FILE NAME: Mundet Cork (MCK)

DATE: 1955

DOC#: MCK140

DOCUMENT DESCRIPTION: WC Claim of Swartout, Pt. 4

File Name	Contract Unit Claim File: John Swartout Dec. 28/55
Scanned ?	yes
Source	JMA: 1745
Start Year	1955
Stop Year	1955
Contents	claim
Notes	

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		# OF PAGES
	1) Decision After Reconsideration	4
	2) Western Asbestos Co. & State Comp Ins Fund Petition for Reconsideration	5

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.
o_____
o_____
o_____
o_____
o_____

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BERGIT A.SWARTOUT,

Applicant

vs.

MUNDET CORK CORPORATION, et.al.

Defendant

CASE No. SF 169-171

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

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

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

ALFRED C. WILLIAMS
Workers' Compensation Judge
Workers' Compensation Appeals Board

Dated at San Francisco, California, this 3rd day of April, 1981

DIA WCAB FORM 118 (NEW 1-73)

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS

SERVED BEFORE THE INDUSTRIAL ACCIDENT COMMISSION
EEA
JUN 10 1958
OF THE STATE OF CALIFORNIA
ERA INSA

CASE NO. [illegible]

BERGIT A. SWARTOUT,

Applicant

v.

KUNDERT 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
By [illegible]

Reconsideration having been granted herein and the matter having been carefully considered, including transcriptions of the testimony, as well as the record as a whole, this Commission 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 May 4, 1958 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, Bergit 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

Commissioners

Deputy Commissioner

JUN 9 - 1958

BERGIT A. SWARTOUT 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

SERVED
EE ✓ ✓
JUN 10 1958
ER ✓ ✓
ERA ✓ INS ✓

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 Gaurene

Commissioners

RECEIVED
MAR 18 1958
Department of Industrial Relations
DIVISION OF INDUSTRIAL ACCIDENTS

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIF

CLAIM NO. 169-171

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS
FILED
MAR 18 1958

BERGIT A. SMARTOUT,

Applicant,

vs.

HUNDET 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.

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 E. Smartout, filed an application with t Industrial Accident Commission on December 26th, 1955 alleging disability due to asbestosis which he had incurred during an empl over a long period of time working for various employers, includ

the Munalet 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 Fi Glass Company, General Insulation & Rubber Corporation, Armstr Cork Co., Johns Manville Sales Corporation, C. C. Moore & Co., J. T. Thorpe & Son, Inc., M. R. Caprenter.

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

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

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

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

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

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

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

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

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

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

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

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

In support of this contention, that the claim for the death benefit is barred by the Statute of Limitations, the defendants cite the Law of Employee Injuries and Workmen's Compensation by Warren L. Hanna, Volume 2 pg. 3-9 which reads as follows:

"Death claims must be filed within one year from the date of death, except that if death occurs more than one year after the date of injury the claim must also be filed within one year from the last furnishing of compensation benefits. If such benefits are not furnished, and death occurs more than one year after the injury, death benefits are not payable even though the effect of applying the limitation statute is to bar a widow's claim before it accrues."

Defendants also cite the case of Jessie E. Decker vs. Industrial Accident Commission of the State of California

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

Defendants also cite the case of Adelina Blanco vs. Industrial Accident Commission of the State of California which is reported in Volume 9 California Compensation Cases at pg. 206.

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

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

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

Respectfully submitted,

Attorney for Defendants

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

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MAR 18 1958
Department of Industrial Relations
DIVISION OF INDUSTRIAL ACCIDENTS

c - Bergit E. Swartout
3000 Marrywood Drive
Sacramento 21, California

c - Smith & Parrish
Attorneys at Law
901 Financial Center Bldg.
Oakland, California

c - Claims Department

MJC:...

STATE OF CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO } ss.

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

R. A. Young

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

Alice J. Bauman

Notary Public in and for the City and County of San Francisco, State of California

My Commission Expires Dec. 27, 1958.

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MAR 18 1958
Department of Industrial Relations
DIVISION OF INDUSTRIAL ACCIDENTS

MJC:ld