Judge Mark Davidson
Multi District Litigation Asbestos Judge
201 Caroline, 15th Floor
Houston, Texas 77002

713-368-6600

July 23, 2009

Ms. Valerie Farwell
Ms. Amy Green
Mr. Edward Slaughter

Re: Cause No. 2008-15687; *Wilhite v. Alcoa*

Dear Counsel:

You will recall that a Motion for Rehearing was filed by the Defendant in the above case following this Court's denial of its Motion for Summary Judgment. This request for rehearing took place after a hearing to strike expert testimony prior to an earlier trial setting. This letter constitutes the ruling of the court on the Motion for Rehearing.

This motion presents complex issues regarding the defenses workers' compensation insurance subscribers may raise in asbestos litigation. At the time of the creation of the workers' compensation system, the Legislature enacted a defense to litigation brought against subscribing employers as an inducement to provide Texas workers "no-fault" coverage for medical care and some lost income resulting from job-related accidents. Any effort to water down that defense will result in fewer workers being covered by the protections of the system. The bar to suit is total, except if a worker is killed in the course and scope of employment as the result of gross negligence or if an injury is as the result of an intentional tort. There is no question that the Defendant carried that insurance during all applicable times of the Plaintiff's employment.

Since Mr. Wilhite is still living, the legal standard the Plaintiff must establish at trial is not negligence ("Failure to exercise ordinary care…"), nor is it gross negligence ("An entire want of care…"), nor even malice ("A specific Intent by the defendant to cause substantial injury or harm to the claimant. . ."). [1] The applicable standard to overcome the "comp bar" defense is stated in the Restatement (Second) of Torts and has been amplified in several cases – An intentional tort. "Intent" means that an "actor desires to cause consequences of his act, or that he

[1] TEX. CIV. PRAC. & REM. CODE §41.001.

believes that the consequences are substantially certain to result from it." *Restatement (Second) of Torts § 8A* (1965). For conduct to be intentional, "more than knowledge and appreciation of risk is necessary; the known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence), and become a substantial certainty." *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985).

What is the evidence of the Defendant's actual knowledge?

First, it must be candidly stated that the record in this case presents evidence that, judged by what we know today of the dangers of asbestos, is nothing short of shocking. Early in Mr. Wilhite's career at Alcoa, he was sent into a contained smelter at a time in which jack hammering of asbestos containing bricks was being performed. Judging past conduct in light of current knowledge, of course, does not prove the requisite requirement of actual awareness. It is, therefore, critical in ruling on the summary judgment to know what the defendant knew and when it knew it. The following is my summary of those facts, looking at all facts in the light most favorable to the non-movant, the plaintiff.

Throughout the late 1940s and early 1950s, Alcoa was capable of researching and analyzing industrial health hazards, including health hazards related to asbestos exposure, involved in its aluminum operations. Alcoa was also a founding member of the IHF and Alcoa received the IHF's publication, *The Digest,* on a regular basis. Prior to 1970, *The Digest* contained numerous abstracts of articles linking asbestos exposure to asbestosis, lung cancer, and mesothelioma. What they were capable of knowing, of course, is not the same as actual knowledge.[2] Accordingly, the contents of medical or scientific literature that the Plaintiff **could** have seen does not constitute proof that the Defendant had actual knowledge. That information, therefore, is irrelevant to the applicable legal standard.

Dr. Dinman, a certified occupational medicine specialist and Alcoa's former medical director and vice president of health and safety who was employed at Alcoa from 1973-1986, testified in his deposition that Alcoa gained this knowledge with Sir Richard Doll's study.[3] Moreover, the articles just stated an **association** between asbestos exposure and the asbestos related diseases; the articles do not give any definite figures or facts regarding the link. That is, the articles do not state how much asbestos exposure would or could cause which asbestos-related diseases. An association between an alleged cause and an alleged effect is not, legally, evidence of causation.[4] If a statistical association is insufficient in a court of law, knowledge of that association can hardly be proof of actual intent to cause injury.

Mr. Thomas Bonney, Defendant's former senior industrial hygienist, joined Alcoa in 1948 and retired in 1986. He testified that in 1948, he and Alcoa understood that asbestos exposure could cause asbestosis and fibrosis. Alcoa knew that fibrosis was the same thing as asbestosis if it was caused by asbestos. However, the Defendant was not substantially certain of

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[2] It should be noted that assuming, without deciding, that some employee of the Defendant read *The Digest*, in order for it to qualify as intentional tort, a principal or vice-principal of the company would have to have been known to have read the articles.

[3] *See* Plaintiff's Exhibit 132.

[4] *See Merrill Dow v. Havner*, 953 S.W.2d 706 (Tex. 1997).

what level of asbestos exposure would cause asbestosis. Alcoa was aware that asbestos exposure could cause lung cancer by the mid-1960s. Alcoa was also aware that even intermittent asbestos exposure could cause mesothelioma by the mid-1960s. The knowledge that Alcoa possessed was also the extent of knowledge in the medical and scientific community at that time.

It was in 1972 that experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer. In that same year, OSHA released its initial asbestos exposure standard that covered all industries on a nationwide basis. Therefore, up until 1972, there was consensus in the medical community that there was a reasonably safe level of exposure to asbestos. Mr. Bonney testified that Alcoa was fully aware of the OSHA regulations. He also testified that Alcoa's medical director, Dr. Miles Colwell, was on the OSHA advisory committee and was aware of the forthcoming OSHA regulations in 1968. Therefore, Alcoa definitely knew that asbestos exposure caused asbestos related diseases by 1968.

In conclusion, the extent of Alcoa's knowledge through the 1940's and until the early-1960's regarding asbestos was that a link existed between asbestos exposure and asbestos-related diseases. The information regarding the link was not clear on how much asbestos exposure, if any, was considered safe. Alcoa's knowledge regarding the level of asbestos exposure was clear in 1972 when OSHA passed its initial nationwide standard. However, since Alcoa's medical director was on the OSHA advisory committee and aware of the OSHA regulations in 1968, it can be said that Alcoa had actual knowledge of what were safe asbestos exposure levels in 1968. That is, in 1968, Alcoa was substantially certain that exposure to asbestos caused asbestosis.

The Plaintiff has submitted as summary judgment evidence an affidavit from Dr. Richard Cohen. He is a physician. Dr. Cohen states that he has reviewed the documents and, based on his expertise, concludes that the Defendant was actually aware of the dangers of asbestos and of the substantial certainty of injury. In a hearing conducted after the summary judgment was originally denied but before the motion to reconsider was heard, I granted a motion to strike that expert testimony. In doing so, I ruled that opinions on corporate governance and corporate knowledge were outside the expertise of a physician. I note that if I am wrong in that finding and if Dr. Cohen's opinion is admissible to prove the culpable mental state of the Defendant, then this summary judgment is wrongfully granted and should be quickly reversed on appeal.

I am aware that in both *Reed Tool v. Copelin*, 689 S.W.2d 404 (Tex. 1985) and *Rodriguez v. Naylor Industries,* 763 S.W.2d 411 (Tex. 1989), the contents of expert witness affidavits were used as the basis of the finding that fact questions existed as to whether an employer was substantially certain injury would result from unsafe conditions on a job site. These cases, and others from the Courts of Appeals, are distinguishable in that they either predate *Robinson*[5] standards on the gatekeeping function of trial courts to determine the admissibility of expert testimony or there is nothing in the opinions that indicate that such a challenge was brought. In this case, the objections were made and sustained. If the law is that subscribing employers are without the protections given by our Legislature every time an expert can be found who will sign an affidavit opining as to the mental state of a corporation, the comp bar means very, very little.

[5] *Robinson v. DuPont*, 923 SW 2d 549 (Tex. 1995)

I would like to emphasize that this ruling is limited to this record. If there is peer-reviewed literature on the subject of corporate governance, written by experts in the field of corporate governance, and if a qualified expert in that field were to offer testimony based on her/his expertise in conjunction with those studies, it could well create a fact question. No such literature was referred to in this case, and no such expert was offered.

In short, neither the affidavits offered by the Plaintiffs, the depositions offered by them, nor the documents attached to their response to the summary judgment create a fact question on the Defendant's actual knowledge of awareness of substantial certainty of injury, except as to asbestosis, which will be discussed below.

Must a Defendant know what injury their intentional conduct is inflicting to be liable?

It is important to understand that the injury and disease that the Plaintiff is suing for – mesothelioma - is a subset of the category of "asbestos related disease." The disease that the Defendant was aware that could be caused by asbestos throughout the 1950s and through the mid-1960s was asbestosis. Asbestosis is the scarring of the inside of the lungs. Asbestosis is significantly different from mesothelioma, both in the severity of its symptoms and in the amount of asbestos that must be inhaled to be a causative factor.

The fact that the Defendant did not have actual awareness of the causative link between asbestos and mesothelioma until the mid-1960s is not dispositive of the case against them for an intentional tort. Texas law apparently does not require the Defendant to know the exact injury its conduct will lead to, only that it will lead to some injury. On the other hand, language in *Welch v. Reynolds Metals Co. & Boatman*[6] indicates that knowledge of the exact injury likely to be sustained is a factor that should be considered in determining whether the intentional tort doctrine applies.

Application of the "any knowledge of any injury" doctrine can lead to absurd results. Let us suppose, for example, an employer provided asbestos containing nails to its workers, and knew that it was highly probable that some employee would get a bruised thumb as a result of using the nails. Under the "any injury" theory, the fact that some employee bruised their thumb would remove the protections of the statute in an asbestos suit brought thirty years after the bruise had healed. It makes sense that in order for a specific injury that cannot be anticipated is actionable as an exception to the comp bar, the known and anticipated injury must be of sufficient gravity that its intentional infliction is, in itself, actionable. In this hypothetical, of course, a worker could sue for intentional injury for the bruised thumb, since that is anticipated at the time. He could not sue for the injury whose causative link was unknown at the time.

The Texas Legislature made a policy decision in adopting Chapter 90 of the Texas Civil Practice and Remedies Code that asbestosis is not actionable unless it is accompanied by a numerical set of measured breathing disability. TEX. CIV. PRAC. & REM. CODE §90.003(a). Since, under our law, asbestosis is not actionable, it is difficult to determine how knowledge of

[6] No. 13-99-394-CV, 2000 Tex. App LEXIS 8659 (Tex. App.—Corpus Christi December 29, 2000, no writ) (not designated for publication).

work assignments leading to asbestosis can result in elimination of the statutory immunity from suit.

I therefore rule that actual awareness of the substantial certainty of asbestosis does not create liability against a subscribing employer whose employee contracts mesothelioma.

Does this ruling mandate dismissal of this case?

In the interests of justice, not at this time.

There is some summary judgment evidence that the Plaintiff was exposed to asbestos after the Defendant was aware of the risk of mesothelioma. The summary judgment record is sparse as to the extent of his exposure in the period after that fact became known. To the extent to which the record exists, the Plaintiff did not attempt to show the dose received solely in the post-1965 time period. Proof of dose is a factor the Plaintiff must prove in order to prove causation in accordance with the opinion of the Texas Supreme Court in *Borg Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007). Since the details of this ruling could not have been anticipated by either side, I will allow additional evidence of the level of exposure after the time the Defendant became aware of the causative link between asbestos and mesothelioma. Since this is a suit alleging intentional injury, the Plaintiff must present some evidence of corporate knowledge both of the level of exposure which could cause mesothelioma and the dose to which the Plaintiff was exposed during that time period exceeded the known level.

Ruling

The Motion to Reconsider the denial of Alcoa's Motion for summary judgment is granted. The Motion for Summary Judgment brought by Alcoa is granted as to all conduct prior to the time Alcoa became aware of the causative link between asbestos exposure and mesothelioma. The motion is denied without prejudice to consideration as to all exposures after that time. Since this was a "no evidence" motion for summary judgment, I will allow the plaintiff to supplement the record to present evidence consistent with this ruling, should the motion be set for a hearing.

Counsel for the Defendant is asked to prepare an order.

Respectfully,

MARK DAVIDSON

MD/ms