

(5) It is any disease of the cardiac, pulmonary or circulatory system not resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein; or

(6) It is any chronic disease of the skeletal joints.

HISTORY: 1962 Code § 72-251; 1952 Code § 72-251; 1949 (46) 565.

Research and Practice References—
82 Am Jur 2d, Workmen's Compensation § 289.
99 CJS, Workmen's Compensation § 169.
14 Am Jur Proof of Facts, Occupational Deafness §§ 22 et seq. (allegation and defense of claim for occupational deafness).

CASE NOTES

Code provisions relating to occupational diseases should be construed together, and in relation to the other provisions of this Title to which reference is made in Code 1962 § 72-253, and which deal with compensation for disability or death resulting from accident arising out of and in the course of the employment. Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960); Raybestos-Manhattan, Inc., 241 SC 116, 127 SE2d 288 (1962).

Compensability is founded upon disability.—Compensability, and therefore liability, is founded upon disability, not injury, under the Code sections relating to occupational diseases. Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

And accrues when disability or death occurs.—In occupational disease cases compensability accrues when disability (in case of pulmonary disease arising out of the inhalation of organic or inorganic dust, total disability) or death occurs. Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

This chapter cited in Drake v Raybestos-Manhattan, Inc., 241 SC 116, 127 SE2d 288 (1962).

§ 42-11-20. "Disablement" and "disability" defined.

As used in this chapter, *"disablement"* means the event of an employee's becoming actually incapacitated, partially or totally, because of an occupational disease, from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, *"partial disability"* means the physical inability to continue work in such occupation only and *"total disability"* means the physical inability to perform work in any occupation.

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The disablement and disability of an employee from an occupational disease shall be determined as provided in this chapter.

HISTORY: 1962 Code § 72-252; 1952 Code § 72-252; 1949 (46) 565.

Cross references—
As to free hunting and fishing licenses for certain totally and permanently disabled residents, see § 50-9-810.

Research and Practice References—
82 Am Jur 2d, Workmen's Compensation § 289.

CASE NOTES

Quoted in Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

This may also apply to some workers suffering from occupational diseases.

§ 42-11-30. Presumption that heart or respiratory diseases occurring in fire fighters arose out of and in course of employment.

Notwithstanding the provisions of this chapter, for purposes of the South Carolina Workmen's Compensation Law, any impairment or injury to the health of a fire fighter caused by heart disease or respiratory disease resulting in total or partial disability, or death, shall be presumed to have arisen out of and in the course of employment, unless the contrary is shown by competent evidence, if such fire fighter is at the time of such impairment or injury a bona fide member of a municipal, county, State, port authority or fire control district fire department in this State. In order to be entitled to the presumption provided for herein, any person becoming a member of a fire department after May 29, 1968 must be under the age of thirty-seven years and must have successfully passed a physical examination by a competent physician upon entering into such service, a written report of which must have been made and filed with such fire department, which examination failed to reveal any evidence of such condition or conditions, and such condition or conditions developed while actively engaged in fighting a fire or within twenty-four hours from the date of last service in such activity.

HISTORY: 1962 Code § 72-251.1; 1968 (55) 2798.

§ 42-11-40. Occupational diseases shall be treated as injuries by accident.

When employer and employee are subject to the provisions of this Title, the disablement or death of an employee resulting from an occupational disease shall be treated as an injury by accident and the employee, or in case of death his dependents, shall be entitled to compensation as for an injury under this Title, except

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as otherwise provided in this chapter; and the practice and procedure prescribed in this Title shall apply to all proceedings under this chapter, except as otherwise provided in this chapter. In no case shall an employer be liable for compensation for an occupational disease unless such disease was contracted by the employee while in the employ of the employer as a direct result of the employment.

OR INDIRECT

HISTORY: 1962 Code § 72-253; 1952 Code § 72-253; 1949 (46) 565.

Research and Practice References—
82 Am Jur 2d, Workmen's Compensation § 289.
99 CJS, Workmen's Compensation § 169.

CASE NOTES

Construction of section.—To construe this section [Code 1962 § 72-253] and Code 1962 § 72-303 as meaning that the liability of employer and carrier arises when an occupational disease is "contracted" would be to usurp the legislative function. Glenn v Columbia Silica Sand Co., 235 SC 13, 112 SE2d 711 (1960).

Section inapplicable to contraction of disease.—This section [Code 1962 § 72-253] declares the event to be treated "as an injury by accident" to be not contraction of the occupational disease, but "disablement or death" resulting from it. Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

The Workmen's Compensation Act does not cover diseases generally, but only occupational diseases or a disease that results from an injury by accident arising out of and in the course of employment. Cooper v John Hancock Mut. Life Ins. Co., 248 SC 534, 151 SE2d 638 (1966).

Quoted in Drake v Raybestos-Manhattan Inc., 241 SC 116, 127 SE2d 288 (1962); Gunnells v Raybestos-Manhattan, Inc., 261 SC 106, 109 SE2d 535 (1973).

§ 42-11-50. Limitation on compensation payable to employee disabled by both injury and occupational disease.

When an employee suffers disability from an occupational disease and also from an injury which is otherwise compensable under this Title, he shall not be entitled to receive compensation for both and benefits payable shall be limited to the cause which results in the longest period of disability, either as provided under this chapter or as provided for an injury by accident arising out of and in the course of employment. In no event shall compensation payable for disability or death exceed the maximum benefits provided under this Title.

HISTORY: 1962 Code § 72-254; 1952 Code § 72-254; 1949 (46) 565.

§ 42-11-60. Requirements for compensation for pulmonary diseases.

No compensation shall be payable for any pulmonary disease arising out of the inhalation of organic or inorganic dust or fumes unless the

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claimant suffers disability as described in §§ 42-9-10 or 42-9-20 and shall not be compensable under § 42-9-30; *provided*, however, in claims based on byssinosis the claimant must have been exposed to dust in his employment for a period of at least seven years.

HISTORY: 1962 Code § 72-255; 1952 Code § 72-255; 1949 (46) 565.

CASE NOTES

The one-year period mentioned in this section [Code 1962 § 72-255] simply limits the right to compensation by requiring, as a condition precedent to it, exposure for one year. Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

And the key to liability under this section [Code 1962 § 72-255] is not the exposure, but the total disability therefrom. Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

Quoted in Drake v Raybestos-Manhattan, Inc., 241 SC 116, 127 SE2d 288 (1962).

§ 42-11-70. Time in which disease must have been contracted.

Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

HISTORY: 1962 Code § 72-256; 1952 Code § 72-256; 1949 (46) 565; 1963 (53) 143.

Research and Practice References—
82 Am Jur 2d, Workmen's Compensation § 298.

CASE NOTES

Quoted in Glenn v Columbia Silica Sand Co., 236 SC 13, 112 SE2d 711 (1960).

§ 42-11-80. Wilful misrepresentation by employee as to absence of disease; waivers.

If an employee, at the time of his employment, wilfully and falsely represents in writing that he has not previously suffered from the disease which is the cause of disability or death, no compensation shall be payable. If an employee who has previously suffered from an occupational disease desires to continue in an employment to which such a disease is a hazard, he may waive his right to receive further benefits for disablement or disability from

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such disease by written agreement approved by the Commission in accordance with such rules as it may promulgate.

HISTORY: 1962 Code § 72-257; 1952 Code § 72-257; 1949 (46) 565.

CASE NOTES

When false statement in employment application will bar compensation benefits.—The following factors must be present before a false statement in an employment application will bar benefits under the Workmen's Compensation Act: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury. Cooper v McDevitt & Street Co., 260 SC 468, 196 SE2d 853 (1973).

§ 42-11-90. Amount of compensation when noncompensable cause or disease affects occupational disease.

When an occupational disease prolongs, accelerates or aggravates or is prolonged, accelerated or aggravated by any other cause or infirmity not otherwise compensable, the compensation payable for disability or death shall be limited to the disability which would have resulted solely from the occupational disease if there were no other such cause or infirmity and shall be computed by the proportion which the disability from occupational disease bears to the entire disability.

HISTORY: 1962 Code § 72-258; 1952 Code § 72-258; 1949 (46) 565.

Research and Practice References—
82 Am Jur 2d, Workmen's Compensation § 297.

CASE NOTES

Determining factor of amount of death benefits, where death caused by occupational disease and noncompensable infirmity, is proportion which disability from occupational disease bears to the entire disability and not to cause of death. Brittle v Raybestos Manhattan, Inc., 241 SC 255, 127 SE2d 884 (1962).

§ 42-11-100. Amount of compensation payable for disability; exceptions.

Compensation payable for disability from an occupational disease shall be the same as that provided for an injury under this title. No compensation shall be payable:

(1) For the degree of disability resulting from noncompensable causes or the employee's refusal to use a safety device or to obey a safety regulation approved by the Commission in accordance with its rules and regulations.

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(2) For any disability resulting from the employee's intoxication or wilful intent to injure himself.

(3) For the time the employee refuses to accept suitable employment when ordered to do so by the Commission.

(4) After the disability terminates.

HISTORY: 1962 Code § 72-259; 1952 Code § 72-259; 1949 (46) 565.

§ 42-11-110. No presumptions; misconception of remedy.

There shall be no presumption that disablement from any cause or infirmity is the result of an occupational disease, nor that an occupational disease will result in disablement or disability. But when disability results from a disease which is compensable under other provisions of this Title, although not an occupational disease, the employee shall not be deprived of any benefits to which he may be entitled because he may have misconceived his remedy to be for an occupational disease.

HISTORY: 1962 Code § 72-260; 1952 Code § 72-260; 1949 (46) 565.

§ 42-11-120. Procedure for determining claims; reference of medical question to medical board.

The procedure for determining claims for benefits from an occupational disease shall be the same as that followed in determining other claims under this Title, save that if any medical question shall be in controversy the Commission may, upon its own motion, and shall, upon motion of either party to the proceeding, refer the question to the medical board as provided in this chapter for investigation and report. A medical question shall be deemed to include any issue concerning the existence, cause and duration of a disease or disability, the date of disablement, the degree of disability and the proportion thereof attributable to a noncompensable cause and any other matter necessarily pertinent thereto requiring the opinion of experts.

HISTORY: 1962 Code § 72-261; 1952 Code § 72-261; 1949 (46) 565.

Research and Practice References—
100 CJS, Workmen's Compensation § 382.

CASE NOTES

Applied in Brittle v Raybestos-Manhattan, Inc., 241 SC 255, 127 SE2d 884 (1962).

§ 42-11-130. Membership of medical board.

The medical board employed to determine controverted medical questions shall consist of three members appointed by the Commission

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or hearing commissioner and selected from the medical advisory panel as follows: One to be named by the claimant and one to be named by the employer or his insurer as the case may be, and the third to be chosen by the Commission or hearing commissioner. But if within ten days after the hearing in which a controverted medical question is raised one or more of the parties have failed to nominate a member, the Commission or commissioner hearing the case shall nominate a member or members to complete the board to three members.

HISTORY: 1962 Code § 72-262; 1952 Code § 72-262; 1949 (46) 565.

§ 42-11-140. Fees and expenses of medical board.

The fees and expenses of the medical board shall be charged in accordance with a schedule adopted by the Commission upon the advice and recommendations of the medical advisory panel and such fees and expenses, along with such clinical and X-ray expenses as the medical board may require in order to properly complete its investigation in a particular case, shall be chargeable as cost to the losing party in the controversy, save that when the claimant is the losing party such fees, costs and expenses shall be borne by the Commission.

HISTORY: 1962 Code § 72-263; 1952 Code § 72-263; 1949 (46) 565.

§ 42-11-150. Procedure before medical board.

The medical board, upon referral to it of a medical question, shall notify the claimant and the employer or its insurer, as the case may be, to appear before the board at a time and place stated in the notice and shall examine the employee, if living, and may examine the body of the employee, if deceased. The medical board shall consider any testimony given before the Commission pertaining to the medical question and necessary to a proper determination thereof. The medical board shall, as soon as practical after it has completed its consideration of the case, report in writing its findings and conclusions on every medical question in controversy. Such report shall be a part of the record in the case and shall include a statement indicating the physician or physicians, if any, who appeared before it, the medical board, what, if any, medical reports and X-rays were considered by it and any other matters which it deems necessary to explain or substantiate its conclusions. The Commission upon receipt of the report shall send a copy thereof to the claimant and to the employer and his insurance carrier, if any.

HISTORY: 1962 Code § 72-264; 1952 Code § 72-264; 1949 (46) 565.

Research and Practice References—
100 CJS. Workmen's Compensation § 626.

Require
Eliminate subrogation
totally or where the ER is negl
or where ER violates OSHA.

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§ 42–11–160. Decisions on questions by medical board.

The decisions and award in the case shall conform to the findings and conclusions in such report insofar as it is restricted to medical questions, except that either party may, within ten days after receipt of a copy of the report, file written objection thereto with the Commission; *provided*, the report shall not be binding on the Commission if it be proven that the conclusion of the board upon a medical question be erroneous, due to fraud, undue influence, or mistake of law or material fact.

HISTORY: 1962 Code § 72-265; 1952 Code § 72-265; 1949 (46) 565.

CASE NOTES

Commission not bound by report where it made no finding as to extent which noncompensable disease may have affected disability of employee. Brittle v Raybestos-Manhattan, Inc., 241 SC 255, 127 SE2d 884 (1962).

§ 42–11–170. Membership of medical advisory panel.

The medical board shall be chosen from the medical advisory panel, composed of medical experts appointed by the Governor who shall be chosen from a list submitted by the executive committee of the South Carolina Medical Association, which list shall be approved by the Industrial Commission. The medical advisory panel shall include at least three doctors of medicine with no less than five years' specialization in the field of X-ray diagnosis and treatment, at least three doctors of medicine with no less than five years' specialization in pathology, at least three doctors of medicine with no less than five years' experience in the treatment and diagnosis of occupational diseases or who are specially qualified by training and experience as experts in the diagnosis and treatment of diseases in general and two doctors who are qualified for the treatment of pulmonary diseases. Members of the medical advisory panel shall serve for a term of two years and the Governor may from time to time fill vacancies in the membership thereof from its lists submitted to him as provided in this section.

§ 42–11–180. Compensation of members of medical advisory panel.

Members of the medical advisory panel shall receive no compensation save that provided when they serve on a medical board. But when the panel is convened to give its advice and recommendations to the Commission, the members participating therein shall receive per diem allowances plus their reasonable maintenance and travel expenses to be paid by the Commission.

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§ 42–11–185.

ADD SECTION 42-11-185, Effective May 30, 1978.

"Notwithstanding the provision of Section 42-11-120, in lieu of a medical panel in claims involving occupationally related diseases, at the election of either party or the hearing commissioner, the claimant shall be referred to a medical doctor or doctors who diagnose or treat pulmonary diseases and who are employed by or associated with one of the medical universities in South Carolina. The findings and testimony of such doctors shall be deemed advisory to, but not binding upon, the hearing commissioner. Fees and expenses of such medical examinations shall be paid by the commission unless the claimant prevails in the controversy in which case, such fees and expenses will be charged to the losing party."

§ 42–11–185.

AMENDED, effective July 25, 1978:

"Notwithstanding the provisions of Section 42-11-120, in lieu of a medical panel in claims involving occupationally related diseases, at the election of either party or the hearing commissioner, the claimant shall be referred to a medical doctor or doctors who diagnose or treat occupational diseases and who are employed by or associated with one of the medical universities in South Carolina. The findings and testimony of such doctors shall be deemed advisory to, but not binding upon the hearing commissioner. Fees and expenses of such medical examinations shall be paid by the commission unless the claimant prevails in the controversy in which case such fees and expenses will be charged to the losing party."

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HISTORY: 1962 Code § 72-267; 1952 Code § 72-267; 1949 (46) 565; 1951 (47) 506.

§ 42–11–190. Promulgation of rules, regulations and schedules.

The Commission may, upon the advice and recommendations of the medical advisory panel:

(1) Make reasonable rules and regulations regarding the conduct of hearings and investigations by medical boards and the fees and expenses to be allowed members of the panel for serving on such boards from time to time;

(2) Adopt a schedule of occupational diseases which shall include also a schedule of the processes or occupations giving rise to such diseases under the definitions given in § 42–11–10; and

(3) After notice to parties interested and public hearings if requested, promulgate reasonable rules regarding the use of safety appliances for the reduction and elimination of occupational hazards which cause occupational diseases.

Nothing contained in this section shall limit the power of the Commission to approve reasonable safety regulations submitted by an employer for application to his business which shall not conflict with the rules and regulations provided for in this section.

HISTORY: 1962 Code § 72-268; 1952 Code § 72-268; 1949 (46) 565.

§ 42–11–200. Rejection of chapter.

Either employer or employee may reject the provisions of this chapter under the same terms and conditions as he may reject the other provisions of this Title.

HISTORY: 1962 Code § 72 269; 1952 Code § 72-269; 1949 (46) 565.

CRMC-Motley1000-Subj-004330

STATEMENT

OF

ELEANOR M. ROSS, WORKERS' COMPENSATION ADVISOR, REGION IV

DIVISION OF STATE WORKERS' COMPENSATION STANDARDS

U. S. DEPARTMENT OF LABOR

BEFORE THE

WORKMEN'S COMPENSATION STUDY COMMITTEE

AND THE

GOVERNOR'S ADVISORY COMMITTEE FOR THE

IMPROVEMENT OF WORKMEN'S

COMPENSATION LAWS

IN RE: OCCUPATIONAL DISEASES

JANUARY 4, 1979

CRMC-Motley1000-Subj-004331

Chairman Lourie and members of the Workmen's Compensation Study Committee and the Governor's Advisory Committee for the Improvement of Workmen's Compensation Laws, my name is Eleanor M. Ross. I am the Workers' Compensation Advisor for the Atlanta Region of the Office of Workers' Compensation Programs, Employment Standards Administration, U. S. Department of Labor. I have been employed in this capacity since Stpember 1, 1978. Prior to that time, I was employed by the North Carolina Industrial Commission for approximately five years.

In my present position as Workers' Compensation Advisor to the eight Southeastern states, my primary function is to encourage and assist in the improvement of workers' compensation programs throughout the Region.

In an effort to accomplish this, it is my responsibility to assist states which are actively seeking legislative or administrative improvements by collecting and sharing information on specific issues.

I am delighted to have been invited to appear before you today for the purpose of discussing compensation for occupational diseases. My remarks relate to the national picture of state workers' compensation for job-related diseases.

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In 1972 the National Commission on State Workmen's Compensation Laws included, as one of its 19 essential recommendations, that states provide full coverage for work-related diseases. The Commission also recommended that the "arising out of and in the course of employment" test be used to determine coverage of inquiries as well as diseases. In addition, they recommended that the etiology of a disease be determined by a medical evaluation unit under the control and supervision of the workmen's compensation agency since, they concluded, it was a medical question.

For the past several years, the U. S. Department of Labor has been concerned with the shortcomings in the delivery of occupational disease benefits through worker's compensation. In February, 1976 the Interdepartmental Workers' Compensation Task Force conducted a conference on occupational diseases and workers' compensation. A number of people knowledgeable in various aspects of the system analyzed workers' compensation as it relates to occupational disease. Representatives from labor, industry, insurance, government, and universities spent three days assiduously discussing the issues involved.

Related to the Task Force efforts, Professor Peter S. Barth, Chairman of the Economics Department, University of Connecticut,

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analyzed the data compiled by Cooper and Company. Professor Barth's report is entitled "Workers' Compensation and Work-Related Illnesses and Diseases". The research done by Cooper and Company was based on a study of 40,066 closed claims which were filed after September 1, 1970. Professor Barth concluded many of the findings that I shall report to you.

Today, every state workers' compensation law provides for coverage of persons disabled by occupational disease. In reality, however, compensating these individuals remains a rarity in some states.

According to the report of the Interdepartmental Workers' Compensation Task Force, 20 states provided full coverage for only those diseases "peculiar to the workers' occupation". Thirty-nine states had "by accident" clauses that were applied. Fifteen or more states had time limitations that barred these claims unless the worker could prove his exposure to a hazard at his place of employment occurred over a specified minimum period of time. The report also indicated at least 19 states had laws that barred claims for diseases caused by hazards encountered in the workplace more than a specified number of years earlier.

The Task Force made a number of recommendations relating to

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the occupational disease area. The recommendations included the following:

(1) coverage of all work-related diseases which "arise out of and in the course of employment";

(2) that work relationships be determined by an expert panel proposed under the following guidelines:

(A) when the disease has been diagnosed, and there is reasonable medical certainty that it is work-related;

(B) when the disease has been diagnosed, the worker can show that there is epidemiological evidence that the incidence in his occupation, industry, or plant significantly exceeds the incidence in the population, and the employer fails to show that the employee's illness is not due to exposure in the workplace; or

(C) when the disease has been diagnosed, contributing causes from outside the place of employment are present, but it can be shown that agents or exposures in the workplace constituted a substantial factor in causing the worker's illness, and the risk of contacting the disease is increased by the nature of employment;

(3) that the Secretary of Health, Education, and Welfare lead the effort to add to the list of potentially significant occupational diseases for which there is documented etiology;

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(4) that each state establish a panel of experts to determine the compensability of disease cases in that state;

(5) the elimination of existing state legal compensability restrictions based on exposure criteria that are unrelated to medical and other scientific evidence;

(6) claimants with work-related diseases should receive benefits at the same level and of the same duration as those with work-related injuries; and

(7) No waivers of workers' compensation should be permitted for any pre-existing condition when employees are hired, and

(8) that the Social Security Administration develops the data and analyses necessary to assess the extent to which claims for disability insurance from people with specific diseases are coming disproportionately from certain industries, occupations, or companies.

We are able to draw two major conclusions from the information available on occupational diseases.

First, many more deaths and disabilities from job-related diseases occur each year than are compensated; and

Second, the causes of this compensation deficit are reasonably clear.

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I shall begin by discussing our first conclusion: that many more deaths and disabilities from job-related diseases occur each year than are compensated. The definitions of what constitutes an occupational disease differ from state to state, and few states publish statistics on these cases. Consequently, the actual number of occupational disease cases that are compensated is not known. Professor Barth stopped short of estimating the total number compensated, but we conclude from the evidence he assembled that the correct figure may lie between 30,000 and 50,000 cases per year. By this estimate, no more than 1,500 are for death.

There are two kinds of estimates of the number of deaths and disabilities that occur. The first kind is derived from counts of cases that are recognized and reported as having resulted from job-related diseases. These are the reports filed by employers and physicians.

These estimates undercount conditions that develop slowly - many years after exposure - such as chronic lung diseases and cancer. This is due to the fact that reports cannot be filed unless the origin of the condition is known and recognized. Yet, even the estimates based on reports, add up to numbers of disabilities that are twice as large as our estimate of the

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number of cases that are being compensated each year.

The second kind of estimates of deaths and disabilities is inferred from medical knowledge about the causes of diseases such as heart disease, cancer, and lung diseases and from documented experience in the industrialized countries. The National Institute for Occupational Safety and Health has inferred from such evidence that 100,000 deaths and 390,000 disabilities result from occupational diseases each year.

While many have raised valid questions as to the specific estimates and the difficulties of defining the short-fall of compensated cases and contrasted with disabilities and deaths, Professor Barth said in his testimony before the Senate Subcommittee on Labor in June 1977, and I quote: ". . . the extent to which state systems recognize and compensate claims for occupational diseases is so small, it seems absolutely certain that a very large number of cases escape the attention of the compensation system entirely".

Now, for some of the reasons why this is so, I shall quote again from Professor Barth's 1977 Senate testimony:

"1. Ignorance - Workers and physicians may not know that a disease is caused by a hazard encountered at the workplace. Even if either suspects this, they may not know

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what rights the worker has under workers' compensation programs.

2. Statutory Limitations - Legislatures and courts have gone to great lengths to assure that 'unworthy' claims would not be compensated. This leads to situations where legitimate claims for certain types of cases may be so difficult to prove or so rarely won that it is not worthwhile to pursue such claims. Thus, for example, disabilities that may per se appear to be due to 'ordinary diseases of life' will frequently not be compensable.

3. Time Limitations on Claims - Various statutes of limitation rules regarding minimum exposure or the time since most recent exposure have served to block many claims. Some of these limits are written to be peculiar to certain diseases. Such rules essentially close the door to a claimant even before a case can be heard. States are generally moving in a direction to liberalize such laws.

4. Problems of Proof - In workers' compensation cases the burden of proof is on the claimant. While such a burden may not be great in most accidental injury claims, it can be an enormous burden in the case of occupational diseases. Thus, some claims are not being filed because attorneys know that the chances of winning are remote.

5. Disability Provisions - A successful claim in most states typically requires that the worker demonstrate the socio-economic concept of 'disability', not 'the physiological-medical one of 'impairment'. The former generally involves the loss of earnings. No such disability may result from elevated blood-lead levels, sterility, diminution of pulmonary capacity, impaired kidney function, etc. Physicians might regard workers with such symptoms as ill, but the absence of 'disability' can mean that the case does not involve workers' compensation.

6. Delays - Occupational disease cases involving serious disability or death are extremely likely to involve prolonged controversion and excessive delays and consequently may discourage claims. Where an attorney's income depends primarily on a rapid turnover of clients, such claims may not merit his time, thereby reducing the volume of these cases. An occupational disease claim is six times more likely to be controverted than is an accident-injury claim. About three-quarters of the former are controverted on the basic issue of compensability.

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7. Economic Fears of Workers - Because many occupational disease cases are controverted, because of the delays in receiving compensation - if any is paid - and for other reasons, workers may be reluctant to file claims where they fear retribution by an employer, the loss of an occupation, the threat to a pension and so on. Thus, a sick worker may delay or postpone indefinitely filing in such problematic cases.

8. The Physician's Apprehensiveness - Although a number of physicians specialize in occupational medicine or compensation medicine, many others seem to want as little contact as possible with the workers' compensation system. Some appear to eschew the adversary process, the time-consuming appearances at hearings and apparent need for certainty in the presentation of evidence, and so on. This will lead some physicians not to suggest to their patient (or a survivor) that the disease may have been occupational in origin, or it may lead the physician to raise doubts about the likelihood of receiving compensation".

Approximately 10% of the injury claims and 60% of the occupational disease claims are contested. The issue of compensability accounts for 20.6% of the injury claims which are contested; whereas, it accounts for 72.5% of the contested disease claims. The percentage of disability is the disputed issue in 56% of the injury claims. In occupational disease cases, however, it accounts for only 12%.

Of the occupational disease cases which are contested, those that are the most highly contested are the dust disease cases. Eighty-eight percent of all dust disease cases are contested. I am well aware of dust disease cases particularly byssinosis. Of the other

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respiratory disease cases, 78% are contested.

From the beginning of disability to the first compensation payment naturally takes longer when the case is contested. However, contested injury claims take an average of 62 days; whereas, occupational disease cases take substantially longer - 367 days.

Serious questions have been raised regarding the use of scheduled diseases. While it is true that many states once relied heavily on schedules to determine compensability, most states have now added a catch-all phrase. Where broad coverage does exist, the schedule serves as a form of presumption that the listed diseases are not considered to be ordinary diseases of life. Thus, the schedule tends to reduce litigation and provides some direction regarding the extent of coverage.

As indicated previously, coverage of occupational diseases varies greatly from one state to another. For example, Oklahoma provides limited coverage of 42 diseases and exposure to radiation. Florida provides full coverage; however, death must result within 350 weeks after such last exposure and must follow continuous disability from such disease. Ohio provides full coverage for diseases peculiar to the occupation but the disease must have been contracted within 12 months prior to disablement. In the case of firemen and policemen, exposure to smoke, toxic gases, chemical

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fumes and other toxic vapors must have been for at least 3 years before disablement. In cases of silicosis, asbestosis and pneumoconiosis, the workers must have been exposed to silica dust, asbestos, or coal dust for at least 3 years prior to disablement. Beryllium workers must have been exposed to beryllium dust in the state. New York provides very broad coverage. Occupational disease is included in the definition of personal injury, and there are no specific exclusions of ordinary diseases of life. No time limits on exposure are imposed. A presumption exists which specifies that exposure to dust in the state for 60 days is considered to be injurious. New York does have a schedule of 29 diseases in addition to a catch-all provision and a provision for exposure to radiation.

There is clearly a need for improvement in the occupational disease provision in most laws. We are pleased to learn that South Carolina is concerned with seeing that workers disabled or killed as a result of occupational diseases are adequately and equitably compensated. We look forward to working with you toward this end.

Thank you.

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tion will show that second-injury-in-reverse liability has no relevance to this purpose. There is no conceivable possibility of the employer's becoming liable for the subsequent nonindustrial injury, and therefore no conceivable impact on his hiring policies as the result of what might or might not be paid to the employee by the Second Injury Fund or anyone else for the nonindustrial injury.

One final limitation on the character of eligible prior injuries may be noted: Often by express statutory language, and sometimes by decisional law, the Second Injury Fund is held to apply only when the prior injury is permanent in character.[94] For example, a preexisting contact dermatitis lacked the essential condition of permanence to draw the Second Injury Fund into a case based on a back injury.[95]

§ 59.33 Manifestation or knowledge of prior injury

When the prior impairment has not manifested itself in such a way that it would place the worker under a disadvantage in obtaining employment, it can be argued that the policy of the legislation does not apply. For example, in *Scott v. Alaska Industrial Board*,[96] the prior "injury" was

the disability was incurred and the weekly amounts presently provided by law." The statute defines total and permanent disability as the loss of both eyes, feet, legs, arms; permanent and complete paralysis of both legs or arms or of one such member; and/or incurable insanity. The statute was attacked as being unconstitutional because it established unreasonable classifications. This contention was rejected mainly on the ground that the legislature merely (and properly) intended to enhance the opportunities of handicapped employees for future employment. An employer taking on a disabled workman "would be required to pay no more if such handicapped person should suffer further injury than he would have been required to pay . . . had the person not been handicapped in the first place." Treatise cited.

[94] St. Paul Fire & Marine Ins. Co. v. Murphree, 347 S.W.2d 317 (Tex. Civ. App. 1961), *aff'd*, 163 Tex. 534, 357 S.W.2d 744 (1962). The Special Fund was not liable since the employer failed to present affirmative knowledge of the permanency of the employee's physical impairment due to a previous back injury.

[95] Capra v. General Elec. Co., 11 A.D.2d 600, 200 N.Y.S.2d 517 (1960).

[96] 91 F. Supp. 201 (D. Alaska 1950).

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silicosis in a stage which had not yet disabled claimant, and the present injury was pneumonia which, superimposed on the silicosis, produced total permanent disability. The court reasoned that "disability or injury" could not include a weakness or disease which had not "obviously manifested" itself. The court also apparently relied on the distinction, which has been repeatedly stressed throughout this discussion of successive injuries, between a second injury which merely combines with a prior injury without acting upon and aggravating it, and a "second" injury which precipitates and renders disabling a prior nondisabling weakness or condition. Here the pneumonia aggravated the silicosis, and the case falls in the latter category.[97]

The federal courts, applying the Longshoremen's Act, have applied the "obviously manifested" requirement to prior conditions as diverse as "underlying inadequate personality," [98] mental deficiency,[98.1] arthritis,[98.2] and congenital back in-

[97] New York, by statute, applies the Second Injury Fund technique to silicosis when there has been any prior exposure, disabling or not. N.Y. Workmen's Comp. Law § 15(8)(ee) (1965).

Cf. Crawford v. Poirier & McLane Corp., 17 A.D.2d 675, 230 N.Y.S.2d 462 (1962). Accidental fracture of ribs activated tuberculosis. Death eight years after the accident held compensable. The Special Fund was held not liable on these facts since the relevant provisions of the statute (N.Y. Workmen's Comp. Law § 15(8)(ee) (1946)) are applicable only to silicosis or other dust diseases.

[98] U.S. Fid. & Guar. Co. v. O'Keeffe, 240 F. Supp. 813 (S.D. Fla. 1962). Claimant was found to have had an underlying inadequate personality. As a result his injury caused schizophrenia and total disability, rather than partial disability. The court held that, since the personality defect was not manifest, it was not a "previous disability" under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 908(F)(1), and the employer was not entitled to reimbursement from the Special Fund.

[98.1] American Mut. Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). Claimant was a borderline moron, who suffered an injury to his arm which left him permanently totally disabled. The employer sought reimbursement from the Special Fund of the Longshoremen's & Harbor Workers' Act, on the ground that in the absence of the prior mental condition the injury would have only resulted in partial disability. The court agreed that there was no ground for distinguishing between

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stability.[98.3]

The New York Appellate Division has gone even further by holding that the prior injury must have been actually known to the employer.[99] The court was confronted with a

physical and mental disability for this purpose, nor between prior congenital and work-connected defects. Reimbursement was denied, however, "not without some hesitation," on the ground that the prior condition was not "manifest" in that it had not been shown that claimant had a sufficient degree of social maladaptation due to his limited intelligence prior to the injury. The Court further noted that there was need for clarification of the term "manifest" with regard to mental deficiency, and suggested that Congress should investigate the situation and formulate some type of guidelines. Treatise cited.

98.2 United States Fid. & Guar. Co. v. O'Keeffe, 240 F. Supp. 816 (S.D. Fla. 1962), relying on the case by the same name cited *supra* this subsection at N. 98.

98.3 Boyd-Campbell Co. v. Shea, 254 F. Supp. 483 (S.D. Tex. 1966). The court observed that to permit a congenital back instability to stand as a "previous disability" would be impractical; persons born with such defects, whether not observable or even not known, would be compensated on an entirely different basis from other workers.

99 Zyla v. A. D. Juilliard & Co., 277 App. Div. 604, 102 N.Y.S.2d 255 (1951).

O'Shaughnessy v. Troy Engineering Co., 285 App. Div. 913, 137 N.Y.S.2d 407 (1955). Employer did not know of ulcer condition of employee; hence Special Disability Fund did not apply.

Fowler v. Miller, 282 App. Div. 790, 122 N.Y.S.2d 495 (1953). Any disability which claimant may have had was not known to nor considered by the employer in continuing the claimant in his employ; therefore the employer was solely liable.

Note that, in many of the cases cited in the ensuing discussion, the New York court refers to "continuing" or "retaining" an employee, as well to hiring him in the first place. For a case directly on this point, see

Ferry v. Jamestown Malleable Iron Div., 35 A.D.2d 870, 314 N.Y.S.2d 116 (1970). Claimant was hired without employer knowledge of his permanent disability, but after his being involved in an automobile accident, the company learned of the prior problem, and after discussion with the personnel manager it was agreed that claimant would be retained with his disability. He then sustained a compensable injury. The court held that these facts supported a finding that the employee was retained with knowledge of permanent injury by the employer, and therefore the employer was entitled to reimbursement from the Fund.

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record containing an explicit finding that neither the employer nor the employee knew of the gravity of claimant's preexisting condition, which in this instance was diabetes. Claimant had slipped and bruised his toe, and, partly because of the diabetes, an amputation of the right leg above the knee became necessary. The employer was required to assume the full liability, and applied for reimbursement under the Second Injury Fund. The applicable statute defines prior permanent physical impairment to include a disease which may be a hindrance or obstacle to employment. The court rested its decision squarely on the underlying policy of the legislation, which was to encourage the hiring of handicapped workers. If the handicap was of such character that it was not known, the policy of the act would not apply because the employee would have been under no disadvantage in seeking employment.

It should be clearly understood that this requirment of actual knowledge was, unlike the similar Florida requirement,[1] not something expressly written into the statute by the legislature; it was engrafted upon the statute by judicial construction. The court said:

> "The statute does not in express terms require that the parties know of the existence of the permanent physical impairment. But the knowledge on the part of the employer, though not necessarily of the employee, is required by the implication of the statutory formula."[2]

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[1] Unit Wall Co. v. Speh, 133 So. 2d 304 (Fla. 1961). The employer had knowledge of the claimant's preexisting diabetes when the claimant was hired as a cabinet maker. The condition did not affect his ability to obtain employment as a cabinet maker. As a result of a nail puncture in one leg, both legs became infected. The Deputy Commissioner held the Special Disability Fund liable for all but 25 percent of the disability, which was charged to the accident and to the employer. The court held that the "permanent physical impairment" need not be a hindrance or obstacle to employment if the employer made an informal decision to hire the handicapped worker The charge against the Special Disability Fund was affirmed.

[2] 102 N.Y.S.2d 255, 257.

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The rule could have given adequate expression to the policy of the legislation by saying no more than that the legislation should not be extended to prior conditions of such character that employers would *presumably* be unaware of them and therefore be unaffected by them in their hiring policies. But the court had to speak in terms of actual knowledge because it had a finding of lack of actual knowledge before it whose impact on the case had to be defined. As a result, New York found itself embarked on a tedious decisional journey, with very little company from other states, as it picked its way from case to case sorting out what was or was not adequate employer knowledge.

An obvious question was: How much must the employer have known about the actual nature of the prior injury?

It soon became clear that the employer did not have to know exactly what the employee's prior condition was in medical terms. If the employer, who was claimant's mother, knew that something was troubling the employee about his bones, she did not need to know also that it was Paget's disease.[3] And if the employer, a brewmaster, knew of the permanency of claimant's previous shoulder injury, but did

[3] Fields v. Rebowsky, 281 App. Div. 787, 118 N.Y.S.2d 671 (1953). There was evidence that claimant's wife and her brother, the son of the employer, knew of the preexisting disease.

Kehoe v. Kimberly Clark Corp., 29 A.D.2d 1049, 284 N.Y.S.2d 56 (1967). Prior to injury, the employer was informed that claimant's prior disability was chronic, was liable to recur, and involved degeneration. As a result, it made an effort to assign claimant lighter work. A finding that claimant was not continued in his employment with knowledge of the nature and extent of his prior disability, and that claimant's condition did not have a bearing on his employment, was held to be unsupported by the evidence.

Bellucci v. Tip Top Farms, Inc., 24 N.Y.2d 416, 248 N.E.2d 864 (1969). Decedent's employer was aware that decedent suffered from high blood pressure, and that the condition could not be cured. This was held sufficient to permit reimbursement from the Special Disability Fund, the only requirement being that the employer hire, or continue in employment, an employee with knowledge of the employee's impairment and a good faith belief of its permanency, and

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not know "what the trouble was," the employer had sufficient prior knowledge.[4]

Since the rationale of the rule is supposed to be the presumed impact of the prior handicap on the employer's hiring policy, it might be expected that the ultimate test would be what the employer believed, and this was indeed held in *Dubrow v. 40 West 33rd Street Realty Corporation*.[5] The requirement of knowledge was found satisfied if the employer had formed his own conclusion on belief that the injury was permanent, even though he had no medical evidence or knowledge to a point of medical certainty as to the permanence of the injury. But in a later case, when five medical reports indicated that the employee's first injury would result in no permanent defect, the employer's lay opinion to the contrary was held to be insufficient, and the Fund was held not liable.[6]

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that the impairment be in fact permanent. The employer does not need to have medical evidence or knowledge to the point of medical certainty concerning the permanency of the impairment

[4] Kirchner v. Standard Rochester Brewing Co., 18 A.D.2d 1114, 238 N.Y.S.2d 1019 (1963). Fund held liable.

Manzione v. Perla Bros. Stations, 13 A.D.2d 574, 211 N.Y.S.2d 931 (1961). The employer was found to have known that a gas station attendant's noticeable limp from infantile paralysis was a permanent disability within the meaning of the Special Disability Fund statute. *Held*, the Fund was liable.

[5] 4 A.D.2d 896, 167 N.Y.S.2d 98 (1957).

Green v. Kentucky Fried Chicken, 38 A.D.2d 644, 327 N.Y.S.2d 197 (1971). The employer was denied reimbursement from the Special Fund, upon a finding that the employer did not have informed knowledge of a preexisting permanent impairment. The court reversed and remanded, holding that the proper test was "knowledge of the impairment and a good faith belief in its permanency."

[6] Randolph v. Howard, 18 A.D.2d 863, 236 N.Y.S.2d 115 (1963).

DeDominic v. Joseph Schlitz Brewing Co., 30 A.D.2d 578, 289 N.Y.S.2d 689 (1968). Claimant had a preexisting disability which the Board found the employer had knowledge of, but did not consider to be a hindrance or obstacle to employment. Upon this finding the Board held that the carrier was not entitled to reimbursement from the Special Fund. The court held that this was error.

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Since the second injury principle applies only to preexisting permanent conditions, the employer would have to know, not just that the employee had some abnormal condition, but that the condition was permanent in character.[7] In *Amo v.*

since the actual fact as to the hindrance or potential hindrance of the preexisting disability was the key factor, rather than the employer's opinion as to the effect of the disability.

[7] Weller v. Imperial Paper & Color Corp., 286 App. Div. 896, 142 N.Y.S.2d 255 (1955). Knowledge of the prior injury is not sufficient; there must be knowledge that the prior injury resulted in a permanent condition.

Luero v. Tronolone, 1 A.D.2d 713, 146 N.Y.S.2d 881 (1955). No recovery from Second Injury Fund because employer believed that employee had fully recovered from operation at time of subsequent accident.

Gilson v. Bickford's, Inc., 12 A.D.2d 709, 208 N.Y.S.2d 849 (1960). The employer's knowledge that the claimant suffered from chronic back trouble was not equal to knowledge of any permanent disability such as to hold the Special Disability Fund liable.

Trewiler v. Republic Light, Heat & Power Co., 12 A.D.2d 845, 209 N.Y.S.2d 584 (1961). The employer's knowledge of a previous arm fracture did not also constitute knowledge that the prior injury was a permanent disability. Liability of Special Fund denied.

Connors v. Haywood Floor Co., 14 A.D.2d 947, 221 N.Y.S.2d 150 (1961). The truck driver strained his back in 1955, received medical-treatment compensation, but lost no time from work. The employer sought reimbursement from the Special Disability Fund when the driver seriously injured his back in 1957. The employer contended that knowledge of the first accident plus personal observation of the driver's physical condition during intervening two years qualified as an employer's notice of the employee's preexisting permanent disability. The court held that the first back strain was not the type of injury to put the employer on notice of permanency of the disability without medical confirmation. The Fund was held not liable.

Echols v. Hooker Electrochemical Co., 14 A.D.2d 475, 217 N.Y.S.2d 241 (1961). Permanency of back injury not known. Fund not liable.

McIntosh v. S. A Healy Constr. Co., 17 A.D.2d 544, 236 N.Y.S.2d 180 (1963). Employer's notice of one symptom of progressive caisson disease did not constitute notice of a prior disability for which the Second Injury Fund would be chargeable.

Shirley v. Triangle Maintenance Corp., 41 A.D.2d 800, 341 N.Y.S.2d 709 (1973). Claimant's back injury required surgery, but due to her excess weight surgery was not possible. The employer sought to hold the

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Empsall-Clark Company,[8] about six months after an automobile accident claimant fell down a flight of stairs while at work, and there was some evidence that since the automobile accident the employee had suffered from occasional dizzy spells. The carrier asserted that, since claimant experienced dizzy spells, the employer had notice of "permanent" disability, and that therefore the award should be paid out of the Special Fund. The court found the Special Fund provision was inapplicable, since the employer did not have notice of "permanent physical impairment," but merely of occasional dizziness.

The knowledge that the employer must have of the nature of the injury also was held to include awareness that the condition was of a kind likely to be a hindrance to employment. On this ground, knowledge of such prior impairments as loss of hearing[9] and a "nervous condition"[10] has failed to qual-

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Special Disability Fund liable for the increased disability, but the court held that since it was possible for the claimant to lose weight, and the employer knew of this, the employer could not show that it retained claimant with knowledge of an impairment (obesity) and a good faith belief in its permanency.

[8] 9 A.D.2d 852, 193 N.Y.S.2d 154 (1959).

[9] Ryan v. Armour & Co., 12 A.D.2d 559, 206 N.Y.S.2d 748 (1960). Approximately 50 percent loss of hearing in both ears was found not to be a hindrance or an obstacle to the employment of a slaughter house foreman. Although the employer's doctor had noticed the impediment, he had not examined the claimant specifically for that condition nor included it in his reports. In order to hold the Special Fund liable, the employer must be in a position to make "an informed judgment" on the extent and permanency of the disability. The Special Fund was relieved on either of the grounds stated.

[10] Charbonneau v. Alco Prods., Inc., 9 A.D.2d 813, 192 N.Y.S.2d 684 (1959). The workman stated, upon rehiring after a layoff, that he had a "nervous condition." Claimant then sustained a compensable back injury. The employer applied for reimbursement from the Special Fund because the workman was physically impaired at the time of rehiring. Reimbursement denied. The employer's knowledge of the preexisting nervous condition was not sufficient to support a finding that the claimant was rehired with knowledge of an impairment "likely to be a hindrance to employment."

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ify, but a different result has been reached as to knowledge of extreme obesity,[11] and of diabetes [12] considered by the employer to be "disabling" although not in fact handicapping the employee in performance of his duties as a house painter.[13]

Finally, as to what the employer must know, it is evident that the preexisting condition of which the employer knew must be the condition that figured in the final disability. In *Jamieson v. Passarelli*,[14] the employee cut his finger at work and the next day suffered a myocardial infarction which was attributed in part to a preexisting but unknown arteriosclerosis, and was not attributed to a preexisting and known diabetes condition. The Special Fund was held not liable and the award was charged solely against the employer.

The next question is: *How* does the employer acquire the requisite actual knowledge? Vague or indirect intimations that the employee is displaying something less than the characteristics of a perfect physical specimen are not enough. So in *Stophilbeen v. G. E. Van Vorst Company*,[15] the claimant, prior to the accident, had been assigned to lighter work at less pay because of his feebleness. The injury aggravated a preexisting condition of which the employer was unaware. The Second Injury Fund was held not applicable. The court stated: "A continuance in employment, even at a change to lighter work of one who to the knowledge of the employer has merely slowed down physically due only to advanced age is not within the purview of the 'second injury law'." [16]

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[11] Durdaller v. Liberty Prods. Corp., 12 N.Y.2d 787, 235 N.Y.S.2d 5, 186 N.E.2d 679 (1962).

[12] Salto v. M. Ruzza & Sons, 14 A.D.2d 964, 220 N.Y.S.2d 977 (1961).

[13] 220 N.Y.S.2d 977, N. 12, immediately *supra*.

[14] 15 A.D.2d 854, 224 N.Y.S.2d 454 (1962).

[15] 280 App. Div. 1004, 116 N.Y.S.2d 855 (1952).

[16] 116 N.Y.S.2d at 856.

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And an employer is not deemed to have knowledge of a preexisting heart condition merely because he knew that the employee had shortness of breath and took medication,[17] or was "nervous and upset" on the day of the accident,[18] or would at times take a drink because of his condition.[19]

Since the knowledge required in New York is actual and not presumptive, it is not even enough that the preexisting condition had been the subject of a compensation award. In *Stein v. La Marguise Footwear, Incorporated*,[20] the decedent-employee had a preexisting asthmatic condition for which he had received a compensation award under a different employer five years before. It could not be implied, said the court, that the asthmatic condition was permanent, or that the present employer must have known of it, merely because an award had once been made on it. Accordingly the Special Fund was held not liable.

When the employer is a corporation, the familiar question is encountered: What constitutes knowledge on the part of the corporation? Knowledge by officers of the corporation that their father, an employee of the corporation, had had a heart coronary occlusion seven years earlier was, not surprisingly, imputed to the corporation.[21] But in several cases in which the employee himself, occupying some managerial or proprietary relation to the corporation, was also the repository of the knowledge of his own prior condition, the New York court has for various reasons refused to credit the corporation with this knowledge.[22] And knowledge of the

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[17] Miller v. Fordham Glass Works, 20 A.D.2d 945, 249 N.Y.S.2d 134 (1964).

[18] Connolly v. Piel Bros., 9 A.D.2d 809, 192 N.Y.S.2d 686 (1959).

[19] Lawler v. Ritz Carlton Hotel, 14 A.D.2d 972, 221 N.Y.S.2d 572 (1961).

[20] 9 A.D.2d 552, 189 N.Y.S.2d 520 (1959), *aff'd*, 8 N.Y.2d 1081, 207 N.Y.S.2d 452, 170 N.E.2d 456 (1960), *mdf'd as to costs*, 9 A.D.2d 697, 191 N.Y.S.2d 927 (1959).

[21] Baron v. Nobar Realty Corp., 281 App. Div. 295, 120 N.Y.S.2d 146 (1953).

[22] Smith v. Evergreen Cemetery Ass'n, 28 A.D.2d 743, 280 N.Y.S.2d 712 (1967). Claimant supervised the operation of the defendant-corpora-

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corporation's insurance manager, not put on claimant's record or passed along to the personnel department, was found to be inadequate employer knowledge.[22.1] The court noted that the insurance manager had no authority to hire or fire, and that he had done nothing with the information because of his own belief that the condition could be cured.

The most reliable evidence of the employer's knowledge is a written notation of the prior condition in the employer's medical record of the employee. In *Fitzgerald v. News Syndicate Company*,[23] the medical records kept by the employer's salaried assistant medical director indicated that the employee had a preexisting susceptibility to herniation due to abdominal wall weakness. The court sustained the Board's finding that the employer knew that the condition was permanent before the accident and that the employer had not concluded the condition was permanent only after the accident. But even medical records are not a complete guaranty of the requisite knowledge. In *Rowles v. General Abrasive Com-*

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tion. However, he was not a stockholder or officer. The court held that this was insufficient to make his knowledge of his own prior disability imputable to the employer, so as to make the Special Disability Fund liable for part of the award.

Alpert v. Tower Brand Yard Corp., 16 A.D.2d 193, 226 N.Y.S.2d 843 (1962). An officer and the active manager of a small corporation continued to work after being informed of his heart condition. The doctor's testimony was "not completely unequivocal" as to whether the officer-manager knew of the permanency of the condition. The officer-manager's sister-in-law, the president of the corporation, testified that she did not know of the manager's condition. The Special Disability Fund was held not liable, due to lack of proof that the employer knew of the preexisting condition and made "an informed decision to continue the employment of the employee handicapped by a permanent condition."

Eckhaus v. Adeck Store, Inc., 21 A.D.2d 707, 249 N.Y.S.2d 195 (1964). Claimant was an employee of a corporation which he owned. He knew he was a diabetic, but there was little evidence that he knew it was an impairment. *Held*, employer did not have notice of a preexisting permanent physical impairment.

22.1 Buckl v. News Syndicate, 35 A.D. 2d 1053, 316 N.Y.S.2d 574 (1970).

23 17 A.D.2d 893, 233 N.Y.S.2d 663 (1962).

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Appeal requiring proof of employer knowledge. The essential test, said the court, was whether the prior condition was "labor disabling"—that is, whether if industrial it would be independently capable of supporting an award.

The *Ferguson* case has been followed in a case involving a preexisting psychosis followed by industrial loss of an eye,[28] and in a case involving a preexisting partial deafness followed by an industrial traumatic loss of hearing.[29]

The principal statutory difference between California and New York lies in the fact that in New York the employee gets his full benefits from the employer, who then must seek reimbursement from the Second Injury Fund, while in California the employee himself must apply directly to the Second Injury Fund. It would be hard to explain why an employee's right to recover from the Fund should turn on what the employer might or might not have known about the claimant's previous condition, especially when the employer is no longer

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[28] Subsequent Injuries Fund v. Industrial Acc. Comm'n, 53 Cal. 2d 392, 1 Cal. Rptr. 833, 348 P.2d 193 (1960), *rev'g* 342 P.2d 28 (1959). Employer's knowledge of preexisting disability not required. The preexisting condition had manifested itself when claimant had tried to teach and had suffered lumps in the throat, precordial pains, and burning sensations in the esophagus. The Commission assigned 33 percent disability to this condition and the remainder of a 79 percent disability to the eye injury. The prior injury satisfied the *Ferguson* test of a "labor disabling" injury. Treatise quoted.

[29] Subsequent Injuries Fund v. Industrial Acc. Comm'n, 56 Cal. 2d 842, 17 Cal. Rptr. 144, 366 P.2d 496 (1961). The claimant had fallen and suffered a head injury in an industrial accident which had resulted in a traumatic partial loss of hearing, some of which was attributed to the fall and some attributed to many years' exposure to a high noise level. He had not been aware of the preexisting partial deafness. Following the accidental fall, he applied for additional benefits from the Subsequent Injuries Fund. The court stated that the preexisting permanent partial loss of hearing was sufficient to support the finding that he was permanently partially disabled, that such disability was labor disabling even though it had not resulted in loss of earnings and had not interfered with his employment in the particular field in which he was then working, and that it was of a kind which could ground an award of per-

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hindrance to employment," and the Special Fund was held not liable.

The rigor with which New York has applied its actual-knowledge requirement is the more surprising when one reminds oneself that the requirement was a judicial invention in the first place. Confronted with the same choice seven years after New York adopted the requirement, California refused to follow the New York precedents and simply held in *Ferguson v. Industrial Accident Commission*[27] that employer knowledge was not necessary under the California statute. Claimant had suffered a compensable fracture of the right hip, and had received compensation under an approved compromise and release. While he was still recovering from the hip injury, he was found to have progressive muscular dystrophy. He then applied to the California Subsequent Injuries Fund for additional compensation. The referee found that the hip fracture had produced 14½ percent permanent partial disability, and that this in combination with a prior permanent partial disability in the form of muscular dystrophy resulted in total permanent disability. The Commission reversed the referee solely on the ground of lack of employer knowledge of the preexisting condition. The Supreme Court of California reversed the Commission, also in the process reversing four opinions by the District Court of

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[27] 50 Cal. 2d 469, 326 P.2d 145 (1958). Treatise quoted with approval.

Maryland has also rejected the requirement of manifestation or knowledge.

Subsequent Injury Fund v. Rinehart, 12 Md. App. 649, 280 A.2d 298 (1971). Decedent suffered an accidental injury which aggravated and accelerated a preexisting malignant brain tumor, resulting in his death. The brain tumor had been undiscovered prior to the injury, but would have caused death within several months to ten years at a maximum. The fund contended that since there was no knowledge of the condition, nor any hindrance to employment prior to injury, no apportionment of benefits against the Fund should be made. The court held that this was immaterial, and that the Fund was required to pay a part of the death benefits.

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pany,[24] the claimant's preemployment physical revealed "Spine back, flexion of 15%." However, there was no finding of any medical condition. The limitation could have been due to obesity, and there was no evidence that the employer considered the condition in hiring claimant. The Special Disability Fund was found not liable. And in *Fuina v. Alco Products, Incorporated*,[25] the employer had noted on claimant's employment record that he had a "spine defect" and "permanent physical impairment which might be an obstacle to employment." Other impairments listed included scars and slight deformities. It was nevertheless held that the employer had no knowledge of prior permanent impairment and was not entitled to reimbursement from the Special Disability Fund.

By this point it is clear enough that the New York courts have certainly not been going out of their way to find the necessary employer knowledge in second injury cases. If there is any doubt of this, it should be dispelled by the case of *Cohen v. George Campbell Company*.[26] The general superintendent testified that the claimant had told him in 1943 of an old back injury that had happened in the navy yard, as a result of which he could not jump up and down ladders. In 1955 the same superintendent had asked the claimant if his reason for wearing a back brace was because of a recent injury, and the claimant had explained that the brace was for the old navy yard back injury. The superintendent said he felt that "an ache for ten years, it must be permanent." The Board found that the information known to the employer was insufficient to establish that the employer hired or retained the claimant with knowledge that the prior condition was permanent and "was or was likely to be a

[24] 27 A.D.2d 604, 276 N.Y.S.2d 149 (1966), *aff'd*, 23 N.Y.2d 956, 298 N.Y.S.2d 733, 246 N.E.2d 533 (1969).

[25] 21 A.D.2d 706, 249 N.Y.S.2d 318 (1964).

[26] 13 A.D.2d 570, 211 N.Y.S.2d 896 (1961).

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even in the case.[30]

The New York rule is defensible only if it is assumed that the exclusive purpose of the second injury principle is to encourage the hiring of the handicapped. This is, of course, the central purpose—but the principle also embraces the idea of achieving this result in a way that works hardship on neither the employer nor the employee. If one did not care about incidental hardship to the employee, one could do the hire-the-handicapped job by merely using an apportionment statute. And if one cares about the element of hardship to the employer, one could argue the employer ought to be relieved of the cost of the preexisting condition, whether he knew of it or not, purely on the ground that the cost of this impairment, not having arisen out of this employment, should not in fairness fall upon this employer.

A more down-to-earth reason for disapproving the New York rule is that, as we have seen, it involves one of those distinctions that consume far more litigation time and cost than the policy at stake is worth.

Minnesota attempts to circumvent this New York difficulty by requiring that the preexisting injury be registered with the Commission.[31] The Council of State Governments' Draft

manent partial disability. "No reason appears why such disability which actually existed . . . must have been known to the employer in order for that disability to ground an award from the Subsequent Injuries Fund." Prior inconsistent California cases were specifically disapproved.

[30] Florida, however, appears to have achieved precisely this incongruous result, under its statute specifically requiring employer knowledge.

Dorsey v. L & A Contracting Co., 155 So. 2d 357 (Fla. 1963). The employee suffered an additional 35 percent loss of use of his hand while suffering from a prior 25 percent loss-of-use disability. The court construed the statutory provision requiring the employer to have knowledge of the preexisting disability (in order to be reimbursed by the Second Injury Fund) as also a restriction on the claimant's rights to benefits. The court held that, if the employer had such prior knowledge, the claimant would be entitled to an award for 60 percent loss of use of the hand; if the employer did not have the knowledge, the claimant would be limited to an award for 35 percent loss of use.

[31] McGuire v. Viking Tool & Die Co., 258 Minn. 336, 104 N.W.2d 519 (1960). The employee suffered an

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Law suggests another device to cut down on controversy about employer knowledge, in the form of the following clause:

> "In order to qualify under this section for reimbursement from the Special Fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment at the time that the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge."[32]

§ 59.34 Amount of Second Injury Fund contribution

The amount of the Fund's contribution is usually the difference between the compensation that would be payable for the second injury alone and the compensation payable for the combined injuries.[33] One logical result of this calculation

injury which of itself caused only partial disability, but when combined with three previous disabilities constituted permanent and total disability. The court sustained the findings of the Board, ruling that the employer had the sole liability and that the employer was not entitled to reimbursement from the Fund because he had not registered the preexisting injuries as required by statute.

[32] Workmen's Compensation & Rehabilitation Law § 20(c).

[33] *California:* Subsequent Injuries Fund v. Industrial Acc. Comm'n, 44 Cal. 2d 604, 283 P.2d 1039 (1955). Where there is a combined disability resulting from a later industrial injury when added to a prior independent disability, the industrially caused disability should first be rated and then deducted from the combined disability to arrive at the disability rating chargeable to the Fund. In aggravation cases, the combined disability should first be rated and then a portion of the combined disability should be assigned to the later injury and a correlative proportion to the preexisting disability.

Pacific Gas & Elec. Co. v. Industrial Acc. Comm'n, 126 Cal. App. 2d 554, 272 P.2d 818 (1954), discussed at N. 38 *infra*, this subsection.

Florida: Sharer v. Hotel Corp. of Am., 144 So. 2d 813 (Fla. 1962). The claimant had previously lost his left hand by amputation. In the second accident he suffered a 40 percent loss of use of his right hand. The fact that the injuries were to two separate schedule members which did not result in total disability did not defeat the intent of the Second Injury Fund provision for compensation in excess of that attributable to the second injury, which would otherwise have been limited to the schedule award. Award granted for 59 percent disability of the body as a whole. Treatise quoted.

Kentucky: Alva Coal Corp. v. Ealy,

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March 21, 1979

Mr. Ronald L. Motley
BLATT & FALES
Post Office Box 365
Barnwell, South Carolina 29812

In Re: Federal Court Asbestosis Cases

Dear Ron:

We enclose herewith and serve upon you Johns-Manville's Answers to Plaintiff's Supplemental Interrogatories in the above matter.

With kindest regards, we are

Yours very truly,

HORGER, HORGER & BARNWELL

By

WAH/etr

Enclosures

cc: All Defense Counsel

CRMC-Motley1000-Subj-004359

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE:)
)
ASBESTOSIS CASES.)

ANSWERS OF DEFENDANT
JOHNS-MANVILLE SALES CORPORATION
TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES

TO ALL ATTORNEYS OF RECORD:

In accordance with the provisions of Rule 33, Federal Rules of Civil Procedure, Johns-Manville Sales Corporation hereby answers the Supplemental Interrogatories of Plaintiff served on Defendant's counsel.

Defendant reserves the right to amend or supplement its answers if it finds that inadvertent omissions or errors have been made or if additional or more accurate information becomes available that is required to be provided by the Federal Rules of Civil Procedure.

1. State whether and when Johns-Manville, or its predecessor, acquired the R. V. Aycock Co. or portions thereof and describe in detail the nature of the transaction.

ANSWER: Yes, 1932; purchase of assets of Aycock distributing, contracting and warehouse operations in given locations, principally Missouri and Texas.

2. State the nature of business enterprise engaged in by the said R. V. Aycock Co.

ANSWER: Distribution, contracting and warehousing, including thermal insulation material.

3. State whether the R. V. Aycock Co. functions and/or employees and/or assets were transferred to Johns-Manville Sales and operated as a contract unit and if so, when.

ANSWER: Assets were purchased, and subsidiary corporations known as the Aycock Corporation and the Aycock Corporation of Texas were operated and an unknown number of its former corporate employees of R. V. Aycock Co. became employees of the new subsidiary corporations. The Aycock Corporation headquartered in Kansas City operated

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as a contract unit. Defendant believes that, while the predecessor operations in Texas had done some limited thermal insulation contract work, the new subsidiary entity consisting of assets purchased by Defendant operated in conjunction with Defendant's Houston operations and functioned primarily as a distributor and warehouser.

Dated this 21st day of March, 1979.

HORGER, HORGER & BARNWELL

By: William G. Horger
Attorneys for Defendant
Johns-Manville Sales Corporation
P.O. Drawer H
459 Amelia, N.E.
Orangeburg, SC 29115
(803) 534-1361

CERTIFICATE OF MAILING

I do hereby [illegible] mailed a true and [illegible] Answers of Defendant Interrogatories to all [illegible] of March 79.

By William G. Horger
Attorneys for Johns-Manville Sales Corporation

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AFFIDAVIT

STATE OF COLORADO)
) ss:.
COUNTY OF JEFFERSON)

R. B. VON WALD being duly sworn according to law deposes and says that he is Vice President and Assistant General Counsel of JOHNS-MANVILLE SALES CORPORATION, successor by merger to JOHNS-MANVILLE PRODUCTS CORPORATION, a defendant in this action, that he is authorized to make this Affidavit on its behalf and that the facts set forth in the foregoing pleading are true and correct to the best of his knowledge, information and belief.

R. B. VON WALD

Sworn and subscribed to before me this 13th day of March, 1979.

NOTARY PUBLIC

My Commission expires June 10, 1982

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STATE OF MISSOURI, } ss.
COUNTY OF JACKSON, }

I, AUSTIN E. VAN BUSKIRK, Court Administrator for the Circuit Court of Jackson County, Missouri and custodian of the records and papers thereof, do hereby certify that the foregoing is a full, true and complete copy of the

SEPATE ANSWER, PETION FOR DAMAGES, FIRST AMENDED PETION FOR DAMAGES, ANSWER, MOTION TO DISMISS, AND SUGGESTION OF DEATH

as the same appears in my office in Case No. 425211, entitled

BERNARD DUGAN
R.
R. V. AYCOCK COMPANY, AYCCCK CORPORATION, AND R. V. AYCOCK

Witness my hand and the seal of said Court on APRIL 25, 19 79

AUSTIN E. VAN BUSKIRK
COURT ADMINISTRATOR
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

By Bonnie Hamsey
Deputy

CRMC-Motley1000-Subj-004363

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY.

MARCH TERM, 1934.

BERNARD DUGAN,)
.....Plaintiff,)
vs.) No. 425,211.
R. V. AYCOCK COMPANY and VAUGHN INVESTMENT COMPANY, corporations, and R. V. AYCOCK,)
.....Defendants.)

A N S W E R.

Come now the defendants and for answer to plaintiff's first amended petition deny each and every allegation in said petition contained.

WHEREFORE, having fully answered said defendants pray to be discharged and with judgment for their costs herein expended.

Earl D. Douglas

of Watson, Ess, Groner, Barnett & Whittaker,
Attorneys for Defendants.

CRMC-Motley1000-Subj-004364

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY.

MARCH TERM, 1935.

BERNARD DUGAN,

Plaintiff

vs

No. 425211.

R. V. Aycock Company, and
Vaughn Investment Company,
Corporations and R. V. Aycock,

Defendants

MOTION TO DISMISS

Come now the defendants and state to the court that a suggestion of death of plaintiff was filed in the above captioned case on May 5, 1934 and that three terms of court have gone by and said cause has not been revived.

WHEREFORE defendants pray that the above entitled action be dismissed at the cost of plaintiff.

WATSON, ESS, GRONER, BARNETT & WE[illegible]

By [signature]
Attorneys for Defendants.

CRMC-Motley1000-Subj-004365

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY,
MARCH TERM, 1934.

BERNARD DUGAN,)

.... Plaintiff)

vs.

No. 425,211

R. V. AYCOCK COMPANY and)
VAUGHN INVESTMENT COMPANY,
corporations, AND R. V. AYCOCK,

..... Defendants)

SUGGESTION OF DEATH

COME NOW the defendants and suggest the death of plaintiff and state that the plaintiff departed this life while residing in Jackson County, Missouri, upon the 26th day of March, 1934.

Of Watson, Ess, Groner, Barnett & Whittaker
Attorney for defendants.

Dated this 3rd day of May, 1934.

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