001254

November 25, 1967

R MAIL

aryland Casualty Company
15 East Ankey Street
ortland, Oregon

TTENTION: John Hopkins

Re: Your Claim No: 750 C 890
Insured: W. R. Grace & Co.
(Zonolite Division)
Claimant: LILAS D. WELCH
Policy: R 001398

ar Mr. Hopkins:

This will confirm our recent telephone conversation concerning the above matter. As I informed you at that time, very recent developments in the case seem to me to require that we re-assess our own position, and as Mr. Robert Conley, of American Adjustment Company, was not available, we contacted you direct, and in accordance with your suggestions, I am forwarding this report to you, with copy to Mr. Conley.

At the time I contacted you, I was conferring with Mr. Earl Lovick, of the insured's Libby, Montana offices, and we had thoroughly reviewed all phases of the case. In addition, we had gone over all material provided by the Montana State Board of Health, and had discussed the entire situation with Mr. Benjamin F. Wake, the State Board's Chief Industrial Hygiene Engineer with the Division of Disease Control.

As we were of course earlier aware through reports furnished insured by the State Board of Health, the original plant inspection conducted in 1956 revealed a dust problem in the dry mill. At that time however, the asbestos content of the dust had not been determined.

Through the years however, the plant inspections did reveal asbestos content, and of course the percentage of such fibers found to exist in the dust in the mill did far exceed what were considered to be allowable concentrations.

Many recommendations were presented by the State Board, and it would appear insured gradually attempted to correct the situation. It must however further be considered that it might appear to others that the action taken by insured to correct the situation which was presented, might not to the unbiased observer, appear to have been either extremely effective, or quickly performed.

State Board records reveal that additional recommendations were made in 1959, and at that time actual dust samples in the dry mill had revealed an asbestos content, which, while not extremely severe, was, in the words of the Board report "significant".

In 1962, dust samples revealed a high asbestos content, and the Board's conclusions at that time were that "no progress had been made in reducing dust concentrations in the dry mill to an acceptable level, and that indeed the dust concentrations had been increased substantially....." Further recommendations were made relative to alleviation of the problem.

In 1963, concentrations again were determined to be well in excess of "acceptable levels" and at that time the State Board recommended that "considerable effort should be made immediately to improve the dust control procedures at the plant to reduce dustiness to an acceptable level".

A study of the information furnished by the State Board would therefore make it appear that the asbestos problem has existed certainly since 1956, and generally with increasing severity. It does however now appear that preventive measures have at least commenced having effect, and according to Mr. Lovick, it would seem that considerable strides have been made within the last couple of years.

Nevertheless, as I informed you, I would hesitate to allow in evidence the State Board reports if it is possible to keep them out of the hands of the Industrial Accident Board, and through it, the general public.

While I have not researched the problem, it has even occurred to me that insured's inability to curb the problem at the State Board's recommendations through the years, might be alleged at least to have constituted willful and wanton conduct on its part, with whatever complications that particular charge might carry with it.

Further, Mr. Lovick, for the first time, thought to advise me of certain studies which have been conducted by a local Radiologist since around 1963 or 1964, which apparently have involved obtaining annual x-rays of all employees for study. The information furnished by Mr. Lovick was to the effect that the Radiologist was convinced that a good many of the employees suffered from lung abnormalities which could be the result of encroaching asbestosis.

This information of course appeared to me to be of extreme importance, and we made arrangements to travel to Whitefish, Montana immediately to interview the Radiologist. The party involved, Dr. William Little, informed me that his studies most certainly did indicate there to be present a great deal of lung abnormalities among the insured's employees, far in excess of the percentage one would find in examining the ordinary population, and he did in addition point out that the situation was even more severe, when considering that he was in general examining young, hearty male workmen.

Dr. Little stated that we did indeed have a severe problem, and that we might expect a good many claims involving asbestosis.

He did further indicate however that in his view, the more recent steps taken by the insured to alleviate the problem were having their effect, in that it appeared to him from his most recent studies, that a lesser percentage existed of new or previously non-discovered abnormalities, as well as some decrease in the speed of the progress of the disease in those workers suffering from it throughout the course of his studies.

We might point out that apparently the only persons aware of the studies are the insured's officials, and Dr. Little. Again, as you may well realize, I would much like to avoid having evidence presented by the opposing party which would reveal the extent and severity of the problem with which we are concerned.

Claimant Walch had been employed in the warehouse situate in the yard at the mill site since 1956, or from a time three years prior to Montana's adoption of the Industrial Disease Act. In addition, "asbestosis" was not added as a compensable industrial disease until 1965.

No dust counts had been obtained in the warehouse or yard area by the State Board, and it appeared that no information with respect to contamination of those areas was available.

I understood that insured's own engineers were never able to find a measurable amount of dust in the yard area, and accordingly it was my thought that our primary defense would rest upon the fact that claimant's last injurious exposure must have been prior to the effective date of the Act, and the inclusion of asbestosis.

As you know however, I have felt that the Industrial Accident Board would require us to provide all available relevant information obtained by the State Board of Health, and while we were willing to admit the existence of asbestos fibers in the dust in the dry mill, it was not felt that tests there conducted were truly relevant to the issues in this case involving employment in the warehouse.

In a letter to me of June 28, 1967, Mr. Robert Swanberg, Chairman of the Industrial Accident Board, had urged a "full disclosure of all pertinent material on this question to avoid controversies that will merely prolong the litigation without materially effecting its outcome", and further discussions with him made it appear that he agreed that a total disclosure of all information in the State Board's hands might well not be justified in the instant case.

Now however, I am informed by Mr. Wake, of the State Board of Health, that while he had limited his own dust counts to the dry mill, he did believe that a problem would exist with respect to the drillers in the mine itself, as well as with respect to truck drivers loading and unloading under and into hoppers. Further, while this information did not appear in any of his reports, he stated that the exhaust at the mill was so placed as to create a dust problem in the yard itself. The warehouse is located in the yard, and accordingly it would now appear that the entire area may be considered to be possibly permeated with concentrations of asbestos fiber in excess of allowable percentages.

Mr. Lovick has now advised that the company did receive a request from union officials to change the mill exhaust around a year ago, and my recollection is that Mr. Wake had made such a recommendation, however apparently on an oral basis.

At any rate, the problem now presented is that claimant Welch may well have suffered "an injurious exposure" as that term may be defined in the Occupational Disease Act, at most every point he was employed, including the warehouse. The fact also now must be considered that a great many of insured's employees suffer from lung abnormalities and a good many of them have probably never been in the mill, which of course simply means that they are contracting the disease in the yard or in fact at any point where a dust condition may exist.

I had explained to Dr. Oscar Sander, of Milwaukee, Wisconsin, in a recent conference, my own theory of defense concerning exposure at the warehouse, however in reviewing the Pathologist's report, and report of Dr. Thomas Power, retained by the Industrial Accident Board to perform a biopsy on claimant Welch, Dr. Sander felt that Mr. Welch must have suffered injurious exposure even while employed in the warehouse.

He advised that he did not feel he could assist us in any way at the Hearing, in that all information available to him would indicate that the claim might well be compensable. He has now provided me with his written report in this respect, copy of which I am attaching, and you will notice that he feels claimant must have suffered a considerable exposure not only in the mill in 1949, but also in the warehouse since 1956.

When all of the above developed so rapidly, it occurred to me that discretion might be the better part of valor in the instant case, and that you might wish to seriously consider a compromise settlement in hopes of, in this manner, avoiding the necessity of exposure of all of the more damaging aspects of our own situation at the Hearings rooms. It was my feeling that when considering the studies made by insured's own Radiologist, that the problem of asbestosis among insured's employees might better be met through a continued attempt by the employer to alleviate the dust problem prior to facing either the Industrial Accident Board, or a competent claimant's attorney.

As you are aware of course, this matter has been set down for Hearing in Kalispell on November 29, 1967. I attempted to obtain a stay through counsel representing claimant. He advised however that his own client was becoming so impatient that he simply could not agreed to a delay at this time, and accordingly if there is any hope of avoiding a Hearing, it must necessarily involve attempting to obtain some authority and disposing of the matter prior to that date.

As you explained to me in our telephone conversation of November 22, 1967, you did not feel we would be in a position to obtain such authority without this written report, and I am accordingly forwarding it to you at the first opportunity.

I may say that it now appears that counsel intends at the Hearing of November 29, to establish his record through claimant himself, as well as other employees who may be expected to testify in general terms as to the dust problem at the mill, and most probably at other points around the premises.

In addition, it appears that counsel has subpoenaed insured's Safety Engineer, who we would assume, is well aware of the major aspects of our problem, and a good bit of damaging testimony may get into the record at that time.

On the other hand however, I do not believe counsel intends to attempt at that time to obtain reports of the State Board of Health, and in fact, Mr. Swanberg of the Industrial Accident Board has indicated to me that he may well continue the Hearing, resetting it in Helena at a later date to pick up this information.

In this latter regard, I am now convinced that we have a good argument with respect to the privileged character of State Board reports, through a provision included in the Session Laws of 1967 relating to State Board of Health records and information.

As indicated on previous occasions however, I simply do not feel when considering the extent of the problem here presented, that we can afford to antagonize the Industrial Accident Board by refusing to be at least somewhat candid in making information available upon which it may make a reasonable decision.

The question of relevancy now of course presents difficulty, in that if dust from the mill is being exhausted in the yard area where the warehouse is situate, the content of the dust at the dry mill may well be considered to relate directly to Mr. Welch's condition. Even our own expert, Dr. Oscar Sander, would be forced to hold to this view, were he in fact examined.

It is my feeling that we may attribute our present situation primarily to the fact that it appears that no one has ever quite realized the extent of the problem which exists. Certainly Mr. Lovick, who has been extremely cooperative and helpful, felt that there was not a contamination problem present at any point other than at the dry mill itself, and possibly at the loading and unloading hoppers. Now however, we find that dust from the mill itself may from time to time permeate the entire yard, and of course it may well be argued, and perhaps with some validity due to the incorrectly placed exhaust, that the entire yard area may subject workmen to what might be termed to be "injurious exposure". Mr. Lovick does inform that funds are now available which will allow moving the exhaust, and correcting that particular problem.

I might point out that the Radiologist involved, Dr. Little, did mention his amazement at the percentage of workers presenting lung abnormalities at the insured's plant, as compared to a problem such as silicosis at a typical mine. His own explanation was that generally in a mine, the only persons directly exposed are the hard-rock miners themselves, and then only on those occasions when silican dioxide is existent in the ore, and he differentiates that situation from our own where the entire area may from time to time be permeated with injurious dust.

I believe it should be further pointed out that we have no genuine guidelines to assist us in approaching this problem. As I understand from information furnished by Mr. Lovick, the Libby, Montana Vermiculite mine and plant may well be the only one in the world where an identical situation exists, and while the problem of asbestosis has been subject to considerable study, it has generally involved either asbestos miners, or persons working with asbestos in some commercial form. In our case, we are concerned primarily with Tremolite, an extremely short fiber asbestos which cannot be used for commercial purposes, and which accordingly has not figured in previous studies.

As I informed you in our telephone conversation, it may be that I can obtain a favorable decision in the instant case on technicalities alone, however it would appear that it will be necessary to expose the entire situation to the Industrial Accident Board, whose records may well be available to unions and the general public. Most certainly claimant's counsel around the area are going to be well aware of the existence of the problem if all information is placed in evidence.

Additionally, when considering the most recent developments, it would appear to me that the Industrial Accident Board might well ignore technicalities and determine the instant claim to be compensable, allowing us to test its decision at the District or Supreme Court level.

At the time I contacted counsel relative to a possible stay of the proceedings, I informed him that we might be willing to consider some sort of compromise in order to avoid the expense of proceeding further. I asked if he had a figure of his own in mind, and was informed that he did not, and I am accordingly unable to provide you with any information to pass along concerning possible compromise and settlement.

We will of course advise you of all developments as they occur, and should you wish to discuss the matter further personally, I would appreciate your contacting me by telephone. In this regard, I will be in other industrial accident Hearings on Monday and Tuesday, November 27 and 28, however arrangements for such discussion can be made through my personal secretary, Mrs. Klehm, should it be necessary.

I am at this time attaching statement submitted by Dr. Oscar Sander in the sum of $50.00, and request that draft in payment be issued and forwarded to this office, in order that we may personally thank the Doctor for his assistance.

Sincerely,

S. Y. Larrick

SYL/nk

Enclosures: Dr. Sander's Report
Dr. Sander's Statement

CC: Mr. Robert Conley
American Adjustment Company
Great Falls, Montana 59401
(With Enclosures as Listed Above)
Your File: 1 C 34-016160

November 25, 1967

AIR MAIL

Maryland Casualty Company
1415 East Ankey Street
Portland, Oregon

ATTENTION: John Hopkins

Re: Your Claim No: 750 C 890
Insured: W. R. Grace & Co.
(Zonolite Division)
Claimant: LILAS D. WELCH
Policy: R 001598

Dear Mr. Hopkins:

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At the time I contacted you, I was conferring with Mr. Earl Lovick, of the insured's Libby, Montana offices, and we had thoroughly reviewed all phases of the case. In addition, we had gone over all material provided by the Montana State Board of Health, and had discussed the entire situation with Mr. Benjamin F. Wake, the State Board's Chief Industrial Hygiene Engineer with the Division of Disease Control.

As we were of course earlier aware through reports furnished insured by the State Board of Health, the original plant inspection conducted in 1956 revealed a dust problem in the dry mill. At that time however, the asbestos content of the dust had not been determined.

Through the years however, the plant inspections did reveal asbestos content, and of course the percentage of such fibers found to exist in the dust in the mill did far exceed what were considered to be allowable concentrations.

PLAINTIFF'S EXHIBIT WRG-186

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State Board records reveal that additional recommendations were made in 1959, and at that time actual dust samples in the dry mill had revealed an asbestos content, which, while not extremely severe, was, in the words of the Board report "significant".

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Nevertheless, as I informed you, I would hesitate to allow in evidence the State Board reports if it is possible to keep them out of the hands of the Industrial Accident Board, and through it, the general public.

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P GRACE
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I believe it should be further pointed out that we have no genuine guidelines to assist us in approaching this problem. As I understand from information furnished by Mr. Lovick, the Libby, Montana Vermiculite mine and plant may well be the only one in the world where an identical situation exists, and while the problem of asbestosis has been subject to considerable study, it has generally involved either asbestos miners, or persons working with asbestos in some commercial form. In our case, we are concerned primarily with Tremolite, an extremely short fiber asbestos which cannot be used for commercial purposes, and which accordingly has not figured in previous studies.

As I informed you in our telephone conversation, it may be that I can obtain a favorable decision in the instant case on technicalities alone, however it would appear that it will be necessary to expose the entire situation to the Industrial Accident Board, whose records may well be available to unions and the general public. Most certainly claimant's counsel around the area are going to be well aware of the existence of the problem if all information is placed in evidence.

Additionally, when considering the most recent developments, it would appear to me that the Industrial Accident Board might well ignore technicalities and determine the instant claim to be compensable, allowing us to test its decision at the District or Supreme Court level.

At the time I contacted counsel relative to a possible stay of the proceedings, I informed him that we might be willing to consider some sort of compromise in order to avoid the expense of proceeding further. I asked if he had a figure of his own in mind, and was informed that he did not, and I am accordingly unable to provide you with any information to pass along concerning possible compromise and settlement.

We will of course advise you of all developments as they occur, and should you wish to discuss the matter further personally, I would appreciate your contacting me by telephone. In this regard, I will be in other industrial accident Hearings on Monday and Tuesday, November 27 and 28, however arrangements for such discussion can be made through my personal secretary, Mrs. Klehm, should it be necessary.

I am at this time attaching statement submitted by Dr. Oscar Sander in the sum of $50.00, and request that draft in payment be issued and forwarded to this office, in order that we may personally thank the Doctor for his assistance.

Sincerely,

S. Y. Larrick

SYL/nk

Enclosures: Dr. Sander's Report
Dr. Sander's Statement

CC: Mr. Robert Conley
American Adjustment Company
Great Falls, Montana 59401
(With Enclosures as Listed Above)
Your File: 1 C 34-016160