FILED

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

JAN 15 1968
James R. Cooney, Clerk, U. S. Court
By _____ DEPUTY

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

MOTION FOR SUMMARY JUDGMENT ON
BEHALF OF DEFENDANT, EAGLE-PICHER INDUSTRIES, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Eagle-Picher Industries, Inc., one of the defendants in the bove entitled and numbered cause, and moves the Court for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, for this Defendant dismissing the action as to this defendant on the grounds that there is no genuine issue as to any material fact in this action as to this defendant and this defendant is entitled to a Judgment as a matter of law.

I.

This lawsuit was filed December 23, 1966, and a reading of plaintiff's deposition clearly reveals that he had no exposure to any product about which suit is brought for a period of two years prior to this date. He has testified that he has had two jobs since that time, but in both instances, he worked in situations in which he was not exposed to dust from any insulation products during that work and these jobs are not included in the amended complaint. Consequently, the two-year statute of limitations of the State of Texas as contained in Article 5526, Section 6, Vernon's Annotated Civil Statutes is applicable. The only exception or manner in which the statute could be tolled would be by reason of the pendency of the compensation claim against Queen Insurance Company which was finally terminated on May 26, 1966. The employer of the Queen Insurance Company against whom the compensation suit


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was brought was the Aber Company, Inc. A copy of the deposition of Doyle Glen Adair was obtained in the compensation case and a copy of that deposition is attached hereto as Exhibit "A", and on page 4 the suppliers of Aber Company are listed. Analysis of the Texas Workmen's Compensation Law and the cases permitting the tolling of of the statute of limitations as to third parties until such time as the compensation case is disposed of, shows that the rule is only applicable as to third parties causing the injury for which the compensation claim is brought. See Judice vs. Sumner Sollit Company of Texas, 346 S.W.2d 135 (Bmt. Civ. App. 1961 Error NRE). Therefore, in this matter, the statute of limitations is tolled only as to the suppliers or manufacturers of the Aber Company for the exposure complained about in the compensation claim. The manufacturers and suppliers are listed at Page 4 of the deposition of Doyle Glen Adair, Appendix A hereto.

The asserted proposition that Tomplait could not have sued any of the manufacturers or companies who are defendants in this case without waiving his right to collect his Workmen's Compensation Insurance from Queen Insurance Company is without merit. The compensation statute provides that where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease shall be deemed the employer within the meaning of the act, Article 8306, Section 24. This Section would have effectively precluded Tomplait from waiving his compensation claim against the last employer in his suit against the Queen Insurance Company if he had brought suit against the suppliers of prior employers. Further, analysis of the cause of action asserted here reveals that while the plaintiff now contends that he now has an indivisible damage or one damage caused by many causes, which amounts to one tort, this does not mean that the liability is one or the causation

was one. Tomplait's deposition reveals that the condition developed over a period of many years with exposure to many different products on many different occasions, over his working life of approximately 25 years. Many defendants have been sued and doubtless many more suppliers are involved. The only reasonable rule would seem to be that plaintiff's cause of action, if he had one, accrued as to each supplier at the time of exposure or as soon thereafter as plaintiff became aware of his condition. Tomplait's testimony is clear that Dr. Jones told him to quit working in the insulation business and to quit smoking if he wanted to live (Tomplait's deposition, Page 20), and that this occurred before December 11, 1961. (Tomplait's deposition, Page 62). It seems quite clear that after December, 1961, any cause of action that Tomplait may have had accrued at the time of the exposure and the only possible tolling of the statute of limitations would be as to injuries or exposures suffered while employed by Aber Company, Inc. by the pending compensation claim. As this defendant was not a supplier to the Aber Company, Inc. as shown on Page 4 of the deposition of Doyle Glen Adair and it is respectfully submitted that any cause of action which Tomplait may have had is now time barred as to this defendant.

II.

The deposition of Tomplait is clear that before December 11, 1961, he was told by Dr. T. R. Jones that he should get out of the business of working as an insulator and quit smoking if he wanted to live (Tomplait's deposition, Page 20 and Page 64). Tomplait's testimony is somewhat equivocal concerning his knowledge prior to this time, but he frankly and clearly admitted that after this time he knew that working in insulation would cause him specific problems and, in fact, it would endanger his own life. He admitted that the jobs undertaken thereafter, as outlined in the Plaintiff's Complaint, were with this knowledge. It can be seen that Tomplait



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clearly assumed the risk of any further exposure to insulation material. At this point in time, Tomplait became a person of such special sensitivity to the products involved that his own continued association with it was voluntary and rendered him contributorily negligent as a matter of law and, therefore, he is completely barred from any recovery in this action.

WHEREFORE, PREMISES CONSIDERED, defendant moves and prays the Court to set this Motion for hearing and thereafter Judgment be entered in favor of defendant, Eagle-Picher Industries, Inc., ordering that plaintiff recover nothing herein against the defendant, Eagle-Picher Industries, Inc., and for such other and further relief as defendant may be justly entitled to receive.

Ben L. Reynolds
Of Royston, Rayzor & Cook
877 San Jacinto Building
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Attorneys for Eagle-Picher
Industries, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served on attorney for Plaintiff, Ward Stephenson, Stephenson Building, Orange, Texas, and attorneys for Defendants, John Rienstra, John G. Tucker, George Weller, George E. Duncan, Charles S. Pipkin and Gordon R. Pate, by depositing the same, properly addressed, in the United States Mail, on this the 15th day of January, 1968.

Ben L. Reynolds
Of Royston, Rayzor & Cook



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