IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

JUL 17 1968

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

By DEPUTY

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

CIVIL ACTION NO. 5402

MOTION OF DEFENDANTS FOR CERTIFICATION OF A CONTROLLING QUESTION OF LAW UNDER TITLE 28, JUDICIARY AND JUDICIAL PROCEDURE, CHAPTER 83, SECTION 1292(b)

TO SAID HONORABLE COURT:

COME NOW the defendants, Combustion Engineering, Inc.; R & I Refractory and Insulation Corporation; Johns-Manville Products Corporation; Pittsburgh Corning Corporation; Fibreboard Paper Products Corporation; Owens-Corning Fiberglas Corporation; and Eagle-Picher Industries, Inc., and file this, their motion under the provisions of Title 28, Judiciary and Judicial Procedure, Chapter 83, Section 1292(b), and as grounds for said motion would represent and show to the Court;

1.

Each of the defendants herein have pending a motion for summary judgment based upon the legal proposition that the plaintiff's cause of action, if any, is barred by the two (2) year statute of limitation of the State of Texas. These defendants are of the opinion that said motions for summary judgment involve a controlling question of law as to which there should be no ground for difference of opinion, but on which the Court feels there is substantial ground for difference of opinion, and an immediate appeal from any order which the Court may make

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either granting or denying the defendants' motions for summary judgment will materially advance the ultimate termination of this litigation.

These defendants respectfully request the Court to make a firm ruling on the motions for summary judgment, and in the event such ruling is adverse to these defendants that the Court certify that such order overruling the defendants' motions for summary judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. An appeal could be taken under the provisions of Section 1292 from the interlocutory order of the Court, to the United States Court of Appeals, within ten (10) days, provided that the Court of Appeals permit such an appeal to be taken from the order of the District Court.

2.

Plaintiff's original claim for workmen's compensation under the Workmen's Compensation Law of Texas was filed on December 20, 1961, against his employer, Armstrong Contracting & Supply Company, in which he stated that the first distinct manifestation of occupational disease began in July, 1961, and that he sustained injury to his body caused by asbestosis and silicosis which caused pulmonary fibrosis, etc.

An amended claim for occupational disease was filed with the Industrial Accident Board dated February 22, 1962, on March 3, 1962, in which he made claim against Armstrong Contracting & Supply Corporation and The Travelers Insurance Company, its workmen's compensation carrier. This claim was supplemented and

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amended by letter of plaintiff's attorney dated June 18, 1962, filed June 19, 1962, with the Industrial Accident Board, where it was stated that claimant's incapacity began on approximately the 26th day of July, 1961, and then he listed the claimed exposures to the hazards of this occupational disease of asbestosis and silicosis, in which it is stated that employment with The Aber Company was subsequent to the first manifestation of the disease on or prior to July 26, 1961. He worked for The Aber Company for approximately five months after his incapacity began.

3.

Plaintiff saw Dr. T. R. Jones, of Houston, Texas, on August 1, 1961, and the doctor made a diagnosis of pulmonary fibrosis secondary to inhalation of probably asbestos fibers, silicates which contained some degree of silica. Plaintiff likewise listed Dr. T. R. Jones, 1608 Professional Building, as his physician.

The plaintiff, Tomplait, testified in his deposition that he could not say which product caused him harm and he was unable to identify any particular product. (Dep., Pg. 18). Tomplait first went to Dr. John Greco, Bridge City, who informed him there was something wrong in his chest after taking X-rays. Dr. Greco made an appointment with Dr. Tom Jones. Dr. Tom Jones, of Houston, examined Tomplait and after the examination, Dr. Jones told him he could do nothing for him because one lung was just as bad as the other. He said, "The only thing I can advise you to do is to get out of that business and quit smoking." "Yes, sir, he told me if I wanted to live - he said if I wanted to live.

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He said I wouldn't get no better or no worse if I just quit." (Dep., Pg. 20).

Tomplait admitted that after he saw Dr. Jones he didn't quit working right then and there, but worked on for a while. (Dep., Pg. 27). Again, he admitted that Dr. Jones told him not to work with any asbestos products or any insulation materials after the examination in Houston, and told him to quit smoking. (Dep., Pg. 25). Dr. Jones told him at the time of the examination that his lungs had a lot of insulation materials on them and that both lungs were in a bad condition. Dr. Jones said, "I would advise you to quit -- get out of that business and quit smoking altogether." (Dep., Pg. 32). Despite this warning, Tomplait did return and continue to work with asbestos and insulation products. (Dep., Pg. 33). This witness further testified:

"Q. Now if you worked with insulation materials after you went over there to Houston and saw Dr. Jones, you knew that they could do you harm -- could do your chest harm, didn't you?

A. Uh-huh, sure did.

Q. And knowing that, you went ahead and worked because you say you had to work?

A. Well, I had to -- that or starve, one.

Q. All right. But in working, you knew that you might get injured and --

A. Yeah.

Q. -- and the materials might cause you further injury?

A. Yeah, I knew it after he told it to me.

Q. And there wasn't any doubt in your mind that you were taking a risk by continuing to work?

A. Well, it's a dot or die because if you are going to see your family without nothing, it will make you do a lot of things you don't want to do. Because at that time I wasn't getting nothing, period. My pay

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check had stopped and you try to live without work for six months and see how long you are going to live on this earth." (Dep., Pgs. 35 and 36).

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"Q. Well, from the time that you saw Dr. Greco and Dr. Jones, you knew they were harmful?

A. Oh yeah, from that time, yeah.

Q. And you didn't need anybody to tell you --

A. And I don't feel --

Q. Now from and after the time you saw Dr. Jones, you didn't need anybody to tell you that you were getting more of this stuff in your lungs when you worked with it and that it was harmful, did you?

A. No, I sure didn't. I wish I had found that out about twenty years sooner." (Dep., Pg. 41).

Tomplait further testified:

"Q. Now in all of these places that you worked right up through 1964 that Mr. Rienstra called your attention to, you were subject to the same type of dust and exposure to dust as you were ever since you started working, weren't you?

A. That's right.

Q. So that after Dr. Jones saw you in July of 1961, you continued to do this type of work right through 1964 with full knowledge that you were subjecting yourself to possible injury?

A. That's right." (Dep., Pg. 87).

As a matter of law, the plaintiff in this case, Claude J. Tomplait, cannot recover damages at common law for any injury or disability sustained as a result of working with asbestos insulation products from and after August 1, 1961, when he saw Dr. T. R. Jones, and thereafter continued to subject himself to the same type of work with full knowledge that he was subjecting himself to probable injury. A brief will be submitted on this point.

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The claim against The Aber Company and its insurer, Queen Insurance Company, originated subsequent to September, 1961.

Plaintiff's original petition in Cause No. 13,916 in the 128th District Court of Orange County, styled Claude J. Tomplait vs. Travelers Insurance Company, et al, was filed December 21, 1962, alleging personal injury in July, 1961, while employed by Armstrong Contracting & Supply Company. An amended complaint was filed in said cause on March 25, 1963, complaining of the Travelers Insurance Company, the insurance carrier for Armstrong Contracting & Supply; Texas Employers' Insurance Association, the compensation carrier for Johns-Manville Corporation and Johns-Manville Sales Corporation; and Queen Insurance Company of America, the insurance carrier of The Aber Company.

A final judgment was rendered in Cause No. A-13,916-A, styled Claude J. Tomplait vs. The Travelers Insurance Company and Texas Employers' Insurance Association for all claims for injury or disability originated while employed by Armstrong Contracting & Supply Company, Johns-Manville Corporation and Johns-Manville Sales Corporation on September 16, 1964.

The claim against the Queen Insurance Company as the workmen's compensation carrier for The Aber Company, remained on the docket of the District Court of Orange County under Cause No. A-13,916, styled Claude J. Tomplait vs. The Queen Insurance Company of America, and judgment was rendered in this cause on May 26, 1966.

The claims against all other companies involved in said litigation had been severed out and a final judgment rendered on

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September 16, 1964. Admittedly, the original petition in the present claim was not filed until more than two (2) years from and after September 16, 1964.

Running of the Two Year Statute of Limitation

The running of the two year statute of limitation began at least in July of 1961, because the plaintiff knew and was claiming to have sustained an injury as the result of coming in contact with asbestos insulation. None of the employers against whom he had a claim in the workmen's compensation suit are alleged to have used any product or products of the defendant, Fibreboard Paper Products Corporation, therefore if plaintiff had a cause of action against this corporation, who is a defendant in the instant case, the filing of such a suit would not have prejudiced or destroyed the plaintiff's claim under the Texas Workmen's Compensation Act against the employers for whom he claimed he was working when he was injured.

Further, it is perfectly obvious that the plaintiff could not create a cause of action for damages from and after August 1, 1961, when he had full and complete knowledge that he had suffered injury as a result of contact with asbestos insulation products and his own doctor had told him to discontinue this type of employment. The alleged claim for workmen's compensation against The Aber Company and its insurer, The Queen Insurance Company of America, originated in employment after August 1, 1961. Such a claim against a subsequent employer did not have the effect of suspending the running of the statute of limitation against a third party because no cause of action existed where the plaintiff voluntarily subjected himself to the effect, if any, of such products after he had full knowledge that he would probably sustain injury if he came in contact with such products.

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It is respectfully submitted that the question of whether the plaintiff's claim is barred by the two year statute of limitation of the State of Texas is a matter of law, and a controlling question of law in this case. There are many and multiple defendants in this case, and it would materially expedite this litigation and eliminate considerable time and expense of the parties if the controlling questions of law in this case were certified to the Court of Appeals of the Fifth Circuit.

We also submit that this Court should decide as a matter of law that no recovery can be had by the plaintiff for damages for any alleged injury or injuries, if any, accruing due to exposures to asbestos products and asbestos insulation subsequent to August 1, 1961, when he was advised by a physician to stop working with asbestos products and to get out of this type of employment, otherwise he would suffer further injury.

It is undisputed that a final judgment was entered on September 16, 1964, on the claims against the employers, Armstrong Contracting & Supply Company and Johns-Manville Corporation and Johns-Manville Sales Corporation. If the statute of limitation was ever suspended, then the statute began to run on the date that the final judgment was rendered, and more than two (2) years expired before the filing of the instant suit. We have heretofore filed an original and additional brief on this limitation question. See Fidelity Union Casualty Company, et al vs. Texas Power & Light Company, Ct. Civ. App., Texas, Dallas, 35 S.W. (2d) 782, writ of error refused; Mourning vs. Crown Stevedoring Company, Ct. Civ. App. Waco, 1967, 417 S.W. (2d) 725; and Garza vs. Sumrall, Ct. Civ. App., Texas, San Antonio, 1954, 267 S.W. (2d) 912, writ of error refused.

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In Fidelity Union Casualty Company vs. Texas Power & Light Company, 35 S.W. (2d) 782, error refused, the court held that the statute of limitation was suspended from the day Riley filed his claim with the Industrial Accident Board to the date of the entry of final judgment in the District Court.

In Mourning vs. Crown Stevedoring Company, supra, where the judgment for compensation was rendered in January, 1964, the court held that the two year statute of limitation commenced to run against the plaintiff in January, 1964.

In Garza vs. Sumrall, supra, in which the Supreme Court denied a writ of error, it was held that Article 8307, Section 6(a) does not operate to toll the limitation statute while a suit against the wrong employer runs its course. In this case, the plaintiff thought that one Boland was his employer, and after he lost his suit grounded upon the proposition that Boland was his employer, then he commenced action to prove that Sumrall and Anaya were his employers. There was a four year delay in filing the second suit for the reason that Garza sued the wrong person as his employer in the first suit. The court further held that the pendency of a compensation action, which was barred by limitations, does not toll the statute of limitations to a common-law action.

In our case, claim for compensation was not filed against the Queen Insurance Company and The Aber Company until more than six months from and after July, 1961, principally because the plaintiff, Tomplait, had not worked for The Aber Company until after he already knew that he had lung trouble or respiratory trouble due to the inhalation of asbestos dust and working with

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asbestos insulation products. Thus, if the plaintiff cannot recover damages for any injury accruing after he knew that he was suffering injury as the result of working with asbestos insulation products, then the pendency of a suit for workmen's compensation against a subsequent employer could not have the effect of suspending the statute of limitation as to other employers or events which occurred while working for such other employers. In any event, under the law of Texas, the statute of limitation, if it was suspended, started to run when the final judgment was entered on September 16, 1964, on the claims against Armstrong Contracting & Supply Company and Johns-Manville Corporation and Johns-Manville Sales Corporation, and such two year statute of limitation barred any claims originating out of the use of any products in the course of Tomplait's employment with such employers.

WHEREFORE, these defendants, and each of them, respectfully pray that the Court rule promptly on the defendants' motions for summary judgment, and in the event the Court should overrule such motions, that the Court certify that such order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Respectfully submitted this 17th day of July, 1968.

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CERTIFICATE OF SERVICE

Attorneys for defendants certify that a true and correct copy of Motion Under Title 28, Section 1292(b), has been mailed to Mr. Ward Stephenson, attorney for plaintiff, Stephenson Building, Orange, Texas 77630, by certified mail on the 17 day of July, 1968.

GEO. A. WELLER, OF COUNSEL

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