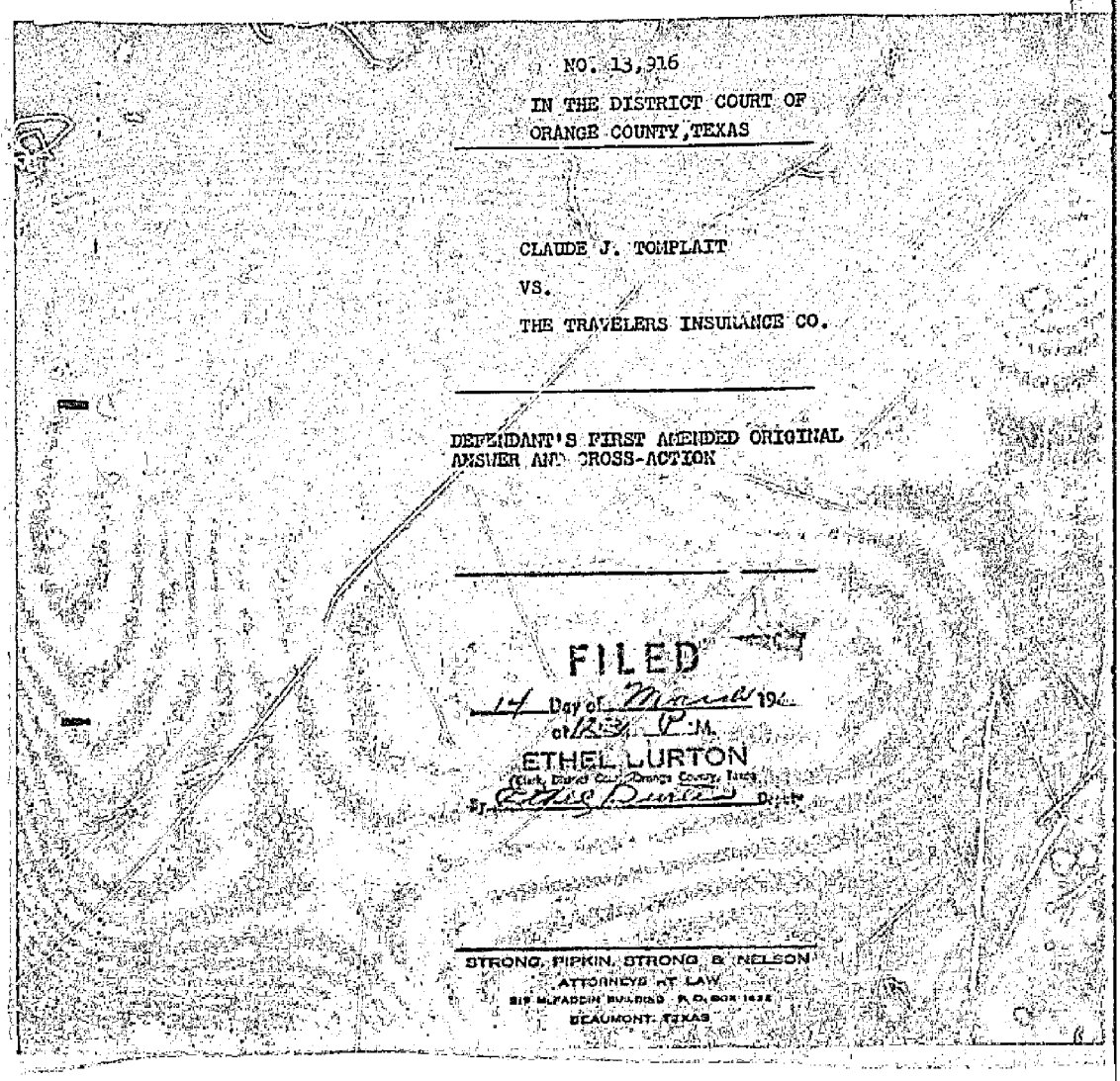


NO. 13,916

IN THE DISTRICT COURT OF
ORANGE COUNTY, TEXAS

CLAUDE J. TOMPLAIT

VS.

THE TRAVELERS INSURANCE CO.

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER AND CROSS-ACTION

FILED
14 Day of March 19[illegible]
at [illegible] P.M.
ETHEL LURTON
(Clerk District Court, Orange County, Texas)
By [illegible] Deputy

STRONG, PIPKIN, STRONG & NELSON
ATTORNEYS AT LAW
[illegible] BUILDING P.O. BOX [illegible]
BEAUMONT, TEXAS

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CLAUDE J. TOMPLAIT	¦	IN THE DISTRICT COURT OF
VS.	¦	
THE TRAVELERS INSURANCE COMPANY	¦	ORANGE COUNTY, TEXAS

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER
AND CROSS-ACTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES The Travelers Insurance Company, defendant in the above entitled and numbered cause, and makes and files this its First Amended Original Answer herein to the petition of the plaintiff, and for such answer says:

1.

Defendant specially excepts to the allegation contained in Paragraph 1 and to plaintiff's petition as a whole for the reason that plaintiff alleges no specific date as to when the injury occurred or the occupational disease manifested itself, for the following reasons:

(a) Because under the provisions of the Workmen's Compensation Law, it is necessary for the plaintiff to comply with certain statutory requirements within a given period following the date of an injury or the date that an occupational disease manifested itself, and plaintiff's petition is insufficient to permit this defendant to properly prepare its defense or to know what proof it will be expected to meet upon a trial of this case.

Of which special exception defendant prays judgment of the Court.

2.

Defendant specially excepts to the allegations contained in Paragraph No. 3 wherein it is alleged:

> "Personal injury and occupational disease, asbestosis and silicosis;"

for the following reasons:

(a) Because plaintiff is attempting to allege both a personal injury and an occupational disease, and same are governed by different

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provisions of the Workmen's Compensation Law;

(b) Because plaintiff should be required to elect whether he is going to attempt to recover under the provisions of the Workmen's Compensation Law pertaining to a personal injury or under the provisions of the Workmen's Compensation Law pertaining to an occupational disease, for the reason that different provisions with reference to recovery of weekly benefits and medical expenses govern the two types of recovery.

Of which special exception defendant prays Judgmen[illegible] Court.

3.

Defendant specially excepts to the allegations contained in Paragraph 3 of plaintiff's petition wherein it is alleged:

"prolonged or accelerated a prior condition."

for the following reasons:

(a) Plaintiff refers to a prior condition without [illegible] forth specifically what prior condition existed.

(b) Because plaintiff should be required to plead what prior conditions he was suffering from in order that this defendant may properly prepare its defense and know what facts or proof it will be expected to meet upon a trial of this case.

Of which special exception defendant prays judgment of the Court.

4.

Defendant specially excepts to the allegations contained in Paragraph 6 of plaintiff's petition wherein plaintiff attempts to sue for medical expenses which have been and will be reasonably necessary, because the same is insufficient in law, in that there is no provision in the Workmen's Compensation Act for recovery of future medical expenses, it being specifically provided that no recovery can be had for any medical expenses not actually furnished to and received by the employee, and, therefore, said allegations insofar as they pertain to future medical expenses are improper; of which special exception defendant prays judgment of the Court.

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5.

Defendant excepts to Paragraph 6 of plaintiff's petition wherein plaintiff attempts to sue for medical expenses which have been incurred, because same is insufficient in law and does not state specifically what medical aid, hospital services, chiropractic services, and medicines provided for by the Texas Workmen's Compensation Law plaintiff has incurred and whether same has been paid and further for the reason that plaintiff is seeking to recover for an occupational disease, and the medical aid and medical services under the provisions of Section 26 of Article 8306 pertaining to occupational disease is limited to a period of 91 days, and plaintiff does not allege the date that said medical expenses and services were incurred; of which special exception defendant prays Judgment of the Court.

6.

Defendant specially excepts to plaintiff's petition as a whole for the reason that he is attempting to recover for an occupational disease: namely, silicosis and asbestosis, and under the provisions of Section 26, Article 8306, defendant is not liable unless during the ten (10) years immediately preceding the date of incapacity, the employee has been exposed to the inhalation of silica dust or asbestos dust over a period of not less than five (5) years, two (2) years of which shall have been in this State, or the said employee has been employed by the same employer during the whole of the 5-year period immediately preceding his incapacity, and under the pleadings contained in plaintiff's original petition, same is insufficient as a matter of law to afford any basis for the recovery under the occupational disease provisions of the Workmen's Compensation Act. Of which special exception defendant prays Judgment of the Court.

7.

Defendant specially denies the allegations contained in Paragraph No. 5 of plaintiff's original petition wherein it is alleged that within thirty (30) days plaintiff notified his employer,

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and in this connection defendant here pleads and alleges that plaintiff did not give notice within thirty (30) days from the alleged date of the occurrence made the basis of this suit and that his alleged employer, Armstrong Contracting & Supply Corporation, had no notice or knowledge that plaintiff was claiming to have sustained an injury or occupational disease within thirty (30) days from the date plaintiff alleges that same occurred.

8.

Defendant specially denies that Armstrong Contracting & Supply Corporation was the employer of the plaintiff, Claude J. Tomplait, within the meaning of the Texas Workmen's Compensation Act at the time the condition, disability, or incapacity, if any, made the basis of this suit arose.

9.

Defendant denies generally, all and singular, the material allegations in plaintiff's petition contained, and says that same are not true in whole or in part, and demanding strict proof thereof, puts itself upon the country.

10.

Further answering herein, defendant denies that plaintiff sustained an accident or injury or incurred an occupational disease in the course of his employment for Armstrong Contracting & Supply Corporation and says that if plaintiff had any incapacity or disability as claimed or alleged, the same was solely caused by disease or pre-existing conditions, and in this connection, defendant would show the Court that the plaintiff had been suffering from the condition made the basic of his present claim for a period of several years prior to his employment with Armstrong Contracting & Supply Corporation.

11.

Further answering herein and in the alternative, in the event plaintiff had any impacity or disability which was not solely caused by disease or pre-existing conditions or some combination thereof, then in that event defendant says that disease, pre-existing

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conditions, or some combination thereof, were the sole cause of a distinct and separate percentage of any such incapacity, and that any incapacity in any way contributed to by an injury or an occupational disease, if any, while in the employment of Armstrong Contracting & Supply Corporation was only a small percentage, not to exceed 10%, and was temporary, after which any remaining disability was solely caused by disease, pre-existing conditions, or subsequent conditions, or some combination thereof.

12.

Further answering herein and in the alternative, defendant says that any incapacity plaintiff had was not sufficient to affect his average weekly wage earning capacity, in that plaintiff's average weekly wage earning capacity after any occurrence made the basis of plaintiff's claim and suit was equal to or greater than his average weekly wage at the time of any such occurrence, or in the alternative, in the event plaintiff had any incapacity which was sufficient to affect his average weekly wage earning capacity to decrease same below his average weekly wages, then in that event, defendant says same was only temporary and partial, after which his average wage earning capacity was equal to or greater than his average weekly wages at the time of the occurrence, if any.

13.

Further answering herein and in the alternative, defendant says that plaintiff has had an average weekly wage earning capacity and has worked for at least four (4) employers subsequent to his employment with Armstrong Contracting & Supply Corporation and will continue to have an average weekly wage earning capacity, and thus has not sustained and will not sustain any total disability.

14.

Further answering herein and in the alternative, defendant says that the condition for which the plaintiff presently complains existed prior to his employment for Armstrong Contracting & Supply Corporation and that if plaintiff had not had any incapacity as claimed or alleged in his petition, then same was an incapacity

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to which such prior condition and its effects and the occupational disease made the basis of plaintiff's suit, if any, contributed, and had plaintiff not had said prior condition, he would have sustained no incapacity; or in the alternative, same would only have been temporary and partial.

15.

Further answering herein and in the alternative, defendant says that in the event plaintiff sustained any occupational disease in the course of his employment for Armstrong Contracting & Supply Corporation, then in that event, defendat says that plaintiff had suffered from disease, infirmities, pre-existing conditions, and other ailments which were noncompensable causes under the Texas Workmen's Compensation Law, and any incapacity plaintiff is claiming or alleging in his suit, if any, if in any way connected with any occupational disease, is an incapacity brought about by said non-compensable causes aggravating said occupational direase, or said occupational disease aggravated, prolonged, or accelerated the incapacity from said noncompensable causes, and in this connection defendant says that occupational disease, if any, as a causative factor as related to all other causes of any such incapacity only caused a minor amount of said incapacity, not to exceed 10%, and further, that same was temporary.

16.

Further answering herein, defendant alleges, in the alternative, that in the event plaintiff sustained any occupational disease in the curse of his employment for Armstrong Contracting & Supply Corporation, the same only caused an acute condition which could be arrested by a change of employment or medical treatment which would leave plaintiff suffering from no objective symptoms, and with such change of employment or medical treatment, same would only persist for a period of a few weeks' duration.

17.

Defendant would further show to the Court that subsequent to the plaintiff's employment with Armstrong Contracting & Supply

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Corporation, plaintiff has worked for at least two (2) employers in whose employment he has been injuriously exposed to the hazards of the disease made the basis of his present claim, to-wit: Johns-Manville Company and the Aber Company, and under the provisions of the Workmen's Compensation Law, the last employer for whom the plaintiff works and is injuriously exposed to the hazards of said disease is his employer, or in the alternative, defendant says that plaintiff's employment with said employers contributed a large percent to his present incapacity or disability, if any, and defendant would show the Court that had plaintiff not worked for said employers and injuriously exposed himself to the hazards of said disease, that his incapacity, if any, resulting from his employment with Armstrong Contracting & Supply Corporation would not have exceeded 10% and would have been temporary in nature.

18.

Further answering herein and in the alternative, defendant would show the Court that under the provisions of Section 25, Article 8306, that this defendant is not liable for the plaintiff's incapacity, if any, sustained while working in the employment of Armstrong Contracting & Supply Corporation for the reason that plaintiff's incapacity, if any, did not result within one (1) year from the date of his employment with said company for the reason that the plaintiff has continued to work in said employment up to and including 1962 and a portion of 1963.

WHEREFORE, premises considered, defendant prays that plaintiff take nothing herein and that defendant go hence without day with its costs.

CHARLES S. PIPKIN

Attorneys for Defendant,
The Travelers Insurance Company
P.O. Box 1632; 319 McFaddin Bldg.
Beaumont, Texas

THE STATE OF TEXAS)
COUNTY OF JEFFERSON)

BEFORE ME, the undersigned authority, on this day personally appeared Gordon R. Pate, who being by me first duly sworn upon his oath deposed and said that he is one of the attorneys of record for The Travelers Insurance Company; that he has read the allegations contained in Paragraph 5 of plaintiff's petition, and he says that the defendant's denial of said allegations contained in Paragraph 7 of Defendant's First Amended Original Answer is true and correct.

SUBSCRIBED AND SWORN TO before me this 13 day of March, 1963.

Notary Public in and for
Jefferson County, Texas.

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CROSS-ACTION OF THE TRAVELERS INSURANCE COMPANY AGAINST TEXAS EMPLOYERS INSURANCE ASSOCIATION AND QUEEN INSURANCE COMPANY OF AMERICA

NOW COMES The Travelers Insurance Company, one of the defendants in the above entitled and numbered cause, and files this its Cross-Action against Texas Employers Insurance Association and Queen Insurance Company of America, and as grounds for such cross-action would show the Court the following:

1.

That the plaintiff, Claude J. Tomplait, has been injuriously exposed to the hazards of the disease made the basis of the present suit subsequent to his employment with Armstrong Contracting & Supply Corporation, for whom the defendant, The Travelers Insurance Company, is the insurance carrier; that while employed by Johns-Manville Company for which the cross-defendant Texas Employers Insurance Association is the insurance carrier, the plaintiff was injuriously exposed to the hazards of the disease made the basis of the present suit; that the employment with Johns-Manville Company was subsequent to the plaintiff's employment with Armstrong Contracting & Supply Corporation; that the plaintiff, while employed by the Aber Company whose insurance carrier was cross-defendant Queen Insurance Company of America, was injuriously exposed to the hazards of the disease made the basis of the present suit; that the employment with the Aber Company was subsequent to the plaintiff's employment with Armstrong Contracting & Supply Corporation; that the liability, if any, for the condition of which plaintiff complains in his suit should be apportioned between the successive carriers based on the amount of incapacity or disability, if any, that his employment with each employer contributed to his present condition, or in the alternative, the defendant, The Travelers Insurance Company, is entitled to contribution or indemnity from cross-defendants Texas Employers Insurance Association and Queen Insurance Company of America for

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the amount of compensation the plaintiff is entitled to, if any, as a result of being injuriously exposed to the hazards of the disease made the basis of his suit, while in the employment of Johns-Mansville Company and the Aber Company.

WHEREFORE, premises considered, defendant, The Travelers Insurance Company, prays that upon a final hearing that the liability for workmen's compensation due the plaintiff, if any, be apportioned among each of said carriers, or in the alternative, that the defendant, The Travelers Insurance Company, have judgment over against Texas Employers Insurance Association and Queen Insurance Company of America for full indemnity, or in the alternative, for contribution for the amount of workmen's compensation benefits, if any the plaintiff is found to be entitled to, as a result of his employment with Johns-Mansville Company and the Aber Company and the incapacity, if any, sustained as a result of being injuriously exposed to the hazards of the disease while in the employment of said employers, and for such other and further relief to which the defendant, The Travelers Insurance Company, may show itself entitled to.

CHARLES S. PIPKIN

Gordon Pate

Attorneys for Defendant and Cross-Plaintiff, The Travelers Insurance Co.

P.O. Box 1632; 319 McFaddin Bldg.
Beaumont, Texas

A copy of the foregoing Defendant's First Amended Original Answer and Cross-Action was this 13 day of March, 1963, delivered to Mr. Cleve Bachman, First Federal Savings Bldg., Beaumont, Texas, attorney for cross-defendant, Queen Insurance Company of America; delivered to Mr. Dave Marcus, Goodhue Bldg., Beaumont, Texas, attorney for cross-defendant, Texas Employers Insurance Association this 13 day of March, 1963; and delivered to Mr. Ward Stephenson, Stephenson Bldg., Orange, Texas, attorney for plaintiff, this 13 day of March, 1963.

Gordon R. Pate

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