IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

JUL 18 1968

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

By Mildred C. Verret DEPUTY

CLAUDE J. TOMPLAIT :

VS. : CIVIL NO. 5402

COMBUSTION ENGINEERING, INC., ET AL :

PLAINTIFF'S MOTION TO STRIKE CERTAIN PORTIONS OF WRITTEN INTERROGATORIES OF DR. STANTON P. FISCHER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLAUDE J. TOMPLAIT, plaintiff in the above entitled and numbered cause, and files this his motion to strike the following from the written interrogatories propounded to Dr. Stanton P. Fischer:

(a) The answer of Dr. Fischer to cross-interrogatory No. 13, wherein Dr. Fischer was requested to attach copies of any letter reports concerning the examination of Claude J. Tomplait by Dr. W. V. Leary, and complied with said request by attaching the following letters:

(1) Letter dated September 16, 1963, addressed to C. F. Boyd, Executive Director of the Industrial Accident Board, Austin, Texas, such letter being signed by Dr. W. V. Leary;

(2) Letter dated November 13, 1962, addressed to Industrial Accident Board, Austin, Texas, and signed by Dr. W. V. Leary, M. D.;

(3) Letter dated April 4, 1963, addressed to Mr. Ward Stephenson, Attorney, Orange, Texas, and signed by Dr. W. V. Leary, M. D.

(b) The answer of Dr. Fischer to cross-interrogatory No. 11, wherein Dr. Fischer was requested to attach copies

of any and all x-ray report or reports made by Dr. M. V. Leary, or at his request, on or about October 19, 1962, and complied with said request by attaching a copy of an x-ray report of films taken October 19, 1962, a PA, right lateral chest x-ray.

2.

As grounds for this motion to strike, the plaintiff would respectfully show unto the Court that by agreement between the attorney for plaintiff and representatives of the defendant counsel group, it was agreed that plaintiff would be examined by Dr. Stanton P. Fischer of the Kelsey-Seybold Clinic in Houston, Texas; that in making this agreement, it was fully understood that Dr. M. V. Leary, formerly associated with Kelsey-Seybold Clinic and who had previously examined the plaintiff was at the present time engaged in teaching and would not talk to the defendants' attorneys, would not agree to testify, and would not agree to re-examine the plaintiff under any circumstances; that the plaintiff's attorney after having been advised of these facts by the defense counsel then agreed that if Dr. Leary would not be called to give his medical opinions or conclusions, and if none of the conclusions or opinions of Dr. Leary were to be used in this case, whether through deposition, reports, oral testimony obtained through subpoena, or any other means, the plaintiff's attorney would then agree to allow the defendants to have Dr. Fischer examine the plaintiff. That this was completely understood by plaintiff's attorney and the representative of the defendant counsel group.

3.

Under these circumstances, plaintiff says that under

the terms of the agreement of counsel, all x-ray reports and letter reports made by Dr. M. V. Leary should be stricken from the written interrogatory deposition of Dr. Stanton P. Fischer, and plaintiff requests that this Court order that the defendants cannot introduce or in any way mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, any of the x-ray reports and letter reports made by Dr. M. V. Leary.

4.

That in addition to the above, plaintiff says that it is improper legally to allow testimony of Dr. Leary to be introduced through letters, reports or otherwise, with no chance for the plaintiff to cross-examine; that this would be in the nature of hearsay and would in substance allow medical reports to be introduced as medical testimony, all of which the plaintiff objects.

WHEREFORE, plaintiff prays that this Court grant this his motion to strike from the written interrogatory deposition of Dr. Stanton P. Fischer the above-mentioned x-ray reports and letter reports, and that the Court further instruct defense counsel not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, any of the x-ray reports and letter reports of Dr. M. V. Leary.

Respectfully submitted,

STEPHENSON, THOMPSON & MORRIS

By _____

Attorneys for Plaintiff
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ACL Doc 10692 · Page 3 of 5 asbestosclaims.law/library/10692/3

CERTIFICATE OF SERVICE BY MAIL

A copy of the foregoing instrument has been forwarded to the following attorneys of record, on this the 16 day of July, 1968, by certified mail, return receipt requested:

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Ward Fitzsimmons
Attorney for Plaintiff

NO. 5402

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ACL Doc 10692 · Page 5 of 5
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