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PRACTICE LIMITED TO FEDERAL COURT

OF COUNSEL
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RECEIVED
JAN 15 1988
S-W LEGAL

January 8, 1988

John F. King, Esq.
Sherwin-Williams Company
101 Prospect Avenue, N.W.
Cleveland, OH 44115-1075

REDACTED

Re: Kaiser Shipyard #3, et al.
WCAB Case No: OAK 141300
Claim No: 918 C 31408/SMBS No: 144.054

Dear Mr. King:

We would like to thank you for referring this matter to our office for representation of Sherwin-Williams' interests in the action presently filed against Kaiser Shipyard #3. Sherwin-Williams is not a party defendant at this time; and, we, of course, are representing your interests in connection with the subpoena issued by counsel for Kaiser Shipyard #3, and Hartford Accident & Indemnity Company.

As you know, from our conversations with Mr. Normington, we did have an opportunity to review the file at the Workers' Compensation Appeals Board; and, our review led us to conclude that the most appropriate Motion to file on behalf of Sherwin-Williams would be a Motion to Set Aside the Order Compelling Answers to Subpoena Duces Tecum, and a Motion for Protective Order. We felt that time to file a Motion to Quash had in fact passed, and that our best hope of limiting the rather-broad subpoena was through the Motions that were in fact filed.

We are enclosing copies of our Motions, which have in fact been hand-delivered at the Workers' Compensation Appeals

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Board on January 8, 1988. You will note, in reviewing the Motions, that we are taking the approach that counsel for Kaiser Shipyard #3, and Hartford Accident & Indemnity Company did not comply with the new Civil Discovery Act in California, and, in doing so, denied due process to Sherwin-Williams. One key aspect to the new Discovery Act is that a deponent, and in particular a non-party deponent, has a right to present its case as to whether or not the deposition is reasonable.

The other argument we made focused on the burdensome quality of the subpoena. As Mr. Normington mentioned in our conversation, he had never seen a subpoena as broad as the one prepared by counsel; and, we tend to agree with him. We had a very similar experience wherein we represented Diamond Shamrock Chemicals Company on a series of toxic cases; and, we were successful in obtaining a Protective Order, as well as reimbursement of costs. As a matter of fact, counsel decided to forego the subpoena in that particular case, because of the rather-extensive costs in connection with production of the documents.

Presently, the Discovery Act calls for reimbursement to the producing party of \$.10 per page for normal-sized documents, and anything larger than 8½" by 11" is payable at \$.20 per page; and, the labor of a clerk, in connection with production of the documents, is \$16 per hour. It would be our estimate that, if you were able to comply with the subpoena, the costs would be rather significant; and, we would ask that potential costs be posted by counsel before we would agree to any production.

In summary, we think we have presented enough arguments that the Judge will take some action in favor of Sherwin-Williams.

You may be wondering why counsel is attempting to obtain the information from Sherwin-Williams. In California, we have what is known as cumulative occupational injuries; and, that is provided for in the Labor Code §5500.5. At one point in time, when an individual had a cumulative injury, whether it be exposure to toxic chemicals or repetitive stresses and strains from employment, he would file an action bringing in all past employers. For example, in this case, all parties listed on Social Security records would be joined as a party defendant. The parties would then go through the process of attempting to identify the various insurance carriers, and, in turn, join the carriers, and then proceed with further discovery.

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The usual outcome in cases of this nature was that, because there were so many parties, it was easy to spread the risk; and, settlements were relatively easy to accomplish. Although settlement was easy to accomplish, the cases became overly burdensome, because, as you can well imagine, in those cases where an individual worked for a number of different employers, you would usually end up at a conference with 15 to 20 defense attorneys. Costs, as well as management of the claims, became unbearable.

In hopes of reducing the nature of the litigation, the California Legislature passed Labor Code §5500.5. This particular Labor Code now limits the period of exposure to the last year of deleterious exposure. In the case presently before us, [redacted] testified that he had his last exposure to asbestos at Kaiser-Richmond Shipyard #3. Although it was well over 35 years ago, the law states that, since that was the last year of deleterious exposure, they would be responsible for all benefits. In this particular case, we now have death benefits in addition to accrued permanent disability, temporary disability, and medical expenses. Obviously, counsel for the defendant is attempting to determine if there was additional asbestos exposure at Sherwin-Williams; and, if there was additional asbestos exposure, was that partially causative of the development of lung cancer. Counsel does not have to show very much asbestos exposure, because most of the physicians who practice in this field state that the last exposure with a latency period of 10 to 20 years is usually enough to establish legal causation, as well as medical causation of the condition. We believe our strength in arguing against counsel's assertion is that there is now a defendant who had some responsibility; and, there is no evidence of any responsibility against Sherwin-Williams. We think counsel for [redacted] will follow an option under Labor Code §5500.5 to elect against Kaiser-Richmond Shipyard #3. By this election, she then proceeds to obtain a Findings and Award against Kaiser Shipyard #3. The usual practice is then that counsel for Kaiser Shipyard #3 will still pursue options concerning liability against Sherwin-Williams; and may later file what is known as a Petition for Contribution.

Our above explanation is as brief as possible. As you can well imagine, case law has developed over the past 10 to 15 years that explains all of this in greater detail. We will, of course, continue to keep you apprised of progress in regards to the case law, and how it applies to this particular matter.

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One other item that we think we should mention is that Sherwin-Williams would, of course, not have personal responsibility for any potential award against it if in fact you had workers' compensation carriers. The workers' compensation carrier becomes the actual defendant; and, they are the actual party responsible for payment of any award. They, of course, have a responsibility to work directly with Sherwin-Williams in attempting to limit their exposure. If Sherwin-Williams is joined as a party defendant, the next step is that the carriers are then identified and joined as party defendants. One further complication can now ensue if Sherwin-Williams is joined as a party defendant, and that is, if there is more than one insurance carrier for Sherwin-Williams, you then have the various carriers attempting to identify when was asbestos last used by Sherwin-Williams. This becomes a major fingerprinting episode, and further complicates litigation.

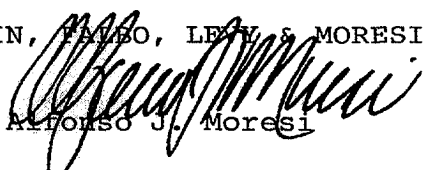
As we discussed with your offices, we are presenting undertaking to identify the insurance carriers for Sherwin-Williams from 1958 to the present time. There is very minimal cost in identifying the carriers through the Workers' Compensation Insurance Rating Bureau.

We will be reporting to you following our attendance at the conference of January 12, 1988. If you have any questions concerning our explanation of the present status, please advise us.

Very truly yours,

LAUGHLIN, PATRICK, LEVY & MORESI

By:


Alfonso J. Moresi

AJM/jm
Enclosure

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