IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY R. HASSEY and CATHERINE HASSEY	:	CIVIL ACTION
v.	:	
UNIROYAL, INC.	:	NO. 80-43

UNIROYAL'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to this Court's Order of September 30, 1980, Uniroyal now files this brief in support of its motion for summary judgment. For the convenience of the Court, Uniroyal has included herein certain portions of memoranda already filed in this action so that the Court may consider the merits of Uniroyal's argument with only minimal cross reference to other documents. URL 12591

I. FACTUAL & PROCEDURAL SUMMARY

Plaintiff, Harry Hassey, worked at the Masland Duraleather plant ("Masland") from September, 1951 to August, 1978. Hassey was originally an employee of the Masland Duraleather Company, but defendant Uniroyal acquired 100% ownership of that corporation in January, 1962. Masland continued as a wholly-owned subsidiary of Uniroyal until December, 1972, when Uniroyal liquidated the company altogether, continuing to use "Masland Duraleather" merely as a fictitious name. This state of affairs continued until August, 1978, when the Masland plant was closed down.

Hassey has sued Uniroyal, alleging that his exposure to certain chemicals during his employment at Masland caused the cancer from which he ultimately died. Before bringing this suit, he filed another claim, also against Uniroyal, seeking compensation under the Pennsylvania Workmen's Compensation Act. This state claim is still pending. Because an employee who is eligible for compensation under the Workmen's Compensation Act is barred from suing his employer at common law, Uniroyal, on February 27, 1980, filed a motion for summary judgment in which it proferred evidence showing that it was Hassey's "statutory employer" under the Act. Hassey promptly petitioned the Court for an opportunity to take discovery regarding the asserted employer-employee relationship, and the Court allowed such discovery by Order of April 1, 1980.

The parties, and indeed the Court, are now in agreement that Uniroyal is Hassey's statutory employer and that any claim plaintiff has under the Workmen's Compensation Act is properly brought against Uniroyal. The present disagreement is the result of a legal argument pressed by Plaintiff, an argument herein referred to as "bifurcation." Hassey reasons that even though Uniroyal is his statutory employer for purposes of *recovery* under the Workmen's Compensation Act, any *immunity* given a statutory employer by that Act is limited to the time period for which the employer can prove his statutory employer status. Under this theory, Hassey's occupational illness may be "bifurcated," with a bar raised against suit premised on exposure during the employment period and no bar for a suit premised on exposure during the pre-employment

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period. This theory was largely accepted by the Court in its Order and Memorandum of June 30, 1980.

In Uniroyal's view, however, Hassey's illness is a single injury that may not be bifurcated. Now that the parties agree that Uniroyal is the proper, and indeed the only possible, defendant under the Workmen's Compensation Act, Uniroyal believes that its motion for summary judgment should be granted. Under Uniroyal's analysis, the statutory employer's immunity from suit is co-extensive with its liability for any Workmen's Compensation recovery. In that the latter is not subject to bifurcation, neither should be the former.

Because Uniroyal rejects bifurcation, it does not believe that the date on which it became Hassey's statutory employer is relevant. Thus, Uniroyal largely confined its evidence in the original motion for summary judgment to the post-liquidation period of 1972-1978, for in that period Uniroyal's status as Hassey's statutory employer is clear, and, in the traditional view at least, such status disposes of this case in its entirety. If, however, this Court adopts plaintiff's novel bifurcation theory, then Uniroyal submits that it can show that the correct bifurcation would be to consider September, 1951 to January, 1962 as the pre-employment period and January, 1962 to August, 1978 as the employment period. Plaintiff has urged a different division, with December, 1972, as the date when the employment relationship was established.[1]

1. It is not clear whether plaintiff alleges that Uniroyal supplied Masland with PVC prior to 1962. Uniroyal has no record or information suggesting it did so, but it is conceded that if bifurcation is permitted, Uniroyal cannot be considered Hassey's statutory employer before January, 1962.

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The Court, in granting Uniroyal's motion for reconsideration, has expressed a willingness to address the bifurcation issue. If Uniroyal prevails on this question, its motion for summary judgment should be granted. If, however, the Court adheres to Hassey's position on bifurcation, then Uniroyal asks that the Court accept evidence on the question of what dates are appropriate ones for that bifurcation.

II. HASSEY'S CLAIM IS FOR A SINGLE INJURY, WHICH, IF WORK-RELATED, IS COMPENSABLE UNDER THE PENNSYLVANIA WORKMEN'S COMPENSATION ACT, AND AS SUCH, THE CLAIM MAY NOT BE BIFURCATED

The "bifurcation" issue presently before the Court is apparently novel. Uniroyal has been able to discover no case in which the question was even raised, much less answered. Uniroyal respectfully submits that this apparent lack of authority is the result of an assumption on the part of the bar that bifurcation is not permissable and a consequent failure to raise the question. Moreover, Uniroyal believes that such an assumption is soundly based and that a decision by this Court to allow bifurcation would radically alter the existing understanding of the Workmen's Compensation Act.

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In the present case the parties are largely agreed regarding the traditional application of the Workmen's Compensation Act. It is agreed that if Hassey's disease was occupational in origin, Uniroyal is the "statutory employer" under the Act. The Pennsylvania Act is very clear:

> . . . The employer liable for compensation provided by section 305.1 or section 108, subsections (k), (l), (m), (o), (p) or (q), shall be the employer in whose employment the employe was last exposed for a period of not less than one year to

the hazard of the occupational disease
claimed. . . .

77 P.S. §411(a).[2] Thus Uniroyal, having shown that it was Hassey's employer at the time of his last exposure, has shown that it is the "statutory employer" liable for <u>all</u> compensation under the Act, regardless of the length of time Hassey was exposed to PVC while employed by others. Hassey recognizes this. He is suing Uniroyal alone for Workmen's Compensation benefits and has not suggested, nor could he suggest, that any previous employer is responsible for any part of those benefits. Bifurcation has never been permitted in the allocation of <u>liability</u> under the Workmen's Compensation Act and is precluded by the distribution of risk mandated in the language quoted above.

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It is also agreed that the Workmen's Compensation Act creates an <u>exclusive</u> remedy. In return for his right to seek compensation under the Act, the employee surrenders his right to sue in tort. 77 P.S. §481(a) provides:

> (a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) or (2) or occupational disease as defined in section 108.

<u>See</u> <u>Albrecht v. Pneuco Mach. Co.</u>, 448 F.Supp. 851 (1978); <u>Hefferin v. Stempkowski</u>, 247 Pa. Super. 366 (1977).

2. A similar approach is taken in Section 301(g) of the Pennsylvania Occupational Disease Act, 77 P.S. §1401(g).

It should also be noted that the language set out above applies only if the employee's exposure is "in whole <u>or</u> <u>in</u> <u>part</u>" after June 30, 1973. Hassey's alleged exposure fulfills this requirement.

What is not agreed upon is the extent of this exclusivity. Plaintiff has taken the position that it is limited to the period during which the employer-employee relationship existed. For any other period of exposure, Hassey contends that he may sue Uniroyal as a third party supplier of chemicals. The right to proceed against third parties is preserved in 77 P.S. §481(b).

Uniroyal believes that there are four compelling reasons to reject this argument. First, the language of the statute neither mandates nor even suggests such a result. 77 P.S. §481(a) relieves the employer of <u>any</u> <u>and</u> <u>all</u> liability to his employees other than that provided by the Act. While §481(b) preserves the employee's right to sue a <u>third</u> <u>party</u> supplier, it nowhere suggests that he may do so if that supplier is also the statutory employer, who is liable for the injury complained of under the Act. Indeed, §481(b) goes so far as to extend the employer's immunity to include claims for contribution or indemnity made by a third party. Neither §481(a) nor §481(b) give any indication that an employer's <u>immunity</u> from suit is measured by anything other than his <u>liability</u> for compensation.

This observation leads naturally enough to the second reason for rejecting bifurcation: bifurcation is unfair and subjects an employer to double liability. If the Workmen's Compensation Act may be said to offer the employer immunity from common law actions in return for his acceptance of responsibility for providing compensation, it follows that the two parts of the Act are co-extensive. In an occupational disease case, a statutory employer is liable for <u>all</u> of a plaintiff's exposure, even if a large part of it took place while plaintiff was employed elsewhere. To allocate liability in this manner, and then to fashion another and inconsistent rule for

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the immunity that goes hand in hand with that liability is not only unfair, but close to irrational.

Support for this view is found in *Moffett v. Harbison-Walker Refractories, Inc.*, 339 Pa. 112, 14 A.2d 111 (1940). There the Pennsylvania Supreme Court concluded that an employee surrenders his common law right of action against his employer *even as to injuries allegedly inflicted before the Act was effective* because the employee was covered when the disability occurred. The Court reasoned that if the date of injury under the Occupational Disease Act was such that plaintiff could claim compensation under that Act, he was barred from seeking compensation in a common law action even though some of the injury might have been inflicted before plaintiff was covered:

> Plaintiff argues that even if the above construction is accepted, he would have surrendered his right to sue in trespass only for injury occurring after the effective date of the act, January 1, 1938, but not for so much of the injury, if any, as was negligently inflicted before that. From his averment that he was employed for many years "prior to March 8, 1938," he would infer that at least part of his injury resulted before he surrendered his common law remedy. It is unnecessary to consider whether in any circumstances, his statement of claim could be supported on that theory; the statute is definitely against that position; section 3, quoted above, provides that "The date when the disability occurs from occupational disease shall be deemed to be the date of injury or accident." Plaintiff's disability occurred on March 8, 1938, when he quit work. The Act of 1937 was then in effect.

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339 Pa. at 118, 14 A.2d at 114. This case, although not directly on point, is a clear rejection of a plaintiff's effort to bifurcate his illness in order to proceed in two fora simultaneously.

Moffett, moreover, supports the third argument against bifurcation: an illness is a single injury, not a series of injuries. Pennsylvania Courts have been consistent in treating occupational diseases as "injuries" that take place at a particular point in time, rather than as slowly developing illnesses resulting from long-term exposure. The Supreme Court has explained Pennsylvania's policy in this regard:

> Occupational diseases are, from a legal standpoint, peculiar in this — that they arise, not from an accident or event happening at a precise moment, but from a day by day exposure to unhealthful conditions over an extended period; the exact time of their origin is necessarily obscure and their insidious progress is not revealed until, frequently after a long interval, the disability which they create manifests itself. In the case of accidents compensable under the Workmen's Compensation Act [77 P.S. §1 et seq.], the accident and the damage resulting therefrom, the cause and the effect, are usually determinable immediately and they are practically simultaneous. But, because in disability arising from an occupational disease both cause and effect are protracted and a long interval is apt to elapse between the exposure and the disability, it becomes necessary to fix a time at which the injury which is the subject of compensation shall be deemed to arise and the right to compensation accrue. Accordingly, the Occupational Disease Compensation Act of 1937 provides, section 3, that 'The date when the disability occurs from occupational disease shall be deemed to be the date of injury or accident.' Thus it makes the occurence of the disability the event which constitutes the compensable injury, although the disability is necessarily preceded by an exposure and an occupational disease of which it is the culmination.

McIntyre v. Lavino & Co., 344 Pa. 163, 165-66, 25 A.2d 163, 164-65 (1942); Accord DeMascola v. Lancaster, 200 Pa. Super. Ct. 265, 369-70 (1963).

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Thus, if an employee works in three different asbestos plants, for example, any one of the three, or all three, may have contributed to his developing asbestosis. The policy of Pennsylvania is to treat his illness as a single indivisible injury and to place all the liability for this exposure on a single employer, even if he employed the plaintiff for a shorter period than other employers.[3] In Gaydosh v. Richmond Radiator Co., 164 Pa. Super. Ct. 154, 63 A.2d 502 (1949), a case involving the liability of insurance carriers, Travelers Insurance Co. was held liable even though it insured the plaintiff's employer for only the last month of plaintiff's exposure. Two other insurance companies, who had insured for two and eighteen years of plaintiff's exposure respectively, were not liable because liability is fixed on the basis of plaintiff's last exposure by §301(g) of the Occupational Disease Act. Accord Pekorofsky v. Glen Alden Coal Co., 171 Pa. Super. Ct. 105, A.2d 890 (1952); Welsh v. State Workmen's Ins. Fund, 28 Northumb. L.J. 67 (C.P. 1957).

Given this clear policy of the Commonwealth, Hassey's disease must be treated as a single injury taking place at a specific point in time. As Moffett, McIntyre and DeMascola make clear, Pennsylvania has unqualifiedly rejected efforts to divide and segregate periods of exposure. Instead, it has constructed a system for determining which employer will bear the burden for the entire illness. Plaintiff now urges this Court to repudiate this policy and, for the first time, divide an individual's exposure and resulting disease. No Pennsylvania Court has ever done so for any reason. Pennsylvania treats occupational diseases as single indivisible wholes.

3. The last employer bears all the liability as between employers. In certain cases, the Commonwealth may pay some of the Occupational Disease liability.

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Fourth, and finally, the Court should consider the practical effects of bifurcation. Pennsylvania's adherence to the single injury approach to occupational disease is in truth the only practical solution to causes of action involving work-related illnesses, which often mature over a substantial period of time. This is so because as a practical matter bifurcation is not bifurcation at all; it is the abrogation of the immunity given in 77 P.S. §481(a). If plaintiff can establish the causative relationship between his exposure to certain chemicals and his cancer, we submit that it would be difficult, if not impossible, for him or anyone to attribute the disease to one period of exposure and not another. As the Pennsylvania Supreme Court noted in McIntyre, supra, occupational diseases generally arise from prolonged exposure over a long period of time. Thus, in the great majority of cases in which a worker had more than one employer in his career, bifurcation will simply deprive the employer responsible for Workmen's Compensation the statutory benefit of his immunity.

In sum, Uniroyal respectfully urges this Court to reject bifurcation. In so doing, Uniroyal does not suggest that the Court need or should offer employers any protection for injuries received outside of the employment context. If, to use the Court's hypothetical case, a plaintiff is hit by a taxicab and later becomes an employee of the cab company, the injury sustained is simply not covered by the Workmen's Compensation Act. Were that Hassey's situation, his compensation claim would be dismissed, but his common law claim could proceed. Similarly, if the new taxi-cab company employee aggravates his injury while on the job, he has in fact sustained two injuries, not one, and the law may rationally treat these injuries separately. Here, in contrast,

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Hassey has sustained a <u>single</u> injury. Uniroyal is responsible under the Act for <u>all</u> of that injury if it was in fact caused by employment conditions. It must follow that it is immune from common law suit for <u>all</u> of that injury. As noted above, a contrary conclusion is (1) unsupported by the Act itself; (2) unfair because it permits double recovery; (3) directly contrary to Pennsylvania's policy of treating an occupational disease as a single injury; and (4) unworkable as a practical matter. Uniroyal respectfully urges the Court not to accept plaintiff's argument that an occupational disease is divisible, an argument that has never been sanctioned by any Pennsylvania Court.

III. IF BIFURCATION IS PERMITTED, HASSEY'S EMPLOYMENT WITH UNIROYAL SHOULD BE DEEMED TO COVER THE PERIOD BETWEEN JANUARY, 1962 AND AUGUST, 1978

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When it filed its motion for summary judgment, Uniroyal believed that if it proved that it was Hassey's "statutory employer" for purposes of recovery under the Workmen's Compensation Act, the exclusivity of that remedy would require that the Court dismiss Hassey's suit. Since that time, plaintiff's bifurcation argument has raised the possibility that some measure of partial summary judgment would be appropriate. If the Court accepts bifurcation, one question that is sure to arise is the correct determination of the employment period. On this question the parties have expressed a reasonable difference of opinion.

Hassey worked at Masland from September, 1951 to August, 1978. His tenure there may be divided into three periods. From September, 1951 to January, 1962, Masland was a separate corporation with no connection to Uniroyal. From January, 1962 to December, 1972, Masland was a corporation, but was wholly owned by Uniroyal. From December, 1972 to August, 1978, Masland was merely a fictitious name used by Uniroyal after the liquidation of the corporation originally using that name. The parties agree that Uniroyal clearly was not Hassey's statutory employer during the first period and that it just as clearly was his statutory employer during the third period. At issue is the second period, during which Uniroyal owned Masland, but Masland continued to exist as a corporate entity.

In determining whether Uniroyal was Hassey's employer during this second period, the Court must decide whether a master-servant relationship existed between the two. See 77 P.S. §§21, 22. The touchstone for this relationship is the right to exert "control" over an employee. Mohan v. Continental Distilling Corp., 422 Pa. 588, 591, 222 A.2d 876, 879 (1966). If the subsidiary corporation, rather than the parent, is the "master" in the sense of control over the employee, then the subsidiary, not the parent, is the statutory employer. The Court in Mohan concluded that that was the case on the facts presented in that appeal. Uniroyal believes that it can show the Court that the facts here differ from those in Mohan and that here the parent corporation is the "master" under the Workmen's Compensation Act.

The basis of Uniroyal's belief in this regard is set out in the affidavit accompanying this brief. From 1962 on, Uniroyal, not Masland, negotiated with Hassey's representative (the United Rubber, Cork, Linoleum & Plastic Workers of America), regarding the terms and conditions of Hassey's employment. The contract between plaintiff's Union and Uniroyal set the basic ground rules for the Masland employees' relationship with their employer. A labor contract is traditionally negotiated between a union, representing the employees, and the employer -- not between the union and a third party. If

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Masland was in fact Hassey's employer during the 1962 to 1972 period, Masland, not Uniroyal, should have been negotiating the terms and conditions of his employment.

Moreover, from 1962 to 1972, Uniroyal, not Masland, was directly responsible for industrial hygiene and toxic materials at Masland — the very area upon which Hassey's suit here is based. Although Masland continued to exist as a corporate entity, it was not a wholly separate operation, as was the case in Mohan. Accordingly, Uniroyal believes that it can demonstrate that it, not Masland, was Hassey's employer from 1962 to 1972, as well as from 1972 to 1978, and it does not wish to be precluded from doing so merely because it failed to anticipate plaintiff's bifurcation theory when it filed its motion for summary judgment. That theory, as Uniroyal has demonstrated above, is both novel and entirely out of keeping with the traditional understanding of the exclusivity of the Workmen's Compensation remedy, upon which Uniroyal's motion for summary judgment was based.

Respectfully submitted,

Alfred W. Putnam, Jr.
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Philadelphia, PA 19107
(215) 988-2907
Attorney for Uniroyal, Inc.

Dated: October 10, 1980

URL 12603

STATE OF NEW YORK)
SS.: **AFFIDAVIT**
COUNTY OF NEW YORK)

VIRGINIA K. SMITH, being duly sworn, says:

1. I am an Assistant Secretary of Uniroyal, Inc., a defendant in this action. I am authorized to make this affidavit on behalf of Uniroyal.

2. During the period 1962 to 1972, Uniroyal owned 100% of the stock of Masland Duraleather. As a wholly owned subsidiary, Masland Duraleather acted in furtherance of Uniroyal's business interests.

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3. During the period 1962 to 1972, the earnings of Masland Duraleather were included in Uniroyal's consolidated financial statement.

4. During the period 1962 to 1972, the terms and conditions of the employment of Masland's employees were governed by an agreement entered into between Uniroyal and the United Rubber, Cork, Lineoleum and Plastic Workers of America.

5. During the period 1962 to 1972, employees at Masland Duraleather received Uniroyal health and medical benefits, and participated in Uniroyal retirement programs.

6. During the period 1962-1972, Uniroyal was responsible for industrial hygiene at Masland Duraleather,

and for ensuring that proper precautions were taken for the handling of toxic materials at Masland Duraleather.

Sworn to before me this
9th day of October, 1980.

VIRGINIA K. SMITH

Patricia A. McGuire
NOTARY PUBLIC

PATRICIA A. McGUIRE
Notary Public, State of New York
No. 4715288
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 30, 1982

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CERTIFICATE OF SERVICE

I, ALFRED W. PUTNAM, JR., hereby certify that a copy of Uniroyal's Brief in Support of Its Motion for Summary Judgment has been served upon plaintiff by hand delivery to plaintiff's counsel, Andrew F. Mimnaugh, CLARY, MIMNAUGH & McGONIGLE, Suite 805, Continental Building, 400 Market Street, Philadelphia, PA 19106

Alfred W. Putnam, Jr.

October 10, 1980

URL 12606

File: Horney

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

AFFIDAVIT

VIRGINIA K. SMITH, being duly sworn, says:

1. I am an Assistant Secretary of Uniroyal, Inc., a defendant in this action. I am authorized to make this affidavit on behalf of Uniroyal.

2. During the period 1962 to 1972, Uniroyal owned 100% of the stock of Masland Duraleather. As a wholly owned subsidiary, Masland Duraleather acted in furtherance of Uniroyal's business interests.

3. During the period 1962 to 1972, the earnings of Masland Duraleather were included in Uniroyal's consolidated financial statement.

4. During the period 1962 to 1972, the terms and conditions of the employment of Masland's employees were governed by an agreement entered into between Uniroyal and the United Rubber, Cork, Lineoleum and Plastic Workers of America.

5. During the period 1962 to 1972, employees at Masland Duraleather received Uniroyal health and medical benefits, and participated in Uniroyal retirement programs.

6. During the period 1962-1972, Uniroyal was responsible for industrial hygiene at Masland Duraleather,

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and for ensuring that proper precautions were taken for the handling of toxic materials at Masland Duraleather.

Sworn to before me this
9th day of October, 1980.

VIRGINIA K. SMITH

Patricia A. McGuire

NOTARY PUBLIC

PATRICIA A. McGUIRE
Notary Public, State of New York
No. 4715288
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 30, 1982

URL 12608