

FILE NAME: Johns-Manville (JMA)

DATE: 1955

DOC#: JMA141

DOCUMENT DESCRIPTION: Contract Unit Claim File - John Swartout

WORKERS' COMPENSATION APPEALS BOARD - CALIFORNIA
(INDUSTRIAL ACCIDENT COMMISSION, prior to 1966)

APPLICANT JOHN SWARTOUT(deceased) by spouse Bergit CASE # SF 169171
Asbestos Insulator

DATE CLAIM FILED December 28, 1955

INJURY ALLEGED Asbestosis

ALLEGED DATE OF INJURY "Exposure over long period of time" Companies
cited 1940-1955

EMPLOYER/INSURER Western Asbestos Co./Mundet Cork Corp. et. al.

No apparent Canadian insurer

OTHER NOTES "Medical evidence without conflict: asbestosis"

No medical reports in file

Widow reopened case upon applicant's death June 6, 1956

DATE OF RESOLUTION June 10, 1958 (Previous: \$2,355 disability)

RESOLUTION Decision after Reconsideration

\$7,000 death benefit + costs for burial

DOCUMENTS COPIED 1) Decision After Reconsideration

OF PAGE
4

2) Western Asbestos Co. & State Comp Ins Fund 5
Petition for Reconsideration

CLAIMANT

John Swartout

36

California Workers' Compensation Appeals Board

CARRIERS INVOLVED:

- The AETNA Casualty & Surety Co.
- oAmerican Automobile Ins. Co.
- oAmerican Employers Ins. Co.
- oAmerican Motorists Ins. Co.
- oArgonaut Ins. Co.
- oAssociated Indemnity Corp.
- oCalifornia Casualty Indemnity Exchange
- oCalifornia Compensation & Fire Co.
- oCasualty Ins. Co. of California
- oEmployers Liability Assurance Corp.Ltd.
- oEmployers Mutual Liability Ins. Co. of Wisconsin
- oFidelity & Casualty Co. of New York
- oFireman's Fund Ins. Co.
- oGeneral Accident, Fire & Life Assurance Corp. Ltd.
- oGlobe Indemnity Co.
- oGuarantee Insurance Co.
- oGreat American Ins. Co.
- oHardware Mutual Casualty Co. (Sentry Ins. Co.)
- Industrial Indemnity Co.
- Industrial Indemnity Exchange
- oInsurance Co. of North America
- Liberty Mutual Ins. Co.
- oLumberman's Mutual Casualty Co.
- oMaryland Casualty Co.
- oMichigan Mutual Liability Co.
- oMission Insurance Co.
- oNational Automobile & Casualty Ins. Co.
- oNew Amsterdam Casualty Co.
- oOcean Accident & Guarantee Corp.Ltd.
- Pacific Employers Ins. Co.
- oPacific Indemnity Co.
- Reliance Ins. Co. (Standard Accident Ins. Co.)
- oRoyal Indemnity
- oSecurity Ins. Co. of Hartford (U.S. Casualty Ins. Co.)
- State Compensation Insurance Fund
- oTransport Indemnity Co.
- The Travelers Ins. Co.
- oThe United Pacific Ins. Co.
- oU.S. Fidelity & Guaranty Co.
- oZenith National Ins. Co.
- oZurich Ins. Co.
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1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3 BERGIT A. SWARTOUT,

CASE No. SF 169-171

4
5 Applicant

6 vs.
7 MUNDET CORZ CORPORATION, et.al.

C E R T I F I C A T I O N

8
9 Defendant

10
11 I hereby certify that the attached documents are true
12 and correct copies of the original documents filed in the records
13 of this office in the above-entitled matter.

14 ATTEST my hand and the Seal of the Workers' Compensation
15 Appeals Board of the State of California.

16
17
18
19 ALFRED C. WILLIAMS

20 Workers' Compensation Judge
21 Workers' Compensation Appeals Board

22
23
24 Dated at San Francisco,
25 California, this 3rd day
26 of April, 1981

1. SERVED BEFORE THE INDUSTRIAL ACCIDENT COMMISSION
 2. JUN 10 1958
 3. JUN 10 1958
 4. JUN 10 1958
 5. JUN 10 1958

THE INDUSTRIAL ACCIDENT COMMISSION
 OF THE STATE OF CALIFORNIA

CASE NO. 154,71

BERGIT A. SWARTOUT,

Applicant

v.

MUNDET CORK CORP., HARRY A. DUTTON,
 INC., DUTTON ASBESTOS CO., DUTTON
 ASBESTOS & SUPPLY CO., WESTERN
 ASBESTOS CO., BAY CITY ASBESTOS CO.,
 LTD., CORK INSULATION CO., INC.,
 WESTERN FIBER GLASS COMPANY, GENERAL
 INSULATION & RUBBER CORPORATION,
 ARMSTRONG CORK CO., JOHNS MANVILLE
 SALES CORPORATION, C. C. MOORE & CO.,
 J. T. THORPE & SON, INC., M. R.
 CARPENTER, AETNA INSURANCE COMPANY,
 STATE COMPENSATION INSURANCE FUND,
 INDUSTRIAL INDEMNITY EXCHANGE,
 INDUSTRIAL INDEMNITY COMPANY, LIBERTY
 MUTUAL INSURANCE COMPANY, TRAVELERS
 INSURANCE COMPANY, STANDARD ACCIDENT
 INSURANCE COMPANY and PACIFIC EMPLOYERS
 INSURANCE COMPANY,

Defendants

DECISION
 AFTER RECONSIDERATION

DEPARTMENT OF INDUSTRIAL RELATIONS
 DIVISION OF INDUSTRIAL ACCIDENTS
 FILED
 JUN 10 1958
 Per *MM*

Reconsideration having been granted herein and the
 matter having been carefully considered, including transcripts
 of the testimony, as well as the record as a whole, this Commis-
 sion now concludes that further proceedings are not essential
 for the disposition of the claim and makes its Decision after
 Reconsideration as follows:

GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that Findings and Award filed March 4,
 1956 be, and the same is, vacated, annulled and set aside, and
 that the following Findings and Award be substituted in lieu
 thereof and made the Decision after Reconsideration of this
 Commission.

FINDINGS OF FACT

1. John E. Swartout, while employed as an asbestos worker in the County of San Francisco, State of California, on January 10, 1955, by Western Asbestos Company, sustained an injury arising out of and occurring in the course of his employment, consisting of substantial and material exposure to asbestosis. At said time, the employee's wages were maximum.

2. There may have been like exposure in other employments both within and without the State of California.

3. Applicant has elected to proceed against the Western Asbestos Company and its insurance carrier, the State Compensation Insurance Fund, pursuant to Labor Code Section 5500.5.

4. Said injury resulted in temporary total disability beginning on January 11, 1955, continuing to and including June 5, 1956, entitling the employee to temporary total disability indemnity at the rate of \$35 a week in the total sum of \$2,555.

5. The evidence establishes that said employee failed to give defendants notice of his need for medical treatment to cure or relieve him from the effects of said injury.

6. The employee died on June 6, 1956, and the evidence establishes that said death was proximately caused by the injury herein.

7. The application for adjustment of claim was filed herein within one year from the date of said injury.

8. The evidence fails to establish that defendants or any of them have been prejudiced by lack of notice of the claim asserted herein.

9. Said employee left surviving him his widow, Sergit A. Swartout, the applicant herein.

10. Applicant is entitled to the statutory burial expense of \$400.

11. The employee incurred expense in the sum of \$35 for

examination and report by Dr. Allan E. Moe required to successfully prove his case.

12. Applicant's counsel, Smith & Parrish, have performed services of the reasonable value of \$600.

A W A R D

AWARD IS MADE in favor of Bergit A. Swartout and against the State Compensation Insurance Fund of accrued temporary disability indemnity commencing January 11, 1955, to and including June 5, 1956, at the rate of \$35 a week in the total sum of \$2,555, payable forthwith.

AWARD IS FURTHER MADE in favor of Bergit A. Swartout and against the State Compensation Insurance Fund of a death benefit in the amount of \$7,000, payable at the rate of \$35 a week beginning June 6, 1956, less \$600 payable to Smith & Parrish as attorneys' fee.

AWARD IS FURTHER MADE in favor of Bergit A. Swartout and against the State Compensation Insurance Fund for burial expense in the amount of \$400.

AWARD IS FURTHER MADE in favor of Bergit A. Swartout and against the State Compensation Insurance Fund of the sum of \$35 for medical litigation costs, payable to Dr. Allan E. Moe.

IT IS ORDERED that all payments herein shall bear interest as provided by Labor Code Section 5800.

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA

F. A. Lawrence

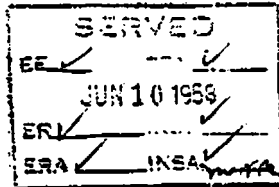
[Signature]
Commissioners

Deputy
Commissioner

JUN 9 - 1959

BERGIT A. SWARTZ

v. MUNDET CORK CORP., HARRY A. DUTTON, INC., DUTTON ASBESTOS CO., DUTTON ASBESTOS & SUPPLY CO., WESTERN ASBESTOS CO., BAY CITY ASBESTOS CO., LTD., CORK INSULATION CO., INC., WESTERN FIBER GLASS COMPANY, GENERAL INSULATION & RUBBER CORPORATION, ARMSTRONG CORK CO., JOHNS MANVILLE SALES CORPORATION, C. C. MOORE & CO., J. T. THORPE & SON, INC., M. R. CARPENTER, AETHA INSURANCE COMPANY, STATE COMPENSATION INSURANCE FUND, INDUSTRIAL INDEMNITY EXCHANGE, INDUSTRIAL INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY, STANDARD ACCIDENT INSURANCE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY



June 6, 1958

Case No. 169-171

REPORT OF PANEL ONE ON
DECISION AFTER RECONSIDERATION

The record reflects that decedent, while employed as an asbestos worker on January 10, 1955 by Western Asbestos Company sustained an injury arising out of and occurring in the course of his employment, consisting of substantial and material exposure to asbestosis. The record further reflects that there may have been like exposures in other employments both within and without the State of California.

The injury caused total temporary disability from January 11, 1955 through June 5, 1956. Employee's death on June 6, 1956 was proximately caused by the injury herein, entitling applicant to death benefits.

It appears from the evidence that decedent failed to give notice to defendants of his need for medical treatment.

Applicant is entitled to the statutory burial expense and to medico-legal expense of \$35, payable to Dr. Moe.

Applicant's attorneys have rendered services herein of the reasonable value of \$600.

It is the opinion of the Panel that the claim is not barred by the statute of limitations and that the evidence fails to establish that defendants have been prejudiced by lack of notice of the claim asserted herein.

Decision after Reconsideration should issue accordingly.

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA

F. A. Lawrence

W. A. [Signature]
Commissioners

Deputy
Commissioner

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Department of Industrial Relations
DIVISION OF INDUSTRIAL
ACCIDENTS

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIF
CLAIM NO. 169-171

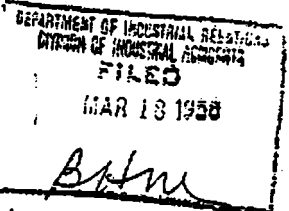
BIRGIT A. SWARTOUT,

Applicant,

vs.

MUNDET CORK CORP.; HARRY A. DUTTON, INC.;
DUTTON ASBESTOS CO.; DUTTON ASBESTOS &
SUPPLY CO.; WESTERN ASBESTOS CO.; BAY
CITY ASBESTOS CO., LTD.; CORK INSULA-
TION CO., INC.; WESTERN FIBER GLASS COM-
PANY; GENERAL INSULATION & RUBBER COR-
PORATION; ARMSTRONG CORK CO.; JOHNS
HARVILLE SALES CORPORATION; C. C. MOORE
& CO.; J. T. THORPE & SON, INC.; M. R.
CARPENTER; AETNA INSURANCE COMPANY;
STATE COMPENSATION INSURANCE FUND;
INDUSTRIAL INDEMNITY EXCHANGE; INDUS-
TRIAL INDEMNITY COMPANY; LIBERTY MUTUAL
INSURANCE COMPANY; TRAVELERS INSURANCE
COMPANY; STANDARD ACCIDENT INSURANCE
COMPANY, and PACIFIC EMPLOYERS INSUR-
ANCE COMPANY,

Defendants.



PETITION FOR
RECONSIDERATION

Come now defendants WESTERN ASBESTOS COMPANY and STATE
COMPENSATION INSURANCE FUND and petition the Industrial Accident
Commission for a Reconsideration in the above entitled matter
upon the following grounds:

1. That the Industrial Accident Commission acted witho
and in excess of its powers.

2. That the evidence does not justify the Findings of
Fact.

3. That the Findings of Fact do not support the award.

The evidence in the above entitled matter shows that th
deceased employee, John B. Swartout, filed an application with t
Industrial Accident Commission on December 30th, 1955 alleging
disability due to asbestosis which he had incurred during an emp
over a long period of time working for various employers, includ

1 the Muriet Cork Corp., Harry A. Dutton, Inc., Dutton Asbestos
2 Co., Dutton Asbestos & Supply Co., Western Asbestos Co., Bay
3 City Asbestos Co., Ltd., Cork Insulation Co., Inc., Western Fibre
4 Glass Company, General Insulation & Rubber Corporation, Armstrong
5 Cork Co., Johns Manville Sales Corporation, C. C. Moore & Co.,
6 J. T. Thorpe & Son, Inc., M. R. Capreuter.

7 John E. Swartout died on May 30th, 1956 prior to a
8 hearing on his claim before the Industrial Accident Commission.
9 His widow, Bergit A. Swartout filed an application with the
10 Industrial Accident Commission on June 13th, 1956, alleging that
11 the death of the deceased was due to his employment as an asbest
12 worker for the above employers.

13 Hearings were held on the claim of Bergit A. Swartout
14 before Referee Roy O. Purvis at Oakland, California on August 15
15 1956 and Herbert J. Williamson on December 6th, 1956.

16 At the hearing before Referee Roy O. Purvis on August 1
17 1956, the applicant elected to proceed against the Western Asbest
18 Company and its insurance carrier, the State Compensation Insurance
19 Fund.

20 On March 4th, 1956 Referee Roy O. Purvis issued Findings
21 and Award in the above entitled matter and found that the deceased
22 employee, John E. Swartout sustained an injury arising out of and
23 in the course of his employment consisting of asbestosis and awarded
24 the applicant, Bergit A. Swartout temporary disability indemnity
25 commencing January 11th, 1955 to and including June 5th, 1956 at
26 the rate of \$35.00 a week in the total sum of \$2,555.00 and also
27 awarded a death benefit in the amount of \$7,000.00 payable at the
28 rate of \$15.00 a week beginning June 6th, 1956.

29 In his report on the decision in question, which is
30 attached to the Findings and Award, Referee Roy O. Purvis states
31 as follows:
32

1 "Applicant is the widow of an employee who died
2 of pneumoconiosis (asbestosis) and claims accrued
3 compensation for temporary disability and a death
4 benefit.

5 There were no admitted facts and all appearing
6 defendants raised the additional issue of Statute
7 of Limitations, prejudiced by reason of lack of
8 notice and jurisdiction of the Commission.

9 The record disclosed that the employee died on May
10 30th, 1956 and the medical evidence is without
11 conflict that his death was due to asbestosis.

12 The employee filed the original application for
13 adjustment of claim on December 30th, 1955. The
14 evidence in the record is that he first became
15 disabled as the result of asbestosis on January
16 10th, 1955 and that date was the first on which
17 he knew he had the pulmonary disease.

18 That date must be taken as the date of injury.
19 The application was filed well within a year from
20 the date of injury and therefore the claim is not
21 barred by the Statute of Limitations. Applicant
22 may recover both accrued temporary total disability
23 and from the death benefit."

24 Defendants agree that the applicant, Bergit A. Swartout
25 is entitled to receive the accrued temporary disability indemnity
26 which was awarded to her by the Findings and Award in question.

27 However, defendants respectfully submit that the claim
28 for the death benefit is barred by the Statute of Limitations.

29 In support of this contention, that the claim for the
30 death benefit is barred by the Statute of Limitations, the
31 defendants cite the Law of Employee Injuries and Workmen's
32 Compensation by Warren L. Hanna, Volume 2 pg. 349 which reads
33 as follows:

34 "Death claims must be filed within one year
35 from the date of death, except that if death
36 occurs more than one year after the date of
37 injury the claim must also be filed within
38 one year from the last furnishing of com-
39 pensation benefits. If such benefits are
40 not furnished, and death occurs more than
41 one year after the injury, death benefits
42 are not payable even though the effect of
43 applying the limitation statute is to bar
44 a widow's claim before it accrues."

45 Defendants also cite the case of Jessie E. Diacher
46 vs. Industrial Accident Commission of the State of California

1 and Douglas Aircraft Company, Inc. which is reported in Volume
2 1- California Compensation Cases at pg. 3.

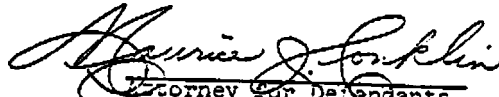
3 Defendants also cite the case of Adalina Bianco vs.
4 Industrial Accident Commission of the State of California which
5 is reported in Volume 9 California Compensation Cases at pg. 206.

6 As the above cases hold the claim for the death benefit
7 is a separate and independent right from the employee's claim
8 for compensation.

9 The evidence in this case shows that no benefits were
10 furnished to either the deceased employee during his lifetime
11 or to the widow, Bergit A. Swartout by the employer, Western
12 Lathos Company and the State Compensation Insurance Fund or any
13 else. The evidence also shows that no benefits were ever promise
14 by the defendants to either the deceased employee or the widow,
15 Bergit A. Swartout.

16 As the evidence shows that the death of the deceased
17 employee occurred more than one year after the date of injury and
18 that no benefits were furnished, the claim for the death benefit
19 clearly barred by the Statute of Limitations and the Petition
20 for Reconsideration should be granted by your honorable Commission
21 and the Findings and Award corrected.

22 Respectfully submitted,

23
24 
25 Attorney for Defendants

26 Dated at San Francisco, California
27 this 13th day of March, 1953.

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MAR 18 1958

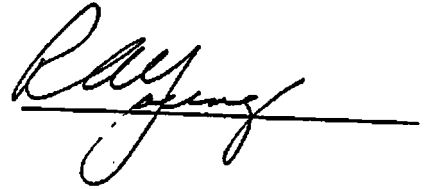
Department of Industrial Relations
DIVISION OF INDUSTRIAL
ACCIDENTS

28 c - Bergit E. Swartout
29 3000 Harrywood Drive
30 Sacramento 21, California
31 c - Smith & Parrish
32 Attorneys at Law
501 Financial Center Bldg.
Oakland, California
c - Claims Department

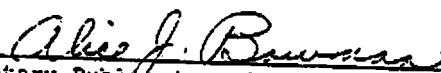
MJC:R

1 STATE OF CALIFORNIA
2 CITY & COUNTY OF SAN FRANCISCO } ss.
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4
5

6 R. A. YOUNG, being first duly sworn, deposes and says:
7 That he is an officer, towit, Assistant General Manager of State
8 Compensation Insurance Fund; that he has read the foregoing
9 Petition for Reconsideration and knows the contents thereof;
10 that the same is true of his own knowledge except the matters
11 which are therein stated on information or belief, and as to those
12 matters he believes it to be true.
13

14 
15
16

17
18 Subscribed and sworn to before me
19 this 13th day of March, 1958.

20 
21 Notary Public in and for the
22 City and County of San Francisco,
23 State of California

24 My Commission Expires Dec. 27, 1958.

25 RECEIVED

26 MAR 13 1958

27 Department of Industrial Relations
28 DIVISION OF INDUSTRIAL
29 ACCIDENTS
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