P Grace 35

March 16, 1967

American Adjustment Company
P. O. Box 2625
Great Falls, Montana 59401

ATTENTION: Robert Conley

Re: Your File: 1 0 34-016160
Insured: W. R. Grace & Co.
Claimant: Lilas D. Welch

Dear Mr. Conley:

This will serve to confirm our various telephone conversations concerning this matter, and provide you with information now available.

As far as we can ascertain, the first indication of a possible claim by Mr. Welch was contained in a letter from Attorney Richard Dzivi, of Great Falls, Montana, to the Montana State Industrial Accident Board dated July 1, 1965, in which Mr. Dzivi stated that his client suffered from asbestosis resulting from his employment with insured, and requested certain information and forms.

On July 12, 1965, forms requested were forwarded to the attorney, and the matter than rested until January 14, 1967, when Mr. Dzivi forwarded the Board an Occupational Disease Claim for Benefits form, subscribed by claimant Welch, and dated December 16, 1966, together with a narrative report submitted by Dr. C. G. McCarthy, of Missoula, Montana.

Our own investigation reveals that Mr. Welch has been employed by insured in the Libby, Montana area since February 8, 1949. He worked in the mill until April 14, 1949, or for a period of approximately two months, and then alternated between driving truck and working on construction for approximately seven years. His truck driving experience included both work in the mine, as well as hauling the refined product from the lower ore bin to the storage bins near the railroad. Since October 15, 1956 Mr. Welch has been employed in the warehouse.

PLAINTIFF'S EXHIBIT 1947

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We are informed by Mr. Earl Lovick, Manager of the insured's operations in the Libby, Montana area, that to his knowledge Mr. Welch was raised in the area, and has had no employment experience which might have subjected him to the type of exposure with which we are dealing, other than his work with our insured.

Mr. Welch is presently 64 years of age, having been born on February 5, 1903, and is apparently presently totally disabled with respect to any employment which would cause any sort of physical exertion.

We are informed that he simply would be unable to walk across a city street without stopping to rest at some point.

Claimant had been employed in the warehouse as a parts man for the past several years, and for the last year or two has been unable to climb stairs or engage in any activity which involved more than minimal exertion. We are advised by Mr. Lovick that they allowed Mr. Welch to continue with his employment until he simply could not continue, and as the work he was doing was the easiest job available, there simply was nothing for him to do other than resign.

According to insured's records, claimant's last date of employment was 11/8/66. He is entitled to Social Security benefits and some small pension from the Company, and we are informed that his present credits would allow him the sum of $331.09 per year if he had been able to wait until he was 65 years of age prior to retiring, but that his benefits, because of his premature retirement, would be actuarily scaled down.

We are further informed that various claims have been forwarded to the Travelers Insurance Company, which carrier provides health and accident coverage to insured's employees, with respect to medical expenses for several years, and that he is in fact now drawing some sort of weekly benefit as a result of his disability. In this respect, the various medical expense claims, as well as the present disability claim, have been presented to Travelers as not job related, and they have for several years paid such expenses, and are, or so we are advised, presently making payment of the weekly benefits.

In this regard, it might be noted that after Mr. Welch's retirement, Dr. McCarthy had forwarded insured a form indicating that his difficulty was in fact related to his employment; however Mr. Lovick had written that carrier and informed them that in his opinion, the difficulty was in no way job connected, and as a result, Travelers did accept the claim.

In discussing the situation with the Industrial Accident Board however, we are informed that Travelers has now written them requesting information with respect to Mr. Welch, and it may be assumed that that Company will now deny applicability of its coverage in view of Mr. Welch's present claims.

We examined all of insured's records relative to claimant's medical history, and are at this time forwarding copies of all pertinent information. It should be noted that the first Group Hospital Insurance Claim is dated 4/19/63, and indicates that claimant was admitted to St. Patrick's Hospital in Missoula, Montana on 3/28/63. In his Claim for Benefits, Mr. Welch has indicated that he first consulted Dr. McCarthy with respect to his present disability on March 27, 1963. We do not presently have information concerning claimant's medical history prior to that date, however will attempt to obtain whatever may be available, either through cooperation of counsel, or discovery proceedings.

At any rate, it is interesting to note that Dr. McCarthy's First Report, dated April 2, 1963, describes the injury as "Pneumonitis. Post pneumonic syndrome which is continuing caused by chronic lung asbestosis".

The diagnosis appearing on the original hospital claim indicates as follows: "Benign prostatic hypertrophy. Arteriosclerotic heart disease. Chronic lung disease".

In March of 1964, it appears that claimant suffered from Bronchitis, and in June of 1964, his condition was again diagnosed by Dr. McCarthy, as Asbestosis. In March of 1965, a Dr. G. A. Diettert of the Western Montana Clinic, diagnosed the condition as "Acute fibrosis secondary to asbestosis".

In May of 1965, Dr. McCarthy diagnosed "Bronchial pneumonia -- Silicosis". In August of 1965, Dr. McCarthy indicated that claimant had suffered from "Bronchial Pneumonia" and "Pneumoconiosis", in June of that year, and from "Furunculosis" in August.

A medical report dated January 24, 1966 by Dr. McCarthy indicated the condition then existing as "Furunculosis" and the records then apparently jumped to December of 1966, at which time claimant was hospitalized with Bronchial Pneumonia. At that time Dr. McCarthy indicated the condition to have arisen out of his employment.

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As you are of course aware, insured is engaged in the manufacture of a product distributed under the brand name "Zonolite". Zonolite is actually Vermiculite, and the ore involved is mined on insured's premises through open-pit methods. It is then hauled on trucks to a transfer point where it is dumped in hoppers and then conveyed some 1700 feet to the mill site. It is then fed to the "wet mill" where it is wet processed and screened. Generally speaking, the screening develops two sizes of ore, and the smaller size is concentrated through a floatation process in the wet mill. Both sizes are then run through a dry shed to the dry mill, and at that point the fine ore is screened for size. The coarser material is crushed through the use of both roll crushing and hammer-mill procedures, and after screening is placed in a holding bin. From that point it is hauled by truck to storage bins which are situate near the Great Northern Railway, from which point it is shipped to approximately 50 expanding and packaging plants in the United States and Canada.

Insured does maintain an expanding and packaging plant in the City of Libby where it does proceed on with the final processing procedures with some of its product.

It does appear that the Montana State Board of Health, as well as the Montana State Tuberculosis Sanitarium at Galen have been interested in insured's operations for some time.

The mill of course has created a dust problem, and insured has been engaged in attempting to improve ventilation and its dust collection system for some years. Mr. Lovick has furnished us with copies of all available information relating to this particular problem, and the first record of interest evidenced by the Montana State Board of Health is contained in a report from that Department to the insured's Libby Offices, dated February 11, 1942, concerning tests conducted on December 9, 1941. We are enclosing copies of all reports and correspondence involving the Montana State Board of Health for your review, however it should generally be noted that a dust condition in the mill area has existed, and has at times presented a severe problem.

The report of February 11, 1942, prepared and submitted by the Director and Chief Engineer of the Division of Industrial Hygiene, indicates that the dust encountered in the plant contained little or no silica, and that it was therefore classed as "a nuisance dust" with a threshold limit of 50 million particles per cubic foot of air.

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tests conducted by the State Board of Health in August of 1955 again apparently specifically considered a free silica count, and again the dust was described as of a nuisance type only, with a minor free silica content. At the time of these tests, the asbestos content of the dust had not been determined, however it was indicated that a small percentage increase in the asbestos content of the material being processed would produce several times greater concentration of the dust in the area, and indicated that the maximum allowable concentration for asbestos was 5 million particles per cubic foot (MPPCF).

This report went on to indicate that Vermiculite, or the dust from this material, was not considered to be toxic, and was generally considered only as a nuisance dust. The asbestos content of the dust however was causing the State Board of Health some anxiety at that time.

In a report dated January 12, 1959, Mr. Benjamin F. Wake, who was then and now is the Industrial Hygiene Engineer of the State Board of Health Division of Disease Control, indicated that his tests conducted on December 16 and 17, of 1958, determined there to be an asbestos content in the dust in the mill of approximately 27%. He quoted from an Article in the Journal of Industrial Hygiene entitled "Pulmonary Asbestosis" as follows:

> "Inhalation of asbestos dust must be expected sooner or later to produce pulmonary fibrosis, depending upon (a) length of exposure and (b) nature and concentration of the dust. Pulmonary asbestosis, once established, is a progressive disease with a bad prognosis; its treatment can only be symptomatic."

Both in the report of 1956 and 1959 it was indicated that the maximum allowable concentration of asbestos particles could be determined only through a "weighted average" formula involving the concentration of material and the hours of exposure, and neither report indicated that the asbestos concentration in the mill was either excessive or acceptable.

In a report involving tests conducted in March of 1962, again by Mr. Benjamin Wake, it was indicated that it had been determined that the airborne dust in the mill contained approximately 40% "tremolite asbestos". It was further indicated that while originally it had been felt that the vermiculite dust should be classified as a nuisance type only, later information supplied by the United States Public Health Service indicated that the vermiculite without asbestos

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concentration should in fact be classified in the order of mica-like minerals, and that the maximum concentration allowable should be 20 MPPCF, rather than 50 MPPCF. Again, the presence of asbestos fibers obviously was causing some anxiety in the mind of the engineer concerned.

A review of a report relating to tests conducted in 1963 again indicated there to be a rather high asbestos concentration in the air dust in the mill, and additional ventilation was recommended. It was indicated that the maximum allowable concentration of asbestos concentration was 5 MPPCF, based upon a 40% asbestos content in airborne dust.

We are in addition to the above reports, attaching copies of correspondence which merely seems to fairly well establish the existence of an asbestos concentration in the dust at the mill site, and the sincere attempts by the insured to alleviate the entire dust problem through the improving of its dust collection and ventilation methods.

Relating all of the above background and information to the instant case, it would seem we must first consider Dr. C. G. McCarthy's diagnosis as set forth in his attending Physician's First Report, dated January 30, 1967, copies of which you have in your file. You will note that Dr. McCarthy states as follows:

> "Exacerbation of chronic lung disease, suspect bronchopneumonia. All of these superimposed on silicosis. Chronic Pulmonary Fibrosis, secondary to asbestosis, pneumoconiosis secondary to zonalite."

I discussed this particular case personally with Dr. McCarthy at his offices in Missoula, Montana, and believe we may expect him to act as an advocate on claimant's behalf. He is positive in his assertion that Mr. Welch's condition is a direct and proximate result of his employment, and his exposure to dust in the insured's premises and operations. He indicated to me that he felt that there were four known pneumoconiosis resulting from inhalation of dust particles, and further that he felt we might be faced with an entirely new and as yet unestablished industrial disease.

He indicated that he had concluded positively through x-ray examination and tests that claimant does suffer from asbestosis, and informed me that the symptoms of this disease as exhibited through x-ray, were as easy for him to detect as a "red flag being waved" or something to that effect.



It is of course interesting to note that Dr. McCarthy is apparently diagnosing a case of silicosis, combined with asbestosis, together with an unknown pneumoconiosis "secondary to Zonalite" and I am sure he feels he has thus covered all possibilities.

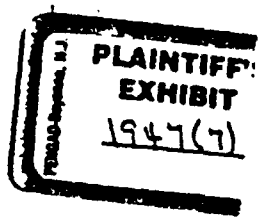
From all information furnished us, as evidenced in the enclosures, we simply should not in any way be facing the problem of silicosis, in that it has been determined that the free silica content is so minimal as to present no problem.

For the Doctor to describe a "Pneumoconiosis secondary to Zonalite" is, it would appear, so sweeping in extent as to have no value as a diagnosis. As above indicated, "Zonolite" is merely a trade name, and the actual mineral involved is Vermiculite. Whether the Doctor is attempting to describe a pneumoconiosis resulting from inhalation of Vermiculite dust would seem to be questionable, and from my own conversation with him, I feel he has included this particular diagnosis in an attempt to assist Mr. Welch to the greatest extent possible.

We are informed that the minerals processed in the mill, which presumably would exist in some combination in the general dust involved, are as follows:

1. Diopside, $CaO \cdot MgO.2SiO_2$
2. Augite, $CaO \cdot 3(Fe,Mg)O \cdot Al_2O_3.4SiO_3$
3. Vermiculite, $10(Mg,Fe)O \cdot 4(AlFe)_2O_3.10SiO_3.7H_2O$
4. Plagioclases (the group), $Na_2O.Al_2O_3.6SiO_2$ to $CaO.Al_2O_3.2SiO_2$
5. Orthoclases (mainly microcline) $K_2O.Al_2O_3.6SiO_2$
6. Biotite $(K,H)_2.O(Mg,Fe)O.(Al,Fe)_2O_3.3SiO_2$
7. Actinolite, $CaO.3(Mg,Fe)O.4SiO_2$
8. Tremolite, $2CaO.5MgO.8SiO_2.H_2O$
9. Traces of other minerals (magnetite, titanite, apatite, and quartz) have been detected at various times.

As I understand, Items 7 and 8 are some type of asbestiform, which is an extremely short fibre asbestos.



As you are of course aware, Section 92-1304 limits occupational diseases to Silicosis and Asbestosis, together with poisoning by various chemicals and compounds.

While I presume we should consult a chemist in this respect, it would be my understanding that in the instant case, we must consider ourselves concerned only with the problem relating to Silicosis and Asbestosis. Again, if the information so far available is correct, if in fact Mr. Welch suffers from Silicosis, it should be extremely difficult to proximately connect his condition with his employment by our insured when considering the lack of free silica in the air, and I presume we may be fairly confident that we can successfully defend a claim of Silicosis.

We must, on the other hand, not underestimate the exposure with respect to the claim of Asbestosis. I have personally discussed the general facts with which we are here concerned with Dr. A. C. Knight, Superintendent of the Montana State Tuberculosis Sanitarium at Galen, Montana, who in 1959 evidenced an interest in the content of the dust in the mill at Libby, as well as with Mr. Benjamin Wake, the Montana State Board of Health Industrial Engineer.

Dr. Knight informs me that to his recollection, he, at least on one previous occasion, was consulted with respect to a pulmonary problem exhibited by one of insured's employees. His recollection of the case was that he had at first felt the party involved suffered from Asbestosis, and had obtained from insured a list of the substances their raw ore contained. He indicated however that it had in that case been determined that the person involved did in fact actually suffer from a disease known as Sarcoidosis, which apparently exhibits characteristics very similar to Asbestosis, but which in fact is a disease of unknown origin, and not considered to be the result of outside irritant.

Dr. Knight further stated that he did not feel that Dr. McCarthy could make an absolute diagnosis of Asbestosis without a biopsy. As you are of course aware, Dr. Knight is most certainly considered to be a leader in his own field, and it would be my assumption that other specialists would agree in this respect, although we are informed that Asbestosis most certainly does exhibit certain characteristics discernible by x-ray.

Without attempting to invade the province of whatever experts we may consult, we find the following in Textbook of Medicine, Ninth Edition, Cecil & Loeb, at Page 1051:

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"Asbestosis is a form of pneumonoconiosis produced by the inhalation of dust containing asbestos or rock wool fibers. The fibrosis of the lung differs from that of silicosis in that it is not nodular, but distributed in collar-like fashion around the atria and the respiratory bronchioles. The fibers find their way along the interlobular septa and into the pleura, outlining polygonal figures of blue-black color. Under darkfield illumination luminous asbestos fibers may be seen. Asbestosis bodies, which consist of such fibers on which iron-containing material is deposited, may be seen in sections as clubbed or beaded shapes. These are also seen in sputum from time to time.

"Symptoms of disability, dyspnea and cough appear relatively much earlier in the course of the disease than is usual in uncomplicated silicosis.

"Diagnosis depends upon the history of exposure; the appearance of an irregular reticular fibrosis in the lung roentgenograms, which has no specific features, and the finding of asbestos bodies in the sputum. Confirmation at autopsy depends upon the demonstration of th asbestos fibers and bodies in the tissues undergoing fibrosis."

Mr. Wake, of the State Board of Health, agreed that the free silica content of the dust in the area was such as to almost necessarily rule out any connection between Mr. Welch's employment and the condition of Silicosis. He did express an opinion that the insured had been taking steps as required or suggested to alleviate the entire dust situation, and felt their present operations were probably within the boundaries suggested by the State Board of Health. He did indicate that in the past, a problem had existed, and that he had considered the possibility of claims arising relating to Asbestosis.

Claimant's employment in the warehouse since 1956 would not have exposed him to any concentrated dust, other than the general dust which does pervade the entire area around the mill. Mr. Wake informed that to his recollection he had never conducted or caused tests to be conducted at the warehouse, as it contains only parts, materials and supplies, and would not seem to present any sort of exposure other than that necessarily present around the mill site. Mr. Lovick has advised that his Company does possess a dust-counting device identical to that used by the State Board of Health, and that they do and have conducted their own air tests from time to time, and may have some records relating to tests made at or near the warehouse.

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Mr. Welch's prime exposure would of course involve the period he was employed in the mill, however he would in addition be exposed when driving truck, loading under the lower hoppers and hauling to the railway junction. In a letter dated December 30, 1964, from Mr. R. A. Bleich, Manager of the Libby operation, to Mr. J. A. Kelley, copies of which are attached, reference is made on Page 4, to the exposure present at the lower ore bins. We quote as follows:

> "Loading of the Kenworth truck beneath the lower ore bins is a dusty operation in a somewhat confined space. The drivers are respirator-equipped and after opening the loading gate do not need to remain at that point but can move a few feet to a clean location. The truck will not overflow. It takes approximately 5 minutes to load the truck. Total loading time is about 1 hour per day. The ventilation problem is immense and other than a rigid enforcement of respirator wearing, no change is scheduled.
>
> "The haul road to the river loading bins becomes very dusty during the dry season. Again water was formerly used but the situation has been adequately controlled by the use of oil as in the case of the mine haul roads.
>
> "The dumping of the Kenworth truck into either the river loading hoppers or the horizontal storage creates dust in considerable quantities because the vermiculite has been handled through the skip system, lower ore bins and Kenworth truck loading. Each handling has been cumulative. However, actual dumping is in the open so exposure is reduced to a low level."

Employment records indicate that Mr. Welch was employed as a truck driver in this particular phase of the operation from 5/19/49 to 12/16/49, from 10/1/51 to 1/1/52, and from 9/1/55 to 10/1/56. The remainder of his work history involving construction, truck driving in the mine, operating a sand truck and his warehouse experience would not indicate any exposure to concentrations of dust.

We are informed by all physicians we have questioned, that the susceptibility to diseases of the type with which we are here concerned, varies greatly from one individual to another. One physician informed us that he would not consider it unusual to find an exposure existing in 1949, resulting in a disability as late as 1966, citing cases of Silicosis which have taken twenty years to develop. On the other hand, Dr. Knight, of

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the tuberculosis sanitarium expressed surprise that such a lengthy period would be involved before the condition became noticeable and disabling. His feeling seemed to be that a person who would be so susceptible as to develop the condition as a result of exposure of a few months, would be likely to contract the disease quite swiftly.

Under any circumstances, it does at least appear that we should be able to establish that Mr. Welch has not been exposed to any concentration of dust in his employment since he took the job in the warehouse in October of 1956, and this point may be of some importance in our defense of the claims presented.

As you are aware, Section 92-1311 A.1. provides as follows:

> "No compensation shall be paid when the last day of the injurious exposure of the employee to the hazard of the occupational disease has occurred prior to the effective date of this act except as in this section, paragraph "A", subparagraph 4 provided."

Subparagraph 4 of this Section seems to apply only in the event an employee has been discharged or transferred from his employment as a result of an occupational disease incurred in that employment, and in the instant case, it does appear that Mr. Welch simply continued to work until he finally was unable to adequately perform his duties.

The effective date of the Act was the date of its approval, or March , 1959, and it would seem to follow that if in fact we are able to establish that work in the warehouse was not "injurious exposure" then, as he has been employed at that point since 1956, his last injurious exposure must necessarily have been prior to that date.

The Montana Occupational Disease Act does of course provide for the procedure to be followed with respect to determining validity of claims presented. Either the Montana Medical Association or the Industrial Accident Board is to appoint a medical panel and medical committee, members of which are to then be directed to conduct necessary medical examinations. I am informed by the Industrial Accident Board that in fact no actual medical panel or committee is in existence, and that their actual practical procedure generally is merely to appoint some qualified physician to make and conduct the examination required.

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The question of proximate causation as required and set forth in some detail in Section 92-1395 is determined by the Industrial Accident Board after all evidence, inclusive of medical testimony, is of record. The defense of the claim here presented will of course involve denial of proximate causation, and it is my assumption we will wish to have available as much information as possible to establish the lack of free silica in the area concerned, as well as in an attempt to establish that the asbestos content of the dust is not such as to constitute a proximate cause of the Asbestosis condition claimed. I assume our problem in this latter respect cannot be minimized.

It would further appear that we should contest any diagnosis of Asbestosis as such, and most certainly any diagnosis of pneumoconiosis related to Zonolite. If Dr. Knight is correct, it may be that other experts will not be willing to give an opinion as to the existence of Asbestosis without biopsy procedure.

In this respect, it is my understanding that the Industrial Accident Board will appoint a physician qualified to conduct examination and express an opinion on the points concerned, however in my discussion with Mr. Swanberg, Chairman of the Industrial Accident Board, I gained the impression that he could not immediately think of any practitioner in Montana qualified directly on the subject of Asbestosis.

In defending against the claims presented, we may further consider the effect of Sections 92-1312 and 92-1313, relating to presentation of written claim and notice of disability, respectively.

In the instant case it would appear that Attorney Dzivi did write the Industrial Accident Board in July of 1965, indicating that his client did suffer from Asbestosis resulting from his employment, and requesting instructions as to procedure and claim forms. It does not however appear that Mr. Welch was at that time more than partially disabled, and of course as we know, he did continue on with his employment until December of 1966.

It does however appear that in July of 1965 both Mr. Dzivi and his client were claiming that Mr. Welch did suffer from Asbestosis resulting from his employment, and that disability might result.

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In his Claim for Benefits, Mr. Welch has indicated that his disability began on November 9, 1966, however he also apparently has penciled in the date of July, 1965. Under any circumstances, it would seem that we should be able to establish that claimant did in fact become disabled on November 9, 1966, at which time he left insured's employment, and further it would appear that the evidence will indicate that Mr. Welch on that date was well aware that he supposedly suffered from Asbestosis related to his employment.

Section 92-1313 would require him to file a Notice of Disability or Death with respect to conditions other than Silicosis within thirty days after he "knew or should have known the nature of the impairment...and its relation to the employment". Technically interpreting this Statute, it would seem that Mr. Welch should consequently have given such Notice of Disability "to his employer, the insurer or the Board as the case may be" on or before the 9th day of December, 1966.

The Notice described is required to be in writing, and contain certain specified information, and is supposedly to be on forms to be furnished by the Board.

We are informed that the Industrial Accident Board does not and has not furnished such forms, however whether this failure by the Board could be considered to relieve Mr. Welch of the requirements of this Section is, it would appear, quite questionable.

At any rate, no written Notice of Disability has ever been furnished to the employer or, I assume, to the insurer, and of course the first notice received by the Industrial Accident Board is Mr. Dzivi's letter of January 14, 1967, and the Claim for Benefits dated December 16, 1966, and apparently received by the Board on January 16, 1967.

While the requirements of Section 19-1312 relative to formal claim requiring such claim to be presented in writing, under oath, within thirty days after filing Notice of Disability, have perhaps been satisfied by the filing of the Claim for Benefits above mentioned, still it would seem that it can be argued that Mr. Welch simply has not followed the statutory requirements relative to timely action on his part, either as to notice or filing of written claim.

The Industrial Accident Board has indicated that they would wish to have testimony of Mr. Welch in evidence prior to proceeding on with medical examination, and it is of course possible that they will further desire that evidence relating to the degree and extent of exposure be also available at that time.

As you are aware, Attorney Daly is presently serving in the legislature in Helena, however as soon as he is available, we will attempt to make arrangements to obtain deposition of claimant in order to satisfy the suggestions of Mr. Swanberg of the Industrial Accident Board.

In the meantime, it is my suggestion that a letter be directed to the Industrial Accident Board and those other persons concerned, making formal denial of the claims presented by Mr. Welch on all grounds which appear to be available to us.

I do intend to further discuss procedure with Mr. Swanberg in order to determine if he would desire us to obtain the testimony of Dr. McCarthy by way of deposition, and further if he would expect us to retain the services of our own medical expert, even though such procedure does not seem to be contemplated by the Act.

At the time of obtaining the testimony of Mr. Welch, I assume we will be able to develop with some certainty evidence relative to his present condition, i.e. whether disability is in fact total in character as required by Section 10-1328.

We will of course appreciate your review of all of the above, and providing us with the benefit of any suggestions or recommendations you may have.

Sincerely,

S. Y. Garrick

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Enclosures

cc: Maryland Casualty Company
1415 East Ankey Street
Portland, Oregon
Attn: Mr. John Hopkins
(With Enclosures)

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