FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
APR 1 - 1971
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Graves

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

S. R. POTTER	§	
	§	
VS.	§	
	§	C. A. NO. 6,329
FIBREBOARD PAPER PRODUCTS	§	
CORPORATION, ET AL	§	

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Defendants, Fibreboard Corporation, Combustion Engineering, Inc., Johns-Manville Products Corporation, Owens-Corning Fiberglas Corporation, Eagle-Picher Industries, Inc., Pittsburgh-Corning Corporation, Unarco Industries, Inc., Philip Carey Corporation, Armstrong Cork Company, Standard Asbestos Manufacturing and Insulating Company and Ruberoid Company, Defendants in the above entitled and numbered cause and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court for a Summary Judgment in their favor.

The various supporting briefs filed herein are incorporated in this Motion and form a part hereof. Dean Keeton's brief is filed in support of all points in this Motion, save and except on the question of limitation, and a separate brief will be filed on this point.

1.

Plaintiff's Contentions

This suit was filed by S. R. Potter against eleven different manufacturers of various insulating products containing some asbestos, as joint and several tort-feasors, alleging the plaintiff had developed the occupational disease of asbestosis during his twenty-seven (27) years employment in the asbestos insulation industry and that such occupational disease was proximately caused by the negligence and/or breach of warranty of the various Defendants.

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On the theory of negligence, Plaintiff alleged:

(a) That Defendants knew, or in the exercise of ordinary care should have known, that the insulation product they prepared, manufactured and distributed contained deleterious, poisonous and highly harmful ingredients which damaged the Plaintiff's body, lungs, and respiratory system;

(b) That Defendants failed to warn the Plaintiff of the danger and harm to which he was exposed;

(c) That they failed to provide the Plaintiff with knowledge as to what what would be reasonably safe, protective equipment and appliances to protect him from the effects of the product.

In addition, the Plaintiff alleged that the Defendants breached warranties in the following respects:

(a) That Defendants knew, or ought to have known, that their insulation product was defective and not suitable for the purpose for which it was intended;

(b) That Defendants should have devised a method of application of their product that would have kept those using the product from contracting asbestosis;

(c) That the products containing asbestos were warranted either expressly or impliedly to be merchantable, when in truth they were not, and therefore Defendants breached the warranty of merchantability;

(d) That the Defendants placed on the market products containing asbestos, which products were in a defective condition that were unsafe for their intended use or which were unreasonably dangerous.

The Defendants, and each of them, deny the allegations of the Complaint.

The Defendants contend as follows:

Defendants deny that Plaintiff sustained any injury as a result of any negligent act or omission on the part of these Defendants and deny that Plaintiff was injured as a result of any alleged breach

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of warranty of these Defendants. Affirmatively, Defendants say that each of the products which each Defendant manufactured and sold were at all times reasonably fit and suitable for the purpose for which they were manufactured and sold and Defendants deny that the same were in anywise defective for the use for which they were manufactured, i.e., as insulation products.

That during the time that S. R. Potter was engaged as an insulator for twenty-seven (27) years, he knew that he was working in dust-laden air which contained asbestos dust, part of which was created by his own work and by the working conditions provided by his employer, and therefore any injury he may have sustained was an occupational disease resulting from his long continued occupation as an insulator and not as a result of any isolated incident or contact with any product manufactured by either of the Defendants.

Defendants further alleged that Plaintiff failed to use and utilize any safety devices such as masks and respirators for breathing and failed to request his employer to furnish blowers and other equipment to remove the dust-laden air, and he worked in such dust-laden air created from the products containing asbestos with full knowledge that he was inhaling such dust-laden air and he continued to work with such insulation materials after he knew, or in the exercise of ordinary care should have known, that it was affecting his health.

That if Plaintiff sustained any injury as the result of the use of any material or materials manufactured by said Defendants, the danger, if any, arising from the continued use of the materials was well known to the Plaintiff, or should have been known to him, but, nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with dust from such insulation materials.

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Further, if there was any danger which was not open and obvious to Plaintiff at all times, nevertheless, he knew at all times of the danger involved in working with insulation materials containing some asbestos and in working in dust-laden air where such insulation materials were in use, but, nevertheless, he continued to work with such materials and under such conditions with such knowledge, and therefore these defendants owed him no duty to warn him of any potential dangers involved.

If Plaintiff did sustain any injury as the result of the use of any product manufactured by the Defendants, or either of them, which is denied, then such occurred more than two (2) years prior to the filing of this suit on May 27, 1969, and prior to the filing of any claim for workmen's compensation on March 14, 1968, and such cause of action is barred by the two (2) year statute of limitation of the State of Texas.

Any claim of injury as the result of the use in the State of California of any product manufactured by the Defendants, or either of them, occurred more than one (1) year prior to the filing of this suit on May 27, 1969, and such cause of action is barred by the one (1) year statute of limitation of the State of California. The filing of a claim for workmen's compensation does not toll or suspend the running of the statute of limitation in California.

Any claim of injury as the result of the use in the State of Louisiana of any product manufactured by the Defendants, or either of them, occurred more than one (1) year prior to the filing of this suit on May 27, 1969, and such cause of action is barred by the one (1) year statute of limitation of the State of Louisiana. The filing of a claim for workmen's compensation does not toll or suspend the running of the statute of limitation in Louisiana.

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If Plaintiff did sustain any injury as the result of the use of any product manufactured by the Defendants, or either of them, which is denied, then such occurred more than four (4) years prior to the filing of this suit on May 27, 1969, and prior to the filing of any claim for workmen's compensation on March 14, 1968, and such cause of action is barred by the four (4) year statute of limitation of the State of Texas.

Each of the Defendants assert the law of limitation of each of the states where any alleged claim for injury as a result of exposure to Defendants' products occurred.

General Statement

Plaintiff, S. R. Potter, an insulator, who worked for some twenty-seven (27) years for various insulation contractors, seeks to recover damages against eleven different manufacturers of various insulation products containing some asbestos, as joint and several tort-feasors, because of the development of a disease called asbestosis that made its appearance many years later after the initial exposure at the age of twenty-eight (28) years to asbestos dust and fiber. Plaintiff was therefore suffering from a disability resulting from a disease, and not an injury arising out of a sudden and unintended event allegedly produced by some condition of a specific and identifiable product. The hazard that produced the disease was an environmental one that was directly related to his occupation. Neither of the Defendants in this case were responsible for the working conditions and the environment to which the Plaintiff was subjected.

NEGLIGENCE - Proposition 1.

A manufacturer of a product that contains no defect, that is intended for industrial use and by specialized contractors, and that does not create any new risk that was not already inherent in the constituent parts being used has no duty to advance the

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state of scientific and medical knowledge as to the risks and dangers involved to employees of the user from any known characteristic of the product that may produce under some conditions an environmental hazard. When such a hazard results and disability develops from long-continued use, the condition is regarded as an occupational disease and is compensable in that way only or through our federal social security system. For a discussion on this point see the Keeton brief, Page 9, etc.

NEGLIGENCE - Proposition 2.

It is the sole duty of the asbestos contractors to protect insulation workers and other employees from, or warn of risks and dangers of which the contractors could be expected to be as fully informed as the makers of the products containing some asbestos.

As a corollary to the foregoing proposition, there exists no duty on the part of the manufacturer of products containing asbestos to warn employees of insulation contractors of the fact that they are working with products containing asbestos which will produce air containing asbestos dust, because the employees are charged with the knowledge of their employer who could be expected to be as fully informed as the manufacturers of the products, and likewise, Potter had knowledge and is charged with knowledge of the content and the characteristic of the product to create dust. See the Keeton brief, Page 15, etc.

NEGLIGENCE - Proposition 3.

It is the duty and responsibility of industrial and other employer-entrepreneurs who specialize in the use of particular types of products and of organized labor in such industries and of governmental agencies, especially when the magnitude of the danger varies because of a variety of processes and conditions under which the products are used, to institute safety programs,

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to install safety devices, and to educate their employees in the handling of the product. It is not the duty and responsibility of the maker of products to protect employees of their purchasers who specialize in installing the product, but rather the responsibility of the employers to safeguard and protect their employees. Each employer is faced with different working conditions and each is in a better position to appreciate and find out the potential risk involved in his work process, and the ways and means to minimize such risk. See the Keeton Brief, Page 25.

STRICT LIABILITY - Proposition 1.

Courts have not imposed liability anywhere against manufacturers on the basis simply that a condition of the product caused harm when used as intended. Instead, they have imposed liability on warranties or strict tort theories only when the product was defective at the time he sold it.

It is the contention of each of the Defendants that the product manufactured by each of them individually was reasonably fit for the purpose for which the product was manufactured. Any exposure to air containing some asbestos or the amount of such exposure in each case was dependent upon the working conditions provided by the employer and the precautions taken by the employee such as the use of respirators when subject to excessive exposures, etc. Section 402A of the Restatement of Torts expressly provides:

(1) That a product must be in a "defective condition", and

(2) unreasonably dangerous. The "defective condition" depends on whether the product is unreasonably dangerous. It is proper to balance the utility of the product against the magnitude of the risk. Many products have both utility and danger. It is the position of all Defendants that each of their products containing approximately fifteen (15%) per cent asbestos were not unreasonably dangerous and they were not in a defective condition. In fact,

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each of the products were manufactured as they were intended to be manufactured and the utility of the product required that it contain heat resistant asbestos. See the Keeton brief, Page 26, etc.

STRICT LIABILITY - Proposition 2.

A product is regarded as defective at the time of sale only if the following conditions are met:

(1) The product as marketed was at the time of sale unreasonably dangerous; and

(2) The risk or hazard involved in the product's use was a concealed or hidden danger; and

(3) The risk or hazard that made the product so dangerous was a scientifically known fact at the time of sale and was one that could have been feasibly reduced by the application of techniques known at such time.

STATEMENT AS TO SUBDIVISION (1) OF PROPOSITION 2.

The requirements of Subdivision (1) are not met unless it can be found from the evidence that a reasonable man with knowledge of the condition and the risks incident to the use of the product as marketed, would not have marketed the product as he did because the magnitude of the danger in fact from so doing outweighed the utility or justification for so doing.

As to design defects, this means that a manufacturer cannot be regarded as selling an unreasonably dangerous product that is designed in a universally accepted or customary manner in the absence of either expert testimony that would serve as a reasonable basis for a finding that safer products could have been made feasibly, or evidence of a violation of some regulatory measure, or finally, evidence that some makers followed a safer procedure. See the Keeton brief, Page 29, etc.

In this case Plaintiff must, in order to recover, be asserting the proposition that virtually all asbestos products of all

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manufacturers have been designed in an unreasonably dangerous manner. This is on its face preposterous. Defendants have been unable to find a single case holding an entire industry subject to liability for an occupational disease that develops after 20 or more years when a variety of different products made by different manufacturers have been used under a variety of conditions not under the maker's control.

STATEMENT AS TO SUBDIVISION (2) OF PROPOSITION 2.

A product is not unreasonably dangerous unless it fails as regards safety features to conform to the normal and reasonable expectations of those for whose use the product is intended. Keeton brief, Page 38.

In support of the foregoing, there is no duty to warn where the other party is already aware of the danger. An employee is charged with all of the knowledge of his employer.

If the buyer discovers the defect in a product and uses the goods anyway, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.

As to products intended for industrial use or for specialty contractors and the unions that represent employees who can reasonably be expected to be as fully informed about the dangers as are the makers, the obvious nature of the danger should be conclusive.

There was obviously no concealed condition about the products containing some asbestos.

ASSUMPTION OF THE RISK.

If the Plaintiff became aware of the existence of a substantial risk of asbestosis or lung disease or lung injury before he became totally disabled or before total disability became inevitable, he cannot recover for his disability because the defense of voluntary assumption of the risk or volenti non fit injuria applies. See Keeton brief, Page 64.

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DEFENSE OF LIMITATION.

If Plaintiff did sustain any injury as the result of the use of any product manufactured by these Defendants, and each of them, then such occurred more than two (2) years prior to the filing of this suit on the 27th day of May, 1969, and such cause of action is barred by the two (2) year statute of limitation of the State of Texas. As to any alleged cause of action for exposure occurring in the States of California and Louisiana, the cause of action is barred by the one (1) year statute of limitation.

Claim for workmen's compensation was filed March 8, 1968, and final settlement of the compensation suit was approved by the Judge of the District Court of Orange County, State of Texas, on January 30, 1969. Under the laws of the State of Texas, the statute of limitation is tolled by the filing of a claim for workmen's compensation but this is not true if the common law action has theretofore been barred by limitation. In Louisiana and California the mere filing of a claim for workmen's compensation does not toll the running of the statute of limitation.

A cause of action based upon implied warranties and a cause of action based on negligence is barred by the two (2) year statute of limitation.

In filing this Motion for Summary Judgment, we are cognizant of the rules. In discussing Motions for Summary Judgment pursuant to Rule 56, Charles Wright points out that Summary Judgment should be available to a litigant where there is no genuine issue or any material fact to be tried, and that allegations in the pleadings do not create an issue as against a Motion for Summary Judgment. The very object of Summary Judgment procedure, as Justice Cardoza long ago said, is "to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." Wright, Federal Courts, 1970, Page 444.

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STATEMENT OF THE EVIDENCE ON WHICH THE DEFENDANTS RELY

The Defendants rely upon the oral depositions on file, including the oral deposition of S. R. Potter, the Plaintiff, Dr. Jenkins, Joseph Shrode, and medical records, which will be pointed out or attached to this Motion. We have filed with this Motion what has been designated as the Page Keeton Brief, and will file shortly a complete brief covering the points involving the statutes of limitation. It is the position of Defendants that the oral deposition of Potter, his medical history and the medical records demonstrate that the claim of Potter is barred (1) by the statute of limitation, and (2) that he has no cause of action by reason of knowledge and long voluntary exposure to the risk, and thirdly, there is no cause of action at common law against each and all of these Defendants for alleged exposure to a known ingredient, asbestos dust, which resulted in the development of asbestosis over a period of twenty-seven (27) years of work.

S. R. Potter testified:

WORKING CONDITIONS

"Q What did you do during World War II?

A Insulation work.

Q All right. Where did you first start in the insulation work?

A Pennsylvania Shipyard in Beaumont.

Q Did they have a union at that time, asbestos workers' union?

A Not there, no, sir.

Q Were you a member of the union at that time?

A No, sir, not at that time.

Q Had you had any prior experience in the insulation industry--

A No, sir.

Q Before going to work at Pennsylvania Shipyard?

A No, sir.

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Q Was that in connection with the construction of new ships?

A No, sir, it was repair of old ships.

Q In 1940?

A Yes, sir.

Q How long did you work at Pennsylvania Shipyard?

A About three weeks.

Q Well, did you work as a helper or what?

A A helper, yes.

Q Under what conditions did you work at Pennsylvania Shipyard?

A You mean inside of the ship or--

Q Was it down in the hold of the ship?

A It was down in the hold.

Q In close quarters?

A Yes, sir.

Q What type of insulation did you work with?

A Asbestos.

Q Did you know you were working with asbestos?

A Yes, sir.

Q Did they have any blowers in close quarters--

A No sir.

Q --or suction equipment?

Q Did they furnish you with any masks?

A No, sir.

Q With glasses?

A No, sir.

Q Safety helments?

A No, sir.

Q When you were working in close quarters, did you have a considerable amount of dust in those quarters?

A Yes, sir.

Q Did you realize that you had the dust there?

A Yes, sir.

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Q And you knew you were breathing it, didn't you?

A Uh-huh.

Q You said "yes"? She can't hear you shake your head.

A Oh, yes, sir.

Q Now, did this dust bother you while you were down in the hold of the ship or in a small space?

A Yes, sir, it bothered me.

Q What did you do to get out of it or to keep from breathing it?

A I just breathed it.

Q You didn't tie a handkerchief around your face or wet a handkerchief or anything of that nature?

A Yes, sir, at times I did tie a handkerchief around my face.

Q Why did you do that? Just to keep from breathing this?

A Breathing so much of it, yes, sir.

Q Was it pretty heavily concentrated there?

A Yes, sir, at times." (Pages 10-13)

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"Q Would you work long hours at the shipyard?

A Yes, sir.

Q Seven days a week sometimes?

A Sometimes. Most of the time it would be, say, eight hours on Saturday and the other times we worked at--

Q Since this was new construction, where, if the products had to be cut or scribed, where was that done?

A On the ship.

Q Did they have a special area set aside for it on the ship?

A No, right where you was working, you would take the measurements and saw the material.

Q At that time would you do your own sawing or did they have a special man who did the ship work?

A Well, they had a ship, but they only made those fittings, portable fittings that you put around out of that asbestos cloth. They did that in the ship and we did our own sawing for the pipe covering for different fittings.

Q Now, when you would do your own sawing, would you create dust?

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A Yes, sir.

Q Of course, you knew that, didn't you?

A Yes, sir.

Q Would you create it to the extent that the air was permeated with it?

A Yes, sir.

Q Pretty thick?

A Yes, sir.

Q And you knew that you were breathing it?

A Yes, sir.

Q Would the dust get so thick sometimes you would have to get out of the hold or the area where you were working, go outside?

A Yes, sir.

Q Did you also use handkerchiefs or covering for your face at times?

A At some times we would.

Q When would you do this mostly? When you were doing the shop work?

A No, I didn't do any shop work over there. I was on the ship.

Q I see. How long did you work on this at this Consolidated Shipyard?" (Pages 20-21)

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"Q Did you inhale the dust?

A Yes, sir.

Q At the time you knew you were inhaling asbestos dust, didn't you?

A Yes, sir.

Q Did you suffer any ill effects from it?

A Well, only coughing and sneezing, you know. I would get out on deck and cough it up and sneeze.

Q What would you cough up?

A Just that dust.

Q Well, did it have any substance to it that you could tell?

A Yeah, it would be white and the color of the stuff we was breathing.

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Q Then you knew that that was asbestos dust, didn't you?

A Yes, sir." (Pages 27-28)

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"Q Well, isn't it true, Mr. Potter, that in the insulation industry if you wanted a mask, all you had to do was ask your employer for it?

A Oh, no.

Q Well, did you ever ask your employer to furnish you with a mask?

A In later years, but back in there, no. If you would ask them for a mask, they would tell you to go buy one.

Q Well, when you worked at Consolidated Shipyard, didn't they have masks there available?

A No, sir.

Q Back during the War?

A No, sir.

Q All right, when you worked at this Brown Insulation Company at the Ford Company in Dearborn, Michigan, did you have a dust problem there?

A Yes, sir.

Q What did you do about it?

A Just breathed it.

Q Well, was there any suction equipment or anything like that on the job?

A No, sir.

Q Did your employer take any precautions, try to put in blowers or--

A No, sir." (Page 47)

DUST PROBLEM DISCUSSED WITH UNION

"Q Have you ever discussed this dust problem with your union representative?

A Yes, in the last few years.

Q Well, how long ago did you first discuss it with him?

A I imagine six or seven years ago.

Q Six or seven years ago--

A Yes, sir.

Q --you discussed with the union representative?

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A Uh-huh.

Q Why did you take it up with him at that time?

A Well, we were talking about the dust, some way to keep it down and furnishing us a mask--respirators on jobs, that some jobs you need them.

Q Well, did you have any particular problem that caused you to discuss this matter with your union representative?

A No, we was discussing it in our contract for them to furnish all safety equipment." (Pages 62-63)

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"Q As long as six or seven years ago didn't you all discuss in your union meetings the fact that asbestos was injurious to the health?

A Yes, sir, that was the first time it started coming out about that.

Q From and after that time you realized that this dust could affect your health, didn't you?

A Yes, sir.

Q Would it cause you to cough when you would inhale this dust?

A Yes, sir.

MR. STEPHENSON: George, you have covered that six times.

Q Did it affect your chest?

A Yes, sir, at times the chest would hurt back then." (Page 91)

KNOWLEDGE OF ASBESTOSIS

"Q Do you know about when that was? If he (Tomplait) had it in 1961, would you have known about it when he first was disabled and had his suit, '61, '62?

A No, I didn't know exactly when he had the suit.

Q Well, he was in the same union that you were, wasn't he?

A Yes, sir.

Q Hadn't you discussed it with him?

A No, sir.

Q How did you know about his suit?

A Just heard about it.

Q You just heard about it?

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A Yes, sir.

Q Well, you knew that if that was true that asbestos could do you harm, couldn't it?

A Yes, sir.

Q You knew that as far back as 1962, didn't you?

A I probably did, yes, sir." (Page 97)

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"Q When was the first time that you started having trouble with your coughing?

A Well, maybe ten years ago.

Q Ten years ago. Did you see a doctor for that?

A Yes.

Q Who was that?

A Dr. Watson.

Q Is that Dr. Watson over in Vinton?

A Yes, sir.

Q What was the nature of the trouble that you were having that caused you to go to Dr. Watson?

A He said it was bronchitis.

Q Sir?

A He said it was bronchitis.

Q I mean how did it affect you physically? Just describe it to me in your own words. You don't have to use any medical terms.

A Well, I hurt in through here. (indicating)

Q You are pointing now to your left chest. It hurt in through your chest.

A Yes, sir, and down here.

Q And in the back?

A Yes, sir, and through my rib cage.

Q And your rib cage. Would you have trouble breathing?

A Yes, sir, at times.

Q Would you have shortness of breath at times?

A Yes, sir.

Q And this was as long as ten years ago?

A Yes, sir.

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Q Well, when you went to the doctor did he take any x-rays?

A Yes, sir.

Q Where were those x-rays taken?

A Here in Orange.

Q What hospital?

A At the old--

Q Lutcher?

A Lutcher Ann Hospital.

Q Lutcher Ann Hospital?

A Yes, sir.

Q Did you tell the doctor you were working in dust and with asbestos products at that time?

A Yes, sir, he knew that.

Q He knew that. Did he at any time advise you to change the nature of your employment, get out of the dust?

A I don't remember. I had had pneumonia one time. I went to the hospital.

Q Did Dr. Watson attend you then?

A Yes, sir.

Q Was he living in Orange at that time?

A Yes, sir.

Q Did you go to the Lutcher Hospital then?

A Yes, sir.

Q How long were you in the hospital at that time?

A Five or six days, I believe.

Q How long were you disabled at that time?

A Not too long. I went back to work as soon as I was feeling better.

Q Well, had you been sick before you were put in the hospital?

A Yes, sir.

Q How long had you been under Dr. Watson's treatment?

A I don't remember. Off and on. I would get a bad cold or sick or something like that.

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Q Would you still have all this hurting that you described in your chest and in your back?

A Yes, sir.

Q Sir?

A At times, yes, sir.

Q At times?

A Uh-huh.

Q Has that been true off and on during the last ten years?

A Yes, sir.

Q How many times would you say that you have been in the hospital with bronchitis and pneumonia in the last ten years?

A About five times, I guess.

Q What hospitals were those?

A I have been twice to Lutcher Ann and I believe three times in Orange Memorial.

Q Were x-rays taken each time?

A Yes, sir.

Q The first two times when you were in Lutcher Hospital, Frances Ann Lutcher Hospital, was your doctor Dr. Watson?

A Yes, sir.

Q Did you have any other doctors come in and consult on the case?

A No, sir.

Q And when you went to Orange Memorial who was your doctors then?

A I believe Dr. Watson one time and the other time was Dr. Shaddock.

Q Was Dr. Shaddock your doctor more recently than--

A Yes, sir.

Q Was he just your doctor beginning in about 1967?

A Yes, sir.

Q Up to that time you had Dr. Watson?

A Yes, sir.

Q Had you ever had a Dr. Richmond in Orange treat you?

A That was years ago, I believe so, during the War.

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Q Had you had pneumonia then?

A Yes, sir.

Q Had you had the same type of hurting that you now have, right across your chest and in your back?

A Yeah, it was regular--they called it a virus pneumonia or something. I don't know what--he said it was pneumonia.

Q Did you have this bronchitis at that time?

A Well, I was coughing a lot at that time.

Q You were coughing a lot at that time. Have you continued to cough as a result of contact with this product at your work over--ever since World War II?

MR. STEPHENSON: I object. Don't answer that.

Q Well, have you had coughing spells from time to time since you worked at the shipyard in Orange?

A At time to time.

Q Right on up to the present?

A No, not like the present.

Q I believe you stated in your deposition or your answers to interrogatories that you had lung congestion, that you were treated by Dr. Watson from 1954 until about 1966. What do you mean? What kind of lung congestion did you have? Would you spit up materials?

A Yes, sir, my lungs would hurt and the bronchitis we would call it.

Q Was this true during the whole time you were going to Dr. Watson, beginning in about 1954?

A Yes, when I would have colds.

Q Well, didn't Dr. Watson tell you that you were--as a result of your work you were inhaling too much dust?

A He didn't mention it.

Q He didn't mention it?

A No, sir.

Q Did you tell him that you had a problem at your work with dust, that you would inhale it from time to time?

A No, he knew it. He used to be a doctor at DuPont when I worked there and he knew the kind of work I was in." (Pages 133-139)

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"Q Did you know the nature of the lung infection?

A No, sir.

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Q Did this affect you, make you short of breath?

A Yes, sir, and it hurt.

Q And you had this hurting over a period of--off and on for ten years, is that right?

A Well, it hasn't been too bad. It has been the last two years it's been kinda bad and it's been bad the last year. It's worse the last year than it has been.

Q Has this been a progressive thing over the last ten years? In other words, it gets a little worse and a little worse?

A It seems to me I have noticed it more the last year than I have at any other time.

Q I see, but you have had some of the symptoms all of the time, is that right?

A For quite awhile, yes, sir.

Q That is, you have had this cough and you have had the hurting in your chest and in your back, your shoulders?

A Yeah.

Q And you have had shortness of breath?

A Yes, sir.

Q Do you have any clubbing of your fingers?

A Yes, sir.

Q Are they stiff or what?

A It's stiff and I don't have much feeling in them." (Pages 142 and 143)

****

"Q In your deposition which you gave on September 19, 1968, you said about six years prior to that time you would have to get up at night and go out on the porch to get your breath?

A Yes, sir.

Q And it sometimes got worse and that you noted shortness of breath during the day on the job?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q So that as early as 1962, you had this problem where you had trouble breathing at night?

A Yes, sir.

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Q You would have to get up at night?

A Yes, sir.

Q And then it would get worse as time went on?

A Yes, sir.

Q You would also have shortness of breath on the job?

A Yes, sir.

Q Did any doctor ever tell you what was causing that?

A Bronchitis.

Q Did the doctor tell you he saw anything in your x-rays?

A Most of it was pneumonia and congested lungs.

Q He did tell you you had congested lungs, didn't he?

A Yes, sir.

Q Is that true over the years, each time you have seen the doctor he has told you you had congested lungs?

A Yes, sir." (Pages 144-145)

****

"Q Since you all discussed this problem in your union meeting, wasn't it discussed in your union meeting at that time that there was danger from inhaling asbestos dust?

A Yes, sir.

Q Sir?

A Yes.

Q What was the nature of that discussion?

A I don't remember, it has been so--

Q But they did tell you that there was some danger to your health when you inhaled asbestos dust?

A Yes, sir.

Q And this was back when you all had this discussion about these safety appliances and getting this in your contract?

A Yes, sir.

Q Was any suggestion made about what you all should do as workers to avoid contact with asbestos dust?

A No, sir, we just -- several of them was complaining about--they had had a few of those respirators and they were just complaining about them not working right.

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Q But you did hear the discussion back in this union meeting about the danger from inhaling asbestos?

A Yes, sir.

Q Up to that time or at that very time you knew that you had worked with all of these various products, didn't you?

A Yes, sir.

Q And you knew that you had inhaled these products, didn't you, right?

A Yes, sir." (Pages 149-150)

****

"Q Now, what year would you say it was that you became aware of the fact that it was hazardous to inhale asbestos?

A Well, I first started hearing about it in about 1960, somewhere along in there.

Q So, would it be fair to say that from 1960 on you knew that it was hazardous to inhale asbestos dust?

A I had no proof of it. I just had heard of it.

Q In other words, you had been advised that it was hazardous to inhale it?

A I had heard people talk about it. I hadn't seen any warning on the bags of material.

Q That was the point I am getting at. Did you know from your contacts with your union people that it was hazardous to inhale it as far back as 1960?

A I knew it wasn't healthy." (Page 159)

ROLE OF UNION AND EMPLOYER

"Q All right, sir. Now, then, what is the full name of the union that you belong to?

A Asbestos Workers' Local No. 112.

Q And their headquarters is in Lake Charles?

A Lake Charles.

Q Who is their business agent at this time?

A Montgomery. They call him Cotton Montgomery. Joseph E. Montgomery.

Q You have handed me his card here?

A Yes.

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Q It says, 'International Association of Heat and Frost Insulators and Asbestos Workers, Joseph E. Montgomery, Business Agent, Local No. 112,' and it gives an address of 'P. O. Box 5216, Drew Station, Lake Charles, Louisiana.' Now, this union and the members in it don't do anything but insulation work, is that right?

A Yes, sir.

Q You all are experts in the installation of insulation products?

A Yes, sir.

Q Various kinds of products?

A Yes, sir.

Q You know how to fix it for installation and you know how to put it up and you hold yourself out as the craftsmen that do this work and do it exclusively, is that right?

A Yes, sir.

Q How do you train your new members to do this work?

A On the field.

Q They learn from you in the field?

A Yes, they work four years apprenticeship.

Q Four years they have to be apprentices. Are they called helpers?

A They are called improvers.

Q They are improving themselves, is that what that refers to?

A Yes.

Q And they go through a rather rigorous training program, isn't it?

A Yes, they have to work with the tools and become familiar with the materials and work with the tools and things right along with the mechanic and after four years they are turned out as a mechanic.

Q This is done by the union itself, is it?

A Yes, sir.

Q It is not done by the contractors?

A No, sir.

Q This supervision and this training is the union project?

A Yes, sir.

Q When you are on the job, you are working for a contractor, is that right? Is this the way you describe your employer?

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A Yes, sir.

Q He is an insulation contractor usually, of some sort?

A Yes, sir.

Q He might be some other kind of contractor along with it, but he has the contract to do the insulation work on a project?

A Yes.

Q When they are doing this, you work--you have been the foreman many times, as I understand your testimony?

A Yes.

Q And you are the man in charge on the job when you are the foreman, is that right?

A Yes, sir.

Q The foreman is a member of the union?

A Yes, sir.

Q As the foreman, who do you look to, who do you receive your instructions from?

A Sometimes they will have a superintendent on the job from the company. You get it from him. And other times you call in the office and you get it from the office.

Q But you are the only man that's on the job?

A Yes, you are the only man. On a larger job, you usually have a superintendent.

Q What's the breakdown in size? Does it depend on the number of men you have working?

A Yes, usually on large jobs you have a superintendent." (Pages 184-187)

Dr. Jenkins testified that Potter gave him a detailed history concerning his occupational exposure to insulation products containing asbestos beginning in 1940. The doctor related that Potter worked in various industries in various places including several years in California using insulation products of various kinds that contained asbestos. In 1967 Potter gave Dr. Jenkins a history of having progressive shortness of breath which occurred in the form of smothering episodes at night and hard coughing episodes for a period of about eight years prior to 1967. He related another form

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of shortness of breath which had its onset about 1962, this was shortness of breath that would occur with exertion such as climbing a flight of stairs or doing moderately heavy work. This type of shortness of breath had been somewhat progressive up to 1967. Potter related that he had noticeable wheezing. In about 1961 he began to have pain in his chest which first came in the lower left chest and had become recurring episodes of pain much like a cramp which sometimes lasted several hours. Potter volunteered to Dr. Jenkins that he had pneumonia perhaps as much as five times in the six years prior to 1967 and that he had pneumonia the first time at age 16. He reported viral pneumonia in 1942. In 1961 he had pneumonia on the left side and was hospitalized in Orange, Texas. In 1963 he had pneumonia while on a job and was again hospitalized and treated. Potter also told Dr. Jenkins that he had smoked cigarettes since the age of 11 or 12, he smoked as much as two packages of cigarettes per day from time to time and had inhaled the smoke moderately, and his smoking habits had continued pretty much up until 1967. (Interrogatory 19 Jenkins' Deposition Pages 14-20).

Dr. P. O. Jones testified by deposition, and while he treated Borel some of his general testimony is material here.

DEVELOPMENT OF ASBESTOSIS

"Q Are you familiar with how long it takes the disease of asbestosis to develop?

A Yes.

Q How long does it take, based on exposures, or an exposure?

A Usually -- I think, what I feel and what I have read from literature and from the authorities, fifteen years is certainly minimal -- twenty to twenty-five years is the average.

Q Is there any way of determining what exposure may have caused the development of the disease?

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A There is no way unless you are there to observe the individual under his working conditions -- in other words, be a medical director where you can go out to the plant and see them expose themselves to the particles, whatever it might be, and then watch them develop disease. That is, I think, the only way.

Q In your opinion is it possible that if a man was subjected to rather heavy exposure as much as thirty years ago in the shipyards, ship construction, that his disease could date from that time?

A Yes, sir.

Q It is not every exposure to asbestos dust that causes asbestosis, is it?

A No, sir.

Q Many asbestos workers work throughout their lifetime without developing asbestosis, do they not?

A That is right." (Dep., pp. 58 and 59)

The doctor admitted that if a patient had a history of pneumonia and spots on his lungs before 1969, he could not say that it was or was not a contributing factor of the diseased condition of the lungs. The doctor was then asked these questions:

"Q Assume as a fact that this man had complained of shortness of breath for a period of ten years and that he had an x-ray in 1964 and was told that he had spots on his lungs.

A There are a lot of people that have spots on their lungs that have never smoked.

Q And that he was told that this was due to dust --

A Un-huh.

Q -- assume that -- shouldn't he have known at that time that he was having trouble with his lungs --

A Sure.

Q -- due to inhalation of asbestos dust?

A Sure.

Q If you had had that as a history back in 1964, you would have immediately recognized that here was an asbestos worker, that he probably had asbestosis, wouldn't you?

A Right." (Dep., pp. 72 and 73)

****

"Q You said it took some twenty-five or thirty years for asbestos to develop, as a rule, and is there any way for you to tell whether, we will say,

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exposures to excessive amount of dust twenty-five years or more ago was the cause of the development, or whether subsequent light exposures, or occasional exposures, were the cause?

A Sir, I can't answer that. There is so much disagreement in the maximal allowable concentration of asbestos particles among all authorities, but what happens is as you said, they can have intermittent exposure, but if they develop asbestos disease, we are assuming, or we have to assume because we have no measurements for it -- we don't go out and measure the particle size, or the number of particles per cubic foot of air -- they have to at least be exposed to five million particles per cubic foot of air.

Q In other words, you recognize that in these studies that the allowable limits for asbestos particles in air is five million particles per cubic foot of air?

A Uh-huh.

Q And this is the measure that was suggested by the Governmental Association -- or Association of Governmental Hygienists?

A Right.

Q So, you recognize this and unless the man has those exposures then you wouldn't anticipate, based on prior history, that he would get the disease of asbestosis?

A Unless he was exposed to that concentration.

Q To that concentration, or some in excess of it?

A Right." (Dep., pp. 77 and 78)

DEPOSITION TESTIMONY OF JOSEPH RALPH SHRODE

This witness is presently employed by the International Association of Heat and Frost Insulators and Asbestos Workers, with headquarters in Washington, D. C. He worked in the asbestos insulation trade beginning in 1942. He was a business agent for Local 22, Houston, Texas, for eight years, and had occupied positions as officer, director, and participated in contract negotiations with the Houston Insulation Contractors Association, an organization of employers.

The Asbestos Workers Union had negotiated a contract with the Houston Insulation Contractors Association which provided that the contractor-employers would provide safety equipment. Shrode says that this included respirators, masks and blowers to

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remove dust from working areas. This factor has been included in the contract since 1957 or 1958.

Beginning with Shrode's employment at Consolidated Shipyard in Orange, Texas, in 1942 (he became a member of the union in 1944), he wore a mask or respirator while working in the fabricating shop. He was well aware that when he was working with materials containing asbestos that he would breathe a foreign material from the dust created by such work. In fact, he would cough up the foreign matter from time to time. He knew it was not healthy to breathe any type of foreign material. (Dep., pp. 20 and 21). He also wore a respirator or mask while working in the fabricating shop for DuPont. The Asbestos Workers Union claim the work of prefabricating materials falls within their jurisdiction. He was well aware of the dust problem while working at DuPont plant in Orange from approximately 1944 to 1947. He was also the shop foreman on the DuPont job in Orange, where he worked for Philip Carey. As foreman, it was part of his job to recommend to workers that they take certain safety precautions. The only time he wore a mask or respirator was while he was working in the fabricating shop, and if any fellow worker was working on the saw he would tell him that he should wear a respirator. Ever since 1942, an insulation worker could get a mask on a job if he requested it. (Dep., p. 36).

Shrode became aware of the danger of breathing asbestos dust about the middle 1950's, 1954 to 1956. (Dep., pp. 37 through 39). Shrode had a personal experience about 1954 when he consulted a doctor. He testified:

"Q Would it be '51, '52, '53, or give us --

A Somewhere in that neighborhood, I would say, that I was told to quit breathing the stuff, due to the fact that it was irritating my lungs.

Q So from that date forward you knew that the breathing of this insulation dust was harmful, or dangerous, is that true?

A Yes. I was made aware of it, personally, at that time."

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Shrode further testified that his union had regular monthly meetings and after he became business agent in January, 1960, he made mention at the union meetings of the danger of inhaling or breathing asbestos insulation dust. He says he is sure he mentioned it after January, 1960, on more than one occasion.

He recalled that in 1962 at the National Convention of the Asbestos Workers Union, Dr. Selikoff presented information he had found in his research, and advised the convention not to breathe any more of the asbestos dust than they had to. He advised the workers to use respirators or masks. He advised them to stop smoking and demonstrated slides showing the different stages of the development of the disease of asbestosis.

Shrode admitted that he was aware of the disease of asbestosis since the middle '50's and he also recalled that one of the members of his union died of asbestosis in 1958 or 1959. (Dep., pp. 41, 42 and 43).

He also testified that information concerning the injurious effects of asbestos dust was communicated to the local unions and to the membership through the "Asbestos Worker", a magazine published by the union and distributed to the dues paying members. (Dep., pp. 44 through 48).

In the opinion of Mr. Shrode, this information concerning the potential danger from the breathing of asbestos dust was brought home to the rank and file union members beginning in 1954 or 1955. For example:

"A Yes, they were made -- pretty well made aware of the fact that there was danger in breathing dust.

Q Breathing insulation dust containing asbestos?

A Correct." (Dep., p. 51).

****

"Q Has there at any time been any articles in this magazine concerning the dangers of asbestos dust?

A Oh, yes." (Dep., pp. 52, 55 and 56).

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He also testified that the article in the magazine published around 1960 would basically advise the workers to use precautions in inhaling particles of asbestos and suggesting the use of respirators and any other preventions they could use. (Dep., p. 56).

RESPONSIBILITY OF THE ASBESTOS INSULATION CONTRACTOR

Shrode testified that in the relationship of the insulation contractors with the union and union membership, it was the responsibility of the contractor-employer to purchase ventilating or exhaust fans and to furnish masks and respirators. It was the responsibility of the foreman on the job to see that the workers wore masks. (Dep., pp. 57 and 58). The foremen while employed by the contractor-employer were members of the union. (Dep., pp. 58 through 60).

When Shrode was business agent beginning in 1960, he suggested to the union steward on each job that they suggest to the men that they protect themselves against the inhalation of asbestos dust. (Dep., pp. 60 and 61).

Again, Shrode testified:

"Q Mr. Shrode, who do you all usually look to on these jobs insofar as the working conditions are concerned?

A Who do we look to?

Q Yes, sir. Do you look to the contractor, or who do the workers look to as providing them with safe working conditions on the job?

A Well, I would say that we look to the people that we negotiate the contract with."

Since the middle 1950's, the International Union has recommended to the local union and membership that they wear respirators and masks while working, whether in the fabricating shop or out in the field. (Dep., pp. 67 and 68).

NOTICE AND NECESSITY FOR NOTICE TO AVOID BREATHING DUST FROM ASBESTOS PRODUCTS

Mr. Shrode testified that after 1966, the manufacturers started placing a warning or a notice on cartons which states:

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"Avoid breathing the asbestos dust." In answer to questions propounded by Mr. Stephenson, attorney for the Plaintiff, Mr. Shrode testified:

"Q Now, you brought this up about breathing the dust after you became business agent. Did you explain, or was there any way that you could tell your men how they could go on a job the next morning and be sure that they would not breathe this stuff?

A No, there was no way I could do that.

Q Was what you were saying simply the only thing you had to say? I mean, was there anything else you could tell them?

A No, sir.

Q Had the manufacturers of these products ever given you anything that you could tell the members of your union, other than the few simple words you told them, to try and keep from breathing it, if you can?

A The only thing I know of that the manufacturers did was when they put the note on the boxes.

Q But that was way after --

A Yes, the later part of my time.

Q Now, then, did they say anything that you hadn't told the members of your union before that?

A No.

Q You do know, or say whether you know or not, that the little warning does not keep the worker from breathing the dust?

A No, sir, it does not." (Dep., pp. 96 and 97).

Shrode also testified that a person wearing a mask or respirator can cut down on the inhalation of asbestos dust more than fifty percent. In other words, that the mask would keep out more dust than was breathed in.

Again, concerning the responsibility for the working conditions, Shrode testified that the asbestos workers were usually employed by the insulation contractor and it was the responsibility of the contractor to keep the area clean and picked up where work was going on.

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In summary, Shrode testified that he was aware of the danger of inhaling asbestos dust or dust containing some asbestos beginning in the 1950's and that the International Union had disseminated information to the local union and his Local 22 had disseminated this information to the membership. Since the mid 1950's, the union workers have been concerned over the problem of the inhalation of asbestos dust. (Dep., pp. 116 and 117).

Again, he testified:

"Q If I had been out there on the job would it have been necessary for me to say, 'Mr. Shrode, be careful about inhaling asbestos dust, it's dangerous'?

A I don't know that it would be necessary, no.

Q I wouldn't have imparted anything to you that you didn't already know, would I, by giving you that warning?

MR. STEPHENSON: Argument.

A Well, again, I don't know whether you would be imparting anything, or not. I don't know that all asbestos workers would know of the danger, but they should, they have been told.

Q They have been told, it's your statement that asbestos workers, at least who are members of the union, had been told of the dangers of the inhalation of asbestos dust?

A Yes.

Q The real danger?

A Yes." (Dep., p. 117).

From and after the mid 1950's, the union, including Local 22, advocated the use of respirators where there was an exposure to a concentration of asbestos dust. (Dep., p. 118). Again, Shrode testified regarding the notices placed on the packaged cartons in 1966:

"Q All right. Now, those notices do not tell you anything or any more than you already knew back in 1955, do they, that asbestos dust is dangerous to health?

A Actually this is true.

Q So far as that notice is concerned, you didn't need that notice, and your union didn't need that notice, did you?

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A Well, I wouldn't say they didn't need it, at least it is a reminder.

Q It's a reminder. All right. Now, asbestos insulation is a trade, isn't it, that a man learns, this is a trade?

A Yes.

Q He's a specialist, isn't he?

A I would like to think so, yes.

Q A member of the general public, for example me, I wouldn't know anything about insulation, if I had never engaged in that trade, would I?

A I doubt it.

Q And this product is usually vended through insulation contractors who are specialists in this field, aren't they?

A Yes, I would say they would be specialists.

Q Those contractors are aware of the dangers of asbestos dust, are they not?

A I can't answer for them, I'm sure they are.

Q Well, aren't they the people who provide the safety appliances on your jobs?

A Yes. The contractor -- any safety equipment that we have is provided by the contractor, yes.

Q And they are the people that the union looks to for safety equipment, aren't they?

A Correct. That's who we negotiate with." (Depo., pp. 122 and 123).

Again, Shrode testified that the danger to exposure can be reduced by wearing a mask and this has been advocated by the union since the mid-1950's. Specifically, he testified:

"Q Can he also wear a mask to cut down on the exposure?

A Yes, he can wear a mask.

Q Now, how long has it been that your union has advocated that field workers wear masks on all insulation work where they apply asbestos products?

A I would say since the mid-'50's we have advocated it.

Q You have advocated it. Now, has it often been difficult to convince an asbestos worker that he should wear a mask?

A It's been difficult to get them to wear them.

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Q Is this because it's uncomfortable?

A I think this is one of the big factors, that they are uncomfortable and difficult to breathe through them. Although I think they have been aware of the danger it's still a little bit difficult, even today, to get them to wear them." (Dep., pp. 126 and 127).

UTILITY OF ASBESTOS INSULATION PRODUCTS

"Q As a representative of the Asbestos Workers Union are you advocating that, because of the danger from the inhalation of dust containing some asbestos, the use of all asbestos insulation be discontinued and scrapped?

A No, I'm not advocating that.

Q This product does have a great utility in many industries, does it not?

A Certainly.

Q And it's been used in many industries for a number of years?

A As long as I can remember.

Q And in many industries there is not any substitute for some uses of it, is there, at this time?

A Well, in some instances I don't know of any, no." (Dep., pp. 129 and 130)

STATE OF MEDICAL KNOWLEDGE

It is entirely clear, and there will be no evidence to the contrary, that there was no published medical knowledge indicating that insulation workers engaged in construction who were exposed to dust from insulation products containing some asbestos would possibly contract asbestosis until Dr. Selikoff's work was published in 1964. (See deposition of Dr. Daniel E. Jenkins, pp. 137-149). Dean Page Keeton clearly points out that the law in Texas is that a manufacturer is not liable under theories of strict liability if the state of the art or scientific knowledge was such that the risk was unknown, as he is not an insurer against unknowable risks. (Keeton's Brief, pp. 44-50). The Fifth Circuit Court of Appeals in Hudson vs. R. J. Reynolds Tobacco Company, 347 F. (2d) 541 (1970), affirmed the granting of a Summary Judgment to Defendant on the ground that cancer caused by cigarettes was

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not scientifically foreseeable, following Lartigue vs. R. J. Reynolds Tobacco Company, 319 F. (2d) 19 (5th Cir. 1963). Certainly, this ground alone warrants the granting of Defendants' Motion for Summary Judgment.

In conclusion, the Defendants, and each of them, respectfully pray that the Court grant each and every one of the Defendants a Summary Judgment decreeing that the Plaintiff take nothing by reason of his cause of action and that they go hence and recover their costs.

Respectfully submitted,

WELLER, WHEELUS, GREEN & BROCATO
P. O. BOX 350
BEAUMONT, TEXAS 77704

By _____
Geo. A. Weller
Attorneys for Defendant,
Fibreboard Corporation

STRONG, PIPKIN, NELSON,
PARKER & POWERS
P. O. BOX 1632
BEAUMONT, TEXAS 77704

By _____
Charles S. Pipkin
Attorneys for Defendant,
Combustion Engineering, Inc.

JOHN G. TUCKER
ORGAIN, BELL & TUCKER
BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS 77701

AND

GORDON R. PATE
BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS 77701

By _____
Gordon R. Pate
Attorneys for Defendant,
Johns-Manville Products Corporation

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asbestosclaims.law/library/10453/36

KING, SHARFSTEIN & RIENSTRA
BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS 77701

By _____
Dale Dowell
Attorneys for Defendant,
Owens-Corning Fiberglas Corporation

FRANK BEAN
BEAN & MANNING
500 JEFFERSON BUILDING
HOUSTON, TEXAS 77002

AND

ROYSTON, RAYZOR & COOK
877 SAN JACINTO BUILDING
HOUSTON, TEXAS 77002

By _____
Ben L. Reynolds
Attorneys for Defendant,
Eagle-Picher Industries, Inc.

WELLS, DUNCAN, BEARD, GREENBERG & HUNT
P. O. BOX 3708
BEAUMONT, TEXAS 77704

By _____
George E. Duncan
Attorneys for Defendant,
Pittsburgh-Corning Corporation

VINSON, ELKINS, SEARLS & CONNALLY
FIRST CITY NATIONAL BANK BUILDING
HOUSTON, TEXAS 77002

By _____
Gerald P. Coley
Attorneys for Defendant,
Unarco Industries, Inc.

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI
BANK OF THE SOUTHWEST BUILDING
HOUSTON, TEXAS 77002

By _____
W. N. Arnold, Jr.
Attorneys for Defendants,
Philip Carey Corporation and
Armstrong Cork Company

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MEHAFFY, WEBER, KEITH & GONSOULIN
SAN JACINTO BUILDING
BEAUMONT, TEXAS 77701

By _____
James W. Mehaffy, Sr.
Attorneys for Defendant,
Standard Asbestos Manufacturing
and Insulating Company

BARNES & BARNES
P. O. BOX 5098
BEAUMONT, TEXAS 77706

By _____
Robert E. Barnes, Jr.
Attorneys for Defendant,
Ruberoid Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendants' Motion for Summary Judgment was served on Mr. Ward Stephenson, Stephenson & Thompson, Stephenson Building, Orange, Texas 77630, by mailing a copy to his office on the 1st day of April, 1971.

_____
Of Counsel

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C. A. NO. 6,320

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

S. R. POTTER

VS.

FIBREBOARD PAPER PRODUCTS
CORPORATION, ET AL

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

ROYSTON, RAYZOR & COOK
ATTORNEYS AT LAW
SAN JACINTO BUILDING
HOUSTON, TEXAS

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