

820200 OHLS

Workers' compensation asbestos third party latency period exclusive remedy asbestos exposure manufacturers negligence cancer financial responsibility

921001 RowVerK 1005

The Crown brings air to the wearer's face through a 'crown' encircling the head, forehead, and temples. An airflow module at the waist houses the motor and a removable, rechargeable battery pack. Racal Airstream, Inc.

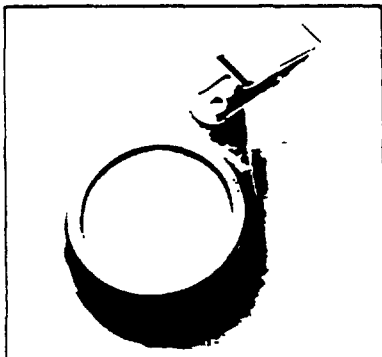
Circle 30 on card.

High-performance gloves

The Worknit HD Glove line has expanded to include eight new models to provide effective, low-cost, high-performance alternatives to leather gloves.

The line now offers three styles: the Gauntlet, Knit Wrist and Slip-on in the Black Stripe Cloth Back, Wash Back, and Nitrile Back glove models. The gloves' flexibility and toughness make them suitable for a wide range of jobs. Norton Safety Products.

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Ethylene oxide monitor

This silver dollar-sized unit measures concentrations as low as .25 ppm over a workshift period. Ethylene oxide diffuses into the monitor chamber and is absorbed by a chemisorption process. The monitor is then analyzed by the 3M Specialty Analytical Service in five working days.

Worn near the breathing zone, Monitor No. 3550 is designed for personnel working in laboratories and chemical processing environments as well as those who sterilize surgical products and equipment. The capacity of the unit is about

600 ppm-hours, sufficient to sample a worker's environment at 1.5 times the present permissible exposure limit of 50 ppm for a full workshift. 3M.

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Medicated liquid soap

Antibacterial and antifungal surfactants, enhanced by p-chloro-m-zylenol and combined with moisturizers, skin protectors and humectants, yield Derma Cidol 2000: an aggressive agent for reducing cross infection without the side effects of harsher medicated lotion soaps.

Derma Cidol 2000 Professional Liquid Soap Formula is available in both a 12-ounce pump dispenser size and an economical gallon container. Minnetonka, Inc.

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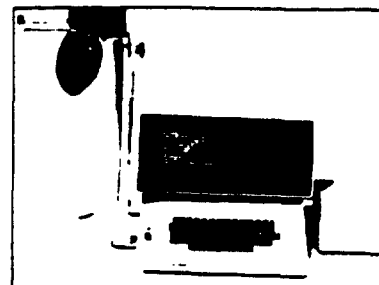
Comfort cushion

Aqua-Ease reduces bodily pressure on any firm seating such as wheelchairs, office chairs or car seats. The comfort pad contains a combination of water, polyurethane foam and air, which together provide a sense of buoyancy. Bactericide and fungicide are also included in the pad's contents for built-in protection against bacteria and mold.

Priced at less than \$50, Aqua-Ease is constructed of heavy-gauge vinyl and comes with a washable cloth cover to minimize perspira-

tion. Shipped unfilled, it easily fills with one gallon of tap water. Lumex, Inc.

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Diffusion analyzer

The Sentry 88 Computerized Diffusion Analyzer includes a Sentry Series Computer with dual expiratory and inspiratory flowmeter, helium analyzer, carbon monoxide analyzer, versatile CRT, and full keyboard. Gould Inc.

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bestosis, according to a recent study by the American Lung Association of Southern California. And an earlier study showed 35 percent of asbestos factory workers' household members showed asbestos-associated abnormalities.

LITIGATION PATTERNS If litigation patterns are any indication, at stake are hundreds of millions of dollars in claims. Over 240 companies have been sued in one or more asbestos lawsuits. The Asbestos Compensation Coalition, representing nine large manufacturers, estimates that the total damages sought in these suits are approximately \$24 billion.

For example, Johns-Manville (JM), the largest asbestos manufacturer in the country, is a defendant in more than 9,000 lawsuits. JM's average share of the settlement or judgment in these suits is \$23,000. (Multiple defendants may contribute their share of the liability in each case.) At that rate, JM's claims — excluding legal costs — could reach more than \$205 million. Raybestos-Manhattan, Inc., a brake lining manufacturer, faces over 8,000 lawsuits. Its average share is \$6,100.

While the net worth of JM is almost 2 billion, and Raybestos-Manhattan weighs in around \$160 million, both figures are qualified by the corporations' accounting firms because of the incalculable future liabilities each now faces. Despite this, their liability "will have very little impact on our corporate earnings," says Richard Von Wald, JM's Corporate Counsel, since "only a very small amount may not be recovered from insurance companies."

Although the courts have ruled that asbestos manufacturers should have known and warned their employees of the dangers of asbestos as far back as the 1930s, the insureds and the insurance carriers didn't contract with asbestos in mind. Policies were issued offering products liability protection at

low rates, with small deductibles and insufficient reserves. Manufacturers and insurers are relentlessly litigating obligations to plaintiffs, definitions of policy terms, and the coverage afforded by the policies.

The 15- to 40-year latency period of asbestos-related disease makes it impossible for workers to file claims shortly after exposure.

Even more intense is the litigation among the insurance companies themselves. Any given employer may have been covered by as many as five different insurance companies over a period of 20 to 30 years. Insurance companies have battled over which of them is obligated to provide a defense and which, when a manufacturer is found liable, must compensate the victim. Over 20 lawsuits alone have been filed to resolve these issues.

NEED FOR REFORM Advocates of asbestos compensation reform frequently offer the view that asbestos victims are not adequately compensated through litigation. Introducing his asbestos legislation, Senator Gary Hart (D-CO) argues that "in about one-half of the asbestos cases that have been tried, the worker or the worker's family received nothing."

Fred Baron, Chairman of the Asbestos Litigation Group which consists of 100 plaintiff attorneys, claims, however, that "using the number of cases tried is misleading because only 50 or 60 cases have been tried . . . 95 percent of the claims brought are settled."

Baron believes that lawsuits do provide adequate relief for asbestos victims: "Out of the 200 cases my firm has handled, the average disposition has been \$145,000." Attorney's fees, however, typically eat up 33 to 40 percent of such awards. His cases also take between 18

months to 2 years before relief is granted.

Nick Calio, an attorney for the Washington Legal Foundation, a conservative public interest group, believes that not only is the asbestos problem "too big for the to system to handle," but also the public interest is not being served because "85 percent of the money paid into asbestos claims goes to parties other than the claimants." In addition to claimants' attorneys' fees, this includes an average of \$2 to \$3 in defense and administrative costs for every dollar paid to plaintiffs.

The workers' compensation program is intended to avoid the court system's expense, the burden of proving employer negligence, and long delays until judgment. Only 5 percent of those severely disabled from an occupational disease receives benefits, however. A worker who becomes totally disabled for life from an occupational disease and who is able to prove that the disability is linked to the workplace receives an average of \$9,776 in total compensation benefits, compared to average future earnings of \$77,000.

But many workers will be lucky to get even these paltry awards. Many states' workers' compensation statutes contain provisions which effectively bar occupational disease victims. The 15- to 40-year latency period for asbestos-related disease makes it impossible for workers to file their claims shortly after their last day of work, or within a specified time of any last exposure, as some states require.

Other states provide benefits only if there is exposure within the state for a long period of time, such as two years in Pennsylvania. Still other states omit or qualify benefits for partial disability or do not permit claimants to reapply for benefits when their disability worsens, as in California.

LEGISLATION This year, Congresswoman Millicent Fenwick (R-

NJ) and Senator Gary Hart (D-CO) have once again introduced their asbestos compensation bills, with a third on its way from Congressman George Miller (D-CA). The Hart bill provides a floor of at least 66 2/3 percent of recent wages for state workers' compensation awards. The Fenwick bill's annual award, paid out of a fund administered at the federal level, would come to at least \$8,200 which, like the Hart bill, is increased depending on the number of dependents.

Clearly the most controversial provision in both the Fenwick and Hart bills is their prohibition against asbestos victims' suing the manufacturer in so-called "third-party" litigation. Under existing workers' compensation schemes, the employee cannot sue his employer for further damage, but is allowed to sue a "third party" such as a manufacturer of a defective product which may have caused his injury.

Not surprisingly, "the asbestos companies will not accept a bill which does not put a stop to the litigation," said Ester Fore of the Asbestos Compensation Coalition. Irene Warshauer, attorney for Keene Corporation, believes, however, that the legislation will not effectively reduce litigation, because "most of the potential beneficiaries will beat the prohibition by filing their suits prior to the bill's enactment date." Keene is a defendant in approximately 11,000 cases.

The exclusive remedy provision is vehemently opposed by labor, trial attorneys, and public interest groups. "The AFL-CIO certainly couldn't go for that," AFL-CIO's George Taylor said. Asbestos Litigation Group Chairman Fred Baron said that "this provision is why these bills are known as bail-out legislation for the asbestos industry." David Gallogly of the Rhode Island Committee on Occupational Safety and Health believes that "the Hart bill serves

only the interest of the asbestos industry and is a dangerous precedent for confronting the dangers of other toxic chemicals and substances."

WHO'S RESPONSIBLE? Almost equally controversial is the question of which "responsible parties" will bear the cost of the program. The Hart bill names employers, manufacturers, or anyone determined by a workers' compensation agency to have contributed to the disease. The bill also names the federal or state government, a provision which the AFL-CIO's George Taylor maintains "is contrived to move financial responsibility onto the backs of the taxpayer."

Asbestos companies frequently sing a different tune. Keene Corporation attorney Irene Warshauer states: "Government is in large part responsible for this problem."

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flat objection to
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In most cases exposure took place in government shipyards, or in Keene's case, companies with contracts with the government. The government either controlled the workers' safety or specifically required the use of asbestos."

The Fenwick bill departs from Hart's proposal in targeting the cigarette industry as a responsible party. Asbestos workers who smoke have an incidence of lung cancer 90 times greater than workers who smoke but are not exposed to asbestos.

Perhaps more importantly, the Fenwick bill, unlike the Hart proposal, eliminates the federal government as a responsible party. Larry Rofenshein, an aide to Congresswoman Fenwick, said that

"the federal government was removed for strategic reasons, as a way to get the bill through." He added that "somebody else will realize that the federal government has responsibility when we have hearings in the spring Fenwick might even offer an amendment to her own bill." Asked why she didn't add the government to begin with, he replied that "the problem is that if the federal government is asked to pay, it's considered a bail out."

Even without legislation, the public bears most of the economic and social cost of compensating asbestos victims. The social security system supplies 24 percent of the compensation going for job-related disease, with an additional 10.5 percent coming from public welfare. A mere 1.3 percent comes from the workers' compensation system. A large but as yet undetermined amount is picked up by private insurance.

The Hart bill avoids the thorny issue of how to apportion liability among the parties by setting up a commission to establish apportionment criteria to be used by state or federal workers' compensation agencies. Not everyone is happy about such an indefinite arrangement, however.

Irene Warshauer objects to the plan because "a majority of the members of the commission would be governed by the larger companies. Also state workers' compensation boards can be more easily influenced by the larger companies because they have large plants across the nation." Warshauer also believes that litigation over which party is liable will be just as vigorous as it is now.

The Fenwick bill addresses the apportionment question by requiring asbestos manufacturers and the tobacco industry to contribute up to 2 percent of their earnings of 15 years ago into a fund. It also avoids using the workers' compensation system altogether.

Court refused to hear an earlier appeal from two federal appeals courts, both of which adopted the exposure theory.

In October, the Appeals Court for the District of Columbia merged the two theories and held "that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies." The court also deviated from other decisions in finding that each insurance company would be liable for the entire injury, subject only to provisions in the policy relating to other insurance.

In its decision the D.C. court rejected the approach taken by the appeals court sitting in New Orleans which apportioned liability on a pro rata basis among insurers who were covering the risk at the time the worker inhaled asbestos fibers. It also rejected the finding by the appeals court sitting in Cincinnati that the insured was liable

for a pro rata share of the defense costs and for judgments concerning the period when it was uninsured.

Unhappy about this additional liability, the attorneys for the insurance companies have appealed to the Supreme Court. They hope that because there is finally a "split in the circuits" the Supreme Court will accept the case to resolve the conflict.

INNOVATIVE APPROACHES
Meanwhile, liability is increasingly being sought through novel theories and additional parties.

One theory being tested in California could result in awarding damages to employees who were exposed to asbestos over a six-week period last year. Lloyd Robinson, attorney for the 37 Pacific Telephone employees said that "a willful act by the company, who knowingly exposed its workers to asbestos but concealed the nature and danger of the substance and failed

to take any precautions, qualifies this case to be taken out of the workers' compensation system and into civil court."

Robinson is suing for \$1 million for each plaintiff for present injuries to the nervous system. The suits were filed when workers discovered that the substance with which they had been covered for six weeks while renovating an old telephone company office was asbestos.

In another case, Keene Corporation is suing Johns-Mansville, who sold them the asbestos which they used in their shipyards, because JM allegedly did not warn Keene of the danger. Keene is also suing the federal government for requiring asbestos in its contracts without enacting safeguards. If Keene's theory prevails, suing the government for its failure to regulate may become quite fashionable in this age of deregulation. **OH&S**

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17 min color — how to lift and move objects

BACK AT WORK
9½ min color — how to maintain a healthy back through good physical condition

MIND YOUR BACK
18 min color — how to avoid back injury and pain through correct lifting posture

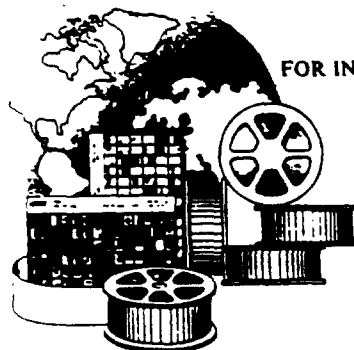


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OPPOSITION Among the bills' most uncompromising opponents is the insurance industry. Its flat objection to legislation of any kind stems from its basic abhorrence of federal intervention into the business of insurance.

Dennis Conolly, Senior Counsel of the American Insurance Association, said that "workers' compensation is a state area. Discretion to the Secretary of Labor in the past resulted in overly broad compensation." Although no statistics on how either bill would affect the insurance industry are available, Conolly said that "it is entirely possible that there would be greater liability for insurers under the proposed legislation."

According to Bill Shore, aide to Senator Hart, the insurance industry will underwrite claims under their proposal through workers' compensation insurance. The last employer who exposed the afflicted person to asbestos pays the claim, presumably through his workman's compensation insurance, and then must seek reimbursement from the other responsible parties. These parties may then seek recovery from product liability insurers which cover that claim.

One lone voice in the insurance world favoring the legislative remedy is Commercial Union (CU). William Bailey, Senior Vice President of CU, does not believe that the insurance industry will suffer with such legislation. Although more claims will be paid out, "we are now paying huge legal fees and lump sum awards.... With a structured settlement, where payment would be given out over a lifetime in monthly checks, the same dollars would cost us less." Bailey cautioned that "someone who finds out he has asbestosis 3 to 5 years from now will find that the insurance limits are exhausted and that the asbestos companies have no capital base left."

ALTERNATIVES Finally, an alternative to the Hart and Fenwick

proposals will soon be offered by Congressman Miller, according to Michael Goldberg, Counsel to the Labor Standards Subcommittee which Miller chairs.

"Congressman Miller is considering a more comprehensive ap-

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proach which will include all occupational diseases," Goldberg explained. This should satisfy the AFL-CIO, which has been pushing for legislation which covers all occupational diseases for almost a decade.

"The main thrust of the AFL-CIO is towards a general workers' comp. for all occupationally induced diseases rather than brown lung one year, and black lung the next," George Taylor said. "Miller is still undecided whether to make his system the exclusive remedy, and is not sympathetic to a federal government contribution," stated Goldberg.

Many interested parties agreed with sentiments expressed by Larry Rofenshein that this was not the time to go for a comprehensive approach. "With the climate produced by the administration, we may see an attitude change in both the AFL-CIO and the companies," he said. He may be right. Expressing his own doubts about the chance that comprehensive legislation could pass during this administration Taylor conceded that the "Fenwick bill is an improvement over the Hart bill," and the AFL-CIO is "keeping an open mind."

Rofenshein hopes that asbestos could serve as a model for future occupational compensation legislation, particularly since the resulting diseases are directly traceable to asbestos exposure. One of the

major criticisms of the only other federal occupational compensation system, the Black Lung Disability Fund, is that it relied in part on presumptions of disability based on years of exposure rather than medical diagnosis.

In contrast, William Bailey thinks that none of these bills is timely. "This type of individualized remedy is too much like the Chrysler bail-out for the American people," he said. Bailey thinks that since the "federal government clearly wants to get out of underwriting losses," the solution is to overhaul the entire products liability system, a remedy compatible with a proposal soon to be introduced by Senator Bob Kasten (R-WI).

Others, including Fred Baron, see the optimal solution as reforming the workers' compensation system by setting federal standards which accommodate occupational disease while leaving the option of third party suits open.

LIABILITY THEORIES If Rofenshein's view of a future of compromise does not materialize, asbestos compensation claims will remain mired in litigation. The Supreme Court is currently being asked for the second time to resolve a rift among insurers over theories of liability.

Hartford Accident and Indemnity is one of about 25 insurers who argue the so-called "exposure theory" of liability. Bodily injury triggers insurance coverage, Hartford contends, and that occurs shortly after exposure to and inhalation of asbestos, regardless of when the symptoms manifest themselves.

Another group of insurers, typified by the Insurance Company of North America, argues for the "manifestation theory" of liability. They say that responsibility rests with carriers that had policies in place when cellular damage advances to the point of becoming a recognizable disease. The Supreme