

February 22, 1968

Maryland American General Group
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:

This letter will serve to confirm our several most recent telephone conversations concerning this particular matter, and to provide you with a general summary of events leading up to final settlement.

As you are of course aware, trial of the issues involved was conducted before the Chairman of the Industrial Accident Board in Kalispell, on November 29, 1967.

We had discussed the matter shortly before the Hearing, and I had informed you of the developments that had occurred and information which had become available a few days prior to the date set for trial, which information was confirmed in our letter of November 25, 1967.

Information then available had led me to believe that we might well wish to attempt to dispose of the case by way of settlement, rather than proceeding on through trial and facing the possibility of the admission of a great deal of very damaging evidence which might have a grave effect on any future claims of this nature arising through employment by the company in Libby.

Settlement of course could not be effected at that late date, and consequently the matter was heard at the time set. The employer itself was of course quite concerned with the general situation, as well as with the particular case with which we are concerned, and the general counsel of the division conducting the Zonolite operations, Mr. Charles Dugan, traveled from Cambridge, Massachusetts to Kalispell in order to attend trial.

PLAINTIFF'S
EXHIBIT

4-33.8

Counsel representing claimant had subpoenaed several fellow employees, as well as Mr. Kujawa, Safety Engineer for the company, and of course the local Zonolite management was present. In addition, the case had apparently aroused considerable interest, and there were several spectators, including counsel representing still another claimant whose physical difficulties arose prior to the time coverage was provided by Maryland Casualty Company.

In general, the testimony of the fellow workers indicated that they encountered a dust problem at many points throughout the Zonolite plant facilities, and a great deal of testimony was introduced with respect to dust conditions existent in the yard area itself. It is of course at this point that the warehouse, where claimant was employed for many years prior to his retirement, is located.

It was further developed that the main exhaust system of the mill had been so constructed as to allow the intense mill dust to pervade the yard area. It was further developed that claimant was required to sweep the warehouse as well as travel from point to point throughout the yard area in performing his general duties. Another party who had been employed in the warehouse testified to the extreme dust conditions which arose while sweeping, and employees working in a machine shed some distance from the mill testified that the condition at that point at times became extremely severe.

It was also developed that complaints had been registered by union representatives in a meeting with the Zonolite manager some months prior to claimant's retirement, and it was alleged that certain concessions or admissions had been made by the management at that time.

It was however established that neither the management nor the employees or union representatives were actually aware of the severity of the conditions, or of the degree of exposure to harmful substance until very recently, and of course this information is pretty well documented in our own file.

The hazard we faced particularly at the time did of course involve the numerous written reports submitted by the State Board of Health which through the years indicate that the State Board had become more and more concerned with the problem of asbestosis.

While no State Board representative had been subpoenaed or was present at the Hearing, counsel attempted to bring in information contained within such reports through the testimony of the employer's Safety Engineer and manager.

We registered an objection on several grounds, including a claim that all such information was included under a statute relating to the privileged nature of information developed by the State Board of Health. A rather heated argument arose at that time, with the Chairman of the Board at first indicating that he was not aware of any such statutory privilege, and indicating that he intended to allow in evidence all such information which might be relevant to the issues.

A noon recess was called at this time, and we were able to convince the Chairman that such privilege did exist, further pointing out that the best evidence of course would be the reports themselves or the actual findings of the State Board representative admitted through his own testimony.

The Chairman finally sustained our objection, and I believe the entire matter was conducted in a manner which made it evident that while we were not attempting to stifle or exclude relevant testimony, we simply had no intention of allowing hearsay evidence in the record.

The Hearing consumed the entire day, and I actually believe the record would indicate little actual evidence establishing claimant's condition to have been proximately connected with his employment in the warehouse was presented.

The general picture however would of course necessarily reflect the dust conditions existent at the plant, and further the existence of asbestos fiber in the mill dust could not be denied.

The Hearing was continued at the conclusion of the testimony, and arrangements were made to obtain the deposition of Dr. Harry Power, of Great Falls, Montana. In addition of course, counsel indicated his intention of continuing with an attempt to obtain the State Board of Health records and place them in evidence, and discussion was had relative to obtaining such testimony at a Hearing to be conducted in Helena, Montana, the State Capitol.

A further problem presented to us, as you and I have discussed by telephone, was the possibility that the Industrial Accident Board might in fact find the claim to be entirely uncompensable, as not within The Occupational Disease Act as such, which in turn opened up the possibility of Zenolite being faced with a civil suit for damages in an employer's liability situation.

This particular situation has in fact arisen in Montana in the past in a case involving inhalation of cement dust, and in that case, the employee obtained a judgment in excess of \$50,000.00 in a suit conducted in the Montana Federal District Court. While this particular facet of the case might not be considered to be actually an element in the occupational disease Hearing, still the exposure that might be encountered by the employer under such circumstances could not be ignored.

After considering the situation as it stood at the close of the Hearing, Mr. Dugan, counsel for Zenolite, indicated that he felt settlement attempt was definitely indicated, and he did in turn assure those concerned that he intended to present all of the problems existent at the Libby plant to the Division management as soon as he returned.

A few days after the Hearing, we had a discussion with the Chairman of the Industrial Accident Board in an attempt to ascertain his view of the proceedings up to that time. He indicated that he felt that while the record before him could not be said to establish with certainty that claimant had been injuriously exposed to asbestos fibers during his employment at the warehouse, which of course had continued for many years prior to his final disability, he did feel that there could be no question but that Mr. Welch had contracted the disease while in the employment of the Zenolite company, and that he felt under such circumstances he should extend the benefit of any doubt to the employee and allow us to contest such decision through the Courts if we felt necessary.

This information of course merely confirmed the opinion we all held at that time, to the effect that some compromise settlement should be entered into without delay.

As you will recall, you and I discussed the situation and decided to open negotiations with an offer in an area under \$5,000.00 with the indication that we felt under any circumstances, the extent of liability was statutorily limited to that amount. I might say in this particular respect, that the Chairman of the Board had agreed that our views might be correct in this regard, but had further indicated that if he ruled the matter to be compensable, he intended to allow the claim in its entirety which of course presented us with total exposure of around \$19,000.00.

At any rate, we did commence negotiations, and after several discussions, were presented with what we were informed to be the final minimum figure of \$12,000.00.

I discussed the matter with you again at that time, and authority in that amount was extended.

We then conducted further negotiations, and in addition called upon the Chairman of the Board to exert whatever pressure he could toward settlement at a figure of \$10,000.00, and after a good deal of discussion, agreement was finally reached at this figure.

As I have informed you, The Occupational Disease Act of Montana simply makes no provision for a compromise lump sum settlement such as is included within the Workmen's Compensation Act.

Our own situation is of course unique in this jurisdiction, and we really have little precedent to follow in concluding the matter in the manner in which we did. It appears that the only method of disposing of such a claim acceptable to the Industrial Accident Board involves the withdrawal of the claim presented by the injured employee, coupled with a full and final release, and we have so proceeded.

Withdrawal of Claim, properly subscribed by Mr. Welch has been forwarded along to the Industrial Accident Board, and in addition we drafted a Release which we feel will adequately protect the employer and insurer's position, which has been subscribed by Lilas D. Welch and Christine Welch, his wife, and we are at this time forwarding copies of Withdrawal of Claim, together with original and copy of Release.

You will note that the Release does contain a hold harmless and indemnification provision, and as in the instant case there are minor beneficiaries, it would appear that no further action need be taken, however in the event a case of this type is disposed of in a similar manner in the future, and minor beneficiaries are involved, further thought most certainly should be given to the proper method of disposing of any possible claims of such minors.

Draft earlier forwarded along has been delivered, and as all phases of this matter are now disposed of, we are at this time closing our file and submitting statement for services, together with itemization of time and expense incurred.

Industrial Accident Board Order acknowledging Withdrawal of Claim will be issued in due course, and we will forward it along to you at that time.

We are certainly pleased to have had the opportunity to be of service to you in the defense of this extremely interesting case, and are happy the matter could be disposed of on an equitable basis.

Sincerely,

S. Y. Larrick

SYL/nk

Enclosures: Statement for Services,
with Itemisation of Time and Expense
Copies, Withdrawal of Claim
Original and copy, Release

cc: Mr. Robert Conley
Your File: 1 C 34-016160
Enclosures: Copy, Withdrawal of Claim
Release