

UNITED STATES DISTRICT COURT

DALLAS COUNTY, TEXAS

44TH JUDICIAL DISTRICT

PLAINTIFF'S EXHIBIT

UC-5167

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DANIEL ALDERETE, JR.; CHARLIE)
RAY BROWN; HAROLD R. CADENHEAD;)
ALBERT DICKEY; JOHN Z. GRACIA;)
CECIL EDWARD JOHNSON; ROSENDO)
LEAL, JR.; CHOYCE EDWARD MITCHELL;)
JOSEPH F. STEVENS; ARNULFO)
ARRENDONDO MADRIGAL, SR. and)
FAUSTINA MADRIGAL,)

Plaintiffs,)

vs.)

No. 97-02640-B

OWENS CORNING, ET AL,)

Defendants.)

DEPOSITION OF

DOUGLAS WAYNE MERRILL

Friday, September 18, 1998

REPORTED BY: BETTY A. CALLIES CSR 11092 Job# 71461

COPY

1 A No.
2 Q What did the Consumer Product Safety
3 Commission ultimately do on the proposed rules
4 published in the July 29, 1977 --
5 A Can we go back to the last one?
6 Q Yes, sir
7 A I recall that an earlier question had
8 come up and I think it was in the testimony about
9 substituting asbestos for titanium And that
10 ended up in the lower cost. But titanium had been
11 used in the product to make it white; and that was
12 the only reason for it And actually, what it was
13 was a change from one source of asbestos to
14 another that had titanium as part of it -- and I
15 think some literature that spoke to the fact that
16 by going from -- there was a Canadian source -- I
17 don't know which one -- going from a Canadian
18 source to a Union Carbide product which had
19 titanium -- it could replace the Canadian
20 asbestos. And some of the titanium was taken out
21 because this asbestos was whiter and had titanium
22 with it
23 So there was some literature that
24 spoke to that. And the way it spoke to that was
25 by putting Union Carbide in you could take

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1 titanium out and cut the price back. But in
2 essence it was changing from one type of asbestos
3 to another type of asbestos. That is sort of an
4 impurity to titanium dioxide
5 Q What type of a product were you just
6 referring to; what was the end product, do you
7 recall?
8 A It's probably ceiling texture, in
9 order to have any titanium in it.
10 Q And the change removed the titanium,
11 is that correct, or the change added the titanium?
12 A No, either reduced it or took it out.
13 Q In reducing or taking out the titanium
14 did it add more asbestos?
15 A I don't believe so The switch was
16 from going from a Canadian source to the Union
17 Carbide source. And typically Union Carbide
18 asbestos itself was a little more efficient. You
19 could get by with using, on a pound-per-pound
20 basis, a little bit less. But it had this whiter
21 characteristic to it which actually had titanium
22 dioxide with it.
23 In fact I think it was called -- I
24 don't remember the name of it -- High Purity Open,
25 or something like that It had some titanium with

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1 it. So in addition to changing the asbestos, some
2 of the titanium could be taken out, because it was
3 only put in there to make the finished coat
4 whiter. It wasn't white, but an off-white.
5 So I remember that coming up sometime
6 in the past where it appeared, based on a meeting
7 or something, that was announced that that was
8 being done. It appeared that asbestos was
9 replacing titanium dioxide, but it was more than
10 just that
11 Q Is there anything else as you reflect
12 back that you would like to change or add about
13 your testimony?
14 A I don't recall anything else.
15 Q I was asking you whether you knew what
16 the Consumer Product Safety Commission did with
17 regard to the proposed rules published in the July
18 28, 1977, Federal Register?
19 A As I recall they acted upon them as
20 proposed. I don't remember any changes.
21 Q In other words, despite the Asbestos
22 Information Association's objection, and despite
23 the Paco objection, which is in Exhibit 3, the
24 Consumer Product Safety Commission still decided
25 to go ahead with the ban as proposed, correct?

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1 A Yes, that's the way I recall it.
2 Q It's true, sir, isn't it, that when
3 the ban of asbestos-containing joint compound was
4 enacted that there was a period of time between
5 when you knew that it was going to happen and the
6 last date that, for example, you could sell a
7 product, correct?
8 A I think there were three -- there
9 was -- well, the first step would be it had
10 passed. And then there would be a short period of
11 notification, and then like a thirty-day period to
12 stop manufacturing. And then another period of
13 six months or something to stop selling it. It
14 was like from January then to June.
15 Q So in other words, it wasn't such that
16 from overnight or from nowhere you had to go from
17 manufacturing to not selling it the very next
18 day -- not without any notice, correct?
19 A Correct.
20 Q In the period of time between when you
21 learned that you were no longer going to be able
22 to manufacture and sell asbestos-containing joint
23 compound and from the time the law forbid you to
24 sell it, Kelly-Moore made a corporate decision to
25 sell as much as they could, didn't they?

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1 A Or '71.
2 Q Prior to that you had no knowledge
3 that asbestos could be harmful?
4 A No
5 Q Didn't see the warnings on the Johns
6 Mansville bag?
7 A No
8 Q Didn't read anything indicating that?
9 A No
10 Q Did you look?
11 A Did I look for asbestos hazards in
12 1969, 1970, no
13 Q No, you did not?
14 A I don't remember what I did back then
15 Q Possibly you may have looked to see
16 whether it was harmful; you just don't recall?
17 A I don't recall.
18 Q Don't you think before Kelly-Moore
19 marketed products it should have tested those
20 products to see whether they would be safe for
21 use?
22 A I don't know if they tested them
23 before they marketed them
24 Q You know they didn't do any testing
25 for health problems in the time you were there,

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1 don't you?
2 A Yes -- well, no, we did some testing
3 Q Starting when?
4 A Starting when?
5 Q Yes.
6 A Well, we asked our insurance company
7 to come in and do some exposure tests after OSHA
8 Q But that didn't have anything to do
9 with the use of the product, did it; that meant
10 you were asking them to test remaining
11 manufacturing facilities to see if they were safe
12 for its workers, right?
13 A. Yes, what the exposure was.
14 Q In manufacturing facilities?
15 A Yes.
16 Q You never ever tested to see if the
17 use of the product would be harmful to health, did
18 you?
19 A For a finished product, yes, we did.
20 Q What do you mean, a "finished
21 product"?
22 A With asbestos in it.
23 Q When did you first test a product to
24 see if it was safe?
25 A Probably '73, or after OSHA

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Combs & Greenley, Inc.

1 Q Tell me the testing that you did
2 A It was ceiling texture in a joint
3 effort with Union Carbide
4 Q You tested the ceiling texture?
5 A Exposure to the applicator
6 Q Did you ever test joint compounds?
7 A I don't recall if I tested it.
8 Q If you learned asbestos was harmful to
9 your health in '72, why did you continue
10 manufacturing and selling asbestos-containing
11 products until the government forced you to stop
12 in '78?
13 A Well, the government set certain
14 thresholds, so we worked -- we did a number of
15 things, but we worked towards eliminating it from
16 the product And also looked to see which ways we
17 could minimize the exposure to the fibers.
18 Q What is the best way to minimize the
19 exposure to asbestos fibers?
20 MS ANDREWS Objection, calls for
21 speculation.
22 THE WITNESS The best way is no
23 exposure at all.
24 MR BARON Q Eliminating asbestos
25 is the very best way?

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1 A Limiting exposure, yes.
2 Q If for some reason the company wanted
3 to put asbestos in after it learned it was
4 harmful, what else could a company do to minimize
5 exposure to users, or people working around users
6 of products?
7 A The labeling, which we did; the
8 warning not to create a dust.
9 Q Let's talk about the label. Do you
10 believe that label was a warning?
11 A That's what it said, yes.
12 Q Do you believe it was an adequate
13 warning?
14 A. It came from the government.
15 MR BARON Objection, nonresponsive.
16 Q Do you believe it was an adequate
17 warning?
18 A. Yes, for that period of time it was.
19 Q Kelly-Moore made available to its
20 employees who made the joint compound, mixed up
21 the dry ingredients, respirators, correct?
22 A Yes.
23 Q And you did that because you thought
24 that might be the prudent thing to do to reduce or
25 eliminate exposure to asbestos, right?

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1 A No
2 Q Because there is no risk of that, is
3 there?
4 A That I don't know We don't use it in
5 paint because of that.
6 Q You as a taxpayer don't want your tax
7 dollars going to try to support government that
8 could test every product made by every
9 manufacturer to determine which ones are safe, do
10 you?
11 MS ANDREWS Objection, calls for
12 speculation, argumentative
13 THE WITNESS As a consumer I would be
14 paying for it one way or the other, whether it be
15 the government or every company involved
16 MR BARON Objection, nonresponsive
17 Q Was that your answer?
18 A Yes.
19 Q Consumers of Paco products paid for
20 the lack of testing and the lack of investigation
21 by Kelly-Moore products with their lives, didn't
22 they?
23 MS ANDREWS. Objection, calls for
24 speculation, argumentative, and absolutely assumes
25 facts not in evidence

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1 THE WITNESS I do not know that
2 MR. BARON Q Do you deny it?
3 A I don't know if Paco customers paid
4 for that with their lives
5 MR BARON Can we take a quick break?
6 (Whereupon, there was a break taken at
7 4:30 to 4:45 p m.)
8 MR BARON Mr Merrill, let me show
9 you a document that's been marked Exhibit 14 to
10 your deposition, and ask you to look at that,
11 please, and tell me whether you recall receiving
12 Exhibit 14.
13 (Whereupon, Exhibit
14 14 was marked for
15 identification)
16 A I recognize this as having received
17 this, yes.
18 Q In fact, it is a letter dated
19 September 27, 1976, addressed to you?
20 A Correct.
21 Q It's from the Union Carbide folks, is
22 that right?
23 A Yes
24 Q They are referencing in this letter --
25 well, it says that you discussed the petition

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1 filed by the National Resources Defense Council
2 demanding the banning of asbestos in patching an
3 similar compounds intended for consumer use. And
4 it then goes on to say, "A copy of the Asbestos
5 Information Association/North America's response
6 to this petition is attached " Would you look and
7 see whether that appears to be what is attached to
8 Exhibit 14?
9 A It appears to be, yes
10 Q In fact if you --
11 A It's probably what we looked at
12 earlier
13 Q Yes, sir We had Exhibit 2 that I
14 think had some incomplete pages in it, right, do
15 you remember that?
16 A Yes, I do
17 Q Does Exhibit 14 appear to be a
18 complete copy of that?
19 A. Yes, it does.
20 Q Does Exhibit 14 refresh your
21 recollection that you, in fact, did receive around
22 September of '76 a copy of the Asbestos
23 Information Association's position on the proposed
24 Consumer Product Safety Commission ban?
25 A I don't recall specifically having

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1 received it; but yes, I did receive it
2 Q. You got the letter?
3 A Yes.
4 Q And you think you got the attachment?
5 A Yes.
6 Q And, in fact, the letter and the
7 attachment exist in the Kelly-Moore files today?
8 A Yes.
9 Q As indicated by the KMX numbers,
10 correct?
11 A Correct.
12 Q Do you recall discussing with Mr
13 Rhodes the proposed ban as he has referenced in
14 the letter?
15 A I don't remember him as an individual,
16 particularly, with Union Carbide, but I know that
17 the issues surrounding the ban were discussed with
18 the asbestos suppliers; certainly Union Carbide
19 was one of them.
20 Q In fact, Mr Rhodes in this letter,
21 Exhibit 14, says, "I want to thank you for your
22 assistance in providing the information needed for
23 this response." Do you see that?
24 A Yes.
25 Q As far as Mr Rhodes was concerned you

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