No. 13,916

IN THE 128TH DISTRICT COURT OF ORANGE COUNTY, TEXAS

CLAUDE J. TOMPLAIT	:	
	:	PLAINTIFF'S FIRST
VS.	:	AMENDED ORIGINAL
	:	PETITION
THE TRAVELERS INSURANCE COMPANY, ET AL	:	

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLAUDE J. TOMPLAIT, plaintiff, who resides in Orange County, Texas, leave of the court having been first had and obtained, and files this his first amended original petition in lieu of his original petition heretofore filed herein, complaining of THE TRAVELERS INSURANCE COMPANY, TEXAS EMPLOYERS INSURANCE ASSOCIATION and QUEEN INSURANCE COMPANY OF AMERICA, defendants, private corporations duly incorporated under and by virtue of the laws of the State of Texas, having license and premission to do business in said state, for the purpose of writing insurance; and for cause of action the plaintiff says the following.

1.

That on or about the 26th day of July, 1961, the plaintiff was working in the County of Orange, State of Texas, for Armstrong Contracting and Supply Corporation in the capacity of insulator and in the furtherance of and while within the usual course of the business of his employer; that the said employer is engaged in the construction business; that the plaintiff was receiving an average weekly wage in the amount of $196.85 working eight hours per day and five days per week; that such average weekly wage in the amount

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of $196.85 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 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 one of the defendants 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 persons' 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 manifestiation of disease during the month of July, 1961, 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

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made the basis of this suit, plaintiff has suffered the following injuries: Severe and permanent injury to his body caused by dust, asbestos and other materials causing asbestosis and silicosis causing severe external and internal injuries including pulmonary fibrosis, restrictive ventilatory defect and arterio-desaturation.

4.

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

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, the 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.

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6.

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 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 sich 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 within ninety-one (91) days according to the provision of Section 26(d) of Article 8306, V.A.T.S., including but not limited to medical aid, hospital services, nursing and medicines, to-wit:

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Medical Expense	Amount	Date
Dr. John C. Greco	$ 67.00	July 26 - Oct. 24, 1961
Dr. Tom R. Jones	90.00	Aug. 1 - 28, 1961
Dr. Peron O. Jones	35.00	Aug. 10, 1961
Memorial Baptist Hospital	132.50	Aug. 8-10, 1961
Orange Memorial Hospital	12.00	July 26, 1961
	$ 336.50	

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 $34.12 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 in the same or a neighboring place, and that during the days when so employed, earned an average daily wage of $34.12 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 $196.85 per week. Further in the alternative, plaintiff says that if by reason of the shortness of the time of

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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 $196.85 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 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.

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WHEREFORE, plaintiff prays that the defendant be cited to appear and answer herein, and that upon trial hereof, 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, nursing 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 hemay be entitled, and all costs of suit.

STEPHENSON, STEPHENSON
AND THOMPSON

By _____
Attorneys for Plaintiff
Stephenson Building
Orange, Texas

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VS.

THE TRAVELERS INSURANCE COMPANY, ET AL

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

FILED
IN THE DISTRICT COURT
OF ORANGE COUNTY, TEXAS
MAR 5 1962
10:58 A.M.
ETHEL BURTON
DISTRICT CLERK

LAW OFFICES
STEPHENSON, STEPHENSON AND THOMPSON
STEPHENSON BUILDING
ORANGE, TEXAS

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THE STATE OF TEXAS §
COUNTY OF ORANGE §

I, ETHEL BURTON, Clerk of the District Court in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of the PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION in Cause No. A13,916 entitled CLAUDE J. TOMPLAIT VS. THE TRAVELRES INSURANCE COMPANY ET AL as the same appears on file in this office.

GIVEN UNDER MY HAND AND THE SEAL OF SAID COURT at my office in Orange, Texas, this the 12 day of January 1968.

ETHEL BURTON, Clerk
District Court,
Orange County, Texas

By Madeline Parker
Deputy