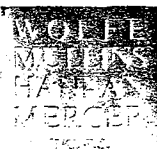
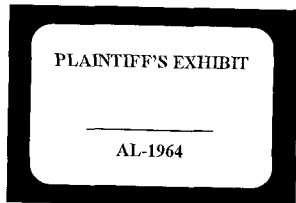


File

HOO 10-12-87
JEB



Attorneys at Law
Terrance D. Hannan*
Morgan J. Mercer
James D. Mullins*
Randall B. Printz
Brian H. Wolfe



October 5, 1987

Ms. Shirley DeCicco
ALCOA
P. O. Box 120
Vancouver, WA 98666

✓ Mr. Joe Burns
Manager of Workers' Compensation
1501 Alcoa Building
Pittsburgh, PA 15219

Re: Edward Martinez
Claim No. S-503211

Dear Joe and Shirley:

The Board of Industrial Insurance Appeals has declined to consider our petition for review. A copy of their Order to that effect dated October 1, 1987, and received in our office on October 5, 1987, is enclosed.

This was somewhat surprising since I had spoken to Judge Curington, who had written the adverse proposed decision concerning the scheduling on the claim of Edward Martinez's son, and she had indicated that she thought the Board had agreed to grant my petition and to review the matter. However, this is apparently not the case.

Their decision not to engage in a review of the proposed decision written by Industrial Appeals Judge Curington means they have officially adopted her decision as the decision of the Board of Industrial Insurance Appeals.

There are several options as to how this claim can be handled from this point on. The first option is to appeal the decision by Judge Curington to the Superior Court. The deadline for appealing is thirty (30) days from the date we receive the Order, or thirty (30) days from October 5, 1987. That deadline will expire on November 4, 1987. The purpose of such an appeal, if made, would be twofold: It would seek to have the Superior Court decide to let Dr. Morgan's testimony be considered by the jury as a part of the record. The second object would be to persuade the jury on the basis of all the evidence in the record that

WEN204242

Ms. Shirley DeCicco
Mr. Joe Burns
Re: Edward Martinez
October 5, 1987
Page Two

the Board of Industrial Insurance Appeals was wrong in concluding that Mr. Martinez's pulmonary fibrosis was caused by his exposure to potroom conditions at Alcoa. Since the Board found against Alcoa, the burden of proof in Superior Court would be on Alcoa.

We have of course recognized all along that, if the case got to the level of Superior Court, certain sympathy factors would come into play and that they would not favor us. We had, however, anticipated winning the case on the Board level on the scientific issues where sympathy factors presumably would not have affected the outcome, and we could have gone before the jury with a Board finding in our favor and the burden of proof on the other side. Now that situation is reversed, and I am pessimistic that we could persuade the jury that the Board was wrong, because of those sympathy issues, even assuming Dr. Morgan's testimony is considered by the jury. As you are aware, closure of the Vancouver plant has not left us with any particular "good feeling" out there in the community toward Alcoa to draw on.

Therefore, my assessment of the option of appealing to the Superior Court is that we would probably lose such an appeal.

A second option is not to appeal the claim of Edward Martinez any further but to continue to contest the claim of his son for survivor benefits under the Workers' Compensation Act. The claim of the son is now pending before the Board of Industrial Insurance Appeals. Because of this, we could adopt the position that we still have the right to present substantive evidence on the claim of the son, and then re-present the testimony of Dr. Morgan in a form the industrial appeals judge could not quibble about. Unfortunately, the same industrial appeals judge is assigned to the survivor claim of the son as was assigned to the claim of Edward Martinez. You will recall, in her decision, she officially excluded the testimony of Dr. Morgan from consideration because of the manner in which the oath was administered, but then also in a footnote indicated that she had listened to his testimony and that, even if the testimony were officially admitted into the

WEN204243

Ms. Shirley DeCicco
Mr. Joe Burns
Re: Edward Martinez
October 5, 1987
Page Three

record, her decision would have been the same and that she would have preferred Dr. Churg over Dr. Morgan. For that reason, going through the mechanics of re-presenting Dr. Morgan in the claim of the son probably would be an exercise in wheel-spinning since it would not achieve a different result at the Board level. At the end of it we would still be faced with a decision by Judge Curington against us with an appeal to the Superior Court and review by a jury being needed to obtain a reversal of the Board's decision.

The third option before us is to not legally contest these matters any further, for the reason that, even though we regard the Board's decision as being based on wrongful reasoning and scientific twaddle, we are nonetheless unlikely to change the result by further proceedings.

Please let me know what you wish me to do in this regard. As indicated, a decision on whether to appeal the Board's decision to the Superior Court needs to be made in advance of November 4, 1987. A decision as to whether we will try to present additional evidence in the survivor claim of the son has no present deadline, but probably needs to be made before the next settlement conference, which is likely to be scheduled shortly.

Sincerely yours,

WOLFE, MULLINS, HANNAN & MERCER, INC., P.S.



Terrance D. Hannan

TDH:can

Enclosure

WEN204244