

1 position that this witness has taken?

2 MR. NASSIF: We haven't made a comparison, Your
3 Honor, of all the data we have given Mr. Carr and where it
4 would be located on this last page here to tell you if this
5 wasn't one of the samples applicable to this location and it
6 has not been covered.

7 MR. CARR: And has the witness done it.

8 MR. NASSIF: I don't know, Mr. Carr.

9 MR. CARR: You know good and well he hasn't.

10 MR. NASSIF: Mr. Carr, he knows a lot more than I
11 do.

12 THE COURT: I will allow you to make the
13 appropriate assumption as to covering the areas sufficiently
14 so we can move on because right now we are at a road block on
15 a tangent.

16 (The following proceedings were had in the hearing
17 and presence of the jury).

18 Q. Doctor, I want you to assume that the only areas of
19 contamination in the soil that were found were as I described
20 to you in the question that I read to you from Plaintiffs'
21 Exhibit 1527. Will you do that, sir?

22 A. What areas is that, now? What areas?

23 Q. The one that I read to you, Doctor?

24 A. Is that just the parking lot, sir?

1 Q. No, Doctor. There were other areas in addition to
2 the parking lot. Do you recall that, sir?

3 A. Yes, I do.

4 Q. Doctor, I would like for you to assume that those
5 areas were all the areas of contamination you found. Will
6 you assume that, sir?

7 A. I assume that.

8 Q. And in all of those areas, those areas were covered
9 up, weren't they, sir?

10 A. I don't know.

11 Q. Doctor, do you recall I read to you that they were
12 all covered up? The very least that was done was that six
13 inches of limestone put over an area?

14 A. Has that been done or is that just a proposal?

15 Q. Doctor, I am not here to answer the question,
16 Doctor. Would you just please assume these things, Doctor,
17 so that we can move on?

18 A. I assume that that was done, sir.

19 Q. Yes.

20 A. Okay.

21 Q. And that there is no contaminated area of which we
22 are aware where there was not some remedial action taken as
23 is described in this Plaintiffs' exhibit 1527?

24 A. Okay. I assume that.

1 Q. Will you assume that?

2 A. Yes.

3 Q. If you assume that is true, Doctor, then they took

4 action because somebody believed that that soil was

5 bioavailable or that TCDD in that soil was available, isn't

6 that correct, sir?

7 A. No, not necessarily, sir.

8 Q. Not necessarily, Doctor. Why would they take the

9 action unless they believed that there was some risk, Doctor?

10 A. I think it would be prudent, even though the

11 contamination might be at a low level at six inches or 12

12 inches or 18 inches below the soil, it might be very prudent

13 to have another cover over it.

14 Q. And, Doctor, why would it be prudent to do that?

15 A. Because at some time or other, the material might

16 be dug up.

17 Q. Well, Doctor, there are other methods for the TCDD

18 that is buried in the soil to get up into the atmosphere

19 other than just being dug up. You know that, don't you, sir?

20 A. I believe I know some of them at least.

21 Q. You know that it rises to the surface when it is

22 buried? You know that, don't you, sir?

23 A. No.

24 Q. You don't know the work that Doctors Freeman and

1 Schroy did in behalf of Monsanto?

2 A. Yes, I do, sir.

3 Q. How the dioxin, even though it is buried 20 inches
4 deep, comes up to the surface?

5 A. Yeah, but it does so have --

6 Q. Doctor, excuse me. You say you didn't know and now
7 you say you do know?

8 A. I read Schroy and Freeman's paper, yes.

9 Q. And do you know that there is a method of the
10 dioxin to get to the surface other than just being dug up,
11 don't you, sir?

12 A. They had only --

13 Q. Excuse me, Doctor. Do you know that or not?

14 A. -- a method.

15 Q. That there are other ways by which TCDD buried in
16 the soil can rise to the surface of the soil other than being
17 dug up?

18 A. Theoretical possibilities, sir. Yes.

19 Q. Theoretical possibilities?

20 A. Yes.

21 Q. Don't you believe that Doctor Freeman and Schroy
22 proved it, sir?

23 A. Only to a degree, sir.

24 Q. Doctor, did they prove it or not, sir?

1 A. No. To my way of evaluating their effort.

2 Q. Doctor, you are saying that they did?

3 A. There is nothing absolute about that, sir.

4 Q. Doctor, you are saying they didn't prove it, is

5 that right?

6 A. They didn't prove it conclusively, no, sir.

7 Q. Doctor, did they have an experiment that they had

8 published and they said -- no one has yet contradicted it,

9 sir -- that it does rise to the surface?

10 A. They even --

11 Q. Are you aware of that, Doctor?

12 A. Yes, I am aware of it. I am aware of that paper.

13 Q. Have you done any work yourself, sir?

14 A. No, I haven't.

15 Q. To disprove what they said was a proven fact

16 according to their tests that they performed?

17 A. I have not done that kind of work, sir.

18 Q. Doctor, they did show a graph, did they not, sir,

19 that showed the TCDD moving upward?

20 A. I believe they have showed it moving. I am not

21 sure whether it was upward or not, sir.

22 Q. Aren't you aware of the fact that they showed it

23 moves downward and upward, both directions from where it was

24 buried?

1 A. It may under certain circumstances.

2 Q. That isn't what I asked you. Aren't you aware of
3 the fact this they proved it, sir?

4 A. No, sir. They haven't proved it to my
5 satisfaction, sir.

6 Q. I would like for you to assume, however, whether it
7 is to your satisfaction or not that it has been proven. That
8 TCDD will vaporize and volatilize and rise to the surface.
9 Will you assume that please, sir?

10 A. Only if you ask me.

11 Q. What do you think I am doing, Doctor?

12 A. Asking me.

13 Q. So will you assume it, sir?

14 A. I will assume it, sir.

15 Q. And, Doctor, one reason to cover the soil, sir, is
16 to prevent the vaporization, the volatilization of the TCDD
17 from rising into the atmosphere, isn't that correct, sir?

18 A. No, sir. It is not so, sir. Absolutely not.

19 Q. Doctor, why do you think they put the cap of clay
20 over the TCDD contaminated soil and the asphalt and the
21 concrete?

22 A. So that the soil beneath would not be available.

23 Q. Doctor, the TCDD is what they are concerned about,
24 isn't it, sir?

1 A. Correct.

2 Q. Not the soil per se?

3 A. Whatever is in the soil and TCDD may be found 18
4 inches or 20 inches. What they wanted to make sure is that
5 nobody got to it.

6 Q. Doctor, now -- I am not even asking you that, am I,
7 Doctor?

8 A. Yes, you are.

9 Q. Doctor, do you know that the Monsanto Task Force
10 Group that was concerned with Sturgeon considered that the
11 only way of really disposing of the contamination at Sturgeon
12 was to put asphalt over the contaminated areas?

13 MR. HEINEMAN: I object, Your Honor. May counsel
14 approach the bench?

15 THE COURT: Yes, you may.

16 (Bench conference had out of the hearing of the
17 jury.)

18 MR. HEINEMAN: My recollection of the document
19 which Mr. Carr is referring to is that the document said that
20 they should do that perhaps to deal with the smell. I have
21 been informed by my boss here that the document title is Odor
22 At Sturgeon. At any rate, my recollection is is that the
23 exhibit that Mr. Carr is referring to proposes that you deal
24 with odor, not deal with TCDD contamination. I object to the

1 form of the question as being misleading to the witness and
2 not correctly representing the facts that have been
3 introduced in the case.

4 MR. CARR: Your Honor, I will agree that the topic
5 was the odor and that was what they considered a solution at
6 least in part to the problem called odor but the document
7 itself dealt with more than just odor. It wasn't limited
8 just to odor. It talked about the Sturgeon problem. In
9 addition, of course, we have the OH remedy which counsel --
10 Mr. Heineman wasn't here but Mr. Musgrave proved extensively
11 as to how they put this impermeable cap of clay over dioxin
12 and there will be other questions that I will get into
13 similar where they have discussed problems in other areas of
14 capping them with asphalt.

15 THE COURT: Objection is overruled. Let's take a
16 break at this time.

17 (The following proceedings were had in the hearing
18 and presence of the jury).

19 THE COURT: Ladies and gentlemen, we will take a
20 short recess at this time and then resume testimony. The
21 admonishments that I gave you earlier will apply during this
22 break also. Court is in recess.

23 COURT RECESSED:

24 (The following proceedings were had in the hearing

1 and presence of the jury)

2 RAYMOND SUSKIND

3 having resumed the witness stand, being previously sworn,
4 testified further as follows:

5 CROSS EXAMINATION

6 By

7 MR. REX CARR.

8 Q. Doctor Suskind, I misstated to you the purpose of
9 the contemplated paving over Sturgeon or part of Sturgeon
10 with asphalt and I would like to correct any misapprehension
11 there might be in your mind. The stated purpose by the
12 Monsanto representatives for the, at least in this exhibit
13 putting the asphalt over the contaminated area in Sturgeon
14 was for the purpose of doing something about the odor problem
15 connected with the spillage and I would like for you to
16 disregard that I stated to you it was for the purpose of
17 containing the TCDD because they did not have that in mind at
18 least at the time, all right?

19 A. Yes, sir.

20 Q. But you do know, Doctor, do you not, in regard to
21 steps that have been proposed for contaminated sites such as
22 Times Beach or Minker Stout in Missouri, that paving over the
23 contaminated areas are possible solutions that have been
24 recommended by some scientists?

1 A. They have been recommended by some persons, yes.

2 Q. All right. And, Doctor, regardless of your views
3 as to whether or not you believe Schroy and Freeman's work
4 has proven the volatility or the vaporization of TCDD from
5 the soil, you are aware of the fact that that is Monsanto's
6 position, are you not, sir?

7 A. No, I am not aware of that, sir.

8 Q. Well, that is what their scientists have said, sir,
9 in this courtroom under oath will happen to the TCDD. Will
10 you accept that, sir?

11 A. No, not really.

12 Q. Doctor, I am asking you to accept that because that
13 is what they have testified to. Will you accept that, sir?

14 A. I can only accept that they testified that.

15 Q. Yes. That is what I am asking you to do.

16 A. All right.

17 Q. Now, Doctor, you have a difference of opinion with
18 Monsanto, I take it, as to whether or not the workers at the
19 Nitro Plant were or were not exposed to TCDD by reason of
20 where they worked in the plant or where they walked through
21 the plant or what they did in the plant or various areas of
22 the plant, is that correct, sir?

23 A. Our view of --

24 Q. Excuse me, Doctor. Could you answer that

1 question? I am asking you whether or not you had a
2 difference of opinion with Monsanto as to what constitutes
3 exposure to a worker by reason of them being in a part of the
4 plant or being in an area or walking through the plant. Do
5 you differ, sir?

6 A. Yes, we have some differences, yes.

7 Q. And at the time you did your studies, sir, you were
8 given information by Monsanto as to the persons that they
9 considered to be exposed, were you not, sir?

10 A. Yes, sir.

11 Q. And you were given classifications of people that
12 were exposed intermittently by reason of the fact that they
13 had plant-wide responsibilities, did you not, sir? You were
14 given such a list?

15 A. Yes, we were given such a list.

16 Q. And you didn't go by that list in deciding who
17 would be an exposed group or unexposed group, did you, sir?

18 A. That is true, sir.

19 Q. Yes. And, Doctor, back to the question that
20 started us down this path. At sometime ago, the libido and
21 sexual impotence and sexual problems that these men had
22 existed in both the exposed and the unexposed groups, did
23 they not, sir?

24 A. I believe so, yes.

1 Q. And, Doctor, do you believe that the fact that it
2 occurs in a so-called unexposed person might suggest or
3 indicate that he was exposed if you have found complaints of
4 loss of libido to exist in a third or better of the so-called
5 exposed population?

6 A. Well, I will answer your first question by saying
7 no, we don't think that the fact that they were found in the
8 unexposed had anything to do with exposure and I think we
9 stated in our paper, sir.

10 Q. All right, Doctor. Then if you found that loss of
11 libido was a relatively common problem occurring in, say, 30
12 percent of your exposed population regardless of their age,
13 you wouldn't take that to be, then, as a pretty strong
14 indication that dioxin affects the libido?

15 A. No, sir.

16 Q. You would not?

17 A. No, sir. Not in 1979, sir.

18 Q. And, Doctor, would you -- I take it then that you
19 wouldn't say that the libido, loss of libido occurring in the
20 so-called unexposed population would not support a view that
21 the unexposed population were, in fact, exposed? Is that
22 also correct?

23 A. Absolutely not. We would not agree to that.

24 Q. Doctor, back to the Nestmann problem. The Nestmann

1 exhibit that we were discussing, on this particular one
2 Haning, as well as -- Haning was found by Doctor Nestmann to
3 have a moderately severe psychoneurosis, was he not, sir? Do
4 you have the Exhibit 1779 in front of you, Doctor?

5 A. Yes, I do.

6 Q. And, Doctor, I think you have testified earlier
7 that you were aware that these reports by Doctor Nestmann
8 were given to the compensation commission?

9 A. I believe so, yes.

10 Q. Doctor, handing you Plaintiffs' Exhibit 1780 and
11 ask if that represents to you that that is a portion of the
12 compensation commission transcript dealing with Harold Young
13 and, Your Honor, I would like to offer that exhibit into
14 evidence at this time.

15 THE COURT: Any objections?

16 MR. HEINEMAN: One moment please, Your Honor.

17 THE COURT: Sure.

18 MR. HEINEMAN: May counsel approach the bench, Your
19 Honor?

20 THE COURT: Sure.

21 (Bench conference had out of the hearing of the
22 jury.)

23 MR. HEINEMAN: This exhibit, which is what number?

24 THE COURT: 1780.

1 MR. HEINEMAN: Your Honor, I thought Mr. Carr said
2 it was a transcript. What I have is definitely not a
3 transcript.

4 MR. CARR: Right. I agree. It is part of the
5 record. I misspoke. It is part of the compensation record.

6 MR. HEINEMAN: All right. Your Honor, at this
7 point we would object to their document as being hearsay and
8 as having no authentication or identification by this
9 witness, no foundation has been laid by the witness in court
10 with respect to allowing it to be admitted into evidence. It
11 is not a document created by -- well, I have said what I need
12 to say.

13 MR. CARR: Your Honor, the status of this record is
14 the same as many other Monsanto records that we have
15 heretofore offered. These are documents that were produced
16 to us by Monsanto from their files dealing with the subject
17 of dioxin and dealing with these people. There has been a
18 considerable issue made of the compensation commission
19 hearing and records thereof and these documents are
20 authenticated and Monsanto has represented to us that they
21 are authentic.

22 THE COURT: I think they probably fall under that
23 status. I think also since it is part of the record of an
24 official tribunal, I can take judicial notice of it, too, and

1 I would do that also since I don't think there is any dispute
2 that it is part of the record of the Workmen's Compensation
3 Board of West Virginia at the time, the way it was
4 constituted in the '50s. On both things I will deny it.

5 I think you should correct for the jury that this
6 part of the record was not a transcript.

7 MR. HEINEMAN: Am I, in terms of the future rulings
8 of the court, am I to understand that anything that is an
9 official record of the Workers Compensation Commission will
10 be admitted under judicial notice of this court?

11 THE COURT: Assuming that it is relevant, it could
12 be.

13 MR. HEINEMAN: All right.

14 THE COURT: I would think so, assuming that it is
15 relevant.

16 MR. HEINEMAN: All right.

17 THE COURT: Now, you know, I mean, as the question
18 of relevancy or any other objection that I can't think of
19 right now. If it is raised then, I will consider it but I
20 would think as a general rule, that is true.

21 MR. HEINEMAN: But the record of the court or the
22 commission would be judicially noticed. All right.

23 (The following proceedings were had in the hearing
24 and presence of the jury).

1 Q. Doctor, I described this as a transcript. In fact
2 it is not a transcript. It is a portion of the records on
3 file with the West Virginia Industrial Commission, is it not,
4 sir, and not a transcript of testimony? At least the part
5 that we have here contains no testimony, isn't that correct,
6 sir?

7 A. Well, all I see are letters to the commission, sir,
8 and I see a cover sheet.

9 Q. My question, Doctor, it does not contain any
10 testimony, does it, sir?

11 A. But the cover sheet indicates, so --

12 Q. It is not a transcript of testimony, is it, sir?

13 A. All but the first sheet, sir.

14 Q. The first sheet is simply an index, Doctor. It is
15 not a transcript, isn't that correct, sir?

16 A. But I am not sure what it is an index of, sir.

17 Q. All right, Doctor. And also show you Plaintiffs'
18 Exhibit 1780A and ask you to confirm that that is a part of
19 1780 and it has on the top of it Employer Exhibit Number 1
20 and it is a report signed by Doctor Nestmann, is it not, sir?

21 A. Yes, it is a report signed by Doctor Nestmann.

22 MR. CARR: Your Honor, I would like to pass that
23 report to the jurors, if I might.

24 A. Sir, is there a date?

1 THE COURT: Go ahead, Mr. Carr.
2 (Plaintiffs' Exhibit 1780A is passed to the jury).
3 Q. Doctor, the date you can see there is July 6, 1955?
4 A. Thank you, sir.
5 Q. Doctor, this particular exhibit has a number of
6 statements about Harold Young, does it not?
7 A. Which statement?
8 Q. The 1780A that I have passed to you, sir?
9 A. 1780A is the findings of Doctor Nestmann, sir, yes.
10 Q. And could I have a 1780B. Doctor, 1780B is a
11 blowup of the second page or signature page of the Nestmann
12 report, is it not, sir?
13 A. Yes, I believe it is.
14 MR. CARR: Your Honor, I would offer 1780B into
15 evidence at this time.
16 THE COURT: All right.
17 MR. HEINEMAN: It is already admitted.
18 MR. CARR: The blowup has not been, counsel.
19 THE COURT: It is part of 1780.
20 MR. HEINEMAN: Well, may the record we have made in
21 connection with 1780 apply?
22 THE COURT: Sure.
23 MR. HEINEMAN: To 1780A and B as well, Your Honor?
24 THE COURT: Right. It so applies.

1 Q. Doctor, is there in that Nestmann report any
2 diagnosis of Doctor Nestmann that Mr. Young has a case of
3 severe psychoneurosis?

4 A. No. But there is no diagnosis or impression here,
5 sir.

6 Q. Doctor, could you answer my question, please, sir?

7 A. No.

8 Q. And, Doctor, this particular sheet is not on Doctor
9 Nestmann's stationary, is it? It appears to be progress
10 notes, something like you would use in a hospital record,
11 sir?

12 A. I can't say from the way this is.

13 Q. Doctor, you see there is no letterhead, do you not,
14 sir?

15 A. Yes. But I can't assume that it is hospital
16 records, sir.

17 Q. May I just give the question to you one more time
18 Doctor. It is not, it does not have Doctor Nestmann's
19 letterhead on it, does it, sir?

20 A. I don't see Doctor Nestmann's letterhead, sir.

21 Q. It has the words progress notes and then over to
22 the left it has got hospital number, does it not, sir, and
23 then room or ward? Do you see that, sir, and then a place
24 for the doctor?

1 A. It is illegible so I can't really verify that.

2 Q. You can't make out the abbreviation hospital number
3 and the doctor and the bed and the room or ward?

4 A. No, I can't but I will accept that, sir.

5 Q. Thank you, Doctor. And, Doctor, do you recall I
6 asked you, suggested to you I think it was yesterday that
7 perhaps the reports that were given to the Workmen's Comp
8 Commission had been edited so as to remove certain diagnoses
9 concluding or referring to the psychoneurosis and you said
10 no, that could not be. Do you recall that?

11 A. I believe I recall that vividly, sir.

12 Q. Yes, you do, Doctor. I hand you now what has been
13 marked as Plaintiffs' Exhibit 1781 and I will represent to
14 you, sir, that these are hospital records furnished to us by
15 Monsanto relating to Harold Young as per our request a couple
16 of weeks ago and, Your Honor, I will offer 1781 into evidence
17 in just a minute.

18 THE COURT: Any objection?

19 MR. HEINEMAN: One moment, Your Honor.

20 THE COURT: Sure. Go ahead.

21 MR. HEINEMAN: Would counsel approach the bench,
22 please?

23 THE COURT: Sure.

24 (Bench conference had out of the hearing of the

1 jury.)

2 MR. HEINEMAN: Your Honor, we will object to this
3 on the same grounds that we have objected before to these
4 outside medical record. A, they are hearsay. B, there has
5 been no authentication, no identification, therefore, no
6 foundation.

7 THE COURT: I will incorporate your argument on
8 both sides and the ruling is the same. They are admitted
9 over objection. I will incorporate your arguments and yours
10 at this time.

11 MR. CARR: Thank you.

12 (The following proceedings were had in the hearing
13 and presence of the jury).

14 Q. Doctor, I will now hand you what has been marked
15 Plaintiffs' Exhibit 1781 and ask you to confirm that this is
16 a copy of the progress notes signed by Doctor Nestmann that
17 is in the exhibit 1780 that I previously had given you?
18 1781, sir. We are now looking at 1781, sir.

19 MR. HEINEMAN: What is the number of the new
20 exhibit?

21 MR. CARR: 1781A which is the progress notes signed
22 by Doctor Nestmann that is part of exhibit 1781 which are the
23 hospital records relating to Harold Young and, Your Honor, I
24 would like to pass that report of Doctor Nestmann's to the

1 jury as well.

2 THE COURT: Fine.

3 MR. CARR: Have I given the Court a copy of that?

4 THE COURT: No, I don't have it.

5 MR. HEINEMAN: Has the witness identified it?

6 (Plaintiffs' Exhibit 1781A is passed to the jury).

7 Q. Doctor, the exhibit I gave you is part of the
8 hospital records, is it not, sir? These two, Doctor, are the
9 same, are they not, sir?

10 A. I have to assume that is part of the hospital
11 record only because there is a room and ward number, bed and
12 doctor.

13 Q. No, Doctor, what I want you to do is to confirm
14 that 1781A is an exact duplicate of the record of Doctor
15 Nestmann's in 1781, that is the hospital records. One is
16 just a copy of the other. That is what I want you to do,
17 sir.

18 A. Okay.

19 MR. HEINEMAN: Do you have a copy of 1781A?

20 MR. CARR: 1781A, counsel, is this here.

21 Q. Doctor, is 1781A that has been passed to the jury
22 is part of the hospital records 1780, is it not, sir? 1781,
23 rather?

24 A. It appears to be.

1 Q. Well, Doctor, it is exactly. One is a copy of the
2 other, is it not, sir? 1781 is an exact copy, photocopy,
3 even the tear in the page is the same. One is a photocopy of
4 the other, isn't that correct, sir?

5 A. Yes, it is.

6 Q. And signed by Doctor Nestmann, is it not, sir?

7 A. I believe so.

8 Q. Doctor, 1781B is a blowup of the second page of
9 that hospital report signed by Doctor Nestmann, is it not,
10 sir?

11 A. Yes, I believe it is.

12 MR. CARR: I offer 1781B into evidence, if it please
13 the Court.

14 MR. HEINEMAN: Can we have the same record, Your
15 Honor?

16 THE COURT: Sure.

17 MR. HEINEMAN: With respect to 1781.

18 THE COURT: I will incorporate all arguments. It
19 is admitted over objection.

20 Q. Doctor, the hospital report is word for word -- the
21 two exhibits bearing Doctor Nestmann's signature are exactly
22 the same word for word with the exception of one line, I am
23 sorry, three lines referring to the Carnow medical index and
24 the impression of severe psychoneurosis, isn't that correct,

1 sir?

2 A. It does appear that way, sir.

3 Q. And, Doctor, the progress notes from this hospital
4 report that was sent to the commission or given to the
5 compensation commission does not contain the impression of
6 severe psychoneurosis for Harold Young, does it, sir?

7 A. I don't know, sir.

8 Q. Look at it, sir, if you would, 1780, sir?

9 A. Yes, sir. I have it right here.

10 Q. It does not contain, does it, sir, the diagnosis of
11 severe psychoneurosis for Harold Young?

12 A. No. But I don't know whether this was sent to the
13 commission.

14 Q. Doctor, you see that marked Employers Exhibit 1?
15 It is part of the record that was sent to the commission and
16 that is in the commission's record. You do see that, do you
17 not, sir?

18 A. No, I don't. Where does it say that?

19 Q. Doctor, if you would look at the exhibits that have
20 been given you, this is where it says it, sir.

21 A. No, sir. It doesn't say that, sir.

22 Q. It doesn't say severe psychoneurosis?

23 A. No, it doesn't say that this is part of the
24 commission's record. This does not refer to that record,

1 sir. This is only an index and it has somebody else's name
2 on it.

3 Q. Doctor, this has been given to us and the Court has
4 admitted it into evidence as part of the commission's
5 record. Would you accept that as correct and true, sir?

6 A. If that is the case, I accept it but --

7 Q. And, Doctor, this particular report is listed as
8 Employers Exhibit Number 1 in these commission records, is it
9 not, sir?

10 A. There is an item which reads Employers Exhibit
11 Number 1, yes, sir.

12 Q. And that item is the progress notes dealing with
13 Harold Young, signed by Doctor Nestmann, is it not, sir?

14 A. It appears to be that, sir.

15 Q. And, Doctor, it is word for word identical to the
16 hospital record, progress notes, with the exception that the
17 impression of severe psychoneurosis and the sentence
18 preceding that is omitted from the report given to the
19 commission, isn't that correct, sir?

20 A. Well, all I can say is that it doesn't contain
21 those three lines, sir.

22 Q. Doctor, I would like for you to answer my question
23 that the two reports are word for word identical with the
24 exception that the hospital notes, Exhibits 1781 and 1781A

1 include the severe psychoneurosis impression of Doctor
2 Nestmann, isn't that correct, sir?

3 A. That is correct.

4 Q. Doctor, are you aware of the fact, sir, that this
5 is considered editing?

6 A. No, sir. It doesn't have to be that at all.

7 Q. It doesn't have to be that at all?

8 A. No, not at all, sir.

9 Q. But it is, isn't it?

10 A. No, sir.

11 Q. Doctor, did Doctor Nestmann arrive at an impression
12 as part of the hospital records that this man was suffering
13 from in his impression severe psychoneurosis?

14 A. Yes.

15 Q. The man was hospitalized, was he not, sir, by
16 Doctor O'Dell?

17 A. I don't know who he was hospitalized by, sir.

18 Q. If you look at the front of the exhibit, it will
19 tell you. His doctor is Doctor O'Dell and he was employed by
20 Monsanto. That pay is going to be by Monsanto. Private
21 pay. Doesn't it say that, sir?

22 A. I don't see what you are referring to, sir. I see
23 O'Dell's signature July 27, 1955, but I don't see the other.

24 Q. Doctor, would you look at the exhibit that is the

1 hospital record Herbert J. Thomas's exhibit 1781, sir?

2 A. I have it, sir.

3 Q. Now, do you see, sir, that it is the Herbert J.
4 Thomas Memorial Hospital record?

5 A. I do.

6 Q. And do you see that the admitting doctor is Doctor
7 O'Dell?

8 A. Yes.

9 Q. And do you see that it is the employer Monsanto?

10 A. Yes, I do.

11 Q. And do you see that the account will be billed to
12 Monsanto, private pay?

13 A. Yes, I do, sir.

14 Q. And, Doctor, the next two pages of those hospital
15 records contain, does it not, sir, the Nestmann report?

16 A. Yes, sir.

17 Q. And, Doctor, so that you can see that they are in
18 chronological order, Monsanto has put microfilm page numbers
19 or page numbers on this exhibit and this report is in the
20 exact chronological order, is it not, sir, on these hospital
21 records?

22 A. I believe this is just one hospital record, sir.
23 One single record, that is correct.

24 Q. Doctor, my question to you is, you can examine the

1 numbers on Exhibit 1781 and you will see that they are
2 numerically consistent, one follows the other, they are all
3 part of one record, are they not, sir? This is the way it
4 was given to us by Monsanto, Doctor Suskind. Do you see
5 that, sir?

6 A. Yes, I do, sir.

7 Q. And, Doctor, this report which contained -- when
8 the man was hospitalized for his various problems and worked
9 up and examined by Doctor O'Dell, Doctor O'Dell caused to be
10 included in that record these progress notes, did he not,
11 sir?

12 A. I believe he wrote progress notes, yes.

13 Q. No, he wrote at the bottom of page two, sir, copy
14 for chart, Richard O'Dell, M.D., isn't that right, sir? On
15 the page number 9566145, sir?

16 A. Correct.

17 Q. And he caused Doctor Nestmann's report to be
18 incorporated in this hospital chart, did he not, sir?

19 A. Yes, I believe so.

20 Q. And there is no question that what he would have
21 known and Doctor Nestmann would have known, that the hospital
22 progress reports have been part of the hospital records in
23 July of '55 contain Doctor Nestmann's impression of severe
24 psychoneurosis, isn't that correct, sir?

1 A. I assume so.

2 Q. Doctor, I don't want you to assume so. I want you
3 to look at the record and be sure that Doctor O'Dell who put
4 his signature on this chart as well as Doctor Nestmann would
5 have been aware of the diagnosis or the impression of Doctor
6 Nestmann, that is severe psychoneurosis on the part of Harold
7 Young. Doctor, you are now looking at the report that was
8 given to the commission. My question to you --

9 A. I am comparing them, sir. Yes.

10 Q. Didn't you already agree that they were the same
11 word for word, sir, except for the impression that was left
12 out?

13 A. No, sir. I did not. This is a copy for chart
14 signed by Richard O'Dell and is not in the report allegedly
15 submitted to the commission and there may be reasons for
16 that.

17 Q. Doctor, it wasn't allegedly submitted to the
18 commission. These records including the compensation
19 commission reports are reports that were given us by your
20 employer, Monsanto. They have been admitted into the record
21 of the evidence of this court. The Court has taken judicial
22 notice of the compensation commission. It is not alleged,
23 Doctor.

24 MR. HEINEMAN: Objection to the statement that the

1 witness is employed by Monsanto. I think Mr. Carr knows
2 better than that.

3 THE COURT: Objection is overruled.

4 Q. Doctor, the records in the commission that the
5 commission had of Doctor Nestmann's report, Employers Exhibit
6 Number 1, does not include the diagnosis of severe
7 psychoneurosis, does it, sir?

8 A. It does not and there could be reasons.

9 MR. CARR: Your Honor, would you instruct the
10 witness to quit responding -- I know there could be reasons
11 but quit volunteering things of that sort, Your Honor.

12 THE COURT: Doctor, again, you were offering
13 comments that are not called for within the scope of the
14 question that has been asked of you. I have asked you a
15 number of times today and I am asking you again please
16 refrain from doing that. Just answer the question that is
17 asked of you. No more, no less.

18 Q. And, Doctor, so that it is crystal clear, there is
19 no question that what Doctor Nestmann said, his impression of
20 Harold Young is that he has got a severe psychoneurosis based
21 upon his Cornell Medical Index Health Questionnaire and that
22 this isn't a part of the record that was in existence in July
23 of 1955, isn't that correct, sir?

24 A. In Exhibit 1781 and 1781A, yes, sir.

1 Q. Isn't that correct, sir?

2 A. It is in 1781 and 1781A, sir.

3 Q. And, Doctor, it was in existence prior to the time

4 of the compensation commission hearing, was it not, sir?

5 A. I don't know that, sir.

6 Q. You don't know that, sir?

7 A. No.

8 Q. Do you see the same date, Doctor, on the exhibits?

9 And, Doctor, do you recall that you testified before the

10 compensation commission in 1956, sir?

11 A. I recall that, sir.

12 Q. And if you will look at the state compensation

13 commission page preceding Doctor Nestmann's report or it is

14 on the very same page that Doctor Nestmann's report starts,

15 it bears a date there of the 20th day of July, 1956, sir?

16 A. I am not sure I am following you, sir. What

17 exhibit?

18 Q. 1781A, sir. 1780A, I am sorry.

19 A. May I see it, sir?

20 Q. Right there, Doctor. July of 1956?

21 A. Yes.

22 Q. There is no question but what Doctor Nestmann's

23 report, that the man has severe psychoneurosis, was in

24 existence prior to July of 1956, prior to November of 1956,

1 isn't that correct, sir?

2 A. Yes. Doctor Nestmann's report in 1955, I see.

3 Q. And, Doctor, the report that was in existence in
4 1955 as part of the hospital records was edited, was it not,
5 sir?

6 A. No, sir.

7 Q. Doctor, what do you consider editing means? Let me
8 answer it for you, Doctor. Editing is changing?

9 A. Well, you ask me a question and let me answer it.
10 Would you like me to answer your question, sir?

11 MR. CARR: Your Honor, would you direct the witness
12 to --

13 A. Well, he asked me a question.

14 MR. HEINEMAN: Objection. He asked him a question.

15 THE COURT: And then he modified it and he has the
16 right to do so. Objection is overruled.

17 Q. Okay.

18 THE COURT: Wait until the question is fully asked
19 of you and then answer it, please.

20 Q. Doctor, editing means change, doesn't it, sir?

21 A. Not necessarily.

22 Q. Well, what else does it mean?

23 A. It means looking through a report and making sure
24 that the report is accurate. The report is accurate

1 grammatically, it is accurate factually, it is accurate in
2 this instance in the way of impressions or diagnoses. There
3 are a variety of things that in a medical report are
4 considered editing.

5 Q. Doctor, you do consider, then, that this report was
6 changed, was it not, sir?

7 A. No, sir.

8 Q. Doctor, is the report that was in existence in 1955
9 by Doctor Nestmann, did it contain an impression severe
10 psychoneurosis?

11 A. No. But that doesn't mean that it was edited.

12 Q. It did contain that, did it not, sir?

13 A. It might have been inserted later, sir.

14 Q. Doctor, excuse me. How could it be inserted
15 later? It is in the hospital records that came in in July of
16 55, sir.

17 A. Okay.

18 Q. But that is not an insertion later, is it, sir?
19 Excuse me, Doctor. That is not an insertion later, is it,
20 sir?

21 A. It could be. It could very well be.

22 Q. Doctor, this is in a report that is part of the
23 hospital records dated July of 1955, isn't that correct, sir?

24 A. Yes, sir. We have --

1 Q. And, Doctor, that preceded the report that was
2 given to the commission by a year at least, did it not, sir?
3 It was earlier than the report given to the commission,
4 wasn't it, sir?

5 A. I don't know when this report was given to the
6 commission, sir.

7 Q. Doctor, I have given you the date. The date of the
8 hearing was November of '56. There is a date appears on the
9 same page of July of '56. That is a year before the hospital
10 record was made, is it not?

11 A. Yes.

12 MR. HEINEMAN: Your Honor, may counsel approach the
13 bench?

14 THE COURT: Yes, you may.

15 (Bench conference had out of the hearing of the
16 jury.)

17 MR. HEINEMAN: Your Honor, as Mr. Carr knows, the
18 Workmen's Compensation Commission hearing went on for a very
19 long period of time. To just allege to this witness that the
20 only hearing was November of '56 when this witness testified
21 is patently false.

22 MR. CARR: I am not suggesting that is the case.

23 MR. HEINEMAN: That is the hearing date that you
24 gave him.

1 MR. CARR: It is a side issue. It has nothing to do
2 with the question. The question is there is a report in
3 existence of July of '55 and this report came into existence
4 July of 1955 and that is the date the same exhibit was given
5 to the commission and bears the same date. All of it.

6 MR. HEINEMAN: You are putting them in a
7 chronological sequence which is not borne out, Mr. Carr. You
8 are saying that it has to be before because the hearing was
9 in November. There were hearings for three years on this, on
10 these workmen compensation matters in Nitro, West Virginia.

11 MR. CARR: The commission couldn't very well have
12 been prior to July of '55, could it, counsel?

13 MR. HEINEMAN: I don't know exactly when they
14 started.

15 MR. CARR: This particular hearing could not have
16 been in existence prior to July of '55. There is no way.
17 There could have been a hearing that predated July of '55
18 with regard to this exhibit.

19 THE COURT: Objection is overruled. Let's
20 proceed.

21 MR. HEINEMAN: Your Honor, further, Mr. Carr has
22 suggested that this document, 1781, is in chronological order
23 and I don't think it is.

24 MR. CARR: It is in the order it was given to me by

1 Monsanto.

2 MR. HEINEMAN: That isn't the point, Your Honor.
3 He made a representation that it was in chronological order
4 and, therefore, these documents necessarily followed each
5 other in a particular sequence. I don't think that is
6 accurate. It covers all kinds of dates.

7 MR. CARR: So what?

8 MR. HEINEMAN: You are basing a premise on
9 sequence.

10 THE COURT: Let's go ahead. Objection is
11 overruled.

12 (The following proceedings were had in the hearing
13 and presence of the jury).

14 Q. Doctor, the report that the commission has in its
15 file is changed from the report that Doctor Nestmann created
16 in July of '55, isn't it, sir?

17 A. No, sir.

18 Q. Look at the two reports again, Doctor.

19 A. It is different but I don't think that one can say
20 it was changed. This might have been submitted to them not
21 in '56, it might have been submitted to them in '55 when the
22 patient was being discharged and I don't know that the
23 Cornell Medical Index which is recorded in the hospital
24 record, the Cornell Medical Index Test was not done after his

1 hospitalization or after this was actually submitted. That
2 is a real possibility. That is a real possibility that the
3 Cornell Medical Index Test was may be done in Doctor
4 Nestmann's office. That is a possibility and he then added a
5 real possibility that he simply added this man was asked to
6 fill out a Cornell Medical Index questionnaire and this shows
7 evidence of psychoneurosis. I don't know from this record
8 whether it was done in the hospital or after the man was
9 discharged and, therefore, I cannot say that this record was
10 changed. It simply doesn't contain that statement.

11 Q. Doctor, when was the man discharged? Let me help
12 you, Doctor. On the first page he is discharged on July 27,
13 1955. The bottom of the page, Doctor, of the 1781?

14 A. July 27, 1955, yes, sir.

15 Q. And when was he admitted to the hospital, Doctor?

16 A. I assume that --

17 Q. It is also on the cover page, Doctor. July 22,
18 1955?

19 A. Admitted?

20 Q. Yes, Doctor.

21 A. Well, then how can this report be July 6?

22 Q. Doctor, could you answer my question? It shows July
23 22, 1955, does it not, sir?

24 A. Yeah. Which differs from the report.

1 MR. CARR: Your Honor, would you direct the witness
2 to answer my question?

3 THE COURT: Doctor. Again --

4 Q. Okay. Sorry.

5 THE COURT: Remember what I said before. Confine
6 your answers to the questions, Doctor.

7 Q. And, Doctor --

8 MR. HEINEMAN: Objection. May counsel approach the
9 bench?

10 THE COURT: Yes, you may.

11 (Bench conference had out of the hearing of the
12 jury.)

13 MR. HEINEMAN: Your Honor, this is what I am
14 talking about in terms of this sequence business that Mr.
15 Carr has alleged. The witness has laid eyes on something
16 that I didn't even see. The hospital record shows he was
17 admitted 16 days after this report.

18 MR. CARR: Exactly right, counselor. We have
19 already established that Doctor O'Dell had it made part of
20 his chart. It said so. If you turn the page, counsel, you
21 will see that. We have already established that Doctor
22 O'Dell --

23 MR. HEINEMAN: That has nothing to do with it.

24 MR. CARR: That is what you think.

1 THE COURT: Objection is overruled.

2 (The following proceedings were had in the hearing
3 and presence of the jury).

4 Q. Doctor, the man was admitted on July 22 and
5 discharged on July 27, was he not, sir?

6 A. That is what the head sheet of the Thomas Memorial
7 Hospital indicates, sir.

8 Q. And Doctor Nestmann's report was made on July 6,
9 1955, was it not, sir?

10 A. That is correct.

11 Q. Prior to the time the man entered the hospital on
12 that particular time, isn't that correct, sir? July 6 is
13 before he was admitted to the hospital on July 22, isn't that
14 correct, sir?

15 A. That is correct, sir.

16 Q. And, Doctor, the report of Doctor Nestmann was
17 written by Doctor O'Dell at the bottom. It says copy for
18 chart, isn't that correct, sir? Richard O'Dell, M.D.?

19 A. That is correct.

20 Q. And, Doctor, we have already established what
21 Doctor O'Dell did. He had Doctor Nestmann's report and he
22 put it in the hospital record as part of Harold Young's
23 chart, isn't that correct, sir?

24 A. That is what Doctor O'Dell did, sir?

1 Q. That is correct, sir, is it not, sir?

2 A. Yes.

3 Q. All right. Now, Doctor, that was in existence,
4 therefore, in July of '55, was it not, sir, with the
5 diagnosis on it psychoneurosis, severe psychoneurosis?

6 A. I am actually confused, sir, about the sequence.

7 Q. Doctor, this report was in existence in July of
8 1955 bearing the diagnosis severe psychoneurosis, was it not,
9 sir?

10 A. Yes, it was.

11 Q. And, Doctor, the document given to the commission
12 and as part of this record, sir, does not contain that
13 diagnosis, does it, sir?

14 A. It doesn't contain that particular diagnosis.

15 Q. It is changed or different from the diagnosis that
16 was made in July of '55, is it not, sir?

17 A. No. No, sir.

18 Q. Are you reading the same report, Doctor, that I am
19 reading?

20 A. Yes. I am reading 1780A.

21 Q. Does the document that is in the commission record,
22 does it include the diagnosis of severe psychoneurosis?

23 A. It doesn't include any diagnosis, sir.

24 Q. Doctor, does it include the diagnosis of severe

1 psychoneurosis?

2 A. No, it does not.

3 Q. It is different from the July of 1955 report that
4 is part of the hospital records, is it not, sir?

5 A. It is.

6 Q. And, Doctor, is a change -- when one edits
7 something, does one change something?

8 A. If you are asking about a general statement --

9 Q. Yes, Doctor, when one edits something, does one
10 make it different than what it was?

11 A. Might.

12 Q. And, Doctor, the report that was given to the
13 commission is changed from the report that was in the
14 hospital record?

15 A. No, sir. It is different. Not changed.

16 Q. Doctor, does it contain the diagnosis, that is,
17 severe psychoneurosis?

18 MR. HEINEMAN: Objection. Asked and answered.

19 THE COURT: Objection is overruled.

20 A. There is no diagnosis on that chart, sir. The
21 diagnosis is not there, sir.

22 Q. The question I have asked you, does it contain the
23 diagnosis of severe psychoneurosis, Doctor?

24 A. It does not, sir.

1 Q. Doctor, the reports that you read of Doctor
2 Nestmann that were given to the commission, not just with
3 Harold Young but all of the reports signed by Doctor Nestmann
4 of which you are aware, none of those reports contained the
5 diagnosis of Doctor Nestmann, that is that the man had these
6 severe, moderate or mild psychoneurosis, isn't that correct,
7 sir?

8 A. That is not so, sir.

9 Q. Doctor, this morning Monsanto delivered to us the
10 workmen's compensation records that contain Doctor Nestmann's
11 report, his written reports that were submitted to the
12 commission. I have placed a yellow tab on each of those
13 reports that is in 1782. I would like for you to look at
14 each of those reports, sir, and tell me if there is a single
15 one of those reports that contains a diagnosis of severe
16 psychoneurosis?

17 MR. HEINEMAN: Objection, Your Honor. May counsel
18 approach the bench?

19 THE COURT: Yes, you may.

20 (Bench conference had out of the hearing of the
21 jury.)

22 MR. HEINEMAN: I object, Your Honor, to this
23 procedure when Mr. Carr is allowed to make these outrageous
24 statements. First of all, he is implying that we just gave

1 him these. All right. He asked for them yesterday, okay.
2 The Court said deliver them last night. All right. We
3 called him at seven o'clock to deliver them last night and he
4 wasn't there. So we gave them to him this morning, all
5 right. So that is the explanation for that.

6 The second thing is, these are document that went
7 to the Appeals Board. All you have to do is look at the
8 document. It went to the Appeals Board. It didn't go to the
9 commission and I object to it on that ground. It is an
10 obviously misleading statement.

11 MR. CARR: Three weeks or four weeks ago I asked for
12 all of the reports that Monsanto had relative to Doctor
13 Nestmann. All the reports that Monsanto made. We were
14 delivered a small stack of reports by Doctor Nestmann by Mr.
15 Nassif in which he said these are all the reports by Doctor
16 Nestmann that we have. Now, yesterday, at the conclusion of
17 the day we asked for reports Monsanto had that they had given
18 to the Workmen's Compensation Commission. Lo and behold we
19 come up now and this is what was given to us as reports that
20 were given to the commission, the ones that have the yellow
21 tab on it. They cannot have it both ways. They have
22 represented to us that these were the reports that were given
23 to the commission and the Court ordered them to give us the
24 reports that were given to the commission. These are the

1 reports that we have and these are all the reports that we
2 have and that is the ones that were given to the commission.

3 MR. HEINEMAN: We haven't finished the compliance
4 yet, Mr. Carr.

5 MR. NASSIF: First of all, Your Honor, this is the
6 report that was given to Mr. Carr long ago. It is a report
7 of Doctor Nestmann. I specifically wrote on the receipt
8 these are reports that you had not previously received. You
9 had that before. Specifically wrote on the report that I
10 gave to Mr. Carr right underneath his name we are providing
11 him only with those we have not previously produced.

12 THE COURT: You mentioned that the other day.

13 MR. NASSIF: And, Your Honor, this is one that he
14 had. There is proof that he had copies of Nestmann's
15 reports.

16 MR. CARR: This is one that you gave me three weeks
17 ago, counsel. The one you have in your hands was given me
18 three weeks ago.

19 MR. NASSIF: You are right. You have others like
20 that. If you want me to prove that on the microfilm.

21 MR. CARR: We have been past that.

22 THE COURT: We have been through microfilm.

23 MR. CARR: It is not production and you know it.

24 MR. NASSIF: It is so production.

1 THE COURT: Wait a minute. Whoa, whoa, whoa. The
2 question whether this is constructive production, whether
3 that complies with the rules is not relevant to the objection
4 that we are making now is a different issue.

5 MR. NASSIF: Let me get to the other issue. The
6 issue is he asked for, he took this memo up to you, Your
7 Honor, and this is the way I understood. I didn't even know
8 about this document when I made my production. We got this
9 document from Charleston, West Virginia. Okay. But, Your
10 Honor, it says here concerning psychoneurosis so I asked to
11 have the Nestmann reports sent to me from Charleston that had
12 to do with psychoneurosis. This is what the document Mr.
13 Carr specifically requested and that is what I got and that
14 is what I produced to Mr. Carr, the Nestmann reports having
15 to do with psychoneurosis and he got all of those. Now, he
16 is saying that we should have provided him with what was
17 provided to the comp appeal board in 1957. These aren't --

18 MR. CARR: That isn't even the issue, Mr. Nassif.

19 MR. NASSIF: Yes, it is the issue, Mr. Carr. These
20 are the documents that we reviewed at this meeting on
21 November 18, 1955 having to do with psychoneurosis and that
22 is the way I understood it. We didn't have these documents
23 here in St. Louis. I just sent over to Charleston and they
24 sent me the Netsmann reports on psychoneurosis and that is

1 what I produced to him. We didn't have these document here.
2 So, I object to him saying that we did not in good faith
3 respond to your prior order three weeks ago.

4 In addition, he has got numerous documents like
5 this one on the microfilm and we have always, as I said on
6 the receipt that we gave to him, we indicate that with the
7 exception of what we have previously produced we are
8 supplementing what we had on these reports on psychoneurosis
9 so we did honor this request. This was produced following
10 your order yesterday for us to produce what Monsanto gave to
11 the commission. I asked. I found a copy of this that we did
12 just receive and I produced it this morning because it was in
13 Belleville as was instructed. I called last night at seven
14 twice. Nobody answered. I was in the office at 7:30 this
15 morning looking through more document. We worked until 10
16 o'clock last night, so we have done everything we can to
17 comply with your orders in good faith.

18 We gave him this. It does have Nestmann's reports
19 in it that I found out about as I was going through it and
20 these reports do not discuss psychoneurosis or -- obviously,
21 I asked for the reports that discuss psychoneurosis. That is
22 what I got from Charleston and that is what I produced to
23 him.

24 MR. CARR: That isn't the issue. Counsel has

1 objected to me telling this witness that these are all Doctor
2 Nestmann reports that we have that were submitted to the
3 commission and it is indeed. All the Doctor Nestmann reports
4 that we have that were submitted to the commission. They
5 were delivered to us just this morning. He has already
6 represented to him that we did this sometime ago.

7 MR. HEINEMAN: First of all, we don't know yet
8 whether these are all the reports.

9 MR. CARR: Then how can you object to that statement
10 that these are all the Nestmann reports?

11 MR. HEINEMAN: Because we think there are more. We
12 think there are more.

13 MR. NASSIF: We know there are other comp files.

14 THE COURT: Basically at this point in time you are
15 saying you think there are more, you don't know if there are
16 any more. You don't know if there are any more and as long
17 as it is purposefull, that is all that we have at that time.
18 Then we have to wait and see what else comes out at
19 Charleston.

20 MR. NASSIF: We know that Nestmann did reports and
21 each one of those individuals that he did reports on has got
22 a record like this in front of the comp commission. My logic
23 would tell you that since this is Harold Young and his --

24 MR. CARR: Harold Young is in here, counsel, just

1 exactly like that one.

2 MR. NASSIF: But there are other reports like this
3 one for other plaintiffs claiming amounts in the comp hearing
4 so there are other documents. Whether we have them or not, I
5 don't know. That is what we called Charleston for but I can
6 tell you there are others in the comp file like this.

7 MR. CARR: I want to get them all.

8 MR. HEINEMAN: My point here, Your Honor, is that
9 this is a document that was submitted to the Workmen's Comp
10 Appeals Board. It isn't necessarily all documents.

11 MR. NASSIF: 1957, Your Honor. It is a year after
12 this situation. So to confuse '82, they are different
13 proceedings. This one is a 1957 in May and that is in mid
14 1956.

15 MR. CARR: So what? My question still stands. That
16 this is all the Doctor Nestmann reports that were given to us
17 that were submitted to the compensation commission. That is
18 an accurate statement, an accurate representation to the
19 witness.

20 MR. NASSIF: I don't think that is an accurate
21 representation, Your Honor, based on the microfilm and we
22 still consider the microfilm to be production. These
23 documents came off the microfilm. There are other documents
24 like this.

1 THE COURT: At this point in time without any
2 further production, the statement that was made when these
3 documents were referred to in front of the jury, that that is
4 what we have got at this point in time, it is accurate. I
5 think for the sake of accuracy, you should indicate that
6 these were submitted to the Appeal Board but it does not make
7 improper the statement because it is part of the Workmen's
8 Compensation proceeding and --

9 MR. CARR: Your Honor, even on that point, this is
10 the record that came from below that was submitted to the
11 Appeals Board. It had to be part of the record below or it
12 would never have gone up.

13 MR. NASSIF: It is a brief we filed with the Appeal
14 Board, Your Honor.

15 THE COURT: Are you claiming that this is briefing
16 an appeal and would be submitting new evidence to the Appeal
17 Board at the Comp Commission?

18 MR. NASSIF: I don't know, Your Honor. They might
19 very well be. I am sure there was an argument that they
20 hadn't submitted to the commission and this is about a 50
21 page argument.

22 THE COURT: The legal argument, I would think that
23 they hadn't, but are you telling me that -- wait a second.
24 Are you telling me that they are going to attach new

1 exhibits?

2 MR. NASSIF: I don't know, Your Honor. I really
3 don't.

4 MR. HEINEMAN: What you have to do is look at it.

5 THE COURT: I think that is very unlikely.

6 MR. HEINEMAN: If you look at it, you will see what
7 is in there. For example, a summary of testimony. In other
8 words, they are summarizing what so and so testified to about
9 a particular ailment. That is in there.

10 MR. CARR: Sure, and the reports.

11 MR. HEINEMAN: Something prepared for the Appeal
12 Board.

13 MR. CARR: And the reports of Nestmann man were
14 submitted at the hearing. Those statements are also in
15 there.

16 MR. NASSIF: Not in this form. There are no
17 Nestmann reports in that form.

18 MR. CARR: So what? The question that I have given
19 the witness is that these are all of the Doctor Nestmann
20 reports that were submitted to the commission that had been
21 given to us and these were given to us this morning and
22 challenging him to find the Nestmann reports of the severe
23 psychoneurosis. That is the point. You are challenging the
24 statement that these are not the records of the commission.

1 They are the records of the commission. It is all the
2 records of the commission that have been given us as of this
3 morning.

4 MR. NASSIF: It is not all of the records of the
5 commission, the records of the commission.

6 MR. CARR: That have been given us by you, counsel.

7 MR. NASSIF: They are from Monsanto as attached to
8 a brief as we have filed.

9 MR. CARR: That have been given us.

10 MR. NASSIF: To date. We got the request
11 yesterday.

12 THE COURT: Okay. The indication on page 11 of the
13 brief, it concludes that the summaries of testimony were
14 submitted to the commission and I think it is very unlikely
15 that in a matter such as this it would have been submitted on
16 the appeal. The objection is overruled. You may proceed
17 without modification. I think the appeals document reflects
18 what went on below as one would normally think an appeals
19 document to do. You may proceed.

20 (The following proceedings were had in the hearing
21 and presence of the jury).

22 Q. Now, Doctor, while we were at the bench, have you
23 had a chance to check all the Doctor Nestmann reports
24 submitted to the commission?

1 A. I had a chance to look through a few of them, sir,
2 yes.

3 Q. Doctor, I want you to check them all, all the
4 Nestmann reports and tell me whether or not a single one of
5 those reports contain an impression or diagnosis that these
6 men had severe psychoneurosis or mild or even moderate
7 psychoneurosis? The ones that have the yellow tab on them,
8 Doctor, are the ones that are the Nestmann reports. To save
9 you time. You are not even close to the yellow tabs,
10 Doctor.

11 A. I understand, sir.

12 Q. Let me help you, sir.

13 A. There are some Nestmann reports before that, sir.

14 Q. Doctor, there are not Nestmann reports before
15 that. There are references to Nestmann testimony. My
16 question to you, sir, relates to Nestmann reports. Will you
17 look at the ones that have the yellow tab, sir?

18 MR. HEINEMAN: Excuse me, Your Honor. Is there a
19 mark on that exhibit of an Exhibit Number?

20 A. Yes, there is.

21 THE COURT: I think so.

22 A. 1782.

23 MR. HEINEMAN: Has it been offered?

24 MR. CARR: No, it hasn't been offered, Your Honor.

1 THE COURT: I don't believe it has. My records
2 show it has not been offered.

3 MR. HEINEMAN: I would object to asking the witness
4 about it until it has been offered.

5 MR. CARR: Your Honor, I am asking the witness to
6 examine the exhibit and to answer a question relative to
7 whether or not there is a single Nestmann report there that
8 has that diagnosis. I don't think I have to offer the
9 exhibit in order to ask the question.

10 THE COURT: Gentlemen, could you approach the
11 bench, please?

12 (Bench conference had out of the hearing of the
13 jury.)

14 THE COURT: I would rather this type of thing go on
15 up here.

16 MR. HEINEMAN: If the Court is taking judicial
17 notice of these matters that are, you say, that is an
18 extension of the Workmen's Comp Commission, if you are indeed
19 taking judicial notice of it, then I think it ought to be
20 offered and it ought to be admitted before the witness is
21 questioned about it.

22 MR. CARR: Your Honor, the fact that the Court has
23 taken judicial notice of the authenticity does not mean that
24 the exhibit thereby automatically becomes admissible. There

1 are a lot of reasons to keep out authentic documents about
2 which there is no question of authenticity and simply because
3 the Court takes judicial notice of records, the Court doesn't
4 mean they are admissible. I don't intend to offer this
5 document because it is a Monsanto produced document and
6 contains a number of self-serving statements on the part of
7 Monsanto. I ask that the witness examine it because it is
8 that these are reports that are submitted to the commission
9 and I am asking the witness to tell us whether or not there
10 is a single report there because he has said that they did
11 submit reports to the commission that were not edited, that
12 contained the diagnoses and this is an effort to impeach this
13 witness and to impeach Monsanto as to what they really did
14 not do.

15 Now, there are a wide variety of statements in the
16 Monsanto document, self-serving statements that do not become
17 admissible simply because the Court will take judicial notice
18 of the authenticity of a particular document.

19 MR. HEINEMAN: Your Honor, I will mark it and I
20 will offer it. We are in the Defendant's case. I will mark
21 it and I will offer it and have the Court take judicial
22 notice of it.

23 MR. CARR: At an appropriate time you can mark it
24 and you can offer it and I can object to it if I have

1 objections to it.

2 MR. HEINEMAN: Well, I will mark it and offer it
3 right now.

4 MR. CARR: Counsel, you cannot because I have got
5 the witness at this point in time and I am asking the witness
6 questions and I would object to you doing anything of the
7 kind to interfere with my cross examination.

8 THE COURT: You can mark it and offer it later.
9 Objection is overruled.

10 (The following proceedings were had in the hearing
11 and presence of the jury).

12 Q. How far along are you, Doctor?

13 A. I have a little more to go.

14 Q. Doctor, you are taking these reports out of the
15 exhibit, out of the order that they were in. I didn't ask
16 you to do that.

17 A. Well, I want to make sure that I have all of the
18 Nestmann --

19 Q. Doctor, all I asked you to do was to look at the
20 ones with the yellow tab.

21 A. I am doing that, sir.

22 Q. But you are doing more than that, Doctor. You are
23 breaking up the exhibit.

24 A. Not really. I am simply --

1 Q. Doctor, don't take any more out, Doctor, but
2 looking at the exhibits that have the pages that have the
3 tabs on them and see if those are Nestmann reports and
4 whether or not they contain a statement of severe
5 psychoneurosis or moderate or mild psychoneurosis, will you
6 do that please, Doctor?

7 A. Yes, sir.

8 Q. Doctor, that is not a Nestmann report. Here is the
9 yellow tab here, sir. Doctor, the page you are looking at is
10 not one with a yellow tab on it. It is not a Nestmann
11 report.

12 A. It is a diagnostic report, sir.

13 Q. Doctor, this is a summary about Doctor Nestmann's
14 testimony by counsel for Monsanto. I am asking you, Doctor,
15 to look at the Nestmann reports submitted by Monsanto.

16 A. That is reference.

17 Q. This is not a report. You see it says summary of
18 Doctor Nestmann's testimony. You know the difference between
19 testimony and a report, don't you, Doctor?

20 A. I believe I do, sir.

21 Q. Thank you, Doctor. One more, Doctor.

22 A. If you allow me to read these, I will be happy to
23 answer your question.

24 Q. Doctor, I am allowing you to read them. I want you

1 to look for statements in the reports of the psychoneurosis?

2 A. I would like to have the time to read them, sir.

3 Q. Now, Doctor, you have looked at all the pages that
4 have yellow tabs on them. On those Doctor Nestmann reports,
5 was there any mention to the commission in those reports that
6 any of the workers had severe, moderate or mild
7 psychoneurosis?

8 A. On these reports sent to the commission, sir --

9 Q. Could you answer my question, Doctor, please, sir?

10 A. Well, in those reports, sir, I don't see any
11 mention of psychoneurosis.

12 Q. Thank you, Doctor.

13 THE COURT: Mr. Carr, we are going to have to break
14 at this time.

15 MR. CARR: Yes, Your Honor. That is part of the
16 record.

17 THE COURT: Ladies and gentlemen, we will end the
18 proceedings for the day at this time. We will resume again
19 tomorrow morning at 9:30. I would remind you as I do on any
20 overnight break you are not to read, listen to or watch
21 anything about this case in particular or the subject matter
22 in general in any of the media. Thank you for your attention
23 and cooperation. Court is adjourned. Gentlemen, could I see
24 you in chambers, please.

1 (The following proceedings were had in chambers out
2 of the hearing and presence of the jury.)

3 THE COURT: You wanted to finish making a record on
4 the wipe samples and I cut you off and I told you you could
5 do it later. On the counting of sample results and I told
6 you you could do it later. It is now later.

7 MR. HEINEMAN: Well, what I wanted to do was get
8 into the record the location in the exhibit of the, the
9 specific exhibit number and the page in the exhibit where
10 those items were and my contention that they should have been
11 provided to the witness, but what I wanted to finish was, it
12 wasn't clear in the record exactly what I was referring to
13 and I don't have the darn record here now, I don't think.
14 Well maybe I do. It is Plaintiffs' Exhibit 1528 and it is
15 the 78th page of that exhibit entitled Table 1B Wipes in
16 which all of the samples reflect none detected for TCDD.

17 MR. CARR: What building is that, counsel?

18 MR. HEINEMAN: Well, you told me the whole --

19 MR. CARR: I didn't even refer to 1528, counsel. I
20 referred to 1530 and 1527.

21 MR. HEINEMAN: You asked the witness about wipes.
22 You asked weren't there wipes.

23 MR. CARR: Of Building 79?

24 MR. HEINEMAN: Yes, and the wipes are all none

1 detected.

2 MR. CARR: What building are you referring to?

3 MR. HEINEMAN: I am referring to the same exhibit
4 you were, sir. You said in the record, told the Court that
5 this was building number 79.

6 MR. CARR: What building was the exhibit referring
7 to?

8 MR. HEINEMAN: I don't know what building the
9 exhibit was referring to.

10 MR. CARR: The exhibit that I had, 1530, and 1530
11 was referring to building 78-79, counsel.

12 MR. HEINEMAN: The record will be clear, Your
13 Honor, based upon the representation Mr. Carr made in the
14 record with respect to exhibit 1528 when he was questioning.

15 MR. CARR: I didn't even mention 1528.

16 MR. HEINEMAN: Because you questioned the witness
17 about the sweepings.

18 MR. CARR: Sweepings were in Building 79, counsel.
19 Exhibit 1530. Not wipes, sweepings.

20 MR. HEINEMAN: Well, the record will be clear.

21 MR. CARR: And you have an exhibit that refers to
22 wipes, have you not, sir?

23 MR. HEINEMAN: I have a record that refers to
24 sweepings and wipes. They are both in the same record and

1 you read him one and not the other.

2 MR. CARR: That is right, counsel. I did not read
3 him 1528.

4 MR. HEINEMAN: You read him the sweepings from 1528
5 and not the wipes from 1528.

6 MR. CARR: Well, it is silly to argue, counsel.

7 MR. HEINEMAN: Yes, it is.

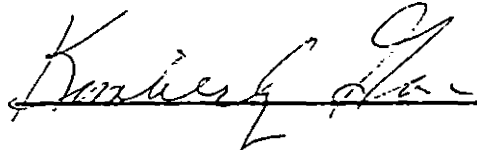
8 THE COURT: Okay. My decision at the time I think
9 was right. It was clear I am afraid as often happens in some
10 of these arguments at the bench, we were going over things
11 again and I haven't heard anything that would change my
12 opinion on the ruling I made out there so I would make the
13 same ruling so we can finish up the record. Okay.
14 Gentlemen, see you in the morning.

15 COURT ADJOURNED:
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT) SS
3 COUNTY OF ST. CLAIR)
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5 I, Kimberly Ganz, one of the Official Court Reporters, do
6 hereby certify that the foregoing transcript is a true and
7 correct transcript of the proceedings had in the
8 above-entitled cause.

9 Dated this 25 day of March, 1986.

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13 KIMBERLY GANZ
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT) SS
3 COUNTY OF ST. CLAIR)
4

5 I, RICHARD P. GOLDENHERSH, one of the Judges in and for
6 the Twentieth Judicial Circuit, do hereby certify that the
7 foregoing transcript is a true and correct transcript of the
8 proceedings had in the above-entitled cause.

9 Dated this ____ day of March, 1986.

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HON. RICHARD P. GOLDENHERSH

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