FILED

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James R. Cousar, Clerk, U. S. Court

By _____ DEPUTY

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

CLAUDE J. TOMPLAIT	)	
	(	
VS.	)	CIVIL ACTION NO. 5402
	(	
COMBUSTION ENGINEERING, INC., ET AL	)	
	(	

ORIGINAL ANSWER OF DEFENDANT, EAGLE-PICHER INDUSTRIES, INC., TO PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, EAGLE-PICHER INDUSTRIES, INC., and files this, its original answer to plaintiff's first amended complaint, and for such answer this defendant would show the court:

1.

In reply to Paragraphs 1 through 12 inclusive, this defendant admits that it is a foreign corporation organized under the laws of a foreign state with a permit to do business in the State of Texas; it likewise admits, assuming that each of the corporate defendants are non-residents of Texas, that this court has jurisdiction of the alleged claim and the remaining allegations do not apply to this defendant.

2.

In answer to Paragraph No. 13, it is admitted that this defendant has been and is now engaged in the manufacture of materials for insulation, but defendant denies that it was engaged in the manufacture of such materials during all times mentioned in plaintiff's petition and for a long time prior thereto and in the compounds alleged.

3.

The allegations contained in Paragraph 14 are denied.

4.

In reply to the allegations contained in Paragraphs 15, 16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35 and 36, this defendant can neither admit nor deny the allegations

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contained in each separate paragraph for the reason that it is without information or knowledge.

5.

In reply to the allegations contained in Paragraph 37, this defendant is without knowledge as to whether the plaintiff handled any insulation or any quantity of the insulation mentioned in plaintiff's petition; however, it is possible this defendant manufactured some of the products that may have been supplied to the various employers, but it is denied that plaintiff received any injurious contact from this defendant's product.

6.

The allegations contained in Paragraph 38 of the Complaint are denied.

7.

The allegations contained in Paragraph 39 of the Complaint are denied.

8.

The allegations of Paragraph 40 of the Complaint are denied.

9.

The allegations contained in Paragraph 41 of the Complaint are denied.

10.

The allegations contained in Paragraph 42 of the Complaint are denied.

11.

The allegations contained in Paragraph 43 of the Complaint are denied.

12.

This defendant denies that the plaintiff sustained any injury as a result of contact or use of any product manufactured by this defendant.

13.

If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, then such injury was sustained as a result of the occupation of the plaintiff, in that he had been engaged as an insulator or a worker in the insulation field for a number of years, and at all times he knew that he was working in dust laden air, part of which was created by his own work and the work of other insulators, and by the failure of his employer to provide facilities for the elimination of dust laden air, and therefore such injury as he may have sustained was either asbestosis or some occupational disease resulting from his long continued occupation as an insulator and not as a result of any isolated incident or contact with any products manufactured by this defendant. This defendant is not legally liable or responsible for any occupational disease which was suffered or sustained by plaintiff in the course of his various employment over a number of years.

14.

For further answer herein, and while denying that the plaintiff sustained any injury as a result of contact or use of any product manufactured by this defendant, if he did sustain injury or did sustain an occupational disease as a result of use of any insulation product manufactured by this defendant separately or in conjunction with products manufactured by other defendants, then this defendant says that plaintiff was guilty of various acts and omissions constituting negligence in the performance of his work, in that he failed to use and utilize any safety devices, such as gloves, protective clothing, masks and respirators for breathing, and he continued to work with insulation material after he knew, or in the exercise of ordinary care should have known, that it was affecting his health, and one or more of such acts

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and omissions on his part was a proximate cause of his alleged injury. Further, the plaintiff was fully advised as to his susceptibility to injury from insulation products in the year 1960 or 1961, and his physician diagnosed his condition and advised him to seek other employment where he would not come in contact with insulation materials. Nevertheless, the plaintiff, knowing of his susceptibility to insulation materials and having been fully advised, failed to seek other employment and failed to remove himself from contamination with insulation materials in the air, and to the contrary, continued to work with insulation materials with full knowledge that such was harmful to his health.

15.

This defendant says that if plaintiff sustained any injury as a result of the use of any material or materials manufactured by this defendant, which is denied, the danger, if any, arising from the continued use of such material or materials was open and obvious and 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 insulation materials, and if he did use products manufactured by this defendant after having been advised that he had asbestosis and should not continue work as an insulator, then he assumed any risk in connection with the use of such product, and such danger, if any, in the use of insulation products was open and obvious and apparent to the plaintiff, and he cannot recover for any period in which he deliberately subjected himself to the dangers, if any, involved in working with insulation materials.

In the alternative, if there was any danger and such was not open and obvious and apparent to plaintiff at all times, nevertheless, he knew at all times of the dangers involved in working with insulation materials and in working in dust laden

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air where insulation materials were in use, and he continued to use and to work with such materials and under such conditions with such knowledge, and therefore this defendant owed him no duty to warn him of any dangers involved, and he is therefore barred from any recovery under the theory of volenti non fit injuria.

In the further alternative, from and after the date on which the plaintiff was advised and had knowledge that he was sustaining injury from working with insulation materials, if this defendant had ever owed him any duty to warn of the possible effects of working with insulation materials, which is denied, then this defendant owed the plaintiff no duty to warn him of any alleged dangers involved after he had full knowledge of his condition and was fully warned to remove himself from insulation work or the area where he could be subjected to air which had insulation dust in it. He is therefore barred from recovery on the basis that this defendant owed him no duty, and this defendant violated no duty of care owing to the plaintiff.

16.

If plaintiff did sustain any injury as the result of use of any product manufactured by this defendant, which is denied, then such occurred more than two (2) years prior to the filing of this suit on December 23, 1966, and such cause of action for personal injury is barred by the two (2) year statute of limitation of the State of Texas.

17.

Further answering, the plaintiff was an experienced insulation worker and knew at all times that he was working with asbestos and asbestos products, or in the alternative, if he did not know this, his employers at all times knew they were working with insulation materials which contained asbestos or magnesia, and they had knowledge of the fact that particles from the product

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could enter the air when the product was cut or applied, and it is common knowledge that if an individual works in an area where the air is laden with dust that the individual will breathe this dust in his nose and into his body system unless he uses some mask or respirator or protective device.

WHEREFORE, premises considered, this defendant prays that upon trial hereof the plaintiff take nothing against this defendant and that this defendant be discharged with its costs.

Respectfully submitted,

ROYSTON, RAYZOR & COOK

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

CERTIFICATE OF SERVICE

Copies of the foregoing original answer of defendant, Eagle-Picher Industries, Inc., to plaintiff's first amended complaint were mailed to the following attorneys of record:

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ORIGINAL ANSWER OF DEFENDANT,
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