Thus closes Milly case - pro tem.

SHELL OIL COMPANY
INCORPORATED
50 WEST 50TH STREET
NEW YORK 20

March 9, 1950

Dr. Willard Machle
3809 47th Street N.W.
Washington 16, D. C.

My dear Dr. Machle:

I know you will be interested to know that [redacted] claim as made was disallowed by the Referee, on the merits. For your convenience and information, I am enclosing a copy of the memorandum decision prepared by the Referee. *

While I have been of the opinion for some time, it is gratifying to have it appear, as a matter of record, that you are "one of the nation's leading experts in the field of lead poisoning" (p. 6). Evidently the Referee was duly impressed by your qualifications, which he recited were "amply demonstrated by the record". It is somewhat interesting to note that the Referee appears to have made no reference whatsoever to the urinary test which you made, and emphasized by claimant's attorneys.

While we can expect an appeal to the Board, we feel that the thorough memorandum by the Referee should be of material assistance. Needless to add, your assistance in this matter has been invaluable and I assure you that we appreciate your valued cooperation. At your early convenience I shall welcome the benefit of your comments and suggestions concerning the enclosed memorandum.

Very truly yours,

Philip M. Payne

Philip M. Payne,
Attorney.

Attachment *

C O P Y

All Parties — Albany

Referee T. J. Doughty — February 23, 1950

54204741

[redacted], Claimant vs. Shell Oil Company,

MEMORANDUM OF DECISION

This is a claim made for disability alleged to be due to lead poisoning. We are not here concerned with the question of whether this is an occupational disease, since lead poisoning or its sequelae is by statute so classified. We are not concerned with the questions whether claimant was exposed to lead in such amounts as to constitute an industrially hazardous exposure, and whether he does have lead poisoning. The two problems are so closely interdependent that they must be considered together.

The claim as originally made was for a somewhat indefinite condition which [redacted] described as "strained heart muscles and stomach trouble resulting from overwork," so stated in a letter from Miller to his employer dated November 18, 1943. This letter was the first written notice of the claim to be given to the employer, that is, that a claim was being made under the provisions of the Workmen's Compensation Law. The notice of claim came to the employer more than one year after the claimant had ceased working for the employer. The first issue raised by the employer was the failure to give notice of claim to the employer, and it was raised at the hearing held on July 31, 1944, which was the first hearing at which all parties were present or represented and at which the claimant testified. The employer did not specifically raise the issue of failure of the claimant to file his claim with the Industrial Commissioner within one year as provided by Sec. 28 as it then stood. The language as used by the employer was "the Shell Oil Company appears here specially to raise the question, that of propriety, and they say that they received no notice of accident, we further did not receive within one year's period of time any notice of accident or any notice of claim based on any circumstances whatsoever" (minutes 7-31-44, page 1.) The Referee reserved decision on that issue until after the claimant's testimony had been taken. The next hearing was held on February 16, 1945.

In the meantime, [redacted] had been examined by two specialists, Dr. Ferguson and Dr. Holcomb. He was at this point under the care of Dr. J. W. Blakely. At this hearing it was demonstrated that [redacted] had stopped work on September 28, 1942 and had not since been employed by Shell. He had filed a series of claims for benefits under an "income protection" insurance policy, a group insurance policy carried by the employer with Travelers Insurance Company for the benefit of its employees. In applying for such benefits it was necessary to state the nature of the illness claimed to be disabling, and in order to qualify for the benefits it was also necessary to show that the disability claimed did not arise out of an accident or an occupational disease coming under the provisions of the Workmen's Compensation Law. From this it appears that the employer had some knowledge, within a few days after the discontinuance of [redacted] employment, that he was claiming to be disabled, even though it does not appear affirmatively that there was any claim being made that the disability allegedly was due to an occupational disease. Indeed, from the variety of the several illnesses listed by [redacted] and his attending physicians it would seem that even [redacted] did not have sufficient knowledge upon which he could have made a compensation claim. But the claimant's failure to give written notice did not as far as I can determine from all the facts and circumstances, result in sufficient prejudice to the employer to justify a disallowance of the claim on that ground. At the same hearing Feb. 16, 1945 claimant was examined by Dr. E. H. Parizot, a State Medical Examiner, who in concluding his report, suggested a "follow-up as to possible chronic poisoning due to either tetraethyl lead or other chemical compounds." Up to this point none of the attending physicians had suggested such a possibility. Dr. Blakely who testified on the February 16, 1945 hearing date had suggested no such diagnosis.

Following this hearing, the claimant was permitted to amend his claim Form C-3 to be a claim for occupational disease due to lead poisoning, and the matter proceeded and all subsequent proof was directed to the issue of whether [redacted] disability is due to chronic lead poisoning or petroleum poisoning, claimed to be an occupational disease contracted in the course of his employment as a truck driver-salesman for Shell Oil Company.

On May 10, 1948 in the course of a hearing, the Referee made an interlocutory decision excusing the late notice to the employer.

The claimant's work as a tank truck driver included daily filling of his tank truck. To do this it was necessary to open a filling hole in the top of the truck, insert a spout and then watch the marker inside the tank to see that it was filled to the proper capacity. This caused [redacted] to be in a position above the opening where he would breathe gasoline fumes. He also had to deliver the gasoline to station customers and in doing this he spilled liquid gasoline on his hands and clothing. He also got gasoline on his hands and clothes in working around the storage yard helping to unload gasoline by pipeline from barges to the storage tanks. His case rests upon the assertion that this gasoline, and the fumes from it, contained lead, derived from the tetraethyl lead mixed with the gasoline; that he inhaled fumes containing lead and absorbed lead from the liquid gasoline in excessive quantities.

Dr. Blakely testified, on a second appearance on Sept. 16, 1946, that he thought the claimant had lead poisoning because he was exposed to excessive quantities of lead in his occupation. At the first hearing at which this Doctor testified he had no such opinion. This doctor had no experience to lead poisoning and based his conclusion on the assumption that claimant was contacting lead. The chief medical witness for the claimant was Dr. J. S. Taylor, a pathologist. He concluded that [redacted] was suffering from lead poisoning, and based that conclusion on several assumptions. One was that because of a blood test taken on June 3, 1946, he felt that Miller had been exposed to "excessive amounts of lead in the past, or at the time the blood test was taken" (minutes 4-23-38 P. 22). He assumed that the blood test showed abnormal quantity of lead. As to the assumption that claimant was exposed to excessive amounts of lead in the past, it is not supported by the proved facts. [redacted] testified that when loading and unloading gasoline he had breathed

gasoline vapors in great quantities. The testimony, both his and that of witnesses produced by the employer, shows that the claimant was exposed to gasoline vapors from loading the truck for only a few minutes at a time, and then for but three to four times during the whole working day. (minutes 5 16 48 p. 34) Some of the time the trucks were loaded by a yard man and claimant would not be present. (minutes 5 16 48 p. 34 ff.). The employer produced a great deal of evidence based on scientifically controlled tests of the fumes rising from tank of trucks openings in the filling process. These tests showed that of all of the component parts of hightest or ethyl gasoline, the tetraethyl lead was the last part to go off by evaporation, and that a test of the air at a point as close as two inches above the center of the tank opening contained five "gamma" of lead per cubic foot. Samples of air taken with the end of the sampling tube fastened to the collar of a truck loader's coat showed three gamma of lead per cubic foot. A gamma is the smallest unit of scientific measurement and it represents one three hundred millionth of an ounce. (minutes 5 27 49 p. 17) Another witness characterized the quantity of lead occurring in gasoline fumes as being "lead fumes, if any, in very minute traces". (minutes 5 27 49 p. 17) So that if we accept this scientifically prepared data, we must necessarily conclude that there is no factual basis for the assumption that Miller, during his employment, was exposed to excessive amounts of lead in the fumes or vapors to which he was exposed in the loading and delivering processes.

Dr. Taylor also assumed that [redacted] may have absorbed lead in excessive quantities from having spilled gasoline on his clothing and hands, and from eating his food with unwashed hands after getting gasoline on them. (minutes 4 23 48 P 96) We turn to [redacted] testimony and find that he himself minimized the occurrence of this type of exposure, stating that it happened "very seldom" (minutes 5 16 48 p. 8,9) "once in a great while," (minutes 5 6 48 p. 8) "once in a while, a little bit" (minutes 5-6-48 p. 8 & 9.)

"once in a great while", (minutes 5 6 48 p. 8) "once ina while, a little bit" (minutes 5-6-48 p. 52.). This was with reference to getting gasoline on his hands. Getting gasoline on his clothes was also described as "an unusual occurrence (minutes 5 6 48 p. 55) and only once in 1940 or 1941 he got his clothes soaked by an overflow so that he had to change (minutes 5 6 48 p. 55) He wore gloves in the winter, lots of times they would be soaked (minutes 5-6-48 p. 54) he let his hands dry, they would dry very quickly (minutes 5 6 48 pp 54, 56) He always washed his hands before eating, (minutes 5 6 48 p. 55) We cannot conclude or assume from this evidence that [redacted] was exposed to excessive quantities of lead in the manner suggested by Dr. Taylor's conclusion.

The other half of Dr. Taylor's conclusion above referred to is that [redacted] must have been exposed to excessive amounts of lead "at the time the blood test was taken". If this be correct, then there was an exposure to lead occurring at least three years after the end of his employment with Shell, since the blood test referred to was made in June 1946.

If we are to indulge in assumptions rather than facts to support this claim, one of these assumptions by Dr. Taylor can be just as good as the other. If we are to weigh them against the scientifically established facts, then the first of these assumptions is demonstrated as unfounded in fact, the other part not proved or disproved, but certainly not favorable to the claimant's case.

In his opinion Dr. Taylor also relied strongly upon his diagnosis of a paralyzed diaphragm. He argued that because [redacted] exhibited symptoms which he interpreted as a paralysis of the diaphragm, and because a paralyzed diaphragm could be caused by lead palsy, Miller must have had lead poisoning. I cannot follow this theory. It is circuitous, saying, in effect, he has lead poisoning because he has a paralyzed diaphragm because he has lead poisoning." Dr. Taylor could not support the paralyzed diaphragm diagnosis independently. He conceded that upon the fluoroscope examination he could not actually see the diaphragm as paralyzed (minutes 4 23 48 p 88), he merely concluded that it might be paralyzed because it did not appear to function. He stated that it was in a normal position (minutes 4 23 48 p. 62) practically motionless (minutes 4 23 48 p. 82) but that another physician had

seen it in partial mobility at about the same date (minutes 4 23 48 p. 69) Now either the diaphragm was paralyzed or it was not, and I see no positive statement by this expert that it was. It seems to me that the claimant has failed to prove by any reasonably established facts that he was exposed to lead in amounts sufficient to constitute any hazardous exposure or that his illness has been correctly diagnosed as lead poisoning or its sequelae.

On the other hand, the employer has adduced a substantial weight of scientifically proven evidence showing that this claimant's occupation did not create a hazardous exposure to lead. It has been shown that the tetraethyl lead in gasoline fumes is infinitesimal in quantity. It has been shown that tetraethyl lead in gasoline can be dangerous only when absorbed in dense fumes in enclosed places, that mild outdoor exposure creates only temporary symptoms that wear off without any lasting effect. Claimant was examined by Dr. Willard Machle, one of the nation's leading experts in the field of lead poisoning whose qualifications are amply demonstrated by the record. Dr. Machle testified that claimant did not have lead poisoning, that the blood test showed that [redacted] blood was normal (minutes 10 27 49) showed no stippling (minutes 10 27 49 p. 45, 46); that the absence of stippling was of great significance and made it imperative to look for a different diagnosis that lead poisoning(minutes 10 27 49 p. 40, 41) that the blood test showed no concentration of lead (minutes 10 27 49 p. 48) He also testified that he found no paralysis of the diaphragm (minutes 10 27 49 p 49, 50) and that in all his experience he never saw a lead poisoning patient have a paralyzed diaphragm (minutes 10 29 49 p. 50). It was his opinion that [redacted] was suffering from myocardial disease and pulmonary emphysema (minutes 10 27 49 p. 48).

Claimant was also examined in the course of the proceedings by Dr. R. T. Lapidus, an internist designated by the Board as an impartial specialist, Dr. Lapidus filed a report stating that the claimant did not have lead poisoning, that he did have evidence of cardiac disease due to coronary sclerosis. He was not called to testify by either side. Dr. C. T. Graham- Rogers then acting as head of the Bureau of Industrial Hygiene stated in a written report that there was no hazard from lead poisoning in the ordinary handling of ethyl gasoline. Nor are we left without a differential diagnosis sufficient to account for the claimant's disability.

He was examined carefully and repeatedly by competent qualified experts. Dr. A. S. Ferguson, an internist, diagnosed the claimant's illness to be not lead poisoning, but chronic sclerosis, with definite evidence of a previous coronary occlusion and a marked pulmonary insufficiency due to long standing and progressive fibrosis changes in both lungs. Dr. Ferguson was a consultant to [redacted] former attending physician, Dr. Capwoski and later to Dr. Blakley, before this claim was made, and had observed the case for several years. His diagnosis was supported by electrocardiagraph studies, laboratory test, and claimant's previous medical history. It was confirmed by the opinion of Dr. Lapidus. (minutes 10 27 28 1949).

Dr. F. W. Holcomb, a well qualified and experienced specialist in disease of the chest and lungs was also a "consultant for one or more of the claimant's attending physicians. He also had the advantages of having been familiar with claimant's case for several years. He had access to hospital records of Miller's previous illnesses, including laboratory studies, blood tests, x-ray studies of his chest and abdomen. In his work, as a specialist in pulmonary diseases, especially in tuberculosis, he had seen many patients with paralysed diaphragms, had many times caused such paralysis to occur by operative procedure (minutes 10 28 49 p. 79 ff.) His opinion regarding paralysis of the diaphragm certainly should bear great weight, and surely should take precedence over that of Mr. Taylor who himself deferred to the opinion of a consultant in chest disease minutes 9 4 23 48 p. 62, 63.) Dr. Holcomb said, in direct contrast to that of Dr. Taylor offered as the opinion expressed by a chest specialist, that Miller's was definitely not a paralyzed diaphragm, or even a partially paralyzed diaphragm (minutes 10 28 49 p. 62, 63, 79 that a paralyzed diaphragm is found in an elevated position, and somewhat higher than a normal diaphragm (minutes 10 28 49 p. 82); that Miller's diaphgram was approximately normal in position (minutes 10 28 49 p. 82); that he had observed the abnormal movement and that it was due to adhesions which had formed from previous pleurisy

attacks (minutes 10 28 49 p. 81) that with emphysema there is a definite limitation of motion of the diaphragm, His opinion is that the claimant's physicial condition and his disability is caused by the result of progressive pulmonary changes due to infections rather than to his occupation. This conclusion is supported by [redacted] medical history, as given by him to his doctors and contained in the various hospital and medical reports and his applications for disability benefits. Dr. Holcomb found no evidence of lead poisoning, gasoline intoxication, petroleum poisoning, or lead palsy (minutes 10 28 49 any time (minutes 10 28 49 p 52, 53).

FINDINGS OF FACT

1. I find that the claimant [redacted] was employed as a driver - salesman by the Shell Oil Company for approximately nine years - prior to September 28, 1942.

2. I find that he was not employed in any capacity by the Shell Oil Company after September 28, 1942.

3. I find that during his employment he was exposed to gasoline and to fumes from gasoline.

4. I find that said gasoline and fumes therefrom contained totraethyl lead in minute and infinitesimal quantities.

5. I find that the exposure to gasoline and fumes from same was not a hazardous exposure.

6. I find that the claimant, [redacted] does not have lead poisoning, or its sequelae, nor does he have lead intoxication, nor petroleum poisoning nor lead palsy.

7. I find that the claimant [redacted] does not have any disease related either directly or indirectly to his occupation while in the employment of the Shell Oil Company.

CONCLUSIONS OF LAW

1. The failure to give written notice of accident or of an occupational disease should be excused.

2. The failure to file a claim for occupational disease for more than one year after date of disablement is waived by the failure of the employer to raise that issue at the first hearing at which all parties were present.

3. The claim as made is disallowed, on its merits.

4. CLOSED.

Dated February 23, 1950
Copied February 28, 1950
DBS

SIGNED: T. F. DOUGHTY
REFEREE