

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

12600 N. Fwy. 100, #105
Houston, TX 77034

PLAINTIFF'S EXHIBIT

MON-2689

Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

March 7, 1986

File No: 8-63651
Re: John L. Elliott vs
Monsanto Company



John L. Elliott, P. O. Box 6B, Alta Loma, TX 77510
Monsanto Company, P. O. Box 1311, Texas City TX 77590
INA of Texas, P. O. Box 759, Houston, TX 77001
Stephen M. Vaughan, MANDELL & WRIGHT 806 Main, 21st Floor, Houston, TX 77002
Douglas W. Poole, Attorney, P. O. Box 629, Galveston, TX 77553

Gentlemen:

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order has been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within ten days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, 1111 - 20th Street, N.W., Suite 757, Washington, D.C. 20036.

Sincerely,

Marilyn C. Felkner
MARILYN C. FELKNER
Deputy Commissioner

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Enclosure

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Longshoremen's and Harbor Workers' Compensation Act, as extended

A petition for reconsideration of a decision and order must be filed with the Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210, within 10 days from the date the Deputy Commissioner files the decision and order in his/her Office.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within 30 days from the date upon which a decision and order has been filed in the Office of the Deputy Commissioner. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30-day period described above, whichever period last expires. A copy shall be served upon the Deputy Commissioner and on all other parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 of the Longshoremen's and Harbor Workers' Compensation Act and an order staying payments has been issued by the Benefits Review Board.

The date compensation is due is the date the Deputy Commissioner files the decision and order in his/her Office.

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Form Ltr. LS-20
Rev. Oct. 1978

LAM012183

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of

JOHN L. ELLIOTT,
Claimant

v.

MONSANTO COMPANY
Employer

and

INSURANCE COMPANY OF NORTH
AMERICA
Carrier

Case No. 85-LHC-879

OWCP No. 8-63651

.....
Appearances:

Stephen M. Vaughan, Esq.
For the Claimant

Douglas W. Poole, Esq.
For the Employer and Carrier

Before: E. EARL THOMAS
Deputy Chief Judge

DECISION AND ORDER AWARDING MEDICAL BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq., and the regulations promulgated thereunder. A hearing, consolidated with 85-LHC-880, was held before me in Galveston, Texas, on October 25, 1985, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral arguments. Upon conclusion of the hearing, I ordered that the record be held open for 30 days for submission of certain depositions, and 60 days for filing briefs. The time limit for filing briefs was subsequently extended until January 10, 1986. 1/

1/ The following references will be used herein: TR for transcript, CX for Claimant's exhibit and RX for Employer/Carrier's exhibit.

The findings of fact and conclusions of law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit entered, particularly those related to the Claimant's medical condition, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration. The resolution of Longshore Benefits claims frequently involves the evaluation and comparison of conflicting medical evidence. Where the contents of a particular exhibit appear inconsistent with the conclusions reached in this decision, the appraisal of the relative merits of medical evidence in each exhibit has been conducted strictly in conformance with the quality standards set out in the Regulations. Any exhibit or document appearing in the case record, unless expressly rejected elsewhere, is hereby admitted as evidence of record and considered in making the decision herein.

Stipulations

At the commencement of the hearing, all parties stipulated and, based on the evidence of record, I find:

- 1) That an employer/employee relationship existed at all relevant times.
- 2) That Claimant's average weekly wage was \$600.00 per week.
- 3) That no compensation or medical benefits have been paid under the Act, although some medical bills have been paid under Monsanto's group insurance policy.

Issues

The issues remaining for adjudication are:

- 1) Jurisdiction of the Act over this case.
- 2) The nature and extent of disability.
- 3) Causation.
- 4) Notice and limitations periods.

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Summary of the Evidence

Claimant John L. Elliott is 54 years old and has worked for the Monsanto Company since 1956 (TR 11, CX 2). His positions at Monsanto have included insulator and asbestos worker, but he is currently a "leadman." (TR 11). In the course of his employment he was exposed to significant amounts of asbestos.

Claimant worked at job sites throughout Monsanto's Texas City facility which is located on navigable water (TR 13). A portion of Mr. Elliott's assignments involved insulating pipelines used to transport Monsanto chemical products onto barges located at the Company's docks. A frequently used insulator was asbestos. Mr. Elliott also installed and removed asbestos insulation from some of the barges (TR 15-22). The exact amount of work performed by Claimant in the immediate area of the Monsanto docks cannot be determined. While Mr. Elliott acknowledges that he spent a proportionately greater amount of time working in other parts of the Monsanto facility, his testimony does indicate that over the years a substantial position of his working hours was spent in the dock area and on the barges (TR 15-20, 35-40, 44-46, 54-55).

Claimant Elliott was first seen by Dr. John W. Middleton on September 21, 1973 for an evaluation of possible pulmonary fibrosis. Dr. Middleton initially felt that Mr. Elliott was suffering from a definite pulmonary disease, "possibly" related to his job (CX 8). Although the Claimant was not then suffering any disabilities, Dr. Middleton notified the Texas Industrial Accident Board of his diagnosis of pulmonary asbestosis by letter dated February 27, 1976. Copies of this letter were also sent to Monsanto and to Mr. Elliott (CX 7). As he treated the Claimant from 1973 until 1985 Dr. Middleton noted progressive pleural thickening and calcification in the Claimant's lungs (CX 1 at 11, CX 8). His current opinion is that Mr. Elliott's condition is a result of exposure to asbestos (CX 1 at 11-12). However, as late as April of 1983 Mr. Elliott continued to feel well enough that he repeatedly forgot to schedule follow-up appointments with Dr. Middleton (CX 1 at 19). The Claimant is still a leadman for Monsanto.

what did he do about it?

On April 30, 1983 Claimant Elliott was examined in Houston, Texas under the auspices of Mount Sinai Hospital of New York City. The data from this examination was reviewed by Dr. Irving J. Selikoff. In a letter to Mr. Elliott on April 25, 1984, referring to that examination, Dr. Selikoff stated that the Claimant's chest X-rays showed scarring "consistent with the diagnosis of asbestosis." (CX 6). The Claimant testified at hearing that it was not until he first received the results of this examination in April of 1983 that he was ever told that he actually had asbestosis (TR 46).

The Claimant filed an Employer's Claim for Compensation on August 29, 1983 based upon continuous exposure to asbestos (CX 3, CX 4). Monsanto's Notice of Controversion of Right to Compensation was filed on September 28, 1983, and its Employer's First Report of Injury or Occupational Illness was filed on October 5, 1983 (RX 5, CX 5).

Findings of Fact and Conclusions of Law

Jurisdiction

The threshold issue which must be resolved in this proceeding is jurisdiction of the Longshore and Harbor Workers' Compensation Act over the claim. Monsanto and the Carrier contend that the Act has no jurisdiction over this matter. Although not explicitly stated in Respondents' brief, they appear to argue primarily that Mr. Elliott does not satisfy the status requirements necessary to invoke the Act.

The jurisdictional prerequisites of the Act are set out at 33 U.S.C. §§ 902(3) and 903(a). 2/

The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, ship builder and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net. 33 U.S.C. § 902(3).

* * * * *

Compensation shall be payable under this chapter in respect of disability or death or an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. 33 U.S.C. § 903(a).

2/ As they pertain to §§ 902(3) and 903(a), the 1984 amendments to the Act apply only to injuries occurring after September 28, 1984. Pub. L. 98-426 § 28(c). Since any injuries involved in this case arose prior to the effective date of the 1984 amendments, the language quoted above is from the Act as it appeared after the 1972 amendments.

These provisions establish two distinct criteria which must both be met before any person will be entitled to benefits under the Act. Section 902(3) contains the first criterion, known as the status standard. This provision restricts coverage of the Act to those workers engaged in "maritime employment." Although persons engaged in longshoring operations and harborworkers, including ship builders and repairmen, are listed as examples, the scope of maritime employment is not restricted to the enumerated occupations. The U. S. Supreme Court has held that the term "maritime employment" as used in the Act is an "occupational test that focuses on loading and unloading" of vessels. P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 80 (1979). While the scope of the term includes other tasks that are inherently maritime, it cannot be extended "to eliminate any requirement of a connection with the loading and construction of ships." Herb's Welding, Inc. v. Gray, ___ U.S. ___, 105 S.Ct. 1421, 1427 (1985). Claimant's occupational status must be judged against this framework and he must show that he was engaged in one of the job categories enumerated in § 902(3) or that he is a maritime employee.

The range of occupations which have been held to be longshoring operations or maritime employment is very broad. The Ninth Circuit has held that the test to be applied in evaluating maritime employment is whether the job in question had a "significant relationship to traditional maritime activity." Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). This standard has been applied to find that a worker who repaired and maintained trucks at a cargo terminal was an integral part of the loading and unloading of cargo. Sea-Land Services, Inc. v. Director, OWCP, 685 F.2d 1121 (9th Cir. 1982). An important consideration in that decision was an administrative finding that a significant amount of the injured workers' time was spent repairing equipment used to load and unload ships.

The Fifth Circuit, where this proceeding arose, has also applied the significant relationship test. In Thornton v. Brown & Root, Inc., 707 F.2d 149 (5th Cir. 1983), cert. denied, 104 S.Ct. 735, reh'g. denied, 104 S.Ct. 2693 (1984), two workers whose jobs involved land-based construction of offshore drilling platforms were held to be within the jurisdiction of the Act because offshore oil exploration was deemed by that Court to be maritime commerce. A Claimant who injured his back while erecting a scaffold, to be used by port facility employees in repairing cargo handling equipment, has also been held to be maritime activity within the meaning of the Act. Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163, (1982). A key factor in that case was that the equipment in question was used to load and unload vessels.

Many types of occupations involving maintenance and repair of cargo handling equipment have also been held by the Benefits Review Board to be within the jurisdiction of the Act as integral parts of the unloading process. Jackson v. Atlantic Container Corp., 15 BRBS 473, BRB No. 81-274 (1983) (claimant whose duties involved inventorying, maintaining terminal buildings and performing minor repairs on a linkspan satisfied the required maritime nexus); Cuellar v. Garvey Grain Co., 11 BRBS 441, BRB No. 77-824 (1979) (millwright at a grain company located on a dock was involved in indisputably longshoring activity); Michaelson v. H. W. Ramberg, Inc., 7 BRBS 886, BRB No. 77-343 (1978) (machinist who repaired ship parts and other non-maritime machinery was covered by § 902(3)).

Monsanto's reliance on Herb's Welding for a result favorable to it is misplaced. The basis for the Supreme Court's holding that the claimant did not satisfy the status standard was that offshore oil drilling was not maritime activity. Therefore, activities incident to drilling were not maritime employment. 105 S.Ct. 1427. Additionally, the Supreme Court specifically noted that there was no indication that the claimant had anything to do with equipment used in loading and unloading ships. 105 S.Ct. at 1428. Thus, Herb's Welding is not on point with the circumstances of this case.

I find that the Claimant satisfies the status standard as one engaged in longshoring activities and maritime employment. The evidence shows that Monsanto's Texas City Plant produces several types of chemicals (TR 92). Insulated pipelines are used to transport bulk chemical products from the plant itself onto barges for shipment, on navigable water, to buyers in this country and overseas. In some cases the chemicals are shipped to other Monsanto plants. Some barges also deliver raw materials to the facility for use in the production of chemicals (TR 13, 98-101). This type of activity is clearly traditional maritime commerce.

Mr. Elliott's testimony shows that he has worked for Monsanto for 30 years, and for that entire period he has been involved in the insulation process (TR 11). In his position as an insulator, and later a leadman, he worked on the Monsanto docks installing and removing asbestos from product lines leading to the transport barges, and in some cases on the barges themselves (TR 14-18). I find that his testimony is credible and that the maintenance and repair work performed by him constitutes an essential element of loading and unloading operations. As an insulator he maintained and repaired the pipelines used to load and unload barges at the Monsanto docks. Without the work of insulators such as the Claimant, shipment of Monsanto's chemicals would not be possible. Therefore, his occupation was an integral part of the longshoring activities

at the docks. Additionally, the Claimant also maintained and repaired insulation on the transport barges. I find that the Claimant satisfies the status test of § 902(3). The fact that only a portion of his duties took place on the dock or the barges does not change this result.

In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, (1977) the Supreme Court held that in enacting the 1972 amendments Congress intended to extend the Act's coverage to persons who spend "at least part of their time in indisputably longshoring operations..." 423 U.S. at 273. The Board has applied this language and held that employees who spend a substantial part of their employment in maritime activity are covered by the Act. Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979). In that case the employee's nexus with maritime activity was deemed insubstantial because the ALJ found that he spent a maximum of five percent of his time working in the dock area. However, in the instant case I find that the Claimant's longshoring activity and maritime employment were a substantial portion of his employment.

At hearing Mr. Elliott testified that although the majority of his work was performed in areas of the facility away from the docks and barges, a substantial amount of time had been spent working on the product pipelines and barges on the plant's waterfront zone (TR 15, 18-19, 22, RX 4). Under vigorous cross-examination the Claimant maintained that during the course of his tenure with Monsanto he had worked in the dock area approximately 25 percent of the time (TR 35-37, 45-46). Of the time spent in the dock area, Mr. Elliott could not estimate what percentage of it was actually spent on the dock and barges. He stated that where he actually worked depended on the workload (TR 45-46). However, his testimony did indicate that he worked for substantial periods of time on Monsanto docks and barges, and this was particularly true during the early years of his employment when he was an insulator (TR 53-54). I find that Claimant's testimony is credible, and I further find that for a substantial portion of his working years he was engaged in maritime activity at the Monsanto plant within the meaning of the Act.

Neither the presence of independent contractors in the dock area nor the work assignment schedules offered by Monsanto affect Mr. Elliott's credibility. The schedules only reflect work assignments back to 1983 (TR 91-92, RX 1) and it does not necessarily follow from the presence of Owens-Corning insulators that Claimant's testimony regarding his employment is erroneous. I find that Claimant Elliott was engaged in longshoring operations and maritime employment within the meaning of § 902(3). He is properly characterized as a maritime employee and therefore satisfies the status standard.

The other criterion which must be satisfied before jurisdiction will exist is the situs standard set forth in § 903(a). The Monsanto dock area and the barges in question are within the expanded definition of navigable water contained in that provision. The facility includes five docks, or wharfs, as well as adjoining areas used by Monsanto to load, unload, and repair barges (RX 4). Accordingly, I find that the situs standard has also been met.

Because Mr. Elliott's claim has met both jurisdictional prerequisites I find that the Longshore and Harbor Workers' Compensation Act has jurisdiction over this claim.

Nature and Extent of Disability and Causation

Under the Longshore and Harbor Worker's Compensation Act, injured maritime employees are compensated for disability due to injury or occupational illness. 33 U.S.C. § 903(a). Section 902(10) defines a disability with respect to non-retired workers as an incapacity to earn wages which the employee was receiving at the time of injury in the same or any other employment.

For purposes of the Act disability is an economic concept. In order for an employee to be disabled, he must be incapable of earning the wages he was receiving at the job in which he was injured, or in any other employment. Todd Shipyards, Inc. v. Fraley, 592 F.2d 805, 811-812 (5th Cir. 1979). Applying this test to Mr. Elliott's claim, I find that he is not disabled within the meaning of the Act.

Although the Claimant testified that other Monsanto employees help him on the job because of his shortness of breath and that he does have difficulty climbing, he acknowledged that he is still well able to perform his job (TR 30-31). This is further evidenced by the fact that he is still employed by Monsanto as a leadman with no reduction of wages. While Dr. Middleton was of the opinion that the Claimant would experience increasing problems, he did not testify that Mr. Elliott was disabled (CX 1 at 17-18). Additionally, the tenor of Dr. Middleton's testimony shows that while Mr. Elliott is suffering from some symptoms of asbestosis he is still capable of performing his job (CX 1 at 16-21, 24-33). Dr. Selikoff's letter dated April 25, 1984 noted that Mr. Elliott was not suffering any "serious problems." (CX 6). Dr. Middleton's treatment notes also lend support to this conclusion. Consequently, I find that the Claimant is capable of continuing to earn his current wage. I have considered the Claimant's age, level of education, industrial history, the existence of a beneficent employer,

and the availability of other employment. However, in light of my finding that Mr. Elliott's wage earning capacity has not been diminished, he is not currently disabled. Therefore, the claim for compensation under the Act will be denied.

In his brief the Claimant argues that he should be awarded de minimis disability to preserve his claim. The Benefits Review Board has indicated that this type of award is not appropriate under the Act. Smith v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 287, BRB No. 82-270 (1984). Moreover, the regulations currently in effect governing notice and filing periods render de minimis awards unnecessary. See 20 C.F.R. §§ 702.212(b) and 702.222(b).

The Claimant has also requested that he be awarded medical benefits in this case. Section 907(a) requires employers to furnish medical treatment to employees based on the nature of their injuries, and the definition of the term injury as set forth in § 902(2) includes occupational diseases which arise out of employment. Although I have found that the Claimant is not disabled by asbestosis, he is injured within the meaning of the Act and Respondents will be ordered to provide medical benefits accordingly. The uncontroverted evidence offered by Dr. Middleton in his treatment notes and testimony shows that the Claimant does indeed have asbestosis (CX 1, CX 6, CX 7). Thus, it is clear that he is afflicted with an occupational disease and entitled to medical benefits.

The Claimant testified at hearing that he had been continuously exposed to asbestos as an insulator and a leadman up through 1974 or 1975 when Monsanto quit installing asbestos insulation (TR 15-21, 25). Mr. Elliott's testimony also indicated that his exposure to asbestos continued well after that date as old insulation was removed from barges and pipelines (TR 25). There was conflicting testimony regarding when the Company ceased using asbestos insulation (TR 97). However, this testimony is irrelevant since Mr. Elliott was clearly exposed to asbestos on the job. I find that Claimant's affliction with asbestosis arose out of and was caused by Mr. Elliott's exposure to asbestos during the course of his employment at Monsanto.

Even absent such a finding, Claimant is entitled to a presumption that his claim comes within the provisions of the Act as causally related to his employment. 33 U.S.C. § 920. Because Mr. Elliott's occupational illness arose from his employment as an insulator, I conclude that he does suffer from an injury within the meaning of § 902(2) and is entitled to medical benefits under the Act.

Timeliness and Notice of Claim

The Act contains two statutes of limitation which are set out at §§ 912(a) and 913(a). Respondents contend that both Mr. Elliott's notice of injury and his claim were untimely. However, in light of the fact that I have found that the Claimant is not entitled to compensation because he is not disabled, and because claims for medical benefits are never time barred, Dean v. Marine Terminals Corp., 7 BRBS 123, BRB No. 7-201 (1977), a determination regarding this argument is unnecessary.

Attorney Fees

Pursuant to § 28 of the Act and 20 C.F.R. § 702.132, Claimant's attorneys are entitled to reasonable fees and costs. A fee petition was submitted on January 28, 1986. It will be considered under a separate order to allow Monsanto and the Carrier an opportunity to respond.

ORDER

1. The Deputy Commissioner has the authority to perform and verify all computations necessary to effect this Order.

2. The Monsanto Company, as Employer, and the Insurance Company of North America, as Carrier, are hereby ORDERED to pay the reasonable cost of authorized and necessary medical care and treatment resulting from the asbestos-related occupational disease, subject to the provisions of Section 907 of the Act.

3. The Employer and the Carrier are FURTHER ORDERED to pay Claimant's attorneys such fees and expenses as may be approved by this Office.

4. Claimant John L. Elliott's claim for disability compensation is hereby DENIED.



E. EARL THOMAS
Deputy Chief Judge

Dated: 21 FEB 1986
Washington, D. C.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 7, 1986 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Eighth District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

John L. Elliott, P. O. Box 6B, Alta Loma, TX 77510

Claimant

Stephen M. Vaughan, MANDELL & WRIGHT, 806 Main, 21st Floor, Houston, TX 77002

Monsanto Company, P. O. Box 1311, Texas City, TX 77590

Insurance Carrier or Employer (if self-insured)

INA of Texas, P. O. Box 759, Houston, TX 77001

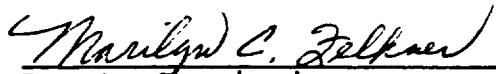
Douglas W. Poole, P. O. Box 629, Galveston, TX 77553

A copy was also mailed by regular mail to the following:

Judge E. Earl Thomas, Office of Administrative Law
Judges, U. S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits,
U. S. Department of Labor, Suite N-2716, NDOL,
Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA)
U. S. Department of Labor, Washington, D.C. 20211



Deputy Commissioner

Eighth Compensation District

U. S. Department of Labor

EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation
Programs

MAILED: 3/7/86

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