IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN 13 1972
JAMES R. COONEY, CLERK
BY DEPUTY Beatrice N. Bryan

SAMUEL R. POTTER

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6329

BRIEF ON THE POINT THAT THE CAUSE OF ACTION ASSERTED BY PLAINTIFF IS BARRED BY THE TWO YEAR STATUTE OF LIMITATION OF THE STATE OF TEXAS, AND BY THE ONE YEAR STATUTE OF THE STATES OF CALIFORNIA AND LOUISIANA

BRIEF FILED IN BEHALF OF
ALL DEFENDANTS OF RECORD

GEO. A. WELLER, OF COUNSEL

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TO THE HONORABLE JUDGE OF SAID COURT:

The plaintiff, Samuel R. Potter, alleges and claims that he sustained the occupational disease of asbestosis over a period of some twenty-seven (27) years while working for various insulation contractors who used products containing some asbestos. There are ten defendants in this case, and the plaintiff is unable to state or claim when he sustained injury from exposure to any particular product of the individual defendants. Each of the defendants claim that they are not liable or responsible for any injury sustained by plaintiff as a result of exposure to a product manufactured by another defendant.

The defendants, and each of them, present this brief to the Court on the proposition that the plaintiff's cause of action,

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if any, is barred by the two (2) year statute of limitation of the State of Texas; and as to any exposure within the State of Louisiana or any exposure within the State of California, such cause of action is barred by the one (1) year statute of limitation in effect in each of said states.

The statute of limitations of Texas which bars an action for personal injury is Article 5526, Vernon's Annotated Civil Statutes of Texas, which provides:

> "Actions to be commenced in two years
>
> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
>
> "6. Action for injury done to the person of another.
>
> "7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured."

Article 4671, Revised Civil Statutes of Texas, "Cause of Action From Injuries Resulting in Death," provides:

> "An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases:
>
> "1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person, corporation, etc., such person, corporation, etc., shall be liable in damages for the injury causing such death."

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A death action in Texas is a creature of statute and did not exist at common law. Morman v. Mustang Aviation, Inc., Sup. Ct. Tex., 1968, 430 S.W. 2d 182; Francis v. Herrin Transportation Company, 423 S.W. 2d 610, reversed on other grounds, 432 S.W. 2d 710.

A statutory beneficiary suing under the Texas wrongful death statute can recover only if the deceased, had he lived, could have recovered. Wentzel v. Neurenberg, Civ. App., 314 S.W. 2d 855; Childs v. Childs, Tex. Civ. App., 107 S.W. 2d 702. Where the cause of action in behalf of the decedent is barred by the statute of limitation, the cause of action for death resulting from the same accident is likewise barred by limitation.

The general rule in Texas is that in negligence or breach of warranty cases resulting in personal injury, the cause of action accrues from the time of the negligent act or omission. Blondeau v. Summers, Civ. App. Tex., 1940, 139 S.W. 2d 223, error refused; Robertson v. Texas & New Orleans Railroad Company, Tex. Civ. App., 1939, 122 S.W. 2d 1098; Tennessee Gas Transmission Company v. Fromme, Tex. Sup. Ct., 1954, 153 Tex. 352, 269 S.W. 2d 336; 37 Tex. Jur. 2d Para. 63, Page 187; and Para. 93, Page 241.

Ordinarily, where injury, though slight, is sustained in consequence of the negligent act of another, the statute of

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limitations attaches at once and the running of the statute is not postponed by the fact that actual or substantial damages do not occur until a later date.

Defendants have filed a brief of the law governing the statute of limitations in Borel vs. Fibreboard Paper Products Corporation in this Court and reference is made to that brief for a detailed discussion of the statutes of limitations.

California Law

Plaintiff is asserting a claim against certain defendants based upon exposures to products containing asbestos in the State of California. The exposure to the products of Owens-Corning Fiberglas Corporation in California was occasioned on certain jobs while plaintiff was an employee, and therefore subject to the Workmen's Compensation Act and the Occupational Disease Act in California. Under the law of California, as reflected by legal opinion on file: "It is unquestionably the law in California that the (one year) Statute of Limitations against a third party is not tolled while an injured employee pursues his compensation remedy." See opinion of Lawyer E. Judge Elderkin on file; Hanna, California Law of Employee Injuries and Workmen's Compensation, 2d Ed., Vol. 2, Ch. 23, Sec. 23.04(5); State Comp. Insurance Fund v. Matulich, 55 Cal. App. 2d 528, 131 P. 2d 21 (1942); Harrison v. Englebrick, 254 Cal. App. 2d 871, 62 Cal. Rptr. 831 (1967). Copies of these

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opinions and the statute are attached to the Borel brief, as well as to the opinion of the attorney on file as evidence in this case.

In Hanna, California Law of Employee Injuries and Workmen's Compensation, supra, the text states that the statutory period of limitations against third-parties is one year except for certain situations (incompetency, fraudulent concealment or action filed by employer against third-party within one year) none of which are applicable to the instant case.

We will demonstrate in a factual discussion that plaintiff's claim is clearly barred under the one (1) year statute of limitations of the State of California.

The Law of Louisiana

Under Louisiana Civil Code, Article 3536, a tort action or related action is prescribed by the one (1) year statute of limitations. The opinion evidence of Carl H. Hanchey, a Louisiana attorney, whose opinion is evidence in this case, states that the filing of a workmen's compensation claim by an injured employee against his employer would not interrupt prescription on a possible claim which he might have against third parties based on the manufacture or sale of a defective product. We will clearly demonstrate under the facts of the instant case that any claim based upon an exposure in the State of Louisiana to any individual product is barred by the one (1) year statute of limitation.

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For a detailed discussion of the facts in the instant case on the defense of limitation we refer to Pages 10 through 34 of the Motion For Summary Judgment on file in this case.

Fact Discussion as to Filing of the Claim For Workmen's Compensation

The Workmen's Compensation Claim filed in the State of Texas is dated March 6, 1968, and was filed with the Industrial Accident Board on March 8, 1968. This claim reflects: "Last injurious exposure May 3, 1967." It further states: "Advised approximately July of 1967 that I might have a disease associated with my work." The comp claim reflects that the employer was Babcock & Wilcox and that Potter was last employed during the period 3/31/67 to 4/28/67.

Interrogatories served reflect that the Babcock & Wilcox Company was working at the Owen-Illinois Plant and that the product used was Kaylo and Asbestos Cement manufactured by Owens-Corning Fiberglas Corporation and that said company worked only with this product on this job.

The claimant's workmen's compensation claim was not filed within six (6) months from May 3, 1967, or within six (6) months from 4/28/67, the date of his last employment, as the comp claim was filed on March 6, 1968, ten (10) months from and after the alleged claimed date of last exposure.

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A compromise judgment was entered in the workmen's compensation suit on January 30, 1969.

This suit for damages against eleven (11) manufacturers of products containing asbestos was filed May 27, 1969, which was more than two (2) years from and after the date on which claimant allegedly had his last injurious exposure.

The plaintiff relies upon the fact that he filed a workmen's compensation claim in Texas on March 8, 1968, and he claims that this act suspended the running of the statute of limitation during the pendency of his claim.

Since plaintiff has admitted that his last injurious exposure was while he was employed by the Babcock & Wilcox Company, which employment terminated on April 28, 1967, and that he was advised in July of 1967 that he might have a disease associated with his work, and since the filing of a claim does not suspend the statute of limitation on a third party claim in the States of California and Louisiana, any third party claim by plaintiff against each and all of the respective defendants for exposures in the States of California and Louisiana is barred by the one (1) year statute of limitation. It is undisputed that Potter knew that his diseased condition was probably associated with his work as early as July, 1967, or earlier, and he filed his workmen's compensation claim on March 8, 1968, but did not

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file this suit until May 27, 1969. Obviously, since more than one year expired between the filing of his comp claim in which he claimed disability for an occupational disease, such third party claim is barred by the one (1) year statute of limitation.

In Texas the question arises whether the workmen's compensation claim filed March 8, 1968, had the effect of suspending or tolls the statute of limitation. The position of each of the defendants is twofold:

First, the only claim asserted by Potter in the workmen's compensation suit was against Babcock & Wilcox Company, who were using products manufactured solely by Owens-Corning Fiberglas. If the statute of limitation was polled by the filing of such claim (it was not filed within six months from the date of the alleged exposure, and under Texas law the claim was barred by failure to file same within six months), then the statute would be suspended only as to the third party claim of Potter against Owens-Corning Fiberglas Corporation, the manufacturer of the products which the Babcock & Wilcox Company was using.

If plaintiff had a claim against Fibreboard Corporation or either of the other defendants in this case, the filing of such compensation claim did not have the effect of polling the statute of limitation. Obviously, plaintiff is asserting joint and several liability against each individual defendant on the basis of each

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alleged exposure to its product containing some asbestos. The general rule is that limitation of plaintiff's action against a third party injuring an employee is suspended under the Texas Workmen's Compensation Act from the day the employee filed his claim until the entry of final judgment against the insurer. (Revised Civil Statutes 1925, Article 5526, Subdivision 6; Article 8307, Para. 6a). See Fidelity Union & Casualty Company v. Texas Power & Light Company, Civ. App. Dallas, 35 S.W. 2d 782; Judice v. Sumner Sollitt Company of Texas, Ct. Civ. App. Beaumont, 1961, 346 S.W. 2d 135, err. ref., n.r.e.; Yeary v. Hinojosa, Ct. Civ. App. Houston, 1957, 307 S.W. 2d 325, err. ref.

Article 8307, Para. 6a, does not operate to toll the statute of limitation while a suit against the wrong employer runs its course. Likewise, the pendency of a compensation action which was barred by limitation does not toll the statute of limitation to a common law action. Garza v. Summerall, Ct. Civ. App. San Antonio, 267 S.W. 2d 912, err. ref.

Qualification of the General Rule in Texas

The only place that Texas has qualified the rule that a cause of action for negligence or personal injury as a result of a breach of warranty is barred by the two (2) year statute of limitation and begins to run from the date of the occurrence is in Gaddis v. Smith, Sup. Ct. Tex., 1967, 417 S.W. 2d 577, which

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case recognized the "discovery rule" in a case where plaintiff sued defendant doctors for damages allegedly resulting from leaving a surgical sponge inside the patient's body. The Court re-examined holdings in two prior cases, overruling them, and held that the cause of action for the negligent leaving of a foreign object in a patient's body accrues when the patient learns of, or in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body. The Court also said: "It should be noted that our holding here is limited to causes of action in which a physician leaves a foreign object in the body of his patient." At Page 581, the Court said:

> "It has been argued that the accrual of this cause of action cannot be distinguished from that received by a person in an automobile accident who is apparently uninjured but years later discovers that the slight trauma produced cancer. See dissenting opinion in Berry v. Branner, 421 P. 2d 996, 1001 (Or. Sup. 1966). However, the instant case involves the inability to know of the negligent act of leaving a sponge in the patient's body, while the cancer producing trauma results from the negligent operation of an automobile which act is readily apparent at the moment of impact."

Also see the opinion of the Court of Civil Appeals, Houston, in Freida Axcell, et vir, Appellants, v. Dr. John R. Phillips, et al, Appellees, 10/27/71, where a summary judgment based on the two (2) year statute of limitation was sustained against a claim which alleged fraudulent concealment of a cause

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of action based upon an unauthorized operation. There the Court said:

> "And Article 5544, Vernon's Texas Civil Statutes, states 'The period of limitation shall not be extended by the connection of one disability with another; and, when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued.'"
>
> xxx
>
> "In Carrell v. Denton, 157 S.W. 2d 878 (Tex. Sup. 1942), it was held that a cause of action against a physician for failure to exercise due care in the performance of an operation accrues when the negligent conduct occurs. In 1967 our Supreme Court overruled Carrell v. Denton to the limited extent that causes of action in which a physician leaves a foreign object in the body of his patient now accrue when the patient learns of, or in the exercise of reasonable care, should have learned of the presence of the foreign object in his body. Gaddis v. Smith, 417 S.W. 2d 577.
>
> "It is not the proper function of a Court of Civil Appeals to extend beyond the limits set by the Texas Supreme Court the application of this 'discovery rule' or of any other rule."

It is clear under the latest authorities in Texas that the "discovery rule" only applies in a medical malpractice case where there has been concealment of a sponge or some similar foreign object. The "discovery rule" is not recognized and does not apply in any other factual situation where personal injury is sustained.

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It is clear under Texas law that Potter's cause of action, if any, accrued when he sustained injury and this would be from the date of any exposure to an individual product, provided he is able to show any injury. Clearly, under all of the medical testimony, and particularly the deposition testimony of Dr. Cooper which is on file, it is not every exposure to a product containing some asbestos or asbestos dust which causes injury, but in any event, it takes 20 to 30 years to develop asbestosis which is disabling.

It is likewise obvious that the injury or injuries which is the basis of plaintiff's cause of action in the instant case did not occur or accrue on the date of his alleged workmen's compensation claim resulting from an exposure to Owens-Corning products while employed by Babcock & Wilcox Company, which employment terminated on April 28, 1967. Under the undisputed testimony before the Court in the depositions of Dr. Cooper and Dr. Jenkins and others, plaintiff's injury of which he complains did not occur during his last employment. Clearly, his cause of action is barred by the two (2) year statute of limitations of the State of Texas.

To demonstrate the plaintiff's knowledge, reference is made to his deposition testimony, the pertinent portions of which are set out in defendants' motion for summary judgment. The

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claimant's deposition was taken on November 25, 1969. He admitted that six or seven years prior to the date of his deposition, which would have been in 1962 or 1963, or earlier, he had discussed and heard discussed the health problem concerned with inhalation of asbestos dust; that the subject that asbestos dust was injurious to health was discussed at the union meetings and from and after that time he realized that this dust could affect his health. He knew about the Tomplait suit in which Tomplait claimed he was disabled as a result of asbestosis, and then he was asked: "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." He started having trouble with his coughing approximately ten years prior to the date of the deposition. His chest hurt, he hurt in his back and through his rib cage, he had trouble breathing, he had shortness of breath. When he went to Dr. Watson some ten years earlier, the doctor knew he was working in asbestos dust and with asbestos products; that he had been in the hospital with chest trouble during the last ten years. Again, he testified: "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,

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sir, my lungs would hurt and the bronchitis we would call it. (Referring to Dr. Watson's examination of him). 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." The claimant also had clubbing of his fingers as long as six years prior to his deposition.

At his union meetings in 1962 or 1963, it was discussed that there was danger to health from inhaling asbestos dust. "Q. But they did tell you that there was some danger to your health when you inhaled asbestos dust? A. Yes, sir. xxx Q. And you knew that you had inhaled these products, didn't you? A. Yes, sir. 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 1960, somewhere along in there. A. I knew it wasn't healthy."

It is undisputed that in the history Potter gave to Dr. Jenkins that Potter stated that he had shortness of breath about 1962 which would occur with exertion such as climbing a flight of stairs or doing moderately heavy work. About 1961 he began to have pain in his chest which came in the lower left chest, and had recurring episodes of pain much like a cramp, which lasted several hours.

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Dr. P. O. Jones testified by deposition that it takes a minimum of 15 years, and 20 to 25 years on the average, for the disease of asbestosis to develop. He likewise testified there was no way of determining what exposure may have caused the development of the disease. "Q. It is not every exposure to asbestos dust that causes asbestosis, is it? A. No, sir."

In 1966, the manufacturers of asbestos products placed a warning notice on cartons, and particularly the defendants, Johns-Manville and Fibreboard Corporation, placed a warning which states: Avoid breathing the asbestos dust. The inhalation of asbestos dust may be injurious to your health.

If Potter sustained any injury from exposures to asbestos dust, then such occurred a minimum of 15 years, and perhaps 20 to 25 years, prior to the date of his last employment, April 28, 1967. (He alleged the last injurious exposure on May 3, 1967, in his claim before the Industrial Accident Board, a certified copy of which is on file among the papers in this case).

Cases from other jurisdictions and a discussion thereof are found in the Borel brief beginning at Page 4, etc., of said brief. The case of Schmidt v. Merchants Despatch Transportation Company, New York Court of Appeals, 270 N.Y. 287, 200 N.E. 824, which involved a disease of the lungs known as pneumoconiosis, is particularly applicable here. The plaintiff claimed that his cause

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of action accrued, not at the time he inhaled the dust, but at the time when the dust so inhaled resulted in a disease of the lungs, and that date could only be determined by medical testimony. The Court held that the injury occurred when there is wrongful invasion of personal or property rights and then the cause of action accrues. The Court concluded:

> "The statute of limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims. The problem created by the slow onset of the disease of pneumoconiosis or silicosis has been considered by the courts of other jurisdictions. They have given to statutes of limitation their intended effect as statutes of repose and have held that a cause of action sounding in negligence accrues at the time when through lack of care by an employer, deleterious substances enter the lungs of an employee though the development of consequential damages may be long delayed. xxx"

In Piukkula v. Pillsbury Astoria Flouring Mills Company, Oregon Supreme Court, 1935, 42 P. 2d 921, 99 A.L.R. 244, we find a suit for death resulting from the inhalation of flour dust which was alleged to be detrimental to the health of the employee when inhaled over a long period of time. The contention was made that the statute of limitations did not begin to run until the workman's condition of health becomes so serious that he realizes the extent of his disease. The Court recognized that the great weight of American authority is to the effect that the cause of action arises and the statute of limitations begins to run from the date of the

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negligent act and not from the time the full extent of the injury may be ascertained. The Court held the action was barred The Court also commented that on September 17, 1930, Piukkula noticed difficulties in breathing and was aware he was suffering from an ailment of the lungs, although at that time "he did not believe that his condition was serious." In January, 1931, he left the defendant's employ. If anything for which the defendant was responsible occasioned Piukkula's ailment, it must have occurred after his first employment began August 28, 1929, and prior to January, 1931, when his employment ceased. He did not file suit until June 8, 1933, and the Court held that his claim was barred.

There is likewise a line of cases involving an action for damages against a single employer caused by exposure to harmful dust, etc., which hold that the statute of limitations against such an action begins to run from the time of cessation of inhalation of the injurious substances for which defendant was responsible in the case of a disease caused by such exposure. These cases also hold that the statute begins to run when employment terminated and not when the disease appeared, according to an expert's opinion. See cases at Pages 14, etc., of the Borel brief.

If the foregoing rule is applied to the case of Potter, who moved from employment to employment, and allegedly worked with

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the product containing some asbestos manufactured by a particular defendant, limitation as to each alleged exposure would begin to run from the time each employment ceased or when exposure to that particular product ceased at the close of such employment. The Court must also consider that once the statute of limitation begins to run it is not suspended by an injurious exposure to the product of a separate defendant in the future.

Clearly, the statute of limitation as to the claim against all of the defendants was barred by the two (2) year statute of limitation prior to the time that plaintiff filed his workmen's compensation claim. In any event, the statute of limitation barred each and all of the claims against all defendants, save and except Owens-Corning, which manufactured the product which was used on Potter's last job with Babcock & Wilcox. Under all the medical testimony, any exposure within the last six months to two years of this man's working career had nothing to do with his disease of asbestosis.

Attached is a copy of plaintiff's workmen's compensation claim filed with the Industrial Accident Board and a true and correct copy of plaintiff's suit to set aside the award of the Industrial Accident Board. There was no adjudication whatever that the plaintiff had good cause for failure to file his workmen's compensation claim within six (6) months from and after the date of his

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last injurious injury or the date of his last employment. There was no adjudication that he had good cause for such failure, therefore the filing of the claim did not suspend the running of the statute of limitation as to any defendant.

WHEREFORE, each of the defendants pray that the Court rule that plaintiff's claim is barred by the applicable statute of limitations or that, in any event, that the plaintiff cannot assert in the trial of this case any claim based upon an exposure or exposures in the States of California or Louisiana because such is barred by the one (1) year statute of limitation.

Respectfully submitted;

GEO. A. WELLER
WELLER, WHEELUS, GREEN & BROCATO
P. O. BOX 350
BEAUMONT, TEXAS 77704
ATTORNEY FOR FIBREBOARD CORPORATION, AND FILING THIS BRIEF IN BEHALF OF ALL DEFENDANTS OF RECORD.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served on Mr. Ward Stephenson, Stephenson & Thompson, Stephenson Building, Orange, Texas, 77630, attorney for plaintiff, by mailing a copy to his office on the 13th day of January, 1972.

OF COUNSEL

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Texas Workmen's Compensation [illegible] DIST. [illegible]

My Full Name Is Samuel (FIRST) R. (MIDDLE) Potter (LAST) Social Security No [redacted] Age 56

My Employer Was The Babcock & Wilcox Company, 161 E. 42nd St., New York, New York 10017
NAME ADDRESS

Last injurious exposure: May (MONTH) 3 (DAY) 1967 (YEAR) in Orange (CITY) Orange (COUNTY) Texas (STATE)

Were You Hired In Texas? Yes * If Accident Occurred Outside Texas, On What Date Were You Transferred to State Where Accident Occurred? ____ (MONTH) ____ (DAY) ____ (YEAR) Did You Work In Texas for This Employer Before Being Transferred? ____

I Was Working 8 to 10 Hours per Day 5-6 Days per Week at $ 4.65 per hour (HOUR · DAY · WEEK · MONTH)

My Average Weekly Wage Was $ About 232.50 How Long Had You Been Working For This Employer? About one month

Were You Paid Wages for Date of Injury? Yes I Started Losing Time On May (MONTH) 3 (DAY) 1967 (YEAR)

Are You Now Receiving Compensation? No Have You Been Paid Any Compensation? No If So, How much per Week? ____ For How Many Weeks Have You Been Paid? ____

Have You Returned to Work? No If So, On What Date? ____ (MO. DAY YR.) At What Wage? ____ (PER HOUR · DAY · WEEK · MONTH)

Describe Accident and Your Injury (in your own words). I am suffering from silicosis and I am totally and permanently disabled.

*Date of First Distinct Manifestation of Disease: I had pneumonia and bronchitis trouble many times over many years. I was never advised until approximately July of 1967 that I might have a disease associated with my work.

Was Any Part of Your Body Amputated? No If So, Name Member and Give Point of Amputation. ____

Were You Sent to a Doctor or Hospital By Your Employer or His Insurance Company? No

PLEASE GIVE AS MUCH OF THE FOLLOWING INFORMATION AS YOU HAVE

Name and Address of Doctor ____

Name and Address of Hospital ____

I Was Hospitalized From ____ To ____

Name of Employer's Insurance Company ____

Received March 1968 L.A.B. dph

Name and Address of Nearest Relatives Wife: Dorothy Potter, 816 Moss Ave., Orange, Tex as

I hereby give notice of injury and file claim for compensation due me under Workmen's Compensation Law of Texas.

I REQUEST THAT THE INDUSTRIAL ACCIDENT BOARD CHECK ONE

☐ Not Take Further Action Until Requested by Me.
☒ Act on My Claim as Soon as Possible.

Date Signed March 6, 1968 Signature of Injured Employee S. R. Potter

Joe Nie Bean
WITNESS TO SIGNATURE

816 Moss Ave.
STREET ADDRESS

Orange, Texas
CITY AND STATE

RECEIVED
SHERIFF'S DEPT.
TRAVIS COUNTY
MAY 10 8 51 AM '69

NO. B-16,773

IN THE 163rd DISTRICT COURT OF ORANGE COUNTY, TEXAS

SAMUEL R. POTTER :

VS. : PLAINTIFF'S ORIGINAL PETITION

THE CHARTER OAK FIRE INSURANCE COMPANY :

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SAMUEL R. POTTER, plaintiff, who resides in Orange County, Texas, complaining of THE CHARTER OAK FIRE INSURANCE COMPANY, defendant, a private corporation duly incorporated under and by virtue of the laws of some State, with license and permission to do business in the State of Texas, for the purpose of writing insurance; and for cause of action, the plaintiff says the following:

1.

That on the 3rd day of May, 1967, and prior thereto, the plaintiff was working in the County of Orange, State of Texas, for The Babcock & Wilcox Company in the capacity of an insulator and asbestos worker, and in the furtherance of and while within the usual course of the business of his employer; that his said employer is engaged in the construction business; that the plaintiff was receiving an average weekly wage in the amount of $214.58, working at least eight hours per day and five days per week; that such average weekly wage in the amount of $214.58 entitled him to have his compensation calculated on the basic figure of $35.00 per week.

2.

The plaintiff says that he was working in the above named

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county, and at the time of his injury, his employer was engaged in a business within and subject to the Workmen's Compensation Act of the State of Texas , and was a subscriber as that term is used in the Workmen's Compensation Act of the State of Texas, and carried a policy of insurance in compliance with said Act with the defendant by the terms of which it agreed to pay to any person entitled thereto under the Workmen's Compensation Act of the State of Texas compensation for disability and death produced by an injury sustained in the course of such person's employment with said employer, in accordance with the provisions of said Act; that the said defendant thereby became bound and obligated to pay to the plaintiff the compensation for which he sues; that the said policy was issued to said employer and was at all times pertinent to this cause of action in full force and effect.

3.

The plaintiff says that prior to the first distinct manifestation of disease during the month of July, 1967, he was a strong, healthy and able-bodied man, able to perform and did perform the duties of his employment in a satisfactory manner, but during said month aforesaid while engaged in the discharge of his duties and in the scope of his employment, the following conditions became apparent: Occupational disease, asbestosis and silicosis; that as a result of the occurrence made the basis of this suit, plaintiff has suffered the following injuries: Severe and permanent injury to his body caused by dust, asbestos, silica, and other materials causing asbestosis and silicosis causing severe external and internal injuries to the plaintiff.

4.

Plaintiff says that in the absence of conclusive evidence that the plaintiff suffered disability from contracting

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silicosis or asbestosis due to the nature of his employment, then plaintiff says that during the ten (10) years immediately preceding the date of incapacity, the plaintiff has been exposed to the inhalation of silica dust and asbestos dust over a period of not less than five (5) years, at least two (2) years of which were in this state under a contract of employment existing in this state.

5.

The plaintiff says that as a result of the injuries which he received, he is now unable to work and has been unable to work or follow the pursuits of a working man so as to obtain and retain employment as such; and he therefore says that he is totally incapacitated at this time within the meaning of the Workmen's Compensation Law and has been so incapacitated since the date of the receipt of said injuries and will continue to be totally incapacitated permanently; or in the alternative, plaintiff says that he has received such lesser degree and percentage of disability as he may show himself entitled to receive upon trial hereof; and he says that his disability began on the date of the receipt of such injuries.

6.

The plaintiff says that he gave due and timely notice (within thirty days) to his employer and to the Industrial Accident Board after the receipt of the said injuries sustained by him, and did within due time (i.e., six months) after the receipt of such injuries make due claim for compensation to the Industrial Accident Board of the State of Texas; and in the alternative, plaintiff says that his employer had actual notice of said injuries within thirty days after the

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receipt thereof; or in the alternative, plaintiff says that any failure (which is specifically denied) to give notice of injury and/or file claim for compensation within the statutory periods is excused for good cause which continued up to the time of filing.

7.

Plaintiff says that he gave notice of appeal to the Industrial Accident Board within twenty (20) days after the rendition of the award by the Board that he would not abide by the said final ruling and decision of said Board; that within twenty (20) days after having given such notice of appeal to the said Board, plaintiff instituted suit to set aside such award of the said Board, claiming compensation for the full amount claimed by him before the said Board, together with full payment of all expenses heretofore incurred, including but not limited to medical aid, hospital services, and medicine.

8.

Plaintiff says that for at least two hundred ten (210) days of the year immediately preceding his injuries, he had worked in the employment in which he was working at the time of his injuries, and during the days when so employed, he earned an average daily wage or salary of $37.20 per day; in the alternative, plaintiff says that if he be mistaken as to the foregoing allegation and that he did not work in such employment for at least two hundred ten (210) days of the year immediately preceding his accident and injuries, he shows that there were other employees of his class at the time of his injuries who had worked in such employment for at least two hundred ten (210) days of the year immediately preceding his accident and injuries, in the same or a similar employment

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in the same or a neighboring place, and that during the days when so employed, earned an average daily wage of $37.20 per day; and plaintiff further says that his average weekly wage shall consist of three hundred (300) times the average daily wage or salary which he has earned or which an employee of the same class has earned during the days which he or an employee of the same class actually worked in such year, divided by fifty-two (52); and plaintiff says that by such computation he earned an average weekly wage of $214.58 per week. Further in the alternative, plaintiff says that if by reason of the shortness of the time of the employment of other employees engaged in the same class of work during the year immediately preceding his injuries, and for other good and sufficient reasons, it is impracticable to compute his average weekly wage under the two methods above alleged, then he prays that his average weekly wage be computed by the court or jury in any manner that is fair and just to both parties, as of the date of his injuries, and in this connection, says that $214.58 as an average weekly wage would be fair and just.

9.

The plaintiff says that he has employed the attorneys whose names are signed to this petition to represent him in this behalf and has contracted to pay said attorneys such fee as the court may allow, not to exceed thirty (30%) per cent of the recovery herein.

10.

Plaintiff says that he has no property, real or personal, from which he can support himself and that if

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compensation be awarded to him in weekly payments, after the attorneys' fees are paid out of each payment, the balance will be wholly inadequate to support him. Further, he shows that he is a man of prudence and care in business matters and in the handling of money, and that, if compensation herein due him be paid him in a lump sum, he will be able to invest part of same in a business of some kind, out of which he can make a living. Plaintiff further says that if future payments of compensation are not awarded to him in a lump sum, then manifest hardship and injustice will result to him.

WHEREFORE, plaintiff prays that the defendant be cited to appear and answer herein, and that upon trial hereof, the plaintiff have judgment against defendant setting aside the final decision and award of the Industrial Accident Board and for compensation for four hundred and one (401) weeks at the rate of $35.00 per week, for payment of all expenses heretofore incurred, including but not limited to medical aid, hospital services, and medicines, and that he have judgment against defendant for all past due installments of compensation together with four (4%) per cent interest, compounded annually, from the respective dates of maturity of each installment of compensation due him herein; and that the balance of compensation due him herein be awarded to him in a lump sum, allowing four (4%) per cent discount on such future installments; and plaintiff prays for such other and further relief, both general and special, at law and in equity, to which he may be entitled, and all costs of suit.

STEPHENSON, THOMPSON AND MORRIS

By /s/ Edward Stephenson
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

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THE STATE OF TEXAS

TO: THE CHARTER OAK FIRE INSURANCE COMPANY, upon whom service may be obtained by serving the Chairman of the Board of Insurance Commissioners, Austin, Travis County, Texas.

, Defendant_____, Greeting:

YOU ARE HEREBY COMMANDED to appear before the Honorable District Court, 163rd Judicial District of Orange County, Texas, at the Court House of said county in Orange, Texas, by filing a written answer, at or before 10 o'clock a. m. of the Monday next after the expiration of twenty days after the date of service of this citation, to Plaintiff's Petition filed in said court on the 9th day of May A. D. 1968, numbered B-16,773 on the docket of said court, and styled.

SAMUEL R. POTTER - , Plaintiff_____,

VS.

THE CHARTER OAK FIRE INSURANCE COMPANY - - - - - - - - , Defendant_____.

The nature of Plaintiff's demand is set out and shown by a true and correct copy of Plaintiff's Petition, accompanying this citation, and made a part hereof.

If this citation is not served within ninety days after the date of its issuance, it shall be returned unserved.

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates hereof, and make due return as the law directs.

Issued and given under my hand and the seal of said court at Orange, Texas, this the 9th day of May A. D. 1968.

Attest: ETHEL BURTON, Clerk,
District Court, Orange County, Texas

(SEAL)

By Edna Emmons, Deputy.

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SHERIFF'S RETURN

Came to hand on the_____day of_____, 19_____, at_____o'clock_____ M., and executed in _____County, Texas, by delivering to the within named

_____

_____

_____each, in person, a true copy of this citation with a true and correct copy of the petition attached thereto having first endorsed on such copy of said citation the date of delivery.

The distance actually traveled by me in serving such process was_____miles, and my fees are as follows:

For serving this citation . . . . . $_____

For mileage . . . . . $_____

Total Fees . . . . . $_____

To certify which witness my hand officially.

Sheriff of_____ _____ County, Texas

By_____, Deputy

Comptroller of Insurance
State of Texas
MAY 13 1968

I hereby certify that this notice was served on me by the Sheriff of Travis County, Texas.

MH 6-11-68

B/55586

File No. B-16,773

CITATION FOR PERSONAL SERVICE
(District Court)

SAMUEL R. POTTER
vs.
THE CHARTER OAK FIRE INSURANCE COMPANY

In District Court of
163rd Judicial District
Orange County, Texas

Issued
This 9th day of May, 19 68
ETHEL BURTON
Clerk, District Court
By Edna Ezzell Deputy

Filed
This _____ day of _____ 19____
Delivered this 9th day of May 19 68
at 2 o'clock P. M.
T. O. L. ETHEL BURTON
Clerk, District Court
By _____ Deputy
By _____ Deputy

CERTIFICATE OF DELIVERY

I do hereby certify that I delivered to_____

_____, on the_____day of_____,

19_____, at_____o'clock_____m., this copy of this instrument.

_____Sheriff

_____County, Texas

By_____, Deputy

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CIVIL ACTION NO. 6329

SAMUEL R. POTTER

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

BRIEF ON THE POINT THAT THE CAUSE OF ACTION ASSERTED BY PLAINTIFF IS BARRED BY THE TWO YEAR STATUTE OF LIMITATION OF THE STATE OF TEXAS, AND BY THE ONE YEAR STATUTE OF THE STATES OF CALIFORNIA AND LOUISIANA.

WELLER, WHEELUS, GREEN & BROCATO
ATTORNEYS AT LAW
BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS 77704

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