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December 2, 1986

PRIVILEGED AND CONFIDENTIAL

Anthony J. Colangelo
The Sherwin-Williams Company
101 Prospect Avenue N.W.
Cleveland, Ohio 44115-1075

REDACTED

Re: ____ v. Sherwin-Williams
Washington Worker's Compensation Claim

Dear Mr. Colangelo:

I have reviewed the file on this claim from the Washington Department of Labor and Industries. This is my report of the events revealed by that file, along with my recommendations for defense of this claim.

HISTORY OF LAIM

first reported claim for respiratory problems was in May 1984, when he saw Dr. Richard Winterbauer at the Mason Clinic in Seattle. complained of respiratory irritation during the week, which improved on the weekends. At that time, Dr. Winterbauer issued an open letter requesting tha be removed from any paint fume exposure. A claim was opened by the Department of Labor and Industries, allowing payment of medical bills and time loss for the few da was off work. This claim was ultimately closed on October 15, 1984.

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The next medical visit recorded in the Department file was with Dr. Edward Gibbons, a cardiologist at the Mason Clinic. was then complaining of heart problems, and Dr. Gibbons diagnosed chronic atrial fibrillatio was hospitalized on September 18 and 19, 1985 by Dr. Gibbons for this heart condition. Dr. Gibbons concluded that ffered not only from an irregular heart beat, but lung disease as well. Dr. Gibbons attributed the heart problem, as well as the lung disease, to paint exposure.

On October 3, 1985 led an application to reopen his worker's compensation claim. By Order and Notice dated November 1, 1985, the Department refused to reopen the case. The Department concluded his treatment was only for heart problems, which the Department felt were unrelated to his occupation.

On December 19, 1985, vas again hospitalized at Virginia Mason Hospital in Seattle. laims in a subsequent letter to the Department that this was for "critical shortness of breath." No hospital records pertinent to this stay are included in the Department's file, since the claim was not open at that time.

In February, 1986, began treatment with Dr. David Dries, a specialist in "chest and infectious diseases" with the Mason Clinic. Beginning February 3, 1986 xperienced shortness of breath and other respiratory problems and was home in bed for a period of several days. He took sick leave from his Sherwin-Williams job from February 4 through February 11, 1986. In a letter dated February 11, 1986, Dr. Dries opined that s permanently disabled, and shouldn't work nce again applied for reopening of his claim on February 24, 1986. He then took early retirement on March 3, 1986.

In response to s application for reopening, the Department sent him to Dr. Jonathan Ostrow for an independent medical examination on June 6, 1986. Dr. Ostrow issued a lengthy report in which he strongly concurs with Dr. Dries' conclusion that as significant respiratory disease which was caused by exposure to paint fumes. Dr. Ostrow called this a "classic case of occupational asthma." Dr. Ostrow disagrees, however, with Dr. Gibbons' conclusion that the heart problems were also caused by paint exposure. Based on Dr. Ostrow's examination, the Department issued an Order and Notice dated July 28, 1986, reopening the claim.

Mr was then treated by Dr. Patricia Sparks, a specialist in occupational medicine with the Mason Clinic. She issued a letter

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dated August 4, 1986, to the Department of Labor and Industries reaffirming that his disability began in early February 1986.

In response to the Department's July 28, 1986 Order, Dr. Gibbons sent another letter to the Department reaffirming his conclusion that art problems are related to this lung problems, and that both were caused by exposure to paint fumes on the job. followed this letter from Dr. Gibbons with one of his own, dated August 21, 1986, requesting a disability pension and payment of all his medical bills retroactive to August 1985. Ernest Fomin, the Department's disability adjudicator assigned to this file has since requested an opinion from a Department doctor on whether the heart condition should be deemed an accepted condition or not. Dr. A. Dean Johnson determined on September 24, 1986 that only the respiratory problem should be considered an industrial illness. The Department file contains no suggestion that this has been communicated to or that it has been formalized in an Order.

In September 1986, the Department issued a time loss check to covering the period retroactive to February 28, 1986. The Department then scheduled for a vocational evaluation with Buckner Rehabilitation Center on October 14, 1986. The file I received contains no report from Buckner Rehabilitation, though I imagine one has been issued by now. This report is important because it will examine the options for putting back to work in another job. If he is employable in another job, he will not be awarded a disability pension.

IMPRESSIONS

The information in this file strongly suggests that suffers from occupational pulmonary disease. The Mason Clinic, where is treating, is highly regarded in the Northwest. Our experience it that the doctors there are fair and objective, and are not "hired guns." Their opinions that a legitimate lung disease caused by paint fumes are probably reliable. Moreover, Dr. Ostrow's examination, requested by the Department, confirms most of the observations made by those at the Mason Clinic, though he refuses to link the heart problems with paint fume exposure. For these reasons, I believe the chances of overturning the Department's decision to reopen the claim are slim.

This conclusion is reinforced by a letter I recently received from Leonor Dow, a claims consultant with the Department. A copy of this letter is enclosed. As I anticipated, the Department is taking the

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position that our request for reconsideration was not timely, since it was not received within 60 days of the date of the Order. The Department will doubtless take the position, as they have in the past, that we have 60 days from the date of the Order, not 60 days from the receipt of the Order in which to file our protest or our request for reconsideration. As we discussed when you first called on October 3, 1986, I anticipated this problem, but sent out a protest letter on that date anyway, just in case the Department decided to be lenient. The enclosed letter from Ms. Dow suggests the Department is going to strictly interpret the rules, which will likely sink any attempt to prevent re-opening of the claim. As a practical matter, however, we have lost nothing, since we lack evidence which might persuade the Department to leave the claim closed.

The reopening of this claim does not mean that will be granted a disability pension. The reopening of the claim means only that the Department will pay his future medical bills until his condition stabilizes, and the treatment becomes palliative rather than curative. This includes any bills incurred after January 19, 1986, the date to which the Order was made retroactive. The Department will also pay time loss, or a wage replacement allowance, until returns to work or until his claim is closed.

Once it is determined that condition has stabilized, then he may apply for a permanent partial disability or permanent total disability award. Permanent partial disability (or PPD) awards are lump sum awards based on a schedule established by the state legislature. The awards range from $0-90,000. If nas occupational asthma, then a PPD award could be anywhere in this range.

A permanent total disability award is colloquially referred to as a disability pension. If, at that point, the Department determines that s permanently totally disabiled (i.e., unemployable in any job) because of his medical condition, and that the condition was caused by exposure to paint fumes on the job, then the Department will award disability pension from that time forward. A disability pension could cost up to approximately $15,000 per year for the remainder of life.

We have the right to appeal an Order awarding a PPD or a pension to the Board of Industrial Insurance Appeals. The issue on an appeal from a PPD award would be the proper amount of the award. The issue on an appeal from a pension award would be whether is employable in another job or not. If we appeal to the Board, the Board

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will appoint an Industrial Appeals Judge to hold a hearing, much like a trial, for presentation of evidence by both sides. The Industrial Appeals Judge will issue a Proposed Decision and Order, which any aggrieved party may then appeal to the three-member Board of Industrial Insurance Appeals. If the Board declines review, then the Proposed Decision and Order becomes the final Decision and Order of the Board. If the Board accepts review, then it may review legal briefing from both sides and issue its own Decision and Order.

A party aggrieved by a Decision and Order of the Board may appeal for a trial "de novo" in superior court, Washington's court of general jurisdiction. Any party may request a jury. This is not a trial "de novo" in the pure sense, because no new testimony is presented to the judge or jury. The record developed before the Industrial Appeals Judge is read to the jury, with the lawyers or "actors" reading the script. The trier of fact then decides if the evidence shows the Decision and Order of the Board to be incorrect. As you can imagine, the Board is rarely reversed.

Any party aggrieved by a decision in the superior court has the same rights to appeal to the Washington Court of Appeals or the Washington Supreme Court as though the case had been brought in the superior court in the first instance.

As you can see from this long list of available procedures, we are far away from a final decision in Mr. ; case.

RECOMMENDATIONS

I recommend we take the following steps to respond to Mr. claim:

1. Send a copy of the Department file to Dr. Ernest Dixon, the environmental consultant in Washington, D.C. you mentioned during our telephone conversation on October 24, 1986. I would be quite interested in Dr. Dixon's opinion, after review of this file, about the causal relationship between Olson's job and his lung disease and heart problems.

2. Ask the Department for an update on any doctor visits by . The file I received shows no treatment since the examination by Dr. Ostrow on June 6, 1986.

3. Obtain a copy of the vocational evaluation, which by now has doubtless been issued by Buckner Rehabilitation. Buckner

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Rehabilitation is a reliable vocational counseling firm. If the vocational counselor at Buckner believes Mr. can go back to work in a sedentary job removed from paint fumes, we should make an earnest effort to find him such a job with Sherwin-Williams, or if necessary, with another employer.

5. Once we are satisfied with our vocational assessment, ask the Department to ascertain whether condition has stabilized so an assessment of whether he has a permanent partial or permanent total disability may be made. If condition has stabilized, this may end our responsibility for medical bills, time loss, or both.

6. Ask the Department for clarification as to whether its July 28, 1986, Order covers heart problems, or just treatment for pulmonary disease. Based on interoffice memoranda appearing in the Department file, I believe they will exclude the heart problems. This may significantly affect the amount of medical bills payable.

CONCLUSION

The best result for all parties concerned is to get Mr. back to work in a job he can do. Taking these steps will help us better understand the potential exposure in this case, and what we can do, if anything, to get Mr. back to work.

I have also enclosed our first statement for services rendered, which covers the period through October 31, 1986. If you have any questions about this statement, please feel free to give me a call to discuss them. Also, I would be interested in your input on whether to take the steps recommended above.

Very truly yours,

LANE POWELL MOSS & MILLER

Ralph C. Pond

RCP:bdr
5428L