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January 27, 1969

Industrial Accident Board
State of Montana
Helena, Montana 59601

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ATTENTION: Robert Swanberg
Chairman

Re: Employee: Robert Cohenour
Employer: Bonolite Division
W. R. Grace & Co.

Dear Mr. Swanberg:

This will serve to confirm our several telephone conversations concerning a determination of the procedure to be followed in the above matter.

As you are aware, Form 37 was filed with the Board by the employer in August of 1968, describing injury as "pulmonary fibrosis". Mr. Cohenour had undergone certain medical tests in July of 1968 which indicated a condition described as "pneumoconiosis characteristic of asbestosis". He returned to his employment immediately after these tests were conducted, and has remained actively employed since that time.

My question as presented to you in our discussions related to the Board's interpretation of The Occupational Disease Act of the State of Montana, particularly as it applies to asbestosis under the above factual situation, and the further procedure if any which may be required by the Board at this time. I believe we agree that under the Act, the Board is required to determine the validity of claims in accordance with the procedure outlined in Section 92-1315, R. C. M., 1947, which apparently requires a medical examination by a member of the "Medical Committee" appointed by the Board. It should however be noted that it is apparently contemplated that this procedure not be set in motion until such time as a claim for actual disability has been filed.

The problem next logically appearing therefore, concerns what, if any activity or action may be required of an employee possibly suffering from the condition known as asbestosis, but not disabled and capable of performing his regular employment.

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It appears that if in fact a person has actually contracted the disease, it may or may not progress to such a point as to be disabling.

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As we discussed, the Act generally distinguishes claims involving silicosis or ionizing radiation from all other occupational disease. The 1965 Amendment adding asbestosis as an occupational disease apparently did not contemplate using the term "asbestosis" interchangeably with "silicosis", and it would therefore appear at first blush that asbestosis must then be considered to be lumped throughout the Act with the other occupational diseases. This distinction would of course appear to be of considerable importance when considering various other portions of the Act.

Sections 92-1312 and 92-1313, R. C. M., 1947, read together, seem to indicate that "notice of disability" should be filed by the employee, except in cases involving silicosis, within thirty days after the employee was or should have been aware of the nature of the impairment, and that his "claim" should be filed within thirty days after filing such notice of disability.

As the term "disability" is synonymous with the term "disablement" under 92-1303, Sub-section 5, and means "the event of becoming physically incapacitated", it does not appear to me that a notice of disability as required under Section 92-1313 need be filed until such time as physical incapacity becomes a fact.

It seems to me that to provide otherwise would require an employee who suspects he may actually have contracted asbestosis to file his notice and claim, even though he is not in any way disabled. This in turn would seem to set in motion the Board procedures required under Section 92-1315, and could very well have the effect of precipitating a contested claim before the Board, which in the final analysis may never involve any actual physical incapacity.

On the other hand, it would seem that if no further action is required in a case of this type unless actual physical incapacity does later occur, all rights of both the employee and employer are fully protected, and the matter can be later litigated if necessary.

As we discussed, I shall very much appreciate your considering the situation and providing me with the benefit of your own views.

Sincerely,

SYL/nk

S. Y. Larrick

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