

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Judge

S.C. SUPREME COURT

Appellate Case No. 2019-000816
Case No. 2013-CP-42-3915

Angie Keene, Individually and as Personal
Representative of the Estate of Dennis Seay, Deceased,
and Linda Seay,..... Respondents,

v.

CNA Holdings, LLC..... Petitioner.

APPENDIX
VOLUME V

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Judge

Appellate Case No. 2016-000227
Case No. 2013-CP-42-3915

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SC Court of Appeals

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Representative of the Estate of Dennis Seay, Deceased,
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v.

CNA Holdings, LLC..... Appellant.

RECORD ON APPEAL
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Dennis Seay

 Mckillop, George (Vol. 01) - 02/22/2007

1 CLIP (RUNNING 00:58:02.205)

 edited

GM001 81 SEGMENTS (RUNNING 00:58:02.205)



1. PAGE 9:07 TO 9:11 (RUNNING 00:00:05.698)

07 Q Okay. Mr. McKillop, did I pronounce that
08 correctly?
09 A Yes.
10 Q Good morning, sir.
11 A Good morning.

2. PAGE 9:16 TO 10:15 (RUNNING 00:00:47.656)

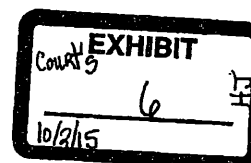
16 Q You have given many depositions in the past
17 on behalf of John Crane Inc., correct?
18 A Yes.
19 Q And you understand, therefore, how this
20 process works, at least in a general sense?
21 A Yes.
22 Q I have some questions for you today, and you
23 have sworn to tell the truth, which is what you intend
24 to do, correct?
25 A Correct.
00010:01 Q And you have given previous depositions in a
02 similar context in alleged asbestos-related cases for
03 John Crane Inc., correct?
04 A Yes.
05 Q And in those depositions, you also swore to
06 tell the truth?
07 A Yes.
08 Q You have testified in trials for John Crane
09 Inc. involving alleged asbestos-related matters,
10 correct?
11 A Correct.
12 Q Approximately how many times have you done
13 that?
14 A I'm really not sure. Maybe 10, 12, maybe
15 more. I really don't know.

3. PAGE 11:22 TO 11:25 (RUNNING 00:00:09.719)

22 Q The deposition that you are giving today is
23 as the corporation John Crane Inc. rather than George
24 McKillop personally.
25 A Yes.

4. PAGE 14:01 TO 14:25 (RUNNING 00:01:01.536)

00014:01 Q You have testified in the past that you have
02 testified for John Crane Inc. more than 50 times in
03 alleged asbestos-related cases. Do you recall that?
04 A That is probably true, yes.
05 Q How about more than 100 times? Have you ever
06 testified for John Crane Inc. that many times?
07 A I don't keep a record of how many times, so I
08 wouldn't know.
09 Q All right, sir. Is it possible that it is
10 more than 100 times you have testified for John Crane?
11 A It is possible.
12 Q You began working for John Crane in 1951,
13 correct?



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Dennis Seay

14 A Correct.
15 Q The company that you actually began working
16 for was Crane Packing Inc.; is that correct?
17 A That's correct.
18 Q Crane Packing Inc. sold products under the
19 brand name John Crane; is that correct?
20 A That's correct.
21 Q What is the origin of the name John Crane?
22 A It comes from an engineer that worked in
23 Chicago named John Crane. And he and F.E. Payne
24 founded the company together, and they used the name
25 John Crane for the products.

5. PAGE 15:18 TO 16:02 (RUNNING 00:00:23.367)

18 Q You worked for Crane Packing Company and then
19 under the new name John Crane Inc. until 1995; is that
20 correct?
21 A That's correct.
22 Q You are retired now?
23 A Yes.
24 Q And you have served as a consultant to John
25 Crane Inc. in asbestos-related cases or ones that were
00016:01 claimed to be since that time, correct?
02 A Yes.

6. PAGE 16:03 TO 16:17 (RUNNING 00:00:42.435)

03 Q When did the name John Crane Inc. become the
04 name of the company that was Crane Packing Inc.?
05 A I really don't know. Probably in the 1980s,
06 but I don't know for sure.
07 Q John Crane Inc. is the successor in interest
08 company to what was Crane Packing Inc., correct?
09 A Yes, but you have also got John Crane
10 Houdaille in there.
11 Q Explain that to me, please.
12 A Houdaille was a company that purchased John
13 Crane in I think around 1980, someplace around there.
14 And they changed the name to John Crane Houdaille, and
15 then it came back to John Crane.
16 Q It is the same company all the way through?
17 A Same company all the time.

7. PAGE 16:18 TO 16:24 (RUNNING 00:00:20.078)

18 Q Do I understand correctly that you were the
19 Sales Manager for the Packing Division of Crane
20 Packing, Inc. from 1963 to 1985?
21 A Yes.
22 Q And then you were the Product Line Manager
23 for the Packing Division from 1985 to 1995?
24 A Yes.

8. PAGE 17:03 TO 18:24 (RUNNING 00:02:23.087)

03 Q What was your job or jobs at Crane Packing
04 Inc. from 1951 when you joined the company until 1963
05 when you became Manager of Sales for the Packing
06 Division?
07 A I started by writing orders for the company.
08 As orders came in from customers, I would write up the
09 order, then make sure that that order got into the shop
10 for manufacture.
11 After that, once I had been there for awhile,
12 I started talking to customers on the phone and also
13 writing to customers regarding their orders or
14 recommendations. I then became the correspondent,

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Dennis Seay

15 which sat across from the order writer in the plant.
16 And at that time, I would be the one giving
17 somebody else those orders to write, although I still
18 wrote orders, made sure they got into the shop and made
19 sure they got shipped to the customer.
20 After that, I became the Assistant Sales
21 Manager in the Packing Division and stayed that way
22 until 1963.
23 But in between there, I also worked as a
24 Product Engineer for the Packing Division working out
25 of the Packing Division setting up the method of
00018:01 manufacture for various products and materials that
02 were used by the company in packing products.
03 I then came back. Once I got it established,
04 it took about 18 months because we didn't have any
05 product engineering prior to that. Excuse me.
06 Once we got that established, I came back to
07 the Packing Division as the Assistant Sales Manager
08 again and then eventually became the Sales Manager of
09 the Packing Division.
10 Q You're personally familiar with what types of
11 packing products, at least in the general sense, that
12 Crane Packing Inc. made historically?
13 A Yes.
14 Q You're personally familiar with what the
15 physical composition was of the various packing
16 products that Crane Packing Inc. and later John Crane
17 Inc. sold, correct?
18 A Yes.
19 Q You are familiar with where those packing
20 products were used, correct?
21 A Correct.
22 Q You're familiar with how they were intended
23 to be used, correct?
24 A Correct.

9. PAGE 18:25 TO 19:13 (RUNNING 00:00:43.382)

25 Q In terms of your formal education after high
00019:01 school, what have you done?
02 A I went to Northwestern University at
03 nighttime, and I graduated from there with a Bachelor
04 of Business Administration.
05 Q Do you have any formal education in the
06 sciences apart from whatever science courses you took
07 in college?
08 A No.
09 Q Is it accurate to say that your knowledge of
10 pump and valve packing came from on-the-job experience
11 at Crane Packing Inc. and a position at another firm
12 before that?
13 A Yes.

10. PAGE 19:23 TO 20:03 (RUNNING 00:00:14.718)

23 Q Am I correct that John Crane does not have
24 any sales records for sales of its packing products
25 before the year 1977?
00020:01 A This is correct.
02 Q Why?
03 A Apparently, there was no need to keep them.

11. PAGE 21:13 TO 21:21 (RUNNING 00:00:37.225)

13 Q In your role as an advocate for John Crane at
14 \$175 an hour, how much money have you made advocating
15 for John Crane in alleged asbestos-related cases?
16 A Offhand, I don't know the exact amount, but

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Dennis Seay

17 probably starting -- it wasn't \$175 at the time when I
18 started. It was I think \$125, actually. Probably
19 around 12 to \$15,000 a year.
20 Q For how many years, sir?
21 A Well, since '95.

12. PAGE 21:22 TO 21:24 (RUNNING 00:00:06.792)

22 Q The Crane Packing Company was family owned
23 until 1981; is that correct?
24 A Correct.

13. PAGE 22:05 TO 22:19 (RUNNING 00:00:39.639)

05 Q Was there an owner and an employee of the
06 company named Frank Payne?
07 A Yes.
08 Q Was there more than one Frank Payne?
09 A No.
10 Q When I use the word "Frank Payne," that means
11 who to you in a professional sense?
12 A It means the President and Owner of the
13 company.
14 Q For how many years do you understand him to
15 have been a President and an owner of the company?
16 A Well, he started the company in 1917, 1918,
17 sometime around there, and I think he stayed until
18 sometime in the '60s, someplace around there. I'm not
19 sure.

14. PAGE 23:05 TO 24:17 (RUNNING 00:01:32.216)

05 Q I want to talk to you about organizations to-
06 which John Crane does or has belonged historically.
07 One of the organizations that John Crane Inc. and Crane
08 Packing before it belonged was the Mechanical Packing
09 Association, correct?
10 A Yes.
11 Q That company now -- that organization is now
12 known as the Fluid Sealing Association?
13 A Correct.
14 Q The Mechanical Packing Association was an
15 organization to which Crane Packing belonged as early
16 as the 1950s, correct?
17 A Prior to that, yes.
18 Q How long prior to that?
19 A Probably -- I think it was formed around
20 1930.
21 Q Was Crane Packing a founding member?
22 A Yes.
23 Q Does John Crane Inc. still belong to the
24 Fluid Sealing Association?
25 A Yes.
00024:01 Q Was there any period of time in which what is
02 the Mechanical Packing Association, now known as the
03 Fluid Sealing Association, a group to which John Crane
04 was not a member?
05 A Yes.
06 Q When?
07 A I don't remember the exact dates, but there
08 was a period in there before they became the Fluid
09 Sealing Association that we dropped out of the
10 Mechanical Packing Association.
11 Q And then you rejoined as a company?
12 A Yes.
13 Q You have attended meetings of the Mechanical
14 Packing Association?
15 A Yes.

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Dennis Seay

16 Q This is true as early as when?
17 A Late '60s.

15. PAGE 26:01 TO 26:04 (RUNNING 00:00:10.847)

00026:01 Q Crane was also a member of an organization
02 known as the American Society of Mechanical Engineers
03 or ASME, correct?
04 A I think you're correct.

16. PAGE 28:21 TO 29:06 (RUNNING 00:00:30.451)

21 Q What is the difference between packing and
22 sheet packing in terms of how it appears and how it
23 functions?
24 A Well, I consider sheet packing a gasketing
25 type of material. If you want to say packing, that's a
00029:01 braided or extruded or a twisted type of product, not a
02 gasket material anymore.
03 Q Sheet packing is a gasket material, in your
04 mind, whereas packing describes something that looks a
05 bit like a rope?
06 A Yes.

17. PAGE 31:11 TO 31:18 (RUNNING 00:00:16.131)

11 Q Let me just go back a step. There was a John
12 Crane product that was 333 that was an
13 asbestos-containing gasket material?
14 A That's correct.
15 Q And you have testified that the applications
16 for 2150 and 333 were essentially interchangeable,
17 correct?
18 A Correct.

18. PAGE 33:09 TO 33:12 (RUNNING 00:00:08.731)

09 Q Is it accurate to say that more than 300
10 asbestos packing styles were sold by Crane over the
11 years?
12 A Yes.

19. PAGE 33:13 TO 34:03 (RUNNING 00:00:58.945)

13 Q Some of those packing styles contained a form
14 of asbestos known as Blue African asbestos or
15 Crocidolite asbestos, correct?
16 A Some did, yes.
17 Q How many different products that were
18 actually sold by Crane contained Crocidolite or Blue
19 African asbestos?
20 A Possibly three or four.
21 Q One of those types of products was gasket
22 material, correct?
23 A Yes.
24 Q The other types were packing material?
25 A Yes.
00034:01 Q John Crane asbestos gaskets had the name John
02 Crane on them, correct?
03 A Yes.

20. PAGE 34:15 TO 34:25 (RUNNING 00:00:27.362)

15 Q And there were several rows going up and down
16 the page of gasket material with the name John Crane on
17 them?
18 A Yes, but it would be more than just the name.
19 It would have a design around it at the same time.
20 Q When John Crane sold packing material, the

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Dennis Seay

21 name was on the box, correct?
22 A Correct.
23 Q And the John Crane name was also on the
24 spool; is that correct?
25 A Correct.

21. PAGE 35:01 TO 35:04 (RUNNING 00:00:10.362)

00035:01 Q The 2150 style of John Crane gasket material
02 contained approximately 70 to 80 percent asbestos,
03 correct?
04 A Correct.

22. PAGE 37:13 TO 37:20 (RUNNING 00:00:12.530)

13 Q All right. You did not believe that in any
14 application asbestos gasket material posed any health
15 hazard?
16 A No, I do not.
17 Q Still don't?
18 A Still don't.
19 Q Same with packing?
20 A Yes.

23. PAGE 37:21 TO 39:07 (RUNNING 00:02:09.282)

21 Q . You have been in a role in which you have
22 advocated for John Crane in alleged asbestos-related
23 cases for how many years?
24 A Maybe '81. I'm not sure. '81 up to the
25 present time.
00038:01 Q Approximately 26 years?
02 A Right. I don't keep records of things like
03 that.
04 Q Okay. But the early '80s sounds about right?
05 A Yes.
06 Q Because you don't believe that these
07 asbestos-containing packings or gaskets posed any
08 health hazards, am I correct that in each instance in
09 which you have advocated for John Crane, it is your
10 understanding that the products of John Crane played no
11 role whatsoever in causing a person's asbestos disease?
12 A Yes.
13 Q It's also your position that a John Crane
14 asbestos-containing gasket has at no time, not in any
15 single instance ever contributed to cause a person's
16 asbestos disease?
17 A My opinion, yes.
18 Q You believe that the asbestos-containing
19 products could be sold and used safely in all
20 applications in every way even today?
21 A Yes.
22 Q Do you know of a minimum level of asbestos
23 exposure at which mesothelioma will not occur?
24 A I do not.
25 Q How do you know then whether or not exposure
00039:01 to John Crane asbestos-containing gasket material does
02 or doesn't exceed a minimum level of exposure necessary
03 to cause mesothelioma?
04 A You are getting into an area which I'm not
05 familiar with really as to what the minimums and so
06 forth are, and I really can't give you a straight
07 answer on that today.

24. PAGE 39:16 TO 40:05 (RUNNING 00:00:35.587)

16 Q All right, sir. I'm going to turn your
17 attention, please, to what's been marked as Exhibit

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Appendix_01925

Dennis Seay

18 Number 53.
19 (Whereupon, Deposition Exhibit
20 No. 53 marked for identification.)
21 Q Do you see that that is a brochure RiteOPak
22 Packing of the Crane Packing Company?
23 A Just Rite Pak.
24 Q Rite Pak. What does Rite Pak mean, sir?
25 A The right packing for the right application.
00040:01 Q Is this a brochure you recognize?
02 A Yes.
03 Q This is an accurate copy of a genuine Crane
04 Packing Company brochure?
05 A It certainly looks like it, yes.

25. PAGE 40:19 TO 42:08 (RUNNING 00:01:53.941)

19 Q Would you please turn three more pages to a
20 nonasbestos packings ad?
21 A Okay.
22 Q Do you see the language there under
23 nonasbestos packings? It says, "John Crane engineered
24 nonasbestos packings are longer lasting, safer, and
25 less abrasive than asbestos-type packing." Do you see
00041:01 that?
02 A Yes.
03 Q And then it says, "Recognized as the standard
04 in their field, our new generation of quality
05 nonasbestos materials are specifically developed to
06 meet existing OSHA requirements." Do you see that?
07 A Yes.
08 Q Why were John Crane nonasbestos packings
09 safer than asbestos-type packings if the asbestos ones
10 posed no hazard?
11 A They weren't necessarily safer. But in
12 advertising, you do things like this to get people to
13 use the newer type of product.
14 Most of the nonasbestos products were more
15 expensive, and a lot of the firms didn't want to use
16 them.
17 And in certain applications, like Teflon
18 would be much better in chemical applications than the
19 asbestos would. Probably more safe.
20 Q Well, you are saying that Teflon works better
21 in some applications?
22 A That's correct.
23 Q But do you agree that the context here by
24 safer is that the nonasbestos materials are developed
25 to meet existing OSHA requirements?
00042:01 A It says it there, yes.
02 Q And OSHA requirements having to do with
03 asbestos exposures are the ones that are being
04 referenced, aren't they?
05 A Right.
06 Q Are you saying that John Crane advertised
07 that the nonasbestos packings were safer than the
08 asbestos-type ones but didn't mean it?

26. PAGE 42:10 TO 42:18 (RUNNING 00:00:27.736)

10 THE WITNESS: Our asbestos packings met the OSHA
11 standards. Now, as I said before, our advertising came
12 in and said let's write it this way so people are more
13 aware of the new nonasbestos products.
14 BY MR. SIMON:
15 Q Do you recall previously testifying that the
16 advertisement that nonasbestos packings were safer than
17 asbestos ones was simply an advertising ploy?

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18 A Well, that's what I just said before, yes.
27. PAGE 43:11 TO 43:14 (RUNNING 00:00:12.274)

11 Q All right, sir. Do I understand correctly
12 that John Crane first heard that asbestos could cause
13 disease in about 1970?
14 A Yes.

28. PAGE 43:22 TO 44:09 (RUNNING 00:00:46.542)

22 Q Prior to 1970, to your knowledge, did Crane
23 Packing ever say to a medical health professional, our
24 product is made up of the following things, one of
25 which is asbestos. Does that pose any health hazards?
00044:01 A I wouldn't be aware of that.
02 Q You never heard of anything like that?
03 A No.
04 Q How did John Crane become aware in 1970 that
05 asbestos could be hazardous?
06 A At the Mechanical Packing Association meeting
07 where a Vice President from Johns Manville got up and
08 told about the problems connected with smoking and
09 loose asbestos fibers.

29. PAGE 44:15 TO 45:17 (RUNNING 00:01:19.708)

15 Did Crane Packing buy asbestos from Johns
16 Manville?
17 A On occasion, yes.
18 Q Prior to 1970, did Crane Packing ever ask any
19 of its suppliers of asbestos or asbestos-containing
20 material whether or not what was being sold to them
21 could be dangerous?
22 A I don't know if they did or not.
23 Q So in 1970 at a meeting of the Mechanical
24 Packing Association, a Johns Manville representative
25 made a presentation that asbestos in combination with
00045:01 smoking could be hazardous, correct?
02 A Correct.
03 Q And you were at that meeting?
04 A Yes.
05 Q Am I correct that what happened next was that
06 John Crane put up a warning sign in its plant that said
07 no smoking, no drinking and no eating in areas where
08 asbestos is being used?
09 A Yes.
10 Q What else did it do, if anything?
11 A At that time, if I remember correctly, we
12 started monitoring our workers.
13 Q Did you at that time pass on on your asbestos
14 products any warning information that asbestos in
15 combination with smoking made the health hazards even
16 greater?
17 A No, we did not.

30. PAGE 45:18 TO 47:15 (RUNNING 00:02:53.263)

18 Q Prior to selling these asbestos-containing
19 products at any point from the '30s until 1985, Crane
20 never tested the products to see how much asbestos
21 fiber, if any, was released in cutting them, correct?
22 A At that time, yes. We did the monitoring
23 within the plant itself, if that's part of what you are
24 asking.
25 Q I'm just talking about the products
00046:01 themselves. There was no testing at any point of the
02 cutting of Crane asbestos-containing gasket material to

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03 see how much asbestos fiber, if any, was released from
04 that operation, correct?
05 A Again, what I answered was when we monitored,
06 we monitored people cutting gasket material, cutting
07 packing material.
08 Q In your plant, however, isn't it true that
09 you were using dust exhaust mechanisms?
10 A Yes.
11 Q You were using wetting methods to make the
12 material moist rather than dry when manipulated,
13 correct?
14 A Yes.
15 Q Was there any testing of the cutting of dry
16 asbestos-containing gasket material where there were no
17 dust suppression or dust exhaust techniques in place?
18 A There may have been because you can't put a
19 dust collector out over every bit of equipment. It is
20 a general type of dust collector, so there were areas
21 that were not covered like that.
22 Q You agree that even out in a field of
23 application, whether it be a machine shop, a Navy ship
24 or anywhere else, you could not expect that you could
25 apply these dust exhaust mechanisms in every operation
00047:01 of Crane gaskets, correct?
02 A Well, you are not carrying one out to the
03 field with you to do something like that, no.
04 Q And that's something John Crane understood?
05 A And I hope our customers did too.
06 Q Okay. Now, prior to 1970, did John Crane or
07 Crane Packing do any testing of its asbestos-containing
08 materials to see how much dust was released from them
09 that contained asbestos in the form of respirable
10 asbestos fiber in any application?
11 A No.
12 Q When did the testing in the plant of what
13 employees were exposed to in various operations begin?
14 A Approximately 1970, I believe, '70, '71, '72,
15 in that area.

31. PAGE 48:18 TO 49:10 (RUNNING 00:01:06.509)

18 Q All right, sir. Do you agree that Crane
19 Packing sold asbestos-containing gasket material as
20 early as the 1930s and extending until 1985?
21 A Yes.
22 Q You also indicated that John Crane received
23 information in the 1970 time frame that asbestos could
24 be hazardous, correct?
25 A Yes. Raw asbestos and smoking, yes.
00049:01 Q Understood. We also talked about the fact
02 that there was a period of time in which brochures
03 advertised asbestos materials as not as safe as the
04 nonasbestos ones? Is that accurate?
05 A Our advertising said that, yes.
06 Q Isn't it true that there were never any
07 asbestos-related caution or warning labels of any kind
08 ever from the 1930s until 1985 placed on the John Crane
09 gasket material?
10 A Till 1983.

32. PAGE 52:10 TO 53:01 (RUNNING 00:00:37.246)

10 Q All right, sir. I want to turn your
11 attention, please, to Exhibit 3, which is a John Crane
12 Fabric Packings brochure. Do you see that, sir?
13 A Yes, sir.
14 Q Is that a correct copy of an authentic Crane

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15 Packing document?
16 A It certainly looks like it, yes.
17 Q All right, sir.
18 A 1920 or 1930, someplace around there.
19 Q You've seen that one before?
20 A Yes, I have.
21 Q Would you look at the second page?
22 A Yes.
23 Q Copywrite is 1931?
24 A Okay.
25 Q Is that correct?
00053:01 A Yes.

33. PAGE 57:07 TO 57:20 (RUNNING 00:00:45.201)

07 Q Okay, sir. I want to turn your attention,
08 please, to a page which is asbestos sheet packing, in
09 which I believe it says -- it's actually Page 26, and I
10 know that because on the following page, it has in text
11 Page 27.
12 A Yes.
13 Q It is an advertisement or information about
14 John Crane asbestos sheet packing and high-pressure
15 service. Do you see that?
16 A Yes.
17 Q It is the Style 333 we spoke of before?
18 A Yes.
19 Q It is made of long fiber asbestos?
20 A Yes.

34. PAGE 57:21 TO 59:13 (RUNNING 00:02:01.110)

21 Q On the next page, there is a description of
22 the table of specifications for asbestos sheet packing?
23 A Yes.
24 Q Special sheet sizes for large gaskets.
25 A Yes.
00058:01 Q What's a large gasket, and what's a small
02 gasket in terms of dimension?
03 A Standard pipe sizes go from what they call a
04 half-inch diameter up to around 36 inches. So you can
05 say the half inch is small. 36 is large.
06 Q And it says that the sheets come in colors
07 such as yellow or gray. Do you see that?
08 A Yes.
09 Q And it has die cut gaskets. We are in
10 position to furnish gaskets of any design and size. Do
11 you see that?
12 A Yes.
13 Q And these gaskets are adapted for use on
14 cylinder heads, pumps, manifolds, water, steam, air or
15 gas connections?
16 A Yes.
17 Q Is a die cut gasket where John Crane cuts the
18 gasket at the plant and sells it as a cut gasket?
19 A Yes.
20 Q All right, sir. Would you turn to Page 32 of
21 the same brochure?
22 A Yes.
23 Q It's an advertisement for flange gaskets for
24 standard flanges, John Crane; is that correct?
25 A That's correct.
00059:01 Q What is a flange gasket, sir?
02 A Flange gasket is a gasket that fits between
03 two pieces of piping to seal them together. Most
04 piping can be anywhere from a couple of feet to ten
05 foot long, and you have to bolt them together. And to

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06 bolt them together, you have to have a gasket between
07 them so you get a seal.
08 Q And the issue is, as it relates to what is
09 being sold here, that John Crane, in this case, Crane
10 Packing Company, will sell a precut flange gasket which
11 is cut from the same asbestos sheet material that a
12 worker might cut for a flange out in the field?
13 A Yes.

35. PAGE 62:13 TO 62:25 (RUNNING 00:00:37.888)

13 Q Do you know whether or not the Crane Packing
14 Company advertised in the ASME catalogs?
15 A No. I don't even remember the ASME catalog.
16 Q All right. Let me show you then what's
17 marked as Exhibit 6, just to see if it's in any respect
18 familiar to you.
19 (Whereupon, Deposition Exhibit
20 No. 6 marked for identification.)
21 Q Do you see on the bottom right that this is,
22 according to the page, a 1944 ASME catalog document?
23 A Yes.
24 Q And it is a Crane Packing Company advertiser?
25 A Yes.

36. PAGE 63:01 TO 63:06 (RUNNING 00:00:10.338)

00063:01 Q It says, "Leading Navies of the World Pack
02 Condensers with John Crane."
03 A Yes.
04 Q It says, "John Crane Packs World's Largest
05 Condensers." Do you see that?
06 A Yes.

37. PAGE 66:15 TO 67:17 (RUNNING 00:01:23.887)

15 Q Okay, sir. Have you ever heard of gasket
16 material being removed with brushes of various types?
17 A Again, I've heard that, yes.
18 Q Did Crane Packing sell any of the brushes?
19 A No.
20 Q All right, sir. Let me turn your attention,
21 please, to Page 50, which is Installation of Gaskets.
22 Do you see that?
23 A Yes.
24 Q It says, "Before installing a new gasket, the
25 old one must be removed." Correct?
00067:01 A Correct.
02 Q All right. And then it says in the fourth
03 full paragraph under that section, "Perhaps the most
04 important factor in insuring proper operating success
05 from the new gasket is to make certain the old gasket
06 is completely removed and the flange faces are clean.
07 Often it is necessary to scrape flange faces."
08 That's what it says, correct?
09 A Correct.
10 Q Why is it so important to completely remove,
11 even scrape, the old gasket material out of a flange?
12 A Well, if you don't have the flanges
13 completely clean, then when you put a new gasket in, it
14 is not going to effect a seal because it is going to
15 have a lump on that particular place or in the ridge,
16 and it won't give you a seal anymore, so you have to
17 remove it.

38. PAGE 67:18 TO 67:19 (RUNNING 00:00:09.363)

18 Q What types of materials are you aware of that

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19 different workers used to remove gaskets from flanges?

39. PAGE 67:21 TO 68:09 (RUNNING 00:00:33.549)

21 THE WITNESS: When I have been there, again, it is
22 like a paint scraper that has been used or I used a
23 paint scraper. The workers I was with used paint
24 scrapers to get it off, and then a solvent to clean the
25 flange afterwards.
00068:01 BY MR. SIMON:
02 Q So even after scraping, there were instances
03 where there was still gasket residue on the flange?
04 A There could be residue. Whether it is gasket
05 material or something else, I don't know.
06 Q Okay. And in your experience, you are saying
07 you saw people use some sort of solvent to remove it,
08 correct?
09 A Yes.

40. PAGE 68:10 TO 68:18 (RUNNING 00:00:15.604)

10 Q When you were at Crane Packing Company, did
11 you hear of workers who would use brushes to remove the
12 remaining gasket material?
13 A Yes.
14 Q Some of those brushes you heard about were
15 hand wire brushes, correct?
16 A Correct.
17 Q And some were power wire brushes, correct?
18 A Yes.

41. PAGE 72:05 TO 72:21 (RUNNING 00:00:36.639)

05 Q What is that, sir?
06 A That is a hand brush.
07 Q In what context have you seen a hand brush
08 that looked like that?
09 A At home for cleaning my grill.
10 Q Okay.
11 A Really. Again, if you are referring this to
12 gasketing, if it was available, I never saw it when I
13 was there. None of the men ever showed it to me.
14 Q I see.
15 A Because I was against use of wire brushes,
16 which could ruin the flange itself.
17 Q A wire brush could ruin the flange?
18 A It could, yes.
19 Q Depending on the skill and the adherence of
20 the gasket?
21 A Yes.

42. PAGE 72:22 TO 73:10 (RUNNING 00:00:25.729)

22 Q Okay. Have you ever seen what has been
23 marked as Exhibit 18 before?
24 (Whereupon, Deposition Exhibit
25 No. 18 marked for identification.)
00073:01 A Yes.
02 Q What is that?
03 A It looks like a ball-peen hammer.
04 Q As it relates to gaskets, in what context
05 have you ever seen something like that?
06 A When you are out in the field, sometimes you
07 take a sheet, part of a sheet, we'll say, that fits a
08 flange and pound around it with a ball-peen hammer, and
09 that gives you your indentation. Then you can take tin
10 snips and actually cut the gasket out.

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43. PAGE 91:25 TO 92:05 (RUNNING 00:00:24.176)

25 Q Mr. McKillop, for the remainder of my time
00092:01 anyway, I want to talk to you about three subjects:
02 John Crane's knowledge about asbestos hazards from 1970
03 onward, their response to knowledge about asbestos
04 hazards, and their access to knowledge about asbestos
05 hazards, if any, prior to 1970, okay?

44. PAGE 92:19 TO 92:22 (RUNNING 00:00:08.940)

19 Q This is in fact a true and correct copy of an
20 actual John Crane brochure for John Crane Rite Pak and
21 Engineered Packings, correct?
22 A Yes.

45. PAGE 93:04 TO 95:11 (RUNNING 00:00:57.392)

04 Q Do you see that this in the bottom left-hand
05 corner is a 1990 document?
06 A Yes, yes.
07 Q And it describes U.S.A. operations of John
08 Crane, correct?
09 A Correct.
10 Q And it gives a list of international
11 operations of John Crane. Do you see that?
12 A Yes.
13 Q And that includes offices in Australia,
14 correct?
15 A Right.
16 Q Austria?
17 A Yes.
18 Q Brazil?
19 A Yes.
20 Q Canada?
21 A Yes.
22 Q Colombia?
23 A Yes.
24 Q Egypt?
25 A Yes.
00094:01 Q France?
02 A Yes.
03 Q Germany?
04 A Yes.
05 Q Italy?
06 A Yes.
07 Q Japan?
08 A Yes.
09 Q Korea?
10 A Yes.
11 Q Kuwait?
12 A Yes.
13 Q Mexico?
14 A Yes.
15 Q New Zealand?
16 A Yes.
17 Q Puerto Rico.
18 A Right.
19 Q Saudi Arabia?
20 A Yes.
21 Q Singapore?
22 A Yes.
23 Q Spain?
24 A Yes.
25 Q Sweden?
00095:01 A Yes.
02 Q Switzerland?

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03 A Yes.
04 Q Taiwan?
05 A Yes.
06 Q Turkey?
07 A Yes.
08 Q United Kingdom?
09 A Yes.
10 Q And Venezuela?
11 A Yes.

46. PAGE 96:05 TO 96:20 (RUNNING 00:00:42.195)

05 Q All right, sir. Do you see that according to
06 this language as it appears in Exhibit 55, a 1990 John
07 Crane brochure, that it says, "John Crane offers a
08 complete line of asbestos-free Rite Pak Packings to
09 meet the sealing requirements of a broad range of
10 industrial media." Do you see that?
11 A Right.
12 Q Here again, we see the language that says,
13 "These packings are safer, longer lasting and less
14 abrasive than asbestos-type packings." Do you see
15 that?
16 A Yes, yes.
17 Q All right. Now, as it appears here, is this
18 representation true or is it a ploy?
19 A Part of it is advertising. Part of it is
20 true.

47. PAGE 96:21 TO 97:05 (RUNNING 00:00:31.146)

21 Q What part is true?
22 A Well, when you say "safer," if you're working
23 with nuclear products, some of these are safer than
24 standard asbestos materials. Standard asbestos
25 materials cannot take the radiation that some of the
00097:01 other materials can, so it is a safer type of product.
02 Longer lasting, if it is Teflon, it could probably last
03 longer than a standard asbestos material in a chemical
04 application, and it can be less abrasive because it is
05 better lubricated.

48. PAGE 97:06 TO 97:09 (RUNNING 00:00:13.988)

06 Q Is it true that the asbestos-free packing
07 products of John Crane are safer because they pose no
08 risk of causing asbestos disease, whereas John Crane
09 asbestos-containing packings did?

49. PAGE 97:11 TO 97:17 (RUNNING 00:00:22.429)

11 THE WITNESS: I can't answer that as the way you
12 are asking it.
13 BY MR. SIMON:
14 Q All right, sir.
15 A I don't think we had safer from an asbestos
16 standpoint in mind at that time. As I say, safer
17 because the applications more than safer from asbestos.

50. PAGE 99:15 TO 99:19 (RUNNING 00:00:22.486)

15 Q All right. In 1981, why did John Crane not
16 put on the gasket material itself for the use of the
17 worker in the field that the use of a respirator was
18 appropriate when working with these asbestos-containing
19 gaskets?

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51. PAGE 99:21 TO 99:23 (RUNNING 00:00:04.009)

21 THE WITNESS: I can't answer that.
22 BY MR. SIMON:
23 Q Does that seem reasonable to you?

52. PAGE 99:25 TO 100:05 (RUNNING 00:00:13.747)

25 THE WITNESS: Not necessarily because you have
00100:01 got -- people with supposedly common sense would know
02 if they really required one or not. And in most cases
03 with the gasket material, I don't believe there's any
04 requirement to have one.
05 BY MR. SIMON:

53. PAGE 100:09 TO 100:11 (RUNNING 00:00:08.447)

09 Q And are you saying that a worker in the field
10 should have the common sense to appreciate whether or
11 not asbestos in a gasket can cause them disease?

54. PAGE 100:13 TO 100:13 (RUNNING 00:00:01.988)

13 THE WITNESS: Very possible, yes.

55. PAGE 101:10 TO 101:17 (RUNNING 00:00:25.515)

10 Q Are you saying common sense does tell you to
11 wear a respirator?
12 A Either way. Some do. Some don't. I mean,
13 I've been out in the field where people put on a mask;
14 other places they say we don't need a mask.
15 Q Okay. What I'm then trying to understand is,
16 what should common sense tell the worker that the
17 absence of a warning label therefore makes unnecessary?

56. PAGE 101:19 TO 102:02 (RUNNING 00:00:22.735)

19 THE WITNESS: I can't quite answer that because I
20 don't know the worker we are talking about, whether he
21 has knowledge of the products to begin with and how he
22 is using the product.
23 BY MR. SIMON:
24 Q Does it seem appropriate to put warnings
25 information that informs all workers irrespective of
00102:01 their educational background what dangers may exist?
02 A I think so, yes.

57. PAGE 103:23 TO 104:03 (RUNNING 00:00:12.400)

23 Q So as we sit here, the Company doesn't know
24 one way or the other whether or not an approved
25 respirator for dust and asbestos fiber was necessary
00104:01 for the safe handling of the asbestos sheet gasketing
02 material?
03 A This is right.

58. PAGE 104:04 TO 104:19 (RUNNING 00:00:49.417)

04 Q Talking about now going back to 1917 with the
05 formation of the company, isn't it true that at no time
06 has Crane had a department that conducted medical
07 research to determine whether any of its materials
08 could be hazardous?
09 A That's true.
10 Q From today back into the beginning of the
11 Company's use of asbestos products in the 1930s, isn't
12 it true that Crane has never contributed any funds to
13 research concerning asbestos and its relation to
14 disease?

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15 A As far as I know, that's correct.
16 Q Isn't it also true that the Company has never
17 employed on its staff an industrial hygienist to
18 evaluate asbestos-related concerns?
19 A That's true.

59. PAGE 105:08 TO 105:13 (RUNNING 00:00:13.661)

08 Q How about the Company itself while it was
09 selling asbestos-containing products; it never
10 conducted, sponsored or contributed financially to any
11 studies or research to determine if the inhalation of
12 asbestos fibers may be harmful?
13 A No, it didn't.

60. PAGE 108:06 TO 108:11 (RUNNING 00:00:19.409)

06 Q Yes, sir. Now, looking at a different
07 question now, which was: What information was in the
08 historical literature about asbestos disease? I assume
09 you do not consider yourself an expert on that subject,
10 correct?
11 A That's correct.

61. PAGE 108:12 TO 108:25 (RUNNING 00:00:38.051)

12 Q How did you arrive at your conclusion that
13 John Crane at its management level had not heard
14 asbestos could be dangerous before the year 1970?
15 A Because of that meeting I went to at the
16 Mechanical Packing Association, I was with the
17 President of our company at that time.
18 And as we were going back to the plant after
19 the meeting, he said I never knew asbestos was bad. So
20 therefore, if he didn't know about it, I doubt if
21 anyone else in the company knew about it at that time.
22 Q Who was the President at that time?
23 A Carl Rohien, R-o-h-i-e-n.
24 Q Did you know Frank Payne?
25 A Yes.

62. PAGE 109:01 TO 109:09 (RUNNING 00:00:24.552)

00109:01 Q Did you ever have an opportunity to talk to
02 him about what information he had received, if any,
03 about the dangers of asbestos?
04 A It was very difficult to talk to Frank Payne,
05 and he only talked to you when he wanted to. And
06 normally, that would not be in a discussion about
07 anything. It was either a sale or materials or
08 something like that that he wanted done, period. That
09 was it.

63. PAGE 109:13 TO 109:16 (RUNNING 00:00:13.420)

13 Q All right, sir. There is an exhibit marked
14 as 28, which is a geographical list of members of the
15 United States of America of the American Society of
16 Mechanical Engineers or ASME.

64. PAGE 109:23 TO 110:06 (RUNNING 00:00:25.837)

23 Q Well, there is a list of names on the
24 document. Somewhere there may be a date on the
25 document, but there is a list of names. And on Page
00110:01 56, I'm just going to represent to you, I'll show you
02 if you want to see it, that Frank R. Payne, President
03 of Crane Packing Company at 1800 Cuyler Avenue is a
04 member, and there's a reference for the year 1922.

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05 Okay?
06 A Okay.

65. PAGE 111:25 TO 113:07 (RUNNING 00:01:23.146)

25 Q I want to show you what's been marked as
00112:01 Exhibit 36.
02 (Whereupon, Deposition Exhibit
03 No. 36 marked for identification.)
04 Q Do you see it is a May 15, 1950 issue with
05 Groucho Marx on the cover?
06 A Okay.
07 Q Do you see that it costs 20 cents to own,
08 according to what it says?
09 A Right.
10 Q I want to turn your attention to the third
11 page as it appears from the document. It's actually
12 Page 53 of the magazine itself.
13 A Okay.
14 Q There's language in the middle of the page.
15 It is the second to last full paragraph in the middle
16 column, and it says, "Studies conducted by the United
17 States Public Health Service now point to airborne
18 particles as the cause of some forms of cancer and
19 respiratory ailments." Do you see that?
20 A Yes.
21 Q "Dr. W.C. Hueper of the National Cancer
22 Institute, Bethesda, Maryland, referred specifically to
23 air pollution with asbestos, selenium, beryllium,
24 arsenic and chromates as the probable cause of
25 increased lung and respiratory tract cancer." Do you
00113:01 see that?
02 A Yes.
03 Q Were you aware that 20 years before you say
04 the Company heard asbestos was dangerous that asbestos
05 was described in News Week Magazine as a probable cause
06 of cancer?
07 A No.

66. PAGE 116:22 TO 117:02 (RUNNING 00:00:11.092)

22 Q Do you see that it's a Wall Street Journal
23 article of March 3, 1966?
24 A Yes.
25 Q What is the title of the article?
00117:01 A "Asbestos Dust Called A Hazard To At Least
02 One-Fourth Of The U.S."

67. PAGE 118:10 TO 118:19 (RUNNING 00:00:32.464)

10 Q Under Other Workers Affected, it says,
11 "Dr. Selikoff noted that the dangers of exposure to
12 asbestos dust were not limited to those who work
13 directly with this ubiquitous insulator and filler
14 material, the dangers, he said, extend to workers in
15 contiguous trades such as other construction workers
16 and their families."
17 Have you ever heard of that proposition that
18 asbestos can hurt someone who breathes it even if
19 they're not the one actually using the product?

68. PAGE 118:21 TO 119:06 (RUNNING 00:00:26.340)

21 THE WITNESS: I have heard that, yes.
22 BY MR. SIMON:
23 Q Does John Crane know one way or the other as
24 to whether that's true, that asbestos dust can hurt a
25 person who breathes it some distance away from where

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Dennis Seay

00119:01 the product is being used?
02 A Again, you'll have to ask a doctor about
03 that. I don't know.
04 Q All right. Did John Crane ask a doctor about
05 that?
06 A I didn't. I don't know if anyone else did.

69. PAGE 119:07 TO 120:22 (RUNNING 00:02:11.906)

07 Q All right, sir. It's John Crane's position
08 that the asbestos fibers in gaskets material are locked
09 in in such a way that they are not released to a point
10 where they can be breathed. Is that your
11 understanding?
12 A That's right.
13 Q Now, you would agree with me that one cannot
14 tell how much asbestos fiber is or isn't in the air
15 simply with the naked eye, right?
16 A That's correct.
17 Q Because asbestos fibers are smaller than the
18 naked eye will permit?
19 A Well, you say so, yes.
20 Q All right. And you would also agree that
21 there's therefore no way to count how many asbestos
22 fibers are in the air or not there with the naked eye?
23 A This is right. You have to do it
24 scientifically to find out.
25 Q How did John Crane decide for itself in the
00120:01 year 1972 that its asbestos-containing products, all of
02 them, were such that the fibers were locked in in such
03 a way that they could not release asbestos fibers in
04 any dangerous way if they didn't test the products to
05 see how much asbestos fibers were being released?
06 A I thought '72. You said '75 when we first
07 started testing and monitoring the people in various
08 areas within the company for cutting the gaskets,
09 working with the material and so forth, and that way we
10 could tell whether there was a -- we met the OSHA
11 requirements at that time, which were '72.
12 Q I heard you, sir, on that, but what I also
13 understood you to say was is that, generally speaking,
14 in your plant when you were doing the air monitoring,
15 you were doing so under circumstances where there were
16 wetting techniques being used and dust exhaust,
17 correct?
18 A That's correct, but that doesn't apply to
19 every area, as I said too, because you couldn't put an
20 exhaust fan over every piece of equipment. It was a
21 general type of thing. So maybe someone cutting
22 gaskets may be over here with no exhaust fan at all.

70. PAGE 120:25 TO 121:08 (RUNNING 00:00:26.419)

25 In a circumstance where somebody is removing
00121:01 a gasket containing asbestos with a power wire brush,
02 does it seem reasonable to you that that is a lot of
03 action being put to the gasket material?
04 A First of all, I don't recommend that. I have
05 never been around where people used a wire brush, a
06 mechanical wire brush like that, and it would be
07 excessive, and also it would probably destroy the
08 flange doing it.

71. PAGE 121:16 TO 123:08 (RUNNING 00:02:08.322)

16 Q How about the sweeping of asbestos-containing
17 gasket material on the floor after they have been
18 removed and/or cut, okay? How can you know how much

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Dennis Seay

19 asbestos fiber is released, if any, in that activity
20 without measuring?
21 A Again, you can't, but there may also be other
22 items on that floor being picked up as dust and so
23 forth, not just the asbestos.
24 Q Right, and that's why you need to measure to
25 know what you're --
00122:01 A That's right, you have to measure it, yes.
02 Q All right. Now, when you describe these
03 Permissible Exposure Levels from OSHA, we are talking
04 about the amount of airborne asbestos in the breathing
05 zone of a worker, correct?
06 A Correct.
07 Q And these standards which were initially
08 passed on or about 1971 or '72 describe a time-weighted
09 average and an excursion limit, correct?
10 A Correct.
11 Q That is, the amount of asbestos fibers which
12 are in the breathing zone of somebody who is being
13 monitored over the course of an eight-hour day
14 averaged, correct?
15 A Correct.
16 Q And also an excursion limit, the amount of
17 asbestos fibers which are not to be exceeded over a
18 15-minute time frame, correct?
19 A Correct.
20 Q And an asbestos product needs to meet both
21 requirements to not be in excess of the Permissible
22 Exposure Level, correct?
23 A Yes, yes.
24 Q And the Permissible Exposure Level was
25 lowered all throughout the 1970s and into the 1980s as
00123:01 well, correct?
02 A Correct.
03 Q Have you ever read any papers published in
04 the literature describing asbestos fibers released
05 above the permissible exposure level either as to its
06 excursion limit or its time-weighted average from the
07 use of gasket material containing asbestos?
08 A No, I have not.

72. PAGE 124:09 TO 124:16 (RUNNING 00:00:30.893)

09 Q All right. Let me show you then what's been
10 marked as Exhibit 52, which is part of the Federal
11 Register, the Department of Labor, the Occupational
12 Safety And Health Administration from June 20, 1986.
13 (Whereupon, Deposition Exhibit
14 No. 52 marked for identification.)
15 Q Do you see that?
16 A Yes.

73. PAGE 125:04 TO 125:12 (RUNNING 00:00:26.270)

04 Q And then it says, "These limits were intended
05 primarily to protect employees against asbestosis, and
06 it was hoped that they would provide some incidental
07 degree of protection against asbestos-induced forms of
08 cancer." Do you understand what that means?
09 A They say primarily to protect employees
10 against asbestosis.
11 Q Right.
12 A Yes.

74. PAGE 125:16 TO 125:24 (RUNNING 00:00:31.997)

16 Q Right. That the 1972 standard, for example,
17 which required caution labels on asbestos products

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18 unless the ordinary use and foreseeable use of those
19 products would not release asbestos fibers above the
20 Permissible Exposure Level, right?
21 A They do talk, and I don't know if it is in
22 this part, about being an encapsulated and lubricated
23 type of material; therefore, it wasn't necessary to put
24 a warning label on it.

75. PAGE 125:25 TO 126:13 (RUNNING 00:00:37.298)

25 Q If the ordinary and foreseeable uses of the
00126:01 product would not result in violations of the
02 Permissible Exposure Level, right?
03 A Agreed. We are back to common sense again,
04 right?
05 Q Right. So the issue is -- the issue is
06 whether or not asbestos fibers would be released in
07 excess of the Permissible Exposure Level, either part
08 of it, in the ordinary and foreseeable use of the
09 products, right?
10 A Right.
11 Q But that standard was an asbestosis standard,
12 which was not described as something likely to prevent
13 all asbestos-related cancers, right?

76. PAGE 126:15 TO 126:23 (RUNNING 00:00:12.155)

15 THE WITNESS: That's what it says here, yes.
16 BY MR. SIMON:
17 Q Did you know that?
18 A No.
19 Q Did you inquire about that?
20 A No.
21 Q Did you just assume that the Permissible
22 Exposure Level was sufficient to prevent all
23 mesotheliomas?

77. PAGE 126:25 TO 127:02 (RUNNING 00:00:07.854)

25 THE WITNESS: Again, you're getting back into an
00127:01 area I don't know. That would have to be -- a doctor
02 would tell you something of that nature.

78. PAGE 127:15 TO 127:20 (RUNNING 00:00:23.495)

15 Q The question that I'm asking you is, is
16 whether or not at Crane Packing Company anybody ever
17 said, hey, there's not a known safe level to prevent
18 mesothelioma; therefore, we should replace asbestos in
19 our products? Did that conversation ever happen?
20 A I don't remember anything like that, no.

79. PAGE 127:21 TO 127:22 (RUNNING 00:03:58.451)

21 Q Okay. I want to show you Exhibit 49 and ask
22 you to take a look at that.

80. PAGE 127:25 TO 131:02 (RUNNING 00:02:43.592)

25 Q We discussed the fact that by 1975, the Crane
00128:01 Packing Company did have an asbestos monitoring
02 program, correct?
03 A Correct.
04 Q And we talked about the fact that this
05 program was something that you knew about, correct?
06 A Yes.
07 Q And you see the date of this document is
08 September 8, 1978?
09 A I don't have the date on there. You say it's

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Dennis Seay

10 '78, that's fine.
11 Q Look at the top right column on the second
12 page.
13 A I am. Oh, second page? Oh, yeah, okay,
14 second page.
15 Q All right. And this is feedback from the
16 Packing Building personnel regarding the asbestos
17 monitoring program, correct?
18 A I don't know this Lewis Czaplewski. I have
19 no idea who he is.
20 Q All right.
21 A You say feedback from somebody in the packing
22 area. I don't know.
23 Q Look at the subject line on the far right.
24 A Right.
25 Q Do you see that it says, "Feedback from the
00129:01 Packing Building personnel regarding the asbestos
02 monitoring program"?
03 A Right.
04 Q And it is to Ken Swanson, correct?
05 A Right.
06 Q Who is Ken Swanson?
07 A He was our Vice President in charge of
08 Production for the whole company.
09 Q You knew him?
10 A Yes.
11 Q Worked with him?
12 A Yes.
13 Q And you agree this is Crane Packing Company
14 letterhead, right?
15 A Yes.
16 Q Have you ever seen this document before?
17 A No, I haven't.
18 Q There are ccs or carbon copies to a number of
19 people. There is an E. Dean. Do you know who he is?
20 A Yes, Ed Dean, yes.
21 Q Who was that?
22 A He was in charge of Packing and Teflon.
23 Q There's an R. -- how do you pronounce that
24 man's last name?
25 A Zobens? No, that's Gieras.
00130:01 Q You knew him?
02 A Yes. He headed up our Personnel Department.
03 Q All right. W. Koch, who is that?
04 A Bill Koch was Packing Superintendent.
05 Q H. Tankus?
06 A Was our Vice President, '78 I guess he was
07 still our Vice President of Engineering or Vice
08 President of Sales. He later became President of the
09 Company.
10 Q V.E. Vorhees?
11 A Was Executive Vice President.
12 Q A. Zobens?
13 A Was head of our laboratory, Chemical Lab.
14 Q This appears to you to be an actual Crane
15 Packing Company document, right?
16 A Yes.
17 Q In the first paragraph, it says, "While
18 monitoring asbestos levels in the Packing Building, the
19 employees have been making comments, asking questions
20 about the safety of their working conditions and
21 offering their impressions of the housekeeping
22 practices in the building." Do you see that?
23 A Yes.
24 Q So this is the subject of the safety
25 practices involved in the manufacture of these asbestos

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Dennis Seay

00131:01 packing products, right?
02 A That's what it says, yes.

81. PAGE 146:08 TO 147:10 (RUNNING 00:01:10.258)

08 Q You were shown what was marked as Plaintiff's
09 Exhibit 14. Do you recall that? And it was the
10 instruction sheets --
11 A Yes.
12 Q -- on how we do this. I have highlighted
13 Number 5 on that. Could you please read that into the
14 record?
15 A "Don't make gasket by hammering on material
16 against flange. That lumps material and may keep the
17 flanges from sealing. Use a good gasket cutter."
18 Q Now, you talked about using a ball-peen
19 hammer to hit a gasket cutter.
20 A Yes.
21 Q Could you explain to us the difference
22 between using a ball-peen hammer to hit a gasket cutter
23 versus what is described here, which John Crane says
24 not to do, putting the gasket on the flange and using a
25 ball-peen hammer to knock it out?
00147:01 A Well, at times you may be with an odd shaped
02 flange. You may use the ball-peen hammer to outline it
03 and then cut, use tin snips or something to actually
04 cut the gasket.
05 Q Okay.
06 A Or you can have a template from that, and you
07 can use that from a carbon paper. I don't know if we
08 still had carbon paper or a paint on the flange, put a
09 gasket material against it, take it off, and then cut
10 it from there again.

TOTAL: 1 CLIP FROM 1 DEPOSITION (RUNNING 00:58:02.205)

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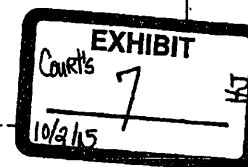
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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS
C.A. NO. 2013-CP-42-03915

ANGIE KEENE, Individually and as *
Personal Representative of the *
Estate of DENNIS SEAY, Deceased, *
and LINDA SEAY, *
Plaintiff, *
vs. *
AURORA PUMP COMPANY, A Minnesota *
Corporation, et al., *
Defendants *

THE VIDEOTAPED DEPOSITION OF RICHARD L. KRADIN, M.D.
Wednesday, July 15, 2015
Liberty Hotel
215 Charles Street
Boston, MA 02114



-----Sandra A. Raymond-----
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Page 118 1 the lung is something that some people, at least, 2 refer to as the mucociliary escalator; is that 3 correct? 4 A. Yes. 5 6 (Exhibit No. 15, Diagram by Mr. Parnell, 7 marked for identification) 8 9 BY MR. PARNELL: 10 Q. Now, I have drawn, perhaps not very 11 artfully -- 12 A. Would the jury like to see this? 13 Q. Yes. And that's two epithelial cells that 14 have a little squiggly thing. That's my intention at 15 least. Is that -- 16 A. Yes. You want to connect them, though. 17 Q. All right. And the purpose is that the 18 windpipe is lined by millions of those cells; isn't 19 that correct? 20 A. Yes. 21 Q. And the little squiggly thing that I've 22 drawn is called a cilia; is that correct? 23 A. Yes. 24 Q. And so that -- those cells, each one also 25 produces some level of mucus; isn't that correct?	Page 120 1 correct? 2 A. Yes. 3 Q. And one of the things that he was able to 4 show by forcing dogs -- and I know a lot of pet 5 owners get offended by that -- but what he did by 6 having these dogs is able to see in a scientific 7 environment what the effect of the mucociliary 8 escalator was in response to smoke; is that correct? 9 A. That's correct. 10 Q. And what he found is that almost 11 immediately, the effect of the toxins and cigarette 12 was to begin to slow down the effect or the beating 13 of the cilia; is that correct? 14 A. Yes. 15 Q. And that the longer you smoke, you could 16 actually denude the cilia entirely so that there was, 17 in fact, no mucociliary escalator; isn't that 18 correct? 19 A. It would be very severe, but, yes. 20 Q. Well, they figured that the first denuding 21 actually began at 15 pack years of cigarettes; isn't 22 that correct? 23 A. Well, again, it's a -- I won't quibble 24 with you. I understand the point you're getting at, 25 but it's very unusual to see the entire
Page 119 1 A. Yes. 2 Q. So what happens is as we are breathing in 3 and fibers or particles fall out, the mucociliary 4 esco -- this cilia, this little whip-like thing, is 5 beating this path of mucus back up into the mouth or 6 into the lung; is that correct? Out of the lung? 7 A. Yes. 8 Q. All right. So what happens when that 9 happens is that whatever the particulate matter is, 10 whether it's silica or whatever, as it gets on this 11 river of -- and "river" is a loose term -- but this 12 pathway of mucus and liquid that this cilia is 13 beating up so it gets up into the mouth, you either 14 spit it out or you swallow it? 15 A. Correct. 16 Q. All right, sir. Now, when one smokes 17 cigarettes, however, the action of that mucociliary 18 escalator can, in fact, be damaged; isn't that 19 correct? 20 A. It can be. 21 Q. As a matter of fact, animal studies -- 22 have you ever read the work of Dr. Oscar Auerbach? 23 A. Yes. 24 Q. Okay. Dr. Auerbach did a lot of studies 25 on bronchial epithelium using big, old dogs; is that	Page 121 1 tracheobronchial tree denuded. 2 Q. But you would agree that someone with a 3 25- to a 45-pack-year history has a significant 4 smoking history? 5 A. I would not argue that Mr. Seay had a 6 significant smoking history, but what I will say -- 7 Q. I'm just asking you specifically -- 8 MR. PANATIER: Let him finish his answer. 9 A. But what I will say is Mr. Seay also 10 stopped smoking, and he stopped smoking 11 approximately, from what I can make out, at least 20 12 or maybe more years prior to developing his 13 malignancy. So he did the right thing. 14 MR. PARNELL: Move to strike as 15 unresponsive. I'll ask the question again. 16 BY MR. PARNELL: 17 Q. A person who has a 25- to 45-pack-year 18 history has a significant smoking history; isn't that 19 correct? 20 A. Yes. 21 Q. And that smoking history would have, based 22 on science, either significantly reduced the effect 23 of the cilia or in some cases denuded it? 24 A. It may have done that. 25 Q. All right, sir. And when it reduces the

Page 122 1 effect of the cilia, the allowance is for more 2 particulate matter to get to the lungs because there 3 is no method by which that particulate matter can be 4 removed? 5 A. That may be the case. 6 Q. All right, sir. So in the case of 7 asbestos, one who has a significant history of 8 smoking, and if, in fact -- I'll ask the same kind of 9 hypothetical Mr. Panatier did. If you assume that 10 that cilia has been adversely affected, then they 11 will be allowing more particles to get into their 12 lungs; isn't that correct? 13 A. The answer is yes. 14 Q. All right, sir. Now, you testified under 15 oath that there has -- there's no link between 16 cigarette smoking and mesothelioma; is that correct? 17 A. That's correct. 18 Q. But there has, in fact, never been an 19 epidemiological study which specifically studied the 20 effect of smoking on cilia and asbestos; isn't that 21 correct? 22 A. Sir, there's no study of that nature. You 23 can't do epidemiological studies of that nature. 24 They're too complicated. But the fact of the matter 25 is, there is an association between cigarette smoking	Page 124 1 A. Yeah, but we can't seem to agree on the 2 reason. 3 Q. All right, sir. Now, let's talk about 4 COPD, which this man had. Mr. Panatier asked you 5 several questions about whether or not there was a 6 reduction in life expectancy. COPD is the -- the 7 chief cause of COPD is cigarette smoking; is that 8 correct? 9 A. You know, I'm going to go back here again. 10 The chart indicates he had COPD. The definition of 11 COPD requires pulmonary function tests that show 12 obstruction. They may be in the chart, but I don't 13 recall seeing them. He certainly had no wheezes when 14 they examined his chest, as we've determined. So I'm 15 not sure that he had COPD, per se. He was a smoker, 16 but I don't know for a fact he had COPD. 17 Q. Then let me do it by way of hypothetical. 18 You would agree that the fiftieth anniversary of the 19 Surgeon General's report on cigarettes says that 20 cigarette smoking is the most predominant cause of 21 COPD in the United States; isn't that correct? 22 A. That's not the issue. The question is 23 whether Mr. Seay has COPD. 24 MR. PARNELL: I'll move to strike as 25 unresponsive.
Page 123 1 and asbestosis, but there's no association between 2 cigarette smoking and mesothelioma. 3 Q. There has been no study whatsoever that 4 dem -- 5 A. There's no association between cigarette 6 smoking and mesothelioma. 7 Q. Are you finished? There's been no study 8 whatsoever which has ever tested the theory of how 9 much additional particulate matter, asbestos or 10 otherwise, is -- comes into the lung by virtue of a 11 25- to 45-year-old pack history of smoking? 12 A. Well, perhaps -- 13 Q. Isn't that correct? 14 A. Perhaps the reason it's not been done is 15 because there is not a great deal of interest in that 16 question. 17 Q. And nobody has paid for it? 18 A. Nobody would pay for it, including the 19 United States government because it's not a question 20 of merit. 21 Q. So it hasn't been done. We agree with 22 that? 23 A. There's a reason it's not been done. 24 Q. We agree that it hasn't been done; isn't 25 that correct?	Page 125 1 BY MR. PARNELL: 2 Q. Dr. Kradin, my question is, do you agree 3 the fiftieth anniversary of the Surgeon General's 4 report on cigarette smoking said that cigarette 5 smoking was the predominant cause of COPD? 6 A. That is true. 7 Q. Okay. I want to ask you to assume that 8 Mr. Seay, as reported in his medical, had COPD, and 9 that at some point in his history documented by 10 respiratory tests. Will you assume that? 11 A. I can assume that. If the documentation 12 is there, that is correct. 13 Q. And if it's not there, it won't be 14 correct, correct? 15 A. If it's not there, then he doesn't have 16 COPD. 17 Q. Okay. So if he had COPD, you would then 18 agree based on his either 25 or 45 years of cigarette 19 smoking that that would have been the predominant 20 cause, correct? 21 A. Absolutely. 22 Q. All right. The Surgeon General in his 23 fiftieth report also said that it was one of the 24 chief causes of CHD. Didn't the Surgeon General's 25 report report that?

Page 130 1 lung disease. My question to you is, do you have any 2 occupational CIH background to disagree with that? 3 A. I don't need CIH background to disagree 4 with that. My major disagreement with that is the 5 fact that Mr. Seay died from a malignant 6 mesothelioma. 7 MR. PARNELL: Okay. Move to strike as 8 nonresponsive. Thank you very much, sir. 9 THE WITNESS. You're welcome. 10 11 REDIRECT EXAMINATION BY MR. PANATIER: 12 Q. All right. I've got a few follow-ups for 13 you, Doctor. First of all, you were asked about Pat 14 Hall. Have you ever heard about Pat Hall, the 15 industrial hygienist? 16 A. I think I've heard the name. 17 Q. Okay. Did you know she was the former 18 industrial hygienist for a company called British 19 Petroleum? Have you ever heard of British Petroleum? 20 A. I've heard the name. 21 Q. Okay. You were asked about different 22 ailments that Mr. Seay may or may not have had. 23 Ischemic heart disease, COPD, et cetera, right? 24 A. Yes. 25 Q. Okay. Do any of those cause mesothelioma?	Page 132 1 cigarette smokers who don't develop that disease in 2 the same way there are people who are exposed to 3 asbestos who don't develop mesothelioma. 4 So there needs to be documentation in that 5 regard, and as we sat here today, at least I was not 6 convinced that was shown. He certainly on his 7 physical examination apparently had nothing to 8 indicate that he had chronic obstructive pulmonary 9 disease. 10 But in order to develop a mesothelioma, one does 11 not require having to have asbestosis, which is a 12 much more -- it indicates a much heavier exposure to 13 asbestos, nor does one need to see pleural plaques, 14 which, again, indicates a certain level of exposure. 15 The thing that the jury needs to understand is 16 that mesotheliomas can develop at very low 17 concentrations of exposure to asbestos, and you don't 18 have to see any of these other than markers of the 19 disease in order to develop a mesothelioma. So it's 20 a different kettle of fish, and, you know, looking 21 for these other things, they're nice if they're there 22 to confirm a heavy exposure, but they don't have to 23 be there by any means. 24 Q. And, Doctor -- 25 MR. PARNELL: Object and move to strike
Page 131 1 A. No. None of those cause mesothelioma, 2 and, again, I was handed a number of documents 3 related to Mr. Seay's medical care, and what was not 4 elicited as part of my answer was the fact that 5 Mr. Seay was being treated with a variety of 6 medications. 7 When he first presented, he had high blood 8 pressure. By the time he was seen years later his 9 blood pressure was well controlled. His heart rate 10 was well controlled. He had coronary disease that 11 had been treated. He had had a bypass graft. There 12 was no evidence that his coronary disease was 13 imminently going to cause a decrease in his life 14 expectancy. So the point is that Mr. Seay did have 15 other medical conditions, but those medical 16 conditions were being treated. 17 Q. You were also asked whether or not he had 18 clear chest x-rays at various points. What does that 19 mean? 20 A. It means nothing in this regard. You 21 know, again, there are two issues here. One is his 22 diagnosis of asbestos-related disease. The other is 23 his so-called diagnosis of COPD. It is true that 24 cigarette smoking can cause what we call chronic 25 obstruction pulmonary disease, but there are many	Page 133 1 the monologue. 2 BY MR. PANATIER: 3 Q. Okay. So I'm going to ask you a specific 4 question in light of the objection. Does one need to 5 have a diagnosis of asbestosis first or pleural 6 plaques or pleural thickening before a physician such 7 as yourself or a doctor can say that this person's 8 mesothelioma is from asbestos? 9 A. No. The answer is simply no, and the only 10 thing that one needs to have is a mesothelioma, which 11 Mr. Seay clearly had. There's no argument about 12 that. And an exposure to asbestos at the workplace, 13 in this case which he had, and I don't think anybody 14 will argue that he was exposed to asbestos. 15 Q. Okay. To your knowledge, Doctor, have 16 scientists found a level of exposure to asbestos 17 above background that doesn't increase the risk of 18 mesothelioma? 19 A. Not that's been established, no. 20 Q. Okay. Smoking. You were asked a whole 21 lot of questions about smoking. First of all, are 22 you aware of any evidence in the scientific 23 literature that smoking causes mesothelioma? 24 A. Absolutely none, and it's all very 25 interesting to talk about the effects that smoking

Page 134 1 have on the host defense system, but, unfortunately, 2 the body doesn't always work in the very rational way 3 that one might expect, and so despite the fact that 4 smoking may decrease one's clearance of asbestos, 5 there's no evidence that smoking causes mesothelioma. 6 Q. Okay. Because there certainly have been 7 studies of people who were smokers and had no 8 asbestos exposure and people who were smokers and had 9 asbestos exposure, correct? 10 A. Absolutely. 11 MR. PARNELL: Objection. It's leading. 12 BY MR. PANATIER: 13 Q. And presumably, those people had those 14 cilia cells in their throats, right? 15 A. We all have those cilia cells in our 16 tracheobronchial tree, if you will. 17 Q. Okay. By the way, is Mass. General 18 related to Harvard in any way? 19 A. Yes. 20 Q. Okay. And how? 21 A. It's the primary teaching hospital for the 22 Harvard Medical School. 23 Q. Have any of the higher-ups at Harvard ever 24 come to you and said, hey, Dr. Kradin, Harvard 25 believes there is a safe level of asbestos exposure?	Page 136 1 exposure is? 2 A. The actual exposure obviously includes the 3 background as well. The exposure that seems to be 4 important in the biomedical sense with respect for 5 developing disease appears to be those exposures 6 above background. 7 Q. Okay. So if a person has exposure in a 8 occupational setting to asbestos, that would be in 9 addition to whatever the background is? 10 A. Absolutely. And, you know, I think the 11 point is you need to have some sense of the magnitude 12 of occupational exposures and background levels. 13 Virtually all occupational exposures are 14 thousands of times higher than what we breathe in the 15 background level. So we're not talking about one or 16 two asbestos fibers. We're talking about tens of 17 thousands to millions of asbestos fibers in what we 18 call an occupational exposure. 19 MR. PARNELL: I didn't want to interrupt. 20 Could I have -- insert an objection as to leading? 21 MR. PANATIER: All right. Yeah. 22 DEFENSE COUNSEL: And I object. Move to 23 strike as nonresponsive. 24 BY MR. PANATIER: 25 Q. From -- I'm -- in light of the objection,
Page 135 1 Has that ever happened? 2 A. It's never happened. Again, I direct a 3 postgraduate course that's sponsored by Harvard 4 Medical School, in which case we have repeatedly 5 suggested that there is no safe level of asbestos. 6 Harvard has never come by and said you need to change 7 that. 8 Q. Now, you were asked a lot of questions 9 about background, and I want to make it very clear. 10 You have said -- correct me if I'm wrong -- that you 11 don't believe right now there's a scientific basis to 12 say background levels increase the risk of 13 mesothelioma? 14 A. Right now there's no scientific basis for 15 that statement. 16 Q. Now, you've also been asked whether or not 17 levels of asbestos that would be similar to 18 background, whether they can cause mesothelioma. So 19 here's what I want to ask you. If you have somebody 20 who is living in the United States, let's say, for 21 instance, they're exposed to background asbestos, and 22 then they have an occupational exposure to asbestos 23 that approaches background levels, do you now ignore 24 the initial background, or do you have to add them 25 together to say that's what the person's actual	Page 137 1 from your review of the literature, your general 2 understanding of the literature and your own review 3 of depositions of individuals who have done this 4 work, can you give us a characterization of 5 background levels in terms of fibers generally versus 6 occupational levels? 7 DEFENSE COUNSEL: Objection. 8 A. A background level of exposure, as we've 9 defined it here, and it is basically defined in the 10 literature, consists of a fiber of asbestos in a -- a 11 tenth of a fiber of asbestos in a cubic centimeter of 12 air. 13 An occupational exposure, even what we would call 14 a relatively trivial occupational exposure, is 15 virtually always magnitudes higher than that. So 16 we're talking about almost always thousands to ten 17 thousands to millions of times higher when we talk 18 about occupational exposures to asbestos. 19 So it's -- it's -- they're two different 20 categories of magnitude. The occupational level is 21 much higher than the background level that we all 22 breathe on a daily basis. 23 Q. And I want to make sure I heard that 24 right. Did you say background was a tenth of a fiber 25 per centimeter?

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 Crapo, James (Vol. 01) - 09/15/2015

1 CLIP (RUNNING 00:31:41.472)

 Combined to match Chris changes

JC03

32 SEGMENTS (RUNNING 00:31:41.472)

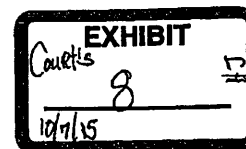


1. PAGE 89:01 TO 90:14 (RUNNING 00:01:34.566)

00089:01 Q Hi, Dr. Crapo, how are you?
02 A Very good.
03 Q You and I have met, what -- much times
04 before in court, correct?
05 A Yes.
06 Q I have probably cross-examined you about
07 six times; does that sound about right, now?
08 A It sounds about right.
09 Q Okay. And I think the last time I saw
10 you was in Philadelphia, in September of 2013, at the
11 Lemann case, do you recall that?
12 A Generally, yes.
13 Q All right. So, let's be clear. You were
14 aware of what your opinion would be, with regard to the
15 ability of gaskets or packing to influence Mr. Seay's
16 risk for mesothelioma, before you ever saw any facts in
17 this case, correct?
18 A That's correct, that I knew my general
19 opinions about chrysotile and chrysotile asbestos and
20 gaskets, but I wanted to know the details of Mr. Seay's
21 case.
22 Q Okay. But you knew that, regardless of
23 what those details were, it would be your opinion that
24 any of the John Crane products to which he may have
25 been exposed would not have played a role in his
00090:01 mesothelioma, correct?
02 A That's correct. I don't know of any
03 circumstance under which that type of product would
04 cause mesothelioma.
05 Q Okay. Let's go through some of those
06 companies that you have worked for in asbestos
07 litigation. I would put them up here on the screen.
08 You worked for W. R. Grace?
09 A I don't recall. I don't recall ever
10 being -- giving testimony on cases involving them.
11 Q You are saying -- what are you saying?
12 A I am saying, I don't recall being
13 retained on -- by them specifically. I just can't
14 remember.

2. PAGE 90:15 TO 93:12 (RUNNING 00:02:06.314)

15 Q So, let's ask it this way, because this
16 is, I think, how I have asked it in the past: You have
17 consulted or testified for the following in asbestos
18 litigation: Grace?
19 A I don't recall doing it for Grace. I
20 just don't remember that.
21 Q Okay. I will hand you your cross
22 examination in the Lemann case, October 1st, 2013.
23 A Okay.
24 Q And you can see, on the top of page 68,
25 you were asked that question: Consulted or testified
00091:01 for, and the second company is W.R. Grace, correct?
02 A I see it, but I don't recall doing it. I



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Dennis Seay

03 might have misstated. I know they have been involved
04 in cases where I have testified, but I don't recall
05 being retained by them.
06 Q Okay. Under oath, in Philadelphia, two
07 years ago, you answered "yes" to the question, correct?
08 A That's correct.
09 Q All right. You have also worked for
10 Union Carbide?
11 A Yes.
12 Q Raybestos-Manhattan?
13 A Yes.
14 Q Owens Illinois?
15 A Yes.
16 Q AC&S?
17 A I believe so, yes.
18 Q Erickson's?
19 A Yes.
20 Q Exxon?
21 A Yes.
22 Q DuPont?
23 A Probably. I don't remember the details,
24 but, probably, yes, sir.
25 Q USG?
00092:01 A Yes.
02 Q Bondex?
03 A Yes.
04 Q GM?
05 A Again, they have been -- there are many
06 cases in which there is a large number of people I have
07 had -- have been co-retained, so I have not been
08 primarily with GM, but they have co-retained.
09 Q Okay. So, GM had retained you as an
10 expert in asbestos litigation, correct?
11 A Yes. I said not as a primary, but as a
12 co-retaining party, yes.
13 Q Same with Chrysler?
14 A Same answer for Chrysler.
15 Q And you have testified for Georgia
16 Pacific?
17 A Yes.
18 Q Ford?
19 A Yes.
20 Q Pittsburgh Corning, correct?
21 A Yes.
22 Q That's one of those insulation
23 manufacturers, right?
24 A That's correct.
25 Q Rapid American?
00093:01 A Yes.
02 Q They made a product called "Cary,"
03 correct?
04 A They bought a company that made Cary.
05 Q That's an insulation company, right?
06 A That's my understanding.
07 Q Texaco?
08 A Yes.
09 Q Hess?
10 A Yes.
11 Q Garlock?
12 A Yes.
3. PAGE 93:13 TO 96:10 (RUNNING 00:02:36.479)
13 Q A.W. Chesterton?
14 A Yes.
15 Q Owen's Corning?
16 A Yes.

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Appendix_01949

Dennis Seay

17 Q And, of course, John Crane, right?
18 A Yes.
19 Q And you have testified on behalf of John
20 Crane for over 10 years, true?
21 A Yes.
22 Q You told Mr. Burns that you made
23 approximately -- or have been paid \$1.6 million from
24 John Crane alone. He gave you that number and you
25 agreed with it, correct?
00094:01 A That's correct.
02 Q All right. Your current rate is about
03 \$600 per hour for testimony, right?
04 A Yes.
05 Q And, so far in this case you've already
06 given one deposition in the case, true?
07 A Yes.
08 Q And prior to that deposition, you said,
09 then, you put in about 10 hours. Does that still sound
10 about right?
11 A Yes.
12 Q You gave that deposition; that was what,
13 about a two or three-hour deposition?
14 A I don't remember the details, but that
15 would be typical, yes.
16 Q So, prior to today's deposition, you
17 would have put in between 12, 13 hours, plus however
18 much time you spent with Mr. Burns, right?
19 A Yes.
20 Q That's all at \$600 a hour, true?
21 A Yes.
22 Q Now, you said that you -- or you agreed
23 with Mr. Burns that John Crane had paid you \$1.6
24 million?
25 A I agree that that sounds reasonable, yes.
00095:01 Q You don't dispute it, true?
02 A I don't.
03 Q Okay. And you've testified, as recently
04 as June of this year, that same thing; you had made
05 complete, in asbestos litigation, from consulting and
06 testifying, approximately \$8.5 million, and you said
07 that number didn't sound unreasonable?
08 A That's correct. I never actually
09 calculated, but it does not sound unreasonable.
10 Q You have only been asked to testify on
11 behalf of industry, correct?
12 A That's correct.
13 Q You have given at least 200 depositions
14 by now, correct?
15 A I'm sure that's correct. I've never
16 counted them, but it's been 25 years.
17 Q You have never appeared at a deposition
18 or trial on behalf of the plaintiff in an asbestos
19 case, true?
20 A I have not been asked to do that, no.
21 Q Okay. You've given a few in-house
22 seminars to lawyers who represent defendants in
23 asbestos cases, correct?
24 A I have talked with in-house lawyers and
25 given them -- explained some of the basis of the
00096:01 disease. It's been probably a decade since I have done
02 that, but, yes.
03 Q And going back a few years, when was the
04 last time you spoke at the Defense Research Institute?
05 A Twelve years ago.
06 Q Okay.
07 A I have spoken at that institute, I think,

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Dennis Seay

08 on three occasions.
09 Q Okay. All right. And that is really a
10 trade organization for the Defense Bar, correct?

4. PAGE 96:12 TO 97:11 (RUNNING 00:00:54.926)

12 THE DEPONENT: Yeah. I don't -- that's
13 that term that I would use, but it's a -- they are the
14 Voice of the Defense Bar. It's an open meeting, and,
15 when I spoke, there were both plaintiff and defense
16 attorneys in the room.
17 BY MR. PANATIER:
18 Q Uh-hum.
19 A But it's my understanding that it's
20 organized by the defense.
21 Q Okay. And I have shown you this exact
22 slide before, on several occasions. You quoted
23 accurately their motto, or their slogan, "The Voice of
24 the Defense Bar."
25 And then they have said -- and I have
00097:01 shown you -- "The Voice of the Defense Bar is a
02 national organization of more than 22,000 defense trial
03 lawyers and corporate counsel. As the Voice of the
04 Defense Bar, it espouses the defense viewpoint on
05 cutting-edge issues in state and Federal legislatures
06 and courts." And you said you had been there three
07 times now?
08 A Yes.
09 Q When was the last time?
10 A I don't remember the exact date. It was
11 a couple of years ago.

5. PAGE 97:12 TO 98:02 (RUNNING 00:00:31.741)

12 Q Okay. All right, sir. You do agree
13 that, outside of the litigation context, you don't do
14 any research, publishing or studies pertaining to
15 asbestos?
16 A At the present time, that's correct.
17 Q You haven't done that for many, many
18 years?
19 A I stopped doing that when I left Duke,
20 which was in the '90s.
21 Q All right. You haven't published on
22 asbestos since the early '90s, correct?
23 A From my own work, no.
24 Q You're not a pathologist, correct?
25 A I am not a clinical pathologist, but I
00098:01 have been a professor of pathology, and have taught
02 pathology for decades, yes.

6. PAGE 99:13 TO 100:20 (RUNNING 00:00:54.877)

13 Q To answer my question, you haven't looked
14 at pathology in a mesothelioma case since the early
15 '90s, fair?
16 A Not for clinical purposes, no.
17 Q Okay. Now, you are not board certified
18 in epidemiology, correct?
19 A No.
20 Q No degree in epidemiology, true?
21 A That's correct.
22 Q Not a board-certified pathologist?
23 A Correct.
24 Q You are not an occupational medicine
25 doctor?
00100:01 A Correct.
02 Q Not a mineralogist, right?

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Dennis Seay

03 A Correct.
04 Q Not an industrial hygienist, right?
05 A That's correct.
06 Q Okay. I think you testified you're board
07 certified; is that right?
08 A Yes.
09 Q And you passed that on your third try,
10 right?
11 A Yes. My pulmonary internal medicine
12 boards, I passed on the first try, and the pulmonary
13 board, I took it three times before I passed it.
14 Q Okay. You never published any
15 peer-reviewed articles on the subject of mesothelioma,
16 true?
17 A That's correct.
18 Q You never published on mesothelioma at
19 all, right?
20 A That's correct.

7. PAGE 101:14 TO 102:12 (RUNNING 00:00:47.978)

14 Q So, Dr. Crapo, you have 12 publications
15 on asbestos, right.
16 A That's -- yes, I think that's correct.
17 Q And the last one was in the early '90s,
18 true?
19 A Yes.
20 Q And I want you to assume for me -- and if
21 you have any reason to dispute this, let me know -- but
22 that Dr. Brody has 153 peer-reviewed publications and
23 45 of those are specifically on asbestos. Can you
24 assume that?
25 A Yes.
00102:01 Q And that 40 of these have been published,
02 I think, since the early '90s, right?
03 A I think that's approximately -- that's
04 consistent with my understanding.
05 Q Okay. Since you stopped publishing on
06 asbestos, he's published at least 40 publications on
07 it, fair?
08 A That's probably correct.
09 Q Okay. And he has 55 book chapters, and
10 54 of those are on asbestos and lung disease. You
11 don't dispute that, do you?
12 A No.

8. PAGE 102:25 TO 103:19 (RUNNING 00:00:29.439)

25 Q Okay. So, today, I looked at the
00103:01 hospital Website for National Jewish, which is your
02 hospital, right?
03 A Yes.
04 Q Okay. And I have got your profile
05 picture up there. And I have asked you about this
06 before, right?
07 A Yes, you have.
08 Q And you're under oath, right?
09 A Yes.
10 Q Okay. That means you are going to tell
11 the whole truth, correct?
12 A That's correct.
13 Q Okay. Would it be true that you only
14 have six likes on Facebook, from your little profile
15 there?
16 A I never looked at that, if that's what it
17 says.
18 Q It looks like six people like you on the

Dennis Seay

19 Facebook.

9. PAGE 103:21 TO 103:22 (RUNNING 00:00:04.329)

21 THE DEPONENT: I don't use Facebook. I
22 never open it myself.

10. PAGE 103:24 TO 105:19 (RUNNING 00:01:43.803)

24 Q Neither do I. Okay. Under, "Conditions
25 Treated," it says, "Chronic Cough," "COPD,"
00104:01 "Emphysema," correct?
02 A Yes.
03 Q It does not list anything having to do
04 with asbestos, correct?
05 A That's correct. Each person at National
06 Jewish approves what they said about them. I, at
07 National Jewish, only focused on those diseases.
08 Q You personally oversaw what went in these
09 descriptions, correct?
10 A Yes.
11 Q And you chose not to list anything having
12 to do with asbestos?
13 A That's right. I don't do -- I do not see
14 asbestos patients at National Jewish.
15 Q Okay. Under research areas, the only one
16 you select to put for research was COPD?
17 A Right. That's the only one that I do at
18 National Jewish, now, yes.
19 Q You don't currently have any work going
20 on at any hospitals where you work on asbestos, do you?
21 A No.
22 Q And under, "Programs and Services," it
23 has, "COPD Program", and "Division of Pulmonary,
24 Critical Care and Sleep medicine (Adult)"?
25 A Yes.

00105:01 Q You do not hold yourself out as an expert
02 in asbestos at National Jewish, correct?
03 A I don't see patients in that area, so I
04 don't want to list myself as an expert to see there.
05 Actually, I don't take any patients from National
06 Jewish, because I am leading a major research program
07 in COPD. So, I did list that.
08 Q This is an asbestos case we're in now,
09 today, right?
10 A Yes.
11 Q And that is primarily the area you
12 testify in in litigation, is asbestos?
13 A That's correct. I have had a lot of
14 experience in that area, but you are -- now you are
15 asking what I do -- what happens in terms of the
16 clinical practice at National Jewish, and I do not do a
17 clinical practice involving asbestos-related diseases
18 at National Jewish. So, you would not expect to find
19 that on my Website.

11. PAGE 106:08 TO 107:01 (RUNNING 00:00:46.803)

08 Q In terms of any conditions you treat, as
09 you show here on your Website, from today, your
10 research areas or any programs and services involved in
11 your professional work, do you hold yourself out as an
12 expert in asbestos, correct?
13 A At National Jewish, I didn't, on the
14 information. If you are talking about at National
15 Jewish, the only thing I do at National Jewish, now, is
16 chronic obstructive lung disease.
17 And, at National Jewish, I do lead what

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Appendix_01953

Dennis Seay

18 is actually the largest worldwide study on COPD,
19 involving over 200 people and 21 medical centers. I
20 lead that. That's what I list. But that's the only
21 thing I do at National Jewish, and, therefore, the only
22 thing you will find on my Website there.
23 Q Is there any institution where we can
24 look at your profile and it will say, "expert in
25 asbestos"?

00107:01 A No.

12. PAGE 107:04 TO 108:15 (RUNNING 00:01:25.519)

04 Q You can also look, by subject area, on
05 the National Jewish Website, and you can search for
06 researchers, doctors in certain areas, right?
07 A Yes.
08 Q And, so, I did that today. And today is
09 what, the 14th, 15th? Today is the 15th. It's
10 September 15th, 2015. And I looked under occupational
11 disease and you didn't come up. And you would expect
12 your name not to come up, correct?

13 A Yeah. I do not list myself there, yes,
14 you are correct.

15 Q You don't list yourself under lung
16 cancer, right?

17 A No.

18 Q You don't list yourself under
19 pneumoconiosis, correct?

20 A I do not.

21 Q You do not list yourself under asbestos,
22 correct?

23 A That's correct.

24 Q There are people who do hold themselves
25 out as doctors researching asbestos, correct?

00108:01 A In doing the research in clinical care,
02 yes, there are people who service that kind of issue
03 and patients at National Jewish.

04 Q Okay. You are not listed under
05 asbestosis?

06 A No, I am not there.

07 Q Or mesothelioma, right?

08 A That's correct.

09 Q This is a mesothelioma case, true?

10 A You are correct.

11 Q Okay. When a consultation comes to you,
12 from a defendant in asbestos litigation, at National
13 Jewish, have you ever said, you know, you ought to talk
14 to Dr. Jett, Dr. Coffin or Dr. Oliveira Duarte
15 Achcar -- is that how you say her name?

13. PAGE 108:17 TO 108:23 (RUNNING 00:00:15.109)

17 THE DEPONENT: I actually don't know her
18 well, but she's come in since I stopped being active in
19 clinical affairs. What's your question?

20 BY MR. PANATIER:

21 Q Do you ever refer any of the defendants,
22 in asbestos litigation, to these folks who do hold
23 themselves out as experts in mesothelioma?

14. PAGE 108:25 TO 109:02 (RUNNING 00:00:05.848)

25 THE DEPONENT: No, I don't. I consider
00109:01 that, in the area of mesothelioma, I have a
02 substantially greater knowledge than they do.

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Dennis Seay

15. PAGE 109:11 TO 109:25 (RUNNING 00:00:36.061)

11 Q You don't really know Dr. Oliveira Duarte
12 Achcar, but you said you have more expertise than her?
13 A That's because they don't see very many
14 cases. I have seen, by now, literally hundreds of
15 cases of mesothelioma, and I have seen that number of
16 cases. And I have seen many cases like that since that
17 time. I have reviewed, literally, thousands of case
18 files. I have talked about, literally, hundreds of --
19 thousands of patients.
20 No one at Jewish National has that kind
21 of experience. It would be quite rare for a
22 mesothelioma case to be referred to National Jewish
23 now.
24 Q When was the last time you did any
25 original research in asbestos?

16. PAGE 110:03 TO 110:20 (RUNNING 00:00:48.702)

03 THE DEPONENT: I had -- my original
04 research would have finished in the early 1990s.
05 BY MR. PANATIER:
06 Q Okay. And you acknowledge -- and you
07 were asked part of this question before -- you have
08 acknowledged that the EPA, OSHA, NIOSH, the Consumer
09 Product Safety Commission, Center for Disease Control,
10 the International Agency for Research on Cancer, the
11 World Health Organization, World Trade Organization,
12 the Agency for Toxic Substances, Disease Registry, the
13 National Cancer Society, the American Cancer Society,
14 and the National Cancer Institute, all state that all
15 fibers, including chrysotile, can cause mesothelioma,
16 correct?
17 A I would agree with that.
18 Q Okay. And they also all say there's no
19 known safe level of exposure to asbestos, correct?
20 A I would agree with that.

17. PAGE 111:22 TO 112:16 (RUNNING 00:00:49.562)

22 Mr. Seay -- you read some of his testimony, right?
23 A Yes.
24 Q Let's be clear. You read one day's worth
25 of his testimony, right?
00112:01 A That's correct.
02 Q You read his deposition from November
03 20th, 2013, true?
04 A Yes.
05 Q You realize that was one half of one
06 volume of his testimony, correct?
07 A I haven't seen the rest of it, so, I
08 can't tell you the extent of the rest of the testimony
09 that I was not -- that was not available to me.
10 Q So, you know he gave testimony on two
11 other days, January 16th, 2014, and January 17th, 2014?
12 A I don't know of the details of that, so I
13 can't provide accurate testimony on that.
14 Q All right. Do you feel comfortable
15 giving opinions in this case having seen only one-third
16 of the testimony?

18. PAGE 112:18 TO 115:19 (RUNNING 00:03:04.495)

18 THE DEPONENT: Based on the facts that I
19 have reviewed, I am very comfortable in my testimony.
20 If there's additional facts that are contrary to what I
21 have been told, that I would be glad to consider, if

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Appendix_01955

Dennis Seay

22 you tell me what the facts are.
23 BY MR. PANATIER:
24 Q The truth is, as we have discussed it,
25 there's no fact that would change your opinions on the
00113:01 ability of gaskets or packing to induce mesothelioma,
02 right?
03 A Well, I mean, the gaskets and packing, as
04 used appropriately, are associated with only extremely
05 low-dose chrysotile exposures. Unless you change that
06 fact, it would not change my opinion.
07 Q What do you mean, using gaskets or the
08 packing appropriately?
09 A Well, I mean, you are arguing that
10 someone took a gasket and spent all day, 10 years, just
11 grinding it continually the whole time. If you want to
12 make that as an hypothesis, it would alter my opinion,
13 but I think it's a very unreasonable hypothesis.
14 Q For the type of work that Mr. Seay was
15 doing, did the one volume give you an appreciation of
16 the type of work he was doing, do you think?
17 A A reasonable one, yes.
18 Q For the type of work he was doing, is it
19 your testimony that someone could do that work, with
20 gaskets, for 100 years straight, with the work
21 practices he was using, which was a combination of
22 scraping, wire brushing, power wire brushing, and be at
23 no more increased risk for mesothelioma than someone
24 who has no occupational asbestos exposure, like myself?
25 A So, let's do the math on it. The typical
00114:01 sort of high-end estimate of his time-weighted average
02 exposure, for that kind of work, would be .02 fibers
03 per cc, on a time-weighted average. You multiply that
04 by 100, and you have two fiber/cc years. That's still
05 insignificant.
06 So, if he did it for 100 years, he still
07 would not -- it would be less than the person who
08 lived, for about five years, in San Francisco. I
09 simply don't see that as a factor that would possibly
10 cause mesothelioma.
11 Q So, if he did it for 100 years, at that
12 level that you gave us.
13 A Yes.
14 Q That would be 50 times lower than the 100
15 fiber/cc years, right?
16 A That would be 50 times lower, yes.
17 Q Right. So, we could multiply 100 years
18 times 50, that's 5,000 years, right?
19 A Well, and remember that --
20 Q Hold on, hold on. The question was, if
21 we multiplied 100 times 50, that's 5,000, right?
22 A Yes.
23 Q And, for the type of work he was doing,
24 it would be your opinion -- let's do the math -- that
25 to get to 100 fiber/cc years, he would need to do the
00115:01 type of work he was doing for 5,000 years, true?
02 A Well, if you just change the -- play
03 with -- the math has nothing to do with reality --
04 that's mathematically correct.
05 Q But, I am using your numbers.
06 A But, in fact, I am also saying you have
07 to understand that there -- that the rate of the dose
08 is also important. So, I mean, it's not ridiculous, in
09 many facets, is what I am trying to say, but, yes, if
10 you are just doing the math, that's what the math comes
11 out to be.
12 Q What I am asking, you threw out an

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RoA_1921

Appendix_01956

Dennis Scay

13 average number, that you said this was the average
14 number for gasket work, correct?
15 A Yes.
16 Q Okay.
17 A It is not an average number. I said it
18 was probably a high-end estimate of what the
19 time-weighted average would be.

19. PAGE 117:06 TO 118:16 (RUNNING 00:01:23.308)

06 Q Sir, before we get to using your high-end
07 gasket estimates, for gasket work, to get to 100
08 fiber/cc years, you would need 5,000 years of that
09 work, correct?
10 A That's a mathematical extrapolation
11 that's unreasonable, yes.
12 Q That's right?
13 A That is right, but extrapolation for a
14 person doing work for 5,000 years is not.
15 Q Right. Because, as far as we know,
16 people don't live 5,000 years, right?
17 A That's correct.
18 Q But, in order to get a dose that would
19 even approach putting somebody at risk for mesothelioma
20 from chrysotile, as it comes out of a gasket, you would
21 have to do that work for 5,000 years, correct?
22 A I won't make that calculation.
23 Q Is it because it sounds ridiculous?
24 A Because the 5,000 years of life is
25 ridiculous, yes. What you have learned from the math,
00118:01 what we're doing, is, working with this kind of gasket,
02 within a reasonable human lifetime, does not create
03 risk. And it's not that, if you did it for 5,000
04 years, you would have risk.
05 Q Right. In fact, you are saying you
06 wouldn't?

07 A You wouldn't have risk because you only
08 -- you can't live long enough, or work with enough
09 gaskets to create risk, with the kind of exposure
10 levels that we're talking about.
11 Q What that also has done is, it means
12 that, for any of your clients in asbestos litigation,
13 that are defendants, who make chrysotile gasket
14 products, there is never, ever, ever going to be a risk
15 of you saying that their product contributed to the
16 disease, under normal circumstances?

20. PAGE 118:18 TO 118:21 (RUNNING 00:00:07.588)

18 THE DEPONENT: Under the normal
19 circumstances of gaskets, resulting in low-level
20 chrysotile exposure, they will not create this disease,
21 and that's what I have said.

21. PAGE 132:10 TO 133:03 (RUNNING 00:00:47.185)

10 Q Okay. Are you familiar with the Joint
11 Statement on Asbestos from the Joint Policy Committee
12 of the Societies of Epidemiology?
13 A Yes.
14 Q Are you a member of the Society of
15 Epidemiology?
16 A No.
17 Q Okay. Do you agree or disagree with this
18 statement: "Rigorous review of epidemiologic evidence
19 confirms that all types of asbestos fibre are causally
20 implicated in the development of various diseases and
21 premature death. Numerous well-respected international

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Appendix_01957

Dennis Seay

22 and national scientific organisations, through an
23 impartial and rigorous process of deliberation and
24 evaluation, have concluded that all forms of the
25 asbestos are capable of inducing mesothelioma lung
00133:01 cancer, asbestosis and other diseases." Do you agree
02 or disagree?
03 A I would disagree with that statement.

22. PAGE 141:11 TO 142:09 (RUNNING 00:00:52.114)

11 You're familiar with the epidemiologic
12 publications by Iwatsubo, Lacourt and Rodelsperger,
13 correct?
14 A Yes.
15 Q And you're aware that they have estimated
16 the risk for mesothelioma anywhere from sevenfold to
17 21fold for accumulative lifetime exposures of less than
18 .1 fiber per cc years, correct?
19 A I have read their paper, and there's not
20 a -- the paper does not provide a reasonable scientific
21 basis to support that statement.
22 Q Okay. And that's three papers I listed,
23 correct?
24 A I think they said it several times.
25 Q Okay.
00142:01 A But, yes, if you look at how their
02 analysis was done, it's deeply flawed.
03 Q You're aware they were all three
04 published in peer-reviewed scientific literature,
05 correct?
06 A I am aware of that.
07 Q Have you ever written a letter to the
08 editor, or anything else, that would put your opinions
09 about their scientific research into the public domain?

23. PAGE 142:11 TO 142:11 (RUNNING 00:00:00.720)

11 THE DEPONENT: No.

24. PAGE 142:12 TO 143:22 (RUNNING 00:01:23.836)

12 BY MR. PANATIER:
13 Q You agree that Mr. Seay worked with John
14 Crane gaskets, correct?
15 A Yes, that's the allegation, yes.
16 Q You don't dispute it, do you?
17 A No, I don't.
18 Q And you agree that, as a result, in his
19 work with asbestos-containing John Crane gaskets, he
20 would have inhaled asbestos from them, correct?
21 A Yes.
22 Q You agree he has mesothelioma, true?
23 A Yes.
24 Q You agree it's from asbestos, correct?
25 A Yes, and by that, I mean amphibole, yes.
00143:01 Q Your opinion is that it is from the, in
02 your own estimate, 10 to 100 fiber/cc years of
03 exposures he had to the insulating product of Celanese?
04 A I would agree that it is his exposure to
05 Celanese, and for installation products containing
06 amosite, that would have created his risk for
07 mesothelioma.
08 Q And, in fact, you estimated his exposure
09 between 10 to 100 fiber/cc years during his work there
10 at Celanese, correct?
11 A I believe that, in my deposition, I gave
12 that as the general estimate, but it's kind of below
13 the tenfold range.

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Appendix_01958

Dennis Seay

14 Q Right. I understand that. You didn't
15 put a specific number on it, but you gave us a range?
16 A I said it, yeah. I said that 10 years of
17 work, in that kind of environment, what he described,
18 would be expected to put you in the range of 10 to 100
19 fiber/cc years.
20 Q And Mr. Seay's asbestos-related
21 mesothelioma did cause his death, correct?
22 A Yes.

25. PAGE 143:23 TO 144:04 (RUNNING 00:00:17.741)

23 Q Dr. Crapo, do you agree that mesothelioma
24 is a very aggressive tumor?
25 A Yes. It's generally a very aggressive
00144:01 tumor.
02 Q Do you agree that it is uniformly fatal?
03 A It's not uniformly, but it's got a very
04 high fatality rate.

26. PAGE 144:25 TO 146:02 (RUNNING 00:01:02.436)

25 Q And Mr. Seay's mesothelioma followed the
00145:01 usual course you would expect for mesothelioma to
02 follow?
03 A It did.
04 Q Okay. Do you agree that the experience
05 of mesothelioma, from your own clinical evaluation, of
06 people who had it, it is a very painful one for those
07 patients?
08 A That's generally correct, yes.
09 Q And that those who have it suffer greatly
10 before they expire; is that fair?
11 A That's a -- it's a bad cancer. It has a
12 lot of pain, requires a lot of pain medication.
13 Q Did you review Mr. Seay's medical
14 records?

15 A I did.
16 Q Did you see that he had, I think, around
17 10 times he had a collapsed lung?
18 A I didn't count the number, but he did
19 have collapsed lungs, yes.
20 Q And, okay. And when a person's lung
21 collapses, how does that make them feel?
22 A Usually they get short breath, is the
23 primary symptom. They have difficulty breathing.
24 Q And, sir, you don't dispute, do you, that
25 Mr. Seay suffered enormously as a result of his
00146:01 mesothelioma?
02 A I don't dispute that, no.

27. PAGE 146:18 TO 146:22 (RUNNING 00:00:09.129)

18 Q Dr. Crapo, this is Thomas Burns.
19 A Yes.
20 Q First of all, I would like to apologize
21 if I was saying "Mr. Seay" instead of "Mr. Seay." That
22 was not an intentional mistake by me.

28. PAGE 158:10 TO 159:17 (RUNNING 00:01:20.402)

10 Q Finally, to get you back to why we came
11 here to you, which was mesothelioma, gaskets and
12 packing. Has anything that you discussed with
13 Mr. Panatier, during his questions, changed any of the
14 opinions that you expressed to this jury earlier today,
15 about the ability of chrysotile-containing gaskets and
16 packing to cause mesothelioma?

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Dennis Seay

17 A No.
18 Q And I thought we handled this when you
19 were talking on direct, obviously it's theoretical
20 math. When you are talking about 5,000 years, just
21 like it's theoretical math, if you are saying you're
22 exposed to the two fibers on the OSHA model, and
23 there's some sort of risk?
24 A Yes.
25 Q Is this something where you want to be
00159:01 able to come to a jury and say, ah-ha, it would take
02 5,000 years? What was the point you were trying to
03 make, when you go through the fiber/cc years and
04 exposures?
05 A When one uses that calculation, one is
06 just trying to show that there's no reasonable
07 exposure, in a human lifetime, that could cause that
08 disease, with low-dose chrysotile. And the same thing
09 is true, if you look at the regulatory model, when you
10 look at really low dose.
11 So, assume a linear response that gives
12 risk of low dose. It is not reasonable. It's just to
13 show that that math shows those things, but that the
14 math is really only a vehicle to help you understand,
15 when it's low levels of chrysotile, within a normal
16 human experience and lifetime, it does not cause this
17 disease.

29. PAGE 162:16 TO 164:02 (RUNNING 00:01:47.685)

16 Q Okay. We talked a lot about what level
17 of asbestos you believe someone would need to inhale
18 chrysotile to put them at risk for mesothelioma. We
19 spent a lot of time on it, but what about amosite?
20 A Amosite, understanding the lowest level
21 that would cause mesothelioma is difficult, because
22 it's not, -- there's not really good data about it, but
23 I would say that the threshold for amosite causing
24 mesothelioma is a few fiber/cc years. I will say five,
25 but it might be less than that, but in that range.
00163:01 Q Okay. I take it it would be your opinion
02 that, based on his work history, Mr. Seay had enough
03 amosite exposure at Celanese to put him at risk for
04 mesothelioma, fair?
05 A I would agree with that.
06 Q What about chrysotile?
07 A Well, chrysotile takes a very high
08 exposure.
09 Q What about crocidolite?
10 A Crocidolite is even more potent than the
11 amosite. I think that, overall, it would be maybe five
12 times more potent than the amosite.
13 Q So, in terms of what a person may do, in
14 an average workday or something, how long would a
15 person have to work with crocidolite to be at risk?
16 A Well, nobody really knows the answer to
17 that question. The new reported cases were very short
18 exposures. They were -- high-dose short exposures were
19 found occurring in patients that had developed
20 mesothelioma with chrysotile, and, so, we don't really
21 know the threshold for chrysotile.
22 Crocidolite, I would say it's probably
23 around one fiber-year cc or less. There is really no
24 hard data to answer that question for crocidolite.
25 Q It's far less than amosite and it's far
00164:01 less than chrysotile, fair?
02 A Yes, that's correct.

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Appendix_01960

Dennis Seay

30. PAGE 164:16 TO 165:20 (RUNNING 00:01:07.925)

16 Q I am going to ask you about Hodgson and
17 Darnton.
18 So, sir, Hodgson and Darnton, you have
19 read this paper from them: "The quantitative risks of
20 mesothelioma and lung cancer in relation to asbestos
21 exposure," right?
22 A Yes, I have.
23 Q And you rely upon that paper?
24 A It's one of the things that I relied
25 upon. The data is primarily what I rely on rather than
00165:01 their opinions, yes.
02 Q It involves a lot of dose estimates for
03 chrysotile, amosite, crocidolite, correct?
04 A It does.
05 Q But they also discuss this idea of a
06 threshold, don't they?
07 A Yes, they do.
08 Q Okay. And, in fact, they state, "Some
09 authors (Illgren and Brown, 1991; Liddell, 1983) have
10 argued for a mesothelioma threshold or threshold-like
11 behavior of the dose/response. Such arguments are
12 fraught with statistical and logical difficulties. The
13 attempt" -- and they cite Illgren and Brown -- "to
14 deduce a 'threshold' by identifying the lowest
15 estimated dose received by any observed case is logical
16 nonsense. Furthermore the existence of zero cases in a
17 dose category (human or animal) should not be
18 automatically interpreted as zero risk."
19 Did I read that right?
20 A Yes, you did.

31. PAGE 167:18 TO 168:10 (RUNNING 00:00:41.869)

18 Q The last sentence I haven't read:
19 ~~"Direct statistical confirmation of a threshold from~~
20 ~~human data is virtually impossible."~~
21 A Yes.
22 Q Did I read that right?
23 A Yes.
24 Q Do you agree or disagree with that?
25 A Well, in context, I probably disagree
00168:01 with it, but in the sense that if you do repetitive
02 studies, like we have with low-dose chrysotile, I think
03 there's sufficient evidence to reach a strong
04 conclusion that is very strongly supported. In that
05 sense, I disagree with them.
06 Q Okay.
07 A So if I am trying to get an exact level
08 for crocidolite, if I am trying to argue where it is,
09 and one is higher or lower, I think I would agree with
10 their concept.

32. PAGE 178:23 TO 179:18 (RUNNING 00:01:02.985)

23 ask you this: Have you given your opinion on low dose
24 on chrysotile, on anything, have you placed that into
25 the public domain in any way in the last 20 years, by
00179:01 virtue of a letter to the editor, a publication, or
02 anything like that?
03 A No. My policy has been to publish only
04 my personal research, where I do it directly in my lab,
05 and I stopped doing asbestos in the early '90s, so I
06 have not published on that since then. I have done
07 many publications since then, but they have been
08 focused on other areas where I did the work in my lab

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Dennis Seay

09 or with my research group.
10 Q As a matter of practical circumstance,
11 the only time you find yourself criticizing the issue
12 of whether or not there's a threshold for asbestos,
13 whether or not chrysotile can induce mesothelioma, or
14 risk for mesothelioma, is in front of juries; is that
15 correct?
16 A That's correct. I've provided testimony
17 and am willing to provide testimony in medical/legal
18 situations, and that is where I am asked that question.

TOTAL: 1 CLIP FROM 1 DEPOSITION (RUNNING 00:31:41.472)

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Appendix_01962

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT
C/A NO.: 2013-CP-42-03915

ANGIE KEENE, as Personal Representative)
of the Estate of DENNIS SEAY and)
LINDA SEAY, Individually,)

Plaintiffs,

vs.

3M COMPANY, et al.,

Defendants.

Defendant CNA Holdings, LLC's
Reply in Support of Motion for
New Trial Nisi Remittitur

TO THE HONORABLE COURT:

Argument

The question before the Court is simply whether the jury was "unduly liberal" in its damage awards. *Becker v. Wal-Mart Stores, Inc.*, 529 S.E.2d 758, 761 (S.C. Ct. App. 2000). It was, and when a jury strays significantly from past awards for similar deaths, judges should take an active role in reviewing the damage awards. *See generally* David W. Leebron, *Final Moments: Damages for Pain & Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989). As shown in Celanese's motion for new trial *nisi remittitur*, the damage awards in this case do in fact stray significantly from past awards in similar cases. Recent verdicts support this conclusion.

For example, in a mesothelioma case tried in April of this year, the jury awarded an 80 year old plaintiff who died from mesothelioma the day before closing arguments and her husband a total of \$3,500,000. The trial court granted remittitur, reducing the damages to \$2,500,000. *Brandes v. Brand Insulations, Inc.*, 2015 WL 4741479 (Wash. Super.) (Verdict and Settlement Summary). In another wrongful-death mesothelioma case tried in December of last year, the jury awarded \$91,008 for economic damages; \$88,888 for the decedent's noneconomic damages; \$1,286,111 for his spouse's noneconomic damages; and \$830,555 for each of his three

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children's noneconomic damages. *Golik v. Georgia Pacific*, 2014 WL 7525708 (Or. Cir.) (Verdict and Settlement Summary). And in another mesothelioma case tried last December, the jury awarded the living plaintiff \$625,000. *Drufuka v. AGCO Corp.*, 2014 WL 7671988 (N.Y. Sup.) (Verdict Settlement and Summary). Finally, in a mesothelioma case tried last October, the jury awarded the sum of \$1,612,000 consisting of \$350,000 for past pain and suffering and loss of enjoyment of life; \$810,000 for future pain and suffering and loss of enjoyment of life; \$155,000 on the spouse's claim for past loss of society and services, and \$297,000 for future loss of spouse's society and services. *Peace v. Special Elec. Co. Inc.*, 2014 WL 7671986 (N.Y. Sup.) (Verdict and Settlement Summary).

Have there been higher verdicts? Yes, there have. But Celanese submits that the verdicts it has supplied for the Court's consideration more accurately represent South Carolina's public policy of ensuring that personal injury damage awards are not unduly liberal. Further, as of 2007, 78 companies had filed for bankruptcy protection due to asbestos litigation costs. Brittan J. Bush, *Crafting An Asbestos Scheduled Compensation Solution for Louisiana & the Nation*, 72 LA. L. REV. 757, 761 (2012). And even today, "Plaintiffs' claims advance like a perpetually unrolling carpet. At any moment . . . some are filed, some are resolved and some are yet to come." *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 237 F. Supp. 2d 297, 302 (S.D.N.Y. 2002). If over-liberal damage awards are permitted to stand, even more companies will be added to the bankruptcy rolls, an undesirable result for both plaintiffs and defendants.

The \$5,000,000.00 award for loss of consortium is particularly overly-liberal. That amount approaches the \$7.2 million verdict in *ACandS, Inc. v. Redd*, 703 So.2d 492 (Fla. Ct. App. 1997), a mesothelioma case. The court held that the \$7.2 million award to the wife for loss of consortium was so excessive as to require a new trial, rather than merely a remittitur. Although Celanese believes the damages in this case are also so excessive as to warrant a new trial, in this motion, Celanese is merely asking the Court for alternative relief in the form of a remittitur of the damages, including a reduction in the loss of consortium damages to \$1 million.

The \$5 million award also greatly exceeds the award that was ruled excessive in *Bart v. Union Oil Co. of Cal.*, 540 N.E.2d 770 (Ill. Ct. App. 1989). In that wrongful death case, the wife was 66 years old at the time of her husband's death at age 63. The husband died in an explosion. *Id.* at 772. The jury awarded the wife \$2.2 million. The trial court reduced the award to \$1 million. The court of appeals held the \$1 million was excessive and remanded for a new trial. "We believe that considering the decedent's age and the emancipation of his children extends the subject recovery beyond the flexible limits of fair and reasonable compensation." Here, Celanese is asking for a remittitur to the \$1 million that the court of appeals held was still too high in *Bart*.

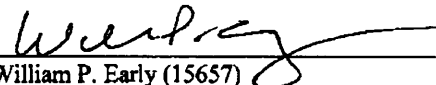
Finally, the \$5 million award greatly exceeds the award held excessive in *Wheat v. U.S.*, 860 F.2d 1256 (5th Cir. 1988). There, the plaintiff husband endured his wife's four year battle with an undiagnosed and untreated disease that ultimately resulted in her death. The district court awarded the husband \$1.8 million for loss of consortium. *Id.* at 1261. The court of appeals held the award was disproportionate to the injury and ruled that the maximum the trial court could have awarded was \$900,000, which is less than the \$1 million Celanese is asking this Court to remit the loss of consortium damages to.

Conclusion

The Court should grant Celanese's motion for new trial *nisi remittitur* and reduce the award for survival damages from \$2 million to \$1.5 million and the wrongful death and loss of consortium damages from \$5 million each to \$1 million each. The Court should render judgment n.o.v. on punitive damages, but if the Court disagrees, it should reduce the award of punitive damages from \$2 million to \$50,000.

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2015 FEB 11 11:08

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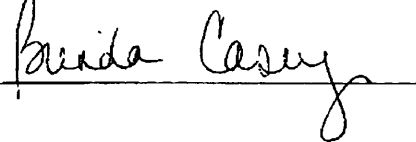

William P. Early (15657)
Attorney for Defendant CNA Holdings,
LLC

11/30, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 30 day of November 2015


Brenda Casey

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	C/A NO.: 2013-CP-42-03915
ANGIE KEENE, as Personal Representative	)	
of the Estate of DENNIS SEAY and	)	
LINDA SEAY, Individually,	)	
	)	
Plaintiffs,	)	Defendant CNA Holdings, LLC's
	)	Reply in Support of Motion for
vs.	)	New Trial Absolute
	)	
3M COMPANY, et al.,	)	
	)	
Defendants.	)	

TO THE HONORABLE COURT:

Introduction

The Court should grant a new trial absolute for Defendant CNA ("Celanese") for each of the reasons stated in CNA's motion. In this reply, Celanese will focus on five of the grounds asserted as a basis for a new trial.

Argument

1. The Court should order a new trial because the jury was improperly charged on premises liability.

The Plaintiffs relegated their response the issue of the improper jury instructions regarding premises liability law to the back of their response in the hope that the Court will overlook the patent flaws in their arguments. First, the Plaintiffs are wrong in asserting that Celanese waived its objection. Celanese's attorney objected to the Plaintiffs' premises-liability instructions after the charge was read to the jury, as required to preserve error. *See Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195 (App. 2003). The colloquy quoted in the Plaintiffs' response shows that the statement by Celanese's attorney—that he would agree to the Plaintiffs' instructions—was merely a matter of moving the trial along so that he could make his objection at the proper time: "I don't want us to have to spend the night here arguing over this." (Resp. at

50). The objection came after that remark, at the proper time, and indisputably preserved error.

Second, the Plaintiffs' narrow reading of the decision in *Lanier Const. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275 (Ct. App. 2009) is at odds with the Court of Appeals' reasoning and holding in that case. The court in *Lanier* explained that the property owners owed no duty to warn an invitee of a latent danger on their property because a contractor working on the property had equal knowledge of the danger and owed the duty to warn its invitee—a subcontractor—of that danger. *Id.* at 281-82. Here, Daniel had equal knowledge of the risks associated with asbestos and owed the duty to provide a safe workplace for its employee Mr. Seay, whom it invited onto Celanese's property. Under *Lanier* because of Daniel's knowledge and its duty to protect Mr. Seay, Celanese owed no duty to warn or otherwise protect Mr. Seay against the risks of exposure to asbestos. It was therefore harmful error to submit premises-liability instructions that were not appropriate under the facts of this case and which permitted the jury to find that Celanese breached a duty to protect Mr. Seay.

2. The evidence is insufficient to establish Celanese had knowledge superior to that of the decedent's employer.

As demonstrated in Celanese's motion for judgment n.o.v. and its reply in support of that motion, the evidence did not establish that Celanese knew Daniel was not going to provide Mr. Seay with a safe workplace, as it was required to do by OSHA. On the contrary, the evidence established that (i) Daniel was aware of the OSHA requirements regarding asbestos exposure, and (ii) by virtue of its knowledge of the OSHA regulations, Daniel was aware that they allegedly were not sufficient to prevent mesothelioma.

The Plaintiffs insist that Celanese should have informed Daniel that adherence to OSHA's PEL and TLV requirements was not sufficient to protect Mr. Seay against the risk of mesothelioma. However, Plaintiffs' expert Holstein testified that the OSHA PELs expressly stated they were inadequate to protect against cancer (TT 10/1 A.M. at 636), and the TLV "said nothing about cancer. It was only about scarring of the lungs." (*Id.* at 594-95). Thus, by virtue of its own familiarity with the OSHA regulations, Daniel had equal knowledge that they were not

sufficient to prevent mesothelioma. As such, the evidence does not support a finding that Celanese had superior knowledge of the risk of harm to Mr. Seay, and a new trial is therefore required if the Court does not grant a judgment n.o.v.

3. There is insufficient evidence of willful, wanton, or reckless conduct supporting punitive damages.

Only willful, wanton, or reckless conduct will support an award of punitive damages. *Mellen v. Lane*, 659 S.E.2d 236, 251 (S.C. Ct. App. 2008). There is insufficient evidence that Celanese acted wantonly and willfully with respect to the safety of Mr. Seay or that it was reckless, *i.e.*, that it “knowingly” engaged in negligent acts or was conscious of some wrongdoing on its part. On the contrary, as demonstrated in Celanese’s reply in support of its motion for judgment n.o.v., it was Mr. Seay’s employer, Daniel, that was charged with the duty of providing him a safe workplace, and the evidence was clear that Daniel had equal knowledge of the risks associated with asbestos exposure. Thus, Celanese was entitled to rely on Daniel to ensure Mr. Seay’s safety. *Cf. Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 23 (Ct. App. 2013) (under sophisticated user defense, a product manufacturer is entitled to rely on plaintiff’s employer to warn its employees of risks associated with product). And there is insufficient evidence that it was unreasonable, much less willful, wanton, or reckless for Celanese to rely on Daniel to do so. Daniel (i) had equal knowledge of the OSHA regulations, (ii) was charged with implementing the regulations and providing Mr. Seay a safe workplace, and (iii) was better situated than Celanese to determine whether adhering to OSHA would be sufficient to protect its employee in carrying out the work Daniel was hired to perform and was specialized in performing. As such, the Court should order a new trial.

4. The playing of the videotape in which Mr. Seay called to Jesus for help requires a new trial.

The New Jersey Supreme Court once condemned a prosecutor’s closing argument that the victim died “calling to Jesus for help. Jesus help me, Jesus help me.” *State v. Williams*, 550 A.2d 1172, 1204 (N.J. 1988). The court said that argument, which included other inflammatory

remarks, was “unduly prejudicial, inflammatory commentary.” *Id.* The Plaintiffs’ argument in this case—that a video in which Mr. Seay was pleading to Jesus for help was not unduly prejudicial—is absurd.

Furthermore, under the circumstances, Celanese’s objection to the video was not waived. When Plaintiffs’ counsel mentioned to Celanese’s counsel that he was going to play a video of Mr. Seay, he gave no indication of its nature, and it was fair for Celanese’s counsel to assume it was simply another segment of the plaintiff’s videotaped deposition, which had previously been played for the jury. After the objectionable video was played, Celanese’s lead counsel learned that none of the other Celanese counsel had agreed to the playing of the video. Only then was it apparent that the Plaintiffs’ counsel had misled the Celanese defense team in order to present this patently-objectionable video. The objection was therefore timely under the circumstances, and the proper remedy for the playing of this video is a new trial.

5. A new trial is required due to premature deliberations.

The Plaintiffs are incorrect in asserting that an outside influence must be shown to secure a new trial based on jury misconduct consisting of premature deliberations. *See State v Aldret*, 333 S.C. 307, 310-11 (Ct. App. 1999). Premature jury deliberations “involves a matter of fundamental fairness.” *Id.* The rationale for prohibiting premature jury deliberations is as follows:

[A] jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed.... The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

Id. at 311.

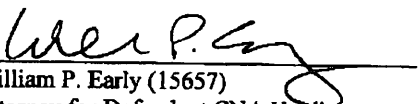
In this case, the record establishes that the jurors engaged in premature deliberations when one of them questioned Juror 16 whether there was still asbestos at the Celanese facility. (TT 10/1 PM at 691) (“Then one of them asked something about asbestos, but then somebody

said, we shouldn't talking about it so we didn't discuss it anymore."'). The fact that this question was asked indicates that the jurors were ignoring the Court's admonition not to discuss the case and were beginning to prejudge the case before the Plaintiffs had even rested. As such, the Court should order a new trial.

Conclusion

The Court should grant Celanese's motion for new trial absolute.

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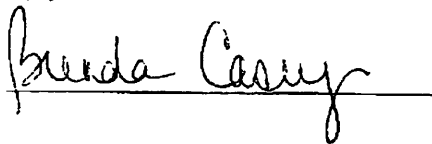

William P. Early (15657)
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LLC

11/30, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 30 day of November 2015



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT
C/A NO.: 2013-CP-42-03915

ANGIE KEENE, as Personal Representative)
of the Estate of DENNIS SEAY and)
LINDA SEAY, Individually,)

Plaintiffs,

vs.

3M COMPANY, et al.,

Defendants.

**Defendant CNA Holdings, LLC's
Reply in Support of Motion for
Judgment Notwithstanding the Verdict**

TO THE HONORABLE COURT:

Introduction

The Court should render judgment n.o.v. for Defendant CNA ("Celanese") for the reasons stated in Celanese's motion. In this reply, Celanese will focus on three of the four grounds asserted as a basis for a judgment n.o.v.

Argument

1. The statutory-employer doctrine requires a judgment n.o.v.

"The concept of statutory employment is designed to protect the employee by assuring workmen's compensation coverage by either the subcontractor, the general contractor, or the owner if the work is a part of the owner's business." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 72, 267 S.E.2d 524, 528 (1980). Pursuant to section 42-1-410 of the South Carolina Code (1985):

When any person, in this section and §§ 42-1-420 to 42-1-450 referred to as "contractor," contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any com-

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pensation under this Title which he would have been liable to pay if that workman had been immediately employed by him.

In determining whether a worker is a statutory employee, our courts consider the following three factors: "(1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, and (3) whether the identical activity in question has been performed by employees of the principal employer." *Poch v. Bayshore Concrete Products/S. Carolina, Inc.*, 386 S.C. 13, 24-25, 686 S.E.2d 689, 695 (Ct. App. 2009) *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013). Moreover, "any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act. *Poch v. Bayshore Concrete Products/S. Carolina, Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013) (citing Code 1976, § 42-1-100 et seq.).

Here, the Court erred by overlooking necessary facts and case law supporting a finding of statutory employment. Such a finding in this case is supported by a wealth of South Carolina jurisprudence concerning maintenance and repair workers just like Mr. Seay. Notwithstanding such ample support, the Court's the prior summary judgment ruling overlooks this supporting authority and inappropriately relies on inapposite cases involving common carriers or construction workers.

A. The cases the Court relied on in its July 18, 2015 order are distinguishable.

The Court's summary judgment order inappropriately relies on inapposite cases involving common carriers: *Abbott v. The Ltd., Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000), and *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003). *Abbott*, unlike the integral nature of equipment maintenance, concerned non-essential work by a retailer's common carrier in delivering inventory. In finding against statutory employment, the *Abbott* Court reasoned: "The fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of Retailer's business." *Id.*, 338 S.C. at 163-64, 526 S.E.2d at 514. "The mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business." *Id.* (quot-

ing *Caton v. Winslow Bros. & Smith Co*, 309 Mass. 150, 154, 34 N.E.2d 638, 641 (1941)). Consequently, the *Abbott* Court held that the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier's employee. *Abbott*, at 163-64, 526 S.E.2d at 514.

Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003), is equally distinguishable. As in *Abbott*, the secondary employer, Shakespeare, was not in the transportation business. Rather, Shakespeare was in the business of designing and manufacturing fiberglass products. As such, it did not own delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. *Id.* 354 S.C. at 426, 581 S.E.2d at 486. Moreover, even though raw materials used to manufacture Shakespeare's products arrived by common carrier and almost all of its finished products left the plant by common carrier, Shakespeare only paid for delivery to its customer when the order exceeded a specific dollar amount. *Id.* Consequently, the *Olmstead* Court, citing *Abbott*, held that although delivery by common carrier was certainly important to Shakespeare's operation, such delivery was not a part or process of its manufacturing business. *Id.* (citing *Abbott*, 338 S.C. at 164, 526 S.E.2d at 514 (quoting *Caton*, 34 N.E.2d at 641) (finding defendant manufacturer of wool was not statutory employer of driver employed by common carrier to transport wool to defendant's warehouse)).

Here, Mr. Seay was not a common carrier but a maintenance and repair worker contracted by Hoechst Celanese to provide required repairs and preventative maintenance on the equipment used at its facility to manufacture synthetic fibers and resins. The repair work and preventative maintenance performed by Mr. Seay was an essential and integral aspect of Hoechst Celanese's business; without such maintenance and repairs, Hoechst would not be able to manufacture its products. These facts are readily distinguishable from those involving common carriers wherein transportation was not the secondary employer's business.

- B. The Court's reliance on *Raines v. Gould, Inc.* and *Glass v. Dow Chemical Co.*, involving construction workers, is misplaced.

The Court relied on *Raines v. Gould, Inc.*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1987) to suggest that Mr. Seay's routine work in repairing and maintaining vital equipment necessary to the manufacturing business of Hoechst Celanese is somehow not part of Hoechst Celanese's trade or business. But in stark contrast to the facts of this case, *Raines* involved a contract employee involved in constructing the actual manufacturing facility for Gould, which was in the business of manufacturing and selling batteries. Given the nature of Gould's manufacturing business, the court determined the construction work performed by Raines in constructing the Gould plant was not part of Gould's actual business or trade. In so finding, the Court further relied on the fact that Gould did not have a construction division to determine that the work performed in constructing the facility was not integral to the business.

Here, the facts are entirely distinguishable. Mr. Seay, through Daniel, performed repairs and preventative maintenance work directly on manufacturing equipment used in the manufacturing business of Hoechst Celanese. Without such repairs or maintenance work, Hoechst Celanese would not be able to manufacture its synthetic fibers and resins. *Raines* is therefore distinguishable and not instructive as to the issue of whether Mr. Seay's work was integral to Celanese's trade or business.

Glass v. Dow Chemical Co., 325 S.C. 198, 682 S.E.2d 49 (1997), is also distinguishable and not instructive as to the precise scenario in this case. The Court cited *Glass* for the proposition that "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." *Id* at 202, 682 S.E.2d at 51. When read in the intended context under the facts of *Glass*, this quote bears no relation to the instant case. Unlike the present matter, *Glass* involved pre-suit remedial work to settle a dispute concerning defective façade panels containing a chemical compound manufactured by Dow known as Sarabond. The plaintiff was among one of the subcontractors hired by Dow to replace the panels. Given that Glass's work, *i.e.*, the removal and replacement of façade panels, was not even remotely akin to Dow's chemical compound manufacturing business, the Supreme Court ruled against statutory employment.

Here, unlike the construction worker in *Glass*, the equipment repair and maintenance work performed by Mr. Seay was directly related to Hoechst Celanese's business of manufacturing synthetic fibers and resin. Moreover, the maintenance and repair work performed by Mr. Seay was not so specialized so as to render Hoechst Celanese unequipped to handle it with its own workforce, as Hoechst Celanese later hired several Daniel maintenance workers to perform the very same maintenance and repair work performed by Seay. Thus, the Court's reliance on the above-referenced quote is misplaced.

- C. The Court has overlooked mandatory authority finding statutory employment under analogous facts.

There are numerous cases supporting a finding that repair and preventative maintenance work is integral to the trade or business of a manufacturing facility such as Hoechst Celanese. See, e.g., *Wheeler v. Morrison Machinery Co.*, 313 S.C. 440, 438 S.E.2d 264 (1993) (asbestos removal contractor was statutory employee of textile company); *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (1992) (machinery installation contractor was statutory employee of textile mill because machine was integral to mill); *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439, 440 (1991) (welder who performed repair work on metal shearing machine was statutory employee where welder's repair work was determined to be an essential part of the trade or business of secondary employer); *Marchbanks v. Duke Power Company*, 190 S.C. 336, 2 S.E.2d 825 (1939) (subcontractor painter of utility poles found statutory employee of power company because power company could not operate if utility poles not maintained in good condition). Notably, none of these cases are referenced in the Court's July 28, 2015 order.

- D. Any doubt as to Mr. Seay's status as a statutory employee should be resolved in favor of statutory employment.

Moreover, even assuming there is any question as to Mr. Seay's status as a statutory employee, any doubt should be resolved in favor of statutory employment so as to extend coverage under the Workers' Compensation Act. *Poch v. Bayshore Concrete Products/S. Carolina, Inc.*, 341 S.C. 111, 458 S.E.2d 811 (1994).

405 S.C. 359, 747 S.E.2d 757 (2013) (citing Code 1976, § 42-1-100 et seq.). Thus, notwithstanding the more than sufficient evidence satisfying the three part test for statutory employment in this case, the Court must construe any such doubt in favor of statutory employment.

2. Plaintiffs failed to establish Celanese had knowledge superior to that of the decedent's employer.

In premises liability cases, the plaintiff must prove that the premises owner had knowledge superior to that of the decedent's employer regarding the hazards of asbestos. *Lanier Construction Co. v. Bailey & Yobs, Inc.*, 681 S.E.2d 909, 912 (S.C. Ct. App. 2009). If the premises owner does not have superior knowledge, then it does not have a duty to warn. *Id.* The overarching issue in this case is whether there is any evidence that Celanese knew Daniel was not going to provide Mr. Seay with a safe workplace, as required by OSHA. The evidence established that Daniel was aware of and followed the OSHA requirements regarding asbestos exposure.

The Plaintiffs, however, contend that Celanese should have informed Daniel that adherence to OSHA PEL and TLV requirements was not sufficient to protect Mr. Seay against the risk of mesothelioma. This, said the Plaintiffs' expert Holstein, was expressly stated in the OSHA PELs (TT 10/1 A.M. at 636), and the TLV "said nothing about cancer. It was only about scarring of the lungs." (*Id.* at 594-95). Thus, by virtue of its own knowledge of the OSHA regulations, Daniel had equal knowledge they were not sufficient to prevent mesothelioma. As a matter of law, this means there is no evidence that Celanese had superior knowledge of the risk of harm to Mr. Seay. Accordingly, the Court should render a judgment n.o.v.

3. Plaintiffs failed to establish willful and wanton conduct.

Punitive damages "can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Mellen v. Lane*, 659 S.E.2d 236, 251 (S.C. Ct. App. 2008). "Reckless" means more than mere negligence—it "implies the doing of a negligent act knowingly; it is a conscious fail-

ure to exercise due care.” *Keeter v. Alpine Towers Int’l, Inc.*, 730 S.E.2d 890, 898-99 (S.C. Ct. App. 2012). The Plaintiffs failed to introduce any evidence supporting a finding that Celanese acted wantonly and willfully with respect to the safety of Mr. Seay or that it “knowingly” engaged in negligent acts or was conscious of some wrongdoing on its part. On the contrary, the evidence showed that Celanese reasonably and justifiably believed that Daniel would protect Mr. Seay.

The Plaintiffs contend that punitive damages are proper because Celanese (i) was aware of the hazards associated with asbestos; (ii) purchased asbestos gaskets; (iii) supposedly concealed the hazards of asbestos from those working on it property; and (iv) failed to ensure that Daniel was protecting Seay. The jury, however, found that asbestos-containing gaskets were not a proximate cause of Mr. Seay’s disease. And not only was it Mr. Seay’s employer, Daniel, which was charged with the duty of providing him a safe workplace, the evidence was clear that Daniel had equal knowledge of the risks associated with asbestos exposure.

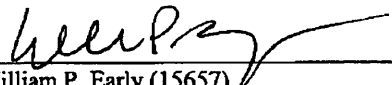
The law regards work done by an independent contractor such as Daniel as the contractor’s own enterprise, and the independent contractor, rather than the landowner, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it. This is a fundamental rule across all American jurisdictions, well expressed in a recent Georgia Court of Appeals’ decision: “an independent contractor is expected to determine for himself whether his place of employment is safe or unsafe, and ordinarily may not recover against the owner for injuries sustained in the performance of the contract” *Forest Cove Apts, LLC v. Wilson*, 776 S.E.2d 664, 668 (Ga. Ct. App. 2015) (internal quotation marks omitted). The court further explained that while generally a premises owner must exercise ordinary care to keep the premises safe for contractors, if the contractor was “hired for the express purpose of assisting in the repair, demolition, or alteration of some instrumentality . . . , and the unsafe conditions from which the injury resulted arose from or were incidental to the work undertaken by him, the . . . general rule is not applicable.” *Id.* (internal quotation marks omitted). South Carolina law is no different. Thus, Celanese was entitled to rely on Daniel to ensure Mr. Seay’s safety. And there was no evidence establish-

ing that it was unreasonable, much less willful, wanton, or reckless for Celanese to rely on Daniel to do so.

Conclusion

The Court should grant Celanese's motion for judgment n.o.v.

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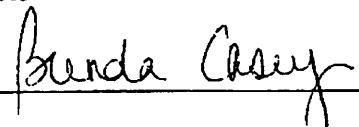

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11/30, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 30 day of November 2015


Brenda Casey

211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

ARGUMENTS AND AUTHORITIES

I. Plaintiffs' evidence established that Seay's mesothelioma was caused by his exposure to asbestos at Celanese.

Despite the fact that Celanese called no experts of its own, and that every medical expert in this case attributed Seay's mesothelioma to his asbestos exposure at the Celanese plant in Spartanburg, Celanese takes the position that "Plaintiffs failed to establish causation."

There is no dispute that Seay had mesothelioma. (Ex. O, Court Exhibit 5, Kradin Video Depo., at 32:24-34:1; Ex. I, TT 10/7 AM, at 1183:12-21, 1188:9-23). There was no dispute that Seay's mesothelioma was caused by asbestos exposure. (TT 10/7 AM, at 1184:1-24, 1188:9-23). The evidence was that Seay died of malignant pleural mesothelioma caused by asbestos exposure. (Ex. D, TT 10/1 AM, at 566:17-567:17; Kradin Video Depo., at 15:14-24, 44:20-25, 48:1-9).

Dr. Richard Kradin, Plaintiffs' medical expert who is a practicing pulmonologist and pathologist, testified that Seay had a history of substantial

exposures to asbestos insulation, gaskets, and packing at Celanese and that these exposures were substantial factors in causing his mesothelioma. (Kradin Video Depo., at 7:14-8:2, 13:7-9, 16:3-17:1, 20:3-21, 26:18-27:8, 31:11-25).

Holstein similarly offered the opinion that, "his mesothelioma was caused by the action of the exposures to asbestos that he had, which were pretty much limited to the period of time when he was working at Hoescht Celanese." (TT 10/1 AM, at 567:14-17). Specifically, Seay's work around insulation was a substantial factor in the development of his mesothelioma. (TT 10/1 AM, at 647:14-20). His work with gaskets was a substantial factor in causing his mesothelioma. (TT 10/1 AM, at 647:21-23).

Celanese offered no testimony to contradict the opinions of Plaintiffs' experts. Even defense expert Dr. Victor Roggli is of the opinion that Seay's exposure to asbestos insulation was a substantial factor in causing his mesothelioma. (TT 10/7 AM, at 1188:24-1189:7). Defense expert Dr. James Crapo similarly testified that Seay had an asbestos-caused mesothelioma and that his exposure to insulating products at Celanese created his risk for mesothelioma. (Ex. T, Crapo Video Depo., at 142:22-143:7).

Celanese does not really dispute that Plaintiffs have demonstrated substantial factor causation, and instead argue that Plaintiffs failed to show "but for" causation. Plaintiffs disagree with the premise of Celanese's argument. South Carolina has adopted the substantial causation standard, as opposed to the but for

standard, in asbestos cases.¹ The Supreme Court has adopted the *Lohrmann* causation standard for asbestos cases. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). Under *Lohrmann*, “[t]o support a reasonable inference of **substantial causation** from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” *Id.* (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir.1986) (emphasis added)). Owen recognizes that the *Lohrmann* standard for proving causation in asbestos cases is “a variant of the substantial-factor test.” David G. Owen, *Product Liability Law* 778 (2d ed. 2008).

Nevertheless, the evidence clearly established but-for causation in this case. Seay testified that the only place he was exposed to asbestos was at Celanese. (Seay Video Depo., at 23:17-25; Ex. C, TT 9/30 PM, at 460:16-20). As set forth at length in Section I.A of Plaintiff’s Response in Opposition to Celanese’s Motion for New Trial, the evidence showed that he was exposed to asbestos insulation, gaskets, and packing at Celanese on a daily basis for nine years and that those exposures were substantially above background levels.

Drs. Kradin, Holstein, Roggli, and Crapo all agree that his exposures at Celanese caused Seay’s disease. As that was Seay’s only source of asbestos exposure, the uncontradicted evidence establishes that Seay would not have

¹ Celanese also appears to disagree with its argument. At trial it took the position that Plaintiffs did not have to show but-for causation in a premises liability case. (TT 10/7 PM, at 1427:17-1428:14).

developed mesothelioma without his exposure at Celanese. Plaintiffs' have met their burden of proving causation in this case.

II. The evidence established that Celanese had superior knowledge about the dangers of asbestos.

Contrary to Celanese's position, the evidence supports the jury's conclusion that Celanese had superior knowledge of the asbestos danger compared to Seay's employer, Daniel. Celanese had earlier and far more extensive knowledge of asbestos hazards than Daniel—and there were no facts elicited at trial to contradict this. First, Celanese knew about the danger of asbestos-related disease long before Daniel did. The medical director of Celanese, Dr. Dixon, attended the 1964 Selikoff conference on asbestos-related diseases. (Ex. N, Laubly Video Depo., at 49:20-50:2; Ex. J, TT 10/7 PM, at 1331:16-23). At that conference, attendees learned that asbestos causes mesothelioma and that even slight exposures or non-occupational exposures created a risk of mesothelioma. (TT 10/1 AM, at 602:17-604:20). On the other hand, an employee for Daniel, Dan Buck, testified that Daniel was not aware that in 1964 asbestos researchers at the Selikoff conference had stated that there is no safe level of asbestos exposure. (Ex. K, TT 10/8, at 1504:16-18, 1509:9-12, 1529:18-1530:7). As of 1970, Daniel did not even know that asbestos could cause mesothelioma. (TT 10/8, at 1525:19-22).

In the 1950s and 1960s, Celanese learned about asbestos-related diseases, including mesothelioma, from its membership in the Industrial Hygiene Foundation (IHF). Celanese was a member of the Industrial Hygiene Foundation (IHF) from 1952 to 1976. (Laubly Video Depo., at 28:11-13; TT 10/7 PM, at 1312:18-1313:15).

Charles Laubly, who was employed as an industrial hygienist with Celanese from 1966 to 1979, testified that Celanese received the IHF publication the Industrial Hygiene Digest. (Laubly Video Depo., at 5:6-9, 11:12-15, 18:15-19:3, 28:11-16; TT 10/7 PM, at 1313:16-24). The Industrial Hygiene Digest was a monthly compilation of abstracts of new medical articles. (TT 10/7 PM, at 1314:7-1315:24). In 1953, one IHF publication listed three new articles on asbestos-related disease—two on asbestosis and one on cancer. (TT 10/7 PM, at 1314:18-1316:22). In September 1955, the IHF published an abstract of the 1955 publication that established asbestos exposure causes lung cancer. (TT 10/7 PM, at 1317:6-1318:7). Medical abstracts about asbestos-related diseases, including mesothelioma, were subsequently published by the IHF in February 1956, April 1957, 1964, May 1966, August 1966, September 1966, February 1967, and March 1969. (TT 10/7 PM, at 1318:8-1319:1, 1320:20-1322:23, 1323:2-1330:8, 1332:9-1334:13). Most of those publications had multiple abstracts about asbestos-related diseases. Some of the abstracts published in 1964 and 1967 pertained to the risk of mesothelioma among insulators specifically. (TT 10/7 PM, at 1321:7-1323:1, 1329:12-1330:4).

At the same time Celanese was receiving almost monthly updates about asbestos-related diseases, including mesothelioma, Daniel was not a member of the IHF and did not receive the Industrial Hygiene Digest. (TT 10/8, at 1531:2-9).

In addition, Celanese knew as of 1970 that mesothelioma could be caused by relatively small levels of exposure to asbestos, and that the Permissible Exposure Limits (PELs) were not protective against cancer. In 1970, Union Carbide sent a

report to Celanese informing it that mesothelioma could "occur in individuals with histories of only slight exposures." (TT 10/7 PM, at 1358:16-1361:3). Further, "[f]rom the data available, it appears that the TLV of 5 million particles per cubic foot is not low enough to protect against mesothelioma, and it is quite possible that 2 million particles per cubic foot is not either." (TT 10/7 PM, at 1360:20-1361:3). In 1977, an internal Celanese memorandum acknowledged that research studies over the previous ten years had "raised serious questions concerning human exposure to cancer-producing agents," and that some researchers had suggested that, "there is no safe exposure to a human carcinogen." (TT 10/7 PM, at 1361:7-1363:25).

As of 1970, Daniel did not know that only slight exposures could cause mesothelioma. (TT 10/8, at 1527:7-11). As of 1970, Daniel was not aware that the published TLVs were not protective against mesothelioma. (TT 10/8, at 1527:20-24). In fact, Daniel was under the impression that asbestos could be used safely if exposures were kept below the PEL. (TT 10/8, at 1518:8-16, 1523:15-18). Daniel was not aware that PEL did not protect against cancer. (TT 10/8, at 1523:19-21).

This evidence establishes that Celanese had much earlier knowledge and more extensive knowledge than Daniel did about the specific danger of mesothelioma and the types of exposures that could cause this disease. Celanese's incorrect allegations that there is "no evidence" of superior knowledge do not entitle it to judgment notwithstanding the verdict.

III. The evidence established that Seay was not a statutory employee of Celanese.

This Court has already determined that Seay was not a statutory employee of Celanese because, as a maintenance worker, he was not engaged in work that was part of Celanese's regular business operations. In the pretrial ruling, this Court found *Raines v. Gould, Inc.*, 288 S.C. 541, 543, 343 S.E.2d 655, 657 (Ct. App. 1986) to be dispositive. *Raines* held that construction work on behalf of a manufacturer will not be considered part of the manufacturer's trade or business unless the manufacturer had its own construction division or its own employees performed construction work. 288 S.C. at 543, 545. There, the plaintiff who helped install an electrical system in a plant being constructed by the defendant was not considered a statutory employee because, "[a]lthough [the defendant] has been involved with the construction of numerous facilities on the property which it owns or leases or manages, the record does not indicate that it had a construction division or that any construction work was performed by its regular employees." *Raines*, 288 S.C. at 547. Further, "[e]very manufacturer must have a plant, but this fact alone does not make the work of constructing a plant part of the trade or business of every manufacturer who engages a contractor to construct a plant." *Id.*

The facts at trial were consistent with those that supported the Court's determination that Seay is not a statutory employee of Celanese. Seay was employed by Daniel from about 1971 until about 1980. (Ex. L, Court Ex. 1, Seay Video Depo., 1/17/14, at 24:8-9; Ex. C, TT 9/30 PM, at 444:10-445:4). Seay worked at the Celanese fiber plant in Spartanburg, South Carolina, during his entire employment with Daniel. (Seay Video Depo., at 24:20-25:5).

The Celanese plant manufactured polyester fibers. (TT 10/7 PM, at 1257:19-22). Seay began as a millwright helper, and after six months he was promoted to millwright. (Ex. C, TT 9/30 PM, at 446:13; Seay Video Depo., at 25:13-23). As a millwright, Seay's primary duties were repairing and maintaining equipment such as pumps and valves. (TT 9/30 PM, at 445:5-11, 445:20-25, 446:18-447:3; Seay Video Depo., at 26:25-27:6, 28:10-18, 61:9-62:2, 63:24-64:5). He had substantial exposure to asbestos while working at Celanese. (Seay Video Depo., at 23:17-25, 27:12-28:5).

Seay testified that all of the maintenance workers at Celanese were employed by Daniel. (TT 9/30 PM, at 448:3-15, 515:6-516:2). Celanese did not have its own maintenance division or its own construction division. (Seay Video Depo., at 67:2-7). No Celanese employees ever did the type of maintenance work performed by Seay and other Daniel workers. (Seay Video Depo., at 67:8-11). The Celanese employees were all production workers who were making polyester fibers. (TT 9/30 PM, at 448:6-10; Seay Video Depo., at 67:12-15). The Daniel workers and the Celanese employees performed "significantly different" work. (Seay Video Depo., at 67:22-68:11).

Bruce Bowyer, Celanese's corporate representative, confirmed that during the years of Seay's employment with Daniel, all maintenance work at the Spartanburg facility was accomplished by Daniel employees under a maintenance services contract. (TT 10/7 PM, at 1262:21-1264:9). All Celanese employees were responsible for making polyester and related products. (TT 10/7 PM, at 1265:6-9). Celanese did not have any of its own maintenance workers. (TT 10/7 PM, at

1264:25-1265:2). Dr. Frederick Toca, who was the Director of Occupational Health and Safety for Celanese in the 1990s, has testified that Celanese was "the second largest chemical company in the world." (Ex. G, TT 10/6 AM, at 932:18-933:22). The purpose of the company was the production of fibers, chemicals, pharmaceuticals, and agrochemicals. (TT 10/6 AM, at 933:1-5).

It is undisputed that the question of statutory employment status turns on whether the work performed by the subcontractor is "part of [the owner's] trade, business, or occupation." *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 484 (2003); *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997); *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946); *Raines*, 288 S.C. at 543, 343 S.E.2d at 657. If the work was not part of the trade or business of the premises owner, then the plaintiff is not a statutory employee and may maintain a suit for damages. *Id.* A worker is only engaged in part of the owner's trade or business if the activity is: (1) an important part of the owner's business or trade, (2) a necessary, essential, and integral part of the owner's business, or (3) has previously been performed by the owner's employees. *Glass*, 325 S.C. at 201, 482 S.E.2d at 50. The Supreme Court has repeatedly held that there is no easy formula or bright-line rule for determining whether the work was part of the owner's trade or business, and that each case must be decided on its own facts. *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000); *Glass*, 325 S.C. at 201, 482 S.E.2d at 51.

The Supreme Court's approach to the question of whether work was important, necessary, or integral focuses on whether the work was *part of the business* of the owner. 526 S.E.2d at 163-64, 526 S.E.2d at 514. In *Abbott*, the Court of Appeals had found that the plaintiff, who drove a delivery truck for a common carrier, was a statutory employee of the retailer to whom he made a delivery. *See id.* at 162, 526 S.E.2d at 514. The worker was injured when he slipped and fell while unloading boxes on the retailer's premises. *See id.* The Court of Appeals reasoned that because the efficient delivery of goods was important to the business of the retailer, whose business depended on such deliveries to restock its stores, the driver was a statutory employee. *See id.* at 163, 526 S.E.2d at 514. The Supreme Court disagreed, holding that, "[t]he fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of the Retailer's business." *Id.* Simply because such deliveries were important to the conduct of the business, "that does not mean that the transportation of the goods is a *part or process* of the business." *Id.* at 164, 526 S.E.2d at 514 (quoting *Caton v. Winslow Bros. & Smith Co.*, 309 Mass. 150, 154, 34 N.E.2d 638, 641 (1941)) (emphasis added).

Under *Abbott*, it is still necessary to conduct a case-specific analysis, but the focus must be on what type of business the defendant conducts. *Olmstead*, 354 at 426, 581 S.E.2d at 486. In *Olmstead*, the defendant was in the business of designing and manufacturing fiberglass products. *See id.* at 426, 581 S.E.2d at 486. The Court focused on the nature of the business in holding that a worker involved in transporting the company's fiberglass products was not a statutory employee:

Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare's products arrive at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier Although delivery by common carrier was certainly important to Shakespeare's operation, it does not follow that such delivery was "part or process" of its manufacturing business.

Id. (emphasis added).

Cases involving construction workers illustrate most starkly that an evaluation of the nature of the defendant's business is dispositive of the statutory employer question. Where construction is a part of a company's documented business purpose, or the company has a construction division or has handled its own construction in the past, then construction contractors have been found to be statutory employees. See *MacMullen v. South Carolina Elec. & Gas Co.*, 312 F.2d 662, 663 (4th Cir. 1963); *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980); *Fortner v. Thomas M. Evans Const. and Development. LLC*, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013); *Ewing v. A.W. Chesterton Co.*, No. 09-CP-40-8342, at p. 5 (Ct. Cmn. Pleas 2010). Conversely, if the defendant is not in the business of construction, and the construction work cannot fairly be characterized as part of the defendant's business, courts will not find the construction worker to be a statutory employee. See *Glass*, 325 S.C. at 202; *Raines*, 288 S.C. at 547, 343 S.E.2d at 659. For example, in *Raines* the court noted that, "the nature of [the defendant's] business, according to its application to transact business in South Carolina, is the 'manufacturing and selling [of] batteries of all kinds and related

products.” 288 S.C. at 547, 343 S.E.2d at 659. Further, “the record does not indicate that [the defendant] had a construction division or that any construction work was performed by its regular employees.” *Id.* Therefore, the plaintiff’s construction work was not part of the defendant’s trade or business and he was not a statutory employee. *Id.*

The construction cases demonstrate that a determination that work is part of an owner’s trade or business depends heavily on the company’s stated business purpose. See *MacMullen*, 312 F.2d at 663; *Parker*, 275 S.C. at 73; *Fortner*, 402 S.C. at 431; *Raines*, 288 S.C. at 547; *Ewing*, at p. 5. Where the corporate documents, partnership agreements, state business filings, or plain language of the company name showed construction as a business activity, the business was found to be in the construction business. *MacMullen*, 312 F.2d at 663; *Parker*, 275 S.C. at 73; *Fortner*, 402 S.C. at 431; *Ewing*, at p. 5. Employees of construction contractors or subcontractors were therefore found to be statutory employees. *Parker*, 275 S.C. at 74; *Fortner*, 402 S.C. at 432; *MacMullen*, 312 F.2d at 671-72; and *Ewing* at 6. On the other hand, in *Raines* where the stated business purpose was to manufacture batteries, the court could not find that construction was part of the company’s business. *Raines*, 288 S.C. at 547.

The focus must thus be on the type of business that Celanese conducted. Celanese manufactures synthetic fibers. It is not in the maintenance business. It did not have a maintenance division and none of its employees ever conducted maintenance (until after Seay stopped working for Celanese). Generally, “where

repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." *Glass*, 325 S.C. at 202, 482 S.E.2d at 51.

Although maintenance of the equipment in the plant may have been important to Celanese's operation, it does not follow that such maintenance was a "part or process" of its synthetic fiber manufacturing business. Celanese has presented no evidence that its corporate purpose included equipment maintenance. Seay was not its statutory employee under South Carolina law.

For the record, Plaintiffs also note that Seay does not have a workers' compensation claim against Celanese for two additional reasons set forth in Plaintiffs' summary judgment briefing, which is adopted and incorporated by reference herein. First, occupational diseases are only compensable under the Workers' Compensation Act if they arise within one year of workplace exposure, or, in the case of pulmonary diseases, within two years of exposure. S.C. Code Ann. § 42-11-70. Seay did not develop malignant mesothelioma until 2013, 35 years after his last exposure to asbestos at Celanese. Second, Celanese has failed to prove that it complied with the Act's requirement that it obtain workers' compensation insurance or provide proof that it was financially able to self-insure. S.C. Code Ann. §§ 42-5-10, 42-5-20. An employer who fails to secure the payment of compensation as required by the Act loses its immunity under the Act's exclusive remedy provision and may be sued in tort. S.C. Code Ann. § 42-5-40; *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999). These additional

grounds support a determination that Seay's recourse against Celanese is in the tort system, not the workers' compensation system.

IV. Plaintiffs' evidence established that Celanese was willful, wanton, and reckless.

Here, the jury had voluminous evidence supporting its finding that Celanese's conduct was willful, wanton, or reckless. As the jury was instructed, willfulness is the conscious failure to exercise due care. (TT 10/8 at 1746:17-1750:12); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15 (Ct. App. 2000).

First, the jury had ample evidence of Celanese's actual knowledge of the danger both before and after the start of Seay's employment with Celanese in 1969. This evidence is set forth in Sections I.C.1 and I.C.2 of Plaintiffs' Response in Opposition to Celanese's Motion for New Trial. Celanese's medical director, Dr. Dixon, attended an entire conference on asbestos-related diseases in 1964. Celanese's industrial hygienist Charles Laubly had actual knowledge that asbestos could cause fatal disease when he started with Celanese in 1966. Celanese was receiving publications from the NSC and IHF throughout the 1950s and 1960s with numerous medical abstracts about mesothelioma and other asbestos-related diseases, and the evidence is that those publications were kept in Celanese's library. In 1970, Union Carbide told Celanese that mesothelioma was caused by slight exposure and the PEL was not protective. In 1971, Celanese undeniably learned through OSHA that asbestos exposure was so dangerous that exposures had to be kept to a minimum through numerous work practices to reduce dust.

Even though it had actual knowledge of the danger, Celanese specified and purchased asbestos insulation, gaskets, and packing for contractors to use on its property. It had alternatives available to asbestos gaskets but chose to use asbestos throughout Seay's tenure at Celanese. The reason was to save money over the better performing, but more expensive, Teflon gaskets. Choosing cost savings over workers' lives is the very definition of recklessness and conscious indifference.

There was also evidence that Celanese made a deliberate decision to conceal the hazards of asbestos exposures from those working on its property. Its policy was not to place any information about hazardous products in writing. This policy was continued throughout the 1970s, when Celanese decided not to give employees interpretive statements of sampling results, and to claim, as a matter of policy, that hazard information was inconclusive.

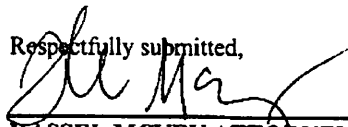
Further, the evidence further showed, as set forth in Section I.C.4 of Plaintiffs' Response in Opposition to Celanese's Motion for New Trial, that even though they required asbestos insulating materials, and knew working with those materials could cause fatal diseases, Celanese did exactly nothing to protect contract workers like Seay who worked with those asbestos materials on a daily basis. Celanese had no work practice requirements for asbestos, and never audited Daniel to see if they were implementing measures to protect their workers from the asbestos products that Celanese purchased and required for use on Celanese property. Celanese never warned, even though it was the only one with the power to post warning signs on its premises. Celanese did not invite contract workers to

safety meetings, even though some plants had implemented such a practice years before Seay went to work at Celanese. These failures continued throughout Seay's nine-year tenure at Celanese. Celanese's decision not to protect or warn Seay continued for *many years* after OSHA was the law of the land. The jury correctly concluded that Celanese's conduct rose to the level of conscious failure to exercise due care for Seay's health and safety and conscious indifference to the fatal consequences of working with asbestos products on its property.

CONCLUSION

As set forth herein and in Plaintiffs' Response in Opposition to Celanese's Motion for New Trial, the jury's verdict was firmly grounded in the evidence at trial. Celanese has presented no reason to disturb any aspect of the jury's considered verdict in this case. Its motion for judgment notwithstanding the verdict should therefore be denied.

Respectfully submitted,


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Civil Action No.
2013-CP-42-03915

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v.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT
CNA HOLDINGS, LLC'S MOTION FOR A NEW TRIAL *NISI REMITTITUR***

Plaintiffs Angie Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay, oppose the motion for a new trial *nisi remittitur* filed by Defendant CNA Holdings, LLC (“Celanese”). Celanese’s motion for new trial should be denied. Plaintiffs adopt and incorporate by reference all facts included in their response to Celanese’s motion for new trial absolute. All exhibit references are to Plaintiffs’ Master Exhibits filed in support of their responses to all three post-trial motions.

STANDARD OF REVIEW

It is well established that the jury's determination of damages must be afforded substantial deference. See *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). “[C]ompelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health & Envtl.*

Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). See also *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995); *Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (denying new trial *nisi remittitur* because circumstances cited by defendant did not constitute “compelling reasons”).

In considering a motion for new trial *nisi remittitur*, the Court must “consider the adequacy of the verdict in light of the evidence presented.” *Proctor*, 368 S.C. at 320; 628 S.E.2d at 518; *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). A court acts within its discretion in denying remittitur when the evidence provides “a factual basis for the jury’s verdict.” *Tuten v. Joel*, 410 S.C. 104, 118, 763 S.E.2d 54, 62 (Ct. App. 2014) (citing *V.E. Amick & Assocs. v. Palmetto Envtl. Grp.*, 394 S.C. 538, 551, 716 S.E.2d 295, 302 (Ct. App. 2011)).

The jury’s verdict may only be set aside if the Court finds that the award excessively compensates the injured party. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). As this Court noted in the *Garvin* case, the Court may not reduce the amount simply because it is greater than the Court would have awarded in the jury’s place, but only if “the amount is so high that it would be a denial of justice to permit it to stand.” Exhibit U, Order, *Garvin v. AGCO Corp.*, December 10, 2014, at 38 (citing *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)).

ARGUMENTS AND AUTHORITIES

Here, the jury’s verdict is not excessive. Celanese’s motion is very dismissive of the grave injuries that Seay suffered as a result of his asbestos exposure—suggesting Seay’s horrifically painful and ultimately fatal injury was in some way

like "winning a lottery ticket," but Celanese has failed to identify any compelling reason to reduce the jury's award in this case. Celanese makes almost no effort to explain how these awards are excessive. Instead, Celanese simply points to a few verdicts by other juries, hearing other evidence, that made smaller awards. There are, on the other hand, larger verdicts than this one that have been upheld, as Plaintiffs will show. The question is what the evidence in this case supported.

The goal of compensatory damages is "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). In a case like this, where the loss is many months of suffering and ultimately the loss of life of a husband and a father, quantifying the amount necessary to restore the injured parties is extremely difficult. The jury's verdict was well supported, however, and should not be reduced in this case.

I. The Award of \$2 Million in Survival Damages Is Supported by the Evidence.

"Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420-21 (Ct. App. 2000). South Carolina courts have recognized that placing a value on pain and suffering is not easy or subject to mathematical certainty. *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000). Celanese suggests that the fact that the \$2 million award in the survival action was 42 times more than the amount of the stipulated medical expenses is evidence that the jury's award was excessive.

However, in *Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (S.C. Ct. App. 2011), the court of appeals found \$450,000 in damages not excessive in a truck accident case despite the fact that the award was approximately 100 times the amount of proven medical bills and lost wages. The proper quantification of Seay's pain and suffering is not simply a multiple of his medical expenses.

Seay was diagnosed with cancer in August 2013. (Exhibit L, Seay Video Depo., at 11:24-12:8). Seay had suffered with a lot of pain in his chest and lungs for quite a while before his diagnosis. (Seay Video Depo., at 12:11-20). Seay had to have fluid drained from his lungs eleven separate times, which involved cutting his side and putting a drainage tube in. (Seay Video Depo., at 13:7-18). At the time of his deposition in January 2014, he had two broken ribs that could not be repaired because his doctors were concerned about cutting him open again. (Seay Video Depo., at 13:18-22).

In the months leading up to his mesothelioma diagnosis, Seay suffered a collapsed lung on three separate occasions. (Seay Video Depo., at 13:23-15:22). Each time required an operation to re-inflate his lung. (Seay Video Depo., at 13:23-15:22). After the first two surgeries he was told he did not have cancer. (Seay Video Depo., at 13:23-15:6).

When Seay was diagnosed with mesothelioma after the third surgery, his doctor told him that he only had 12 to 18 months to live. (Seay Video Depo., at 15:21-16:1). Seay said the news "hit me like a tractor and trailer truck had run over me or something," because after the other two operations he had been told he was cancer

free. (Seay Video Depo., at 16:2-4). He testified that, to be "hit with something like that afterwards and tell me my lifespan was that short, it was a terrific blow." (Seay Video Depo., at 16:2-10).

Seay underwent chemotherapy that made him "terribly sick." (Seay Video Depo., at 16:23-17:14). He got so sick he had to discontinue the chemotherapy treatment. (Seay Video Depo., at 17:8-14). He had a lot of serious problems with dehydration after his diagnosis. He had to go to the hospital three times a week for fluids, and was even hospitalized several times for dehydration. (Seay Video Depo., at 17:15-18:3).

After his third lung operation, Seay never really recovered physically. (Seay Video Depo., at 18:18-22). Before that, he was able to walk around some, but he testified that, "in the last couple of months, I haven't had no life other than sitting in this chair and going to the doctor and laying in the bed." (Seay Video Depo., at 18:22-19:3).

Seay testified that he "stay[ed] in pain all the time." (Seay Video Depo., at 19:4-5). He had completely lost his appetite and every time he tried to eat something he could not keep food down. (Seay Video Depo., at 19:6-17).

Seay's pain was so severe that when he tried to sleep he laid awake in pain most of the night:

Q. Sir, how has your sleeping changed as a result of your cancer?

A. Well, I go to bed at night, I'm hurting so bad, I -- I take pain medication but it don't ease it. And I lay there 'til 1:00 or 2:00 in the morning and I doze off.

And it's -- trying to lay in bed, I've got so much scar tissue from this -- these surgeries I've had. I haven't laid on this side in over a year. I can't lay on this side. And there's so much scar tissue everywhere from all that surgery, because they cut me three times and all three times they cut in the same area, and there's so much scar tissue there, can't get comfortable in the bed. You just lay there and suffer until you just get numb, and once you get numb you might doze off a little while. It's -- it's been pretty bad.

(Seay Video Depo., at 20:2-18).

Prior to his mesothelioma diagnosis, Seay led a very active life. Although he retired right before he turned 65, he came out of retirement almost immediately, worked another year, and then went to a schedule of working full-time about six months each year. (Seay Video Depo., at 20:19-21:10, 70:5-25). He became too sick to work and had to quit. (Seay Video Depo., at 21:7-10). He testified that he had planned to keep working indefinitely and that if he had not developed mesothelioma he would "be working today." (Seay Video Depo., at 71:13-24).

Seay was strong and in very good physical shape before his mesothelioma diagnosis. (Seay Video Depo., at 22:23-23:9). He used to stay active with hobbies like fishing and working in his yard every day. (Seay Video Depo., at 21:11-22:22). He took great pride in having a beautiful yard and garden. (Seay Video Depo., at 22:1-22). He testified that, "I enjoy getting out and working in the yard and -- and all of that. And I just don't have that kind of life no more. And I miss it and I wished I had it back." (Seay Video Depo., at 21:18-21).

Every year Seay and his entire family, including children and grandchildren, took trips to the mountains and to the beach. (Seay Video Depo., at 72:11-20). He could no longer take those trips after he got sick. (Seay Video Depo., at 72:18-73:12).

The whole family really missed taking those vacations together, and his grandchildren would even ask him when they were going to go on a trip to the mountains again. (Seay Video Depo., at 72:18-73:12).

Seay testified that the hardest part about having mesothelioma was knowing he was going to die soon. (Seay Video Depo., at 78:6-14.) He also said that he was in pain 24 hours a day and that because of the constant pain it had been a "terrible, terrible year." (Seay Video Depo., at 78:15-79:7). At times he was in such agony that he was hoping and praying to die, but at the same time he wanted to be healed so he could have more a little more time with his family. (Seay Video Depo., at 79:8-15).

His daughter, Angie Keene, testified that Seay was in a lot of pain when he his lung collapsed. (Exhibit F, TT 10/2, at 866:14-17). She said that she had never seen her father cry, but that when he his lung collapsed "he would be just screaming and crying." (TT 10/2, at 866:15-17). She described that when he had to go in for the third surgery, it was really terrible:

The surgery was going to be excruciating. And they – where they cut him, they broke two ribs. And he had also cut through a lot of nerves that couldn't heal. And no pain medicine could help. And he had to endure that for another month or so before it collapsed again.

(TT 10/2, at 866:22-867:2).

Kradin testified that Seay's disease was incurable. (Exhibit O, Kradin Video Depo., at 34:7-12, 37:22-23). He was treated with a number of surgeries and chemotherapy, but those measures were not taken to cure him but to try to make him more comfortable for the little time he had left:

[Seay] was treated in a fairly standard way for this disease, which is essentially incurable. So all of his treatment was, for all intents and purposes, what we call palliative, which is just meant to make him more comfortable and extend his life by a short period of time.

So he had a talc pleurodesis, as mentioned. He had chest tubes placed. He had several pneumothoraces, as I've already noted. He had the decortication procedure. He then had chemotherapy. All of these things were meant to reduce his pain, help prolong his life, but ultimately he died as would be expected from this disorder.

(Kradin Video Depo., at 34:7-19). Seay had at least eight pneumothoraces, which is a condition where air accumulates around the lung. (Kradin Video Depo., at 32:4-15). That is treated by inserting a chest tube to evacuate the air. (Kradin Video Depo., at 32:4-15). Seay had a decortication procedure that involved removing the lining of his lung. (Kradin Video Depo., at 32:18-20, 37:4-20).

Seay also had multiple thoracentesis procedures to remove fluid from the pleural space around the lungs. (Kradin Video Depo., at 38:16-39:4). Kradin explained that,

Mesotheliomas, in addition to being a space-occupying mass, tend to produce an inordinate amount of fluid as they grow, and this often requires multiple procedures to remove the fluid in order to make it more comfortable for the patient to breathe as the fluid tends to collapse the underlying lung.

So in this case, multiple thoracentesis were performed. Multiple efforts at evacuating air, which had ruptured into the pleural space had been performed, and ultimately there were efforts to close the pleural space by the talc pleurodesis.

(Kradin Video Depo., at 38:19-39:4).

Kradin testified that Seay's death from mesothelioma occurred primarily through suffocation:

Q. Okay. Can you explain to the jury how the mesothelioma tumor actually -- actually kills somebody?

- A. There are many ways in which malignant mesothelioma contributes to one's death. Again, probably the primary mode is through suffocation. So as we've mentioned, the tumor grows around the lung. It grows pretty much as a rind, very much like an orange peel around the pulp of an orange, and it becomes increasingly thickened, and as a result, the underlying lung becomes constricted, and the individual has increasing difficulties with shortness of breath and breathing.

In addition, like other forms of cancer, patients tend to lose weight. Their appetite is poor. The chemotherapies and other treatments they use for pain relief also diminish an individual's appetite. There's a wasting phenomena that occurs with cancer.

There's a phenomena of the tumor becoming -- encroaching on the large vessels of the chest, including the aorta and the vena cava, so they interfere with circulation. So all of these things contribute ultimately to the demise in patients who have this disease.

(Kradin Video Depo., at 46:2-25). The wasting phenomenon is that diminished appetite causes the body to become debilitated. (Kradin Video Depo., at 47:1-10).

Far higher awards for pain and suffering have been sustained in mesothelioma cases. For example, more than 20 years ago, a mesothelioma victim's estate was awarded \$4.5 million in pain and suffering when the decedent suffered from the disease 11 months before succumbing. *In re Joint E. & S. Dists. Asbestos Litig.*, 798 F. Supp. 925, 937-38 (E.D.N.Y. 1992), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds*, 995 F.2d 346 (2d Cir. 1993). The award could be considered the equivalent of \$409,090.91 per month of pain and suffering. *In re N.Y. Asbestos Litig.*, 847 F. Supp. 1086, 1142 (S.D.N.Y. 1994). The court denied remittitur under the New York standard, which provided that "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. CPLR § 5501(c); *In re Joint E. & S. Dist. Asbestos Litig.*, 798 F. Supp. at 937. In

1994, the court denied remittitur of an award of \$7.5 million in pain and suffering to the estate of a mesothelioma victim who suffered with the disease for 18 months before death because his suffering was "continual, severe and unrelenting." *In re New York Asbestos Litig.*, 847 F. Supp. at 1096-97. Recently, in *Bobo v. TVA*, 2015 U.S. Dist. LEXIS 130741, at *111 (N.D. Ala. Sept. 29, 2015) (Exhibit X), the judge in a bench trial awarded the plaintiff \$3 million for the decedent's physical pain and suffering when the decedent died of mesothelioma at 71 years of age. In light of the facts in this case, the award of \$2 million in actual damages for the survival claim was not unduly liberal.

As Celanese points out, in *Garvin*, this Court did remit the pain and suffering awarded to Garvin from \$10 million to \$1.5 million. But the cases are very different. Garvin was four years older at the time of trial than Seay was at his death, and Garvin's life expectancy was a number of years shorter. Garvin suffered from a testicular form of mesothelioma, while Seay suffered from pleural mesothelioma, which encased his lungs over time. At the time of trial, Garvin had been cancer free since his surgery, whereas Seay suffered unrelenting pain until his mesothelioma killed him. Order, *Garvin v. AGCO Corp.* at 38-39. The award of \$2 million for the survival action is not unduly liberal, and Celanese has shown no compelling reason for reducing the award.

II. The Award of \$5 Million in Loss of Consortium Is Supported by the Evidence.

Celanese suggests that the jury's awards of \$5 million for loss of consortium and \$5 million for wrongful death are "particularly excessive." Mo. at 2. But the

damages are reasonable in light of the particular evidence in this case—for example, the length of the Seays' marriage and the relationships between Seay and his wife and children.

Damages for loss of consortium compensate the plaintiff for the loss of a spouse's "companionship, aid, society and services." See S.C. Code Ann. § 15-75-20. "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." *Preer v. Mims*, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996) (citing S.C. Code Ann. § 15-75-20).

As this Court charged the jury, Mrs. Seay was entitled to damages for the loss of her relationship with her husband:

Now, the plaintiff Mrs. Seay also claims loss of consortium because of injuries received by her husband. The companionship for society of a spouse are, again, article -- not articles of commerce that can be weighed or measured or bought or sold. No one is competent to testify to their value. *There's no way we can determine the market price, and, again, the plaintiff is entitled to compensation and money for their loss.* Loss of consortium includes services provided by the other spouse, love, companionship, affection, society, sexual relations, comfort, solace, and guidance. *Plaintiff is entitled to recover the value of those services of her spouse which were lost, including the loss of society and companionship in her home* and for any expenses for the care and treatment to her spouse, including medical expenses reasonably incurred.

(Exhibit K, TT 10/8 AM, at 1721:22-1722:18) (emphasis added).

Linda and Dennis Seay were married for 47 years. (TT 10/2, at 884:13-20). Their daughter described them as best friends. (TT 10/2, at 875:15-17). They did not have a lot of other friends and "[t]hey were just together, just the two of them." (TT 10/2, at 875:15-17). Linda Seay confirmed that, testifying that, "[w]e were just

together all the time." (TT 10/2, at 889:18-19). They always wanted to be together. (TT 10/2, at 889:20-22). When she was eight months pregnant she went on a fishing trip with Seay, "just to be with him." (TT 10/2, at 889:16-18).

They met when they were young and Linda's parents owned a fruit market in Knoxville, Tennessee. (TT 10/2, at 885:3-887:5). Seay delivered peaches to the market and one day asked her if she wanted to ride to Hendersonville to pick up more peaches. (TT 10/2, at 885:3-887:5). They drove all the way to Spartanburg and she spent the night with a friend of his. (TT 10/2, at 885:3-887:5). The next morning, they decided to get married. (TT 10/2, at 885:3-887:5). They got married after only knowing each other for two days. (TT 10/2, at 885:3-887:5).

Seay always worked to support them. (TT 10/2, at 889:23-890:1). He also spent a lot of time tending his yard and garden, doing such a beautiful job that people would stop and ask for the name of their landscaper. (TT 10/2, at 890:13-20).

Seay's wife, Linda, took care of him when he was sick. (TT 10/2, at 869:14-870:5). He always wanted her right beside him. (TT 10/2, at 870:4-5). He wanted to maintain a dignified appearance and asked her to shave him every day. (TT 10/2, at 892:19-893:6).

Toward the end, Seay's mind started to go and he was having such trouble breathing that he was convinced his breathing tube was crimped even though it was not. (TT 10/2, at 871:17-872:11). Every night, in the middle of the night, Linda Seay would have to crawl under his bed to fix the tubes, even though they were perfectly fine. (TT 10/2, at 871:17-872:11).

Linda Seay misses her husband terribly. She testified:

I just miss talking with him. I mean, you know, we talked all the time. We had -- we would -- I mean, we were together for 48 years. We -- I didn't have friends. He didn't have friends. We were just together all the time. And I miss talking to him.

Sometimes I talk to him when I -- when -- knowing he's not even there.

(TT 10/2 at 893:16-23). She said they used to take drives into the country about every other Sunday, and that she really misses that. (TT 10/2 at 894:3-7). She said, "I just sit there at night. And it's terrible." (TT 10/2 at 894:7-8). Her whole life she always looked forward to telling Seay about anything that happened in her life, but now she thinks about wanting to do that and he's not there and "[it] is really terrible." (TT 10/2 at 894:13-25).

In *Sulton v. Healthsouth Corp.*, 400 S.C. 412, 415-16, 734 S.E.2d 641, 643 (2012), the jury had awarded \$306,693.25 in economic damages to a bystander shot in an armed robbery who developed a pressure ulcer while being treated by for his wounds. The jury awarded no non-economic damages to the gunshot victim. *Id.* The jury awarded \$4 million in loss of consortium and \$8,000,000 in punitive damages. *Id.* at 416. The trial court had denied remittitur on the entire award, including the independent loss of consortium award that was 13 times higher than the award to the gunshot victim. *Id.* On appeal, the court granted a new trial based on an improper jury charge that said the defendant healthcare provider owed a heightened duty of care. *Id.* at 418.

Other widows in mesothelioma cases have received substantial awards for loss of consortium. In *Baccus v. Atl. Richfield Co.*, 2010 Phila. Ct. Com. Pl. LEXIS 8, *30-

31 (Pa. C.P. 2010) (Exhibit V), the court denied remittitur in a mesothelioma case where the jury awarded \$1 million on the survival action, \$2.5 million on the wrongful death action, and \$3.5 million on the wife's loss of consortium claim. The decedent had survived 11 months before succumbing to his disease. *Id.* at *28. Mrs. Seay took care of her husband through a significantly longer illness. Like Mrs. Seay, the widow in *Baccus* was awarded substantially more on the wrongful death claim than the jury awarded on the survival claim. In *Schroeder v. Anchor Darling Valve Co.*, 2010 Phila. Ct. Com. Pl. LEXIS 283, *2, 16 Pa. D. & C.5th 449, 451 (Pa. C.P. 2010) (Exhibit W), the trial judge in a bench trial awarded \$2 million with respect to the survival action on behalf of a mesothelioma victim, \$3 million on the wrongful death claim, and \$5 million on the widow's claim for loss of consortium.

In *Garvin*, this Court found "no compelling reason to disturb" an award of \$1 million for loss of consortium when there was none of the evidence the jury saw here—of a wife caring for her husband as he dies, shaving him everyday and crawling under his bed to try to relieve his breathing. See Order, *Garvin v. AGCO Corp.*, at 39. The award was substantially higher in this case, and the evidence of Mrs. Seay's loss of consortium was likewise substantially greater.

Defendant seems to suggest that, because Seay and his wife were older and had been married a long time, her loss of consortium should not be as high as a younger wife's loss might be. *Mo.* at 3 (comparing Mrs. Seay to a 28-year-old widow). But this reasoning is contrary to the evidence in this case. Seay and his wife were best friends, married for 47 years. They did not have a lot of other friends and relied

almost entirely on one another. The loss of such an intensely intimate and all-encompassing relationship—the relationship Mrs. Seay had built her entire life around—represented an overwhelming loss. As Celanese points out, Mrs. Seay is not a young woman, prepared to rebuild her life. When Dennis Seay got sick, Linda Seay lost everything she had built with her husband. She lost his strength and ability to care for and protect her, and she became the caretaker. And then she lost even the chance to take care of him.

III. The Award of \$5 Million in Wrongful Death Damages Is Supported by the Evidence.

“Unlike a number of other states, South Carolina’s Wrongful Death Act has been interpreted by this Court to extend beyond pecuniary damages to beneficiaries. Mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship are recoverable in a wrongful death action.” *Garner v. Houck*, 312 S.C. 481, 487-88, 435 S.E.2d 847, 850 (1993) (citing *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972)). The Court charged the jury on the damages that could be awarded under the wrongful death claim:

Whenever someone’s death is proximately caused by the wrongful act or negligence of another, the law allows their heirs to recover, and the personal representative of the estate may bring an action for the wrongful death and has a right to recover actual damages for this wrongful death. It is not necessary to show the money value of the deceased’s life since the direct proof of the value of a human life is not possible. What is reasonable compensation is left to your sound discretion and judgment.

Our legislature has come up with a life expectancy table that may be considered by you along with the other evidence in the case that you might believe bears on Mr. Seay’s life expectancy, including his occupation, habits, and health at the time of his death, but that table

states that his life expectancy at the time of his death for a 70-year-old male was 13 years.

Now, a wrongful death action also includes damages recoverable from mental shock and suffering and wounded feelings, grief, sorrow, loss of companionship, loss of use and comfort and society of the deceased, including loss of his experience, knowledge and judgment in managing the affairs for himself and his beneficiaries. It is not necessary to show the exact amount of damages suffered by the beneficiary or the beneficiary suffered a monetary loss.

In addition, the person for whose benefit the action is brought does not have to be dependent on the deceased for support in order to recover under the wrongful death statute. The companionship and society of a spouse or parent are not articles of commerce that can be weighed or measured, bought or sold. No one is competent to testify to their value, and there are no markets for them. The amount of compensation is determined by you based on your common sense and judgment after reviewing and weighing the evidence.

Now, neither the existence, causation, or amount of damage can be left to speculation or guesswork. The plaintiff always bears the burden of proof as to damages to a reasonable degree of certainty, although she is not required to prove them to a mathematical certainty.

(TT 10/8 AM, at 1719:17-1721:21) (emphasis added).

Testimony about the losses of Seay's family came from his daughter, Angie Keene, and his widow, Linda Seay. Seay had three children—a daughter and two sons—and six grandchildren. (TT 10/2, at 859:17-19, 860:15-21). His wife and daughter described a very rich family life. Keene testified that, "Dad was absolutely amazing. He always showed us love." (TT 10/2, at 862:1-2). The family spent a lot of time together and always got along very well. (TT 10/2, at 862:7-13, 863:16-25). Every year, they took a trip to the beach together with the kids and grandkids. (TT 10/2, at 887:24-888:3). When the grandchildren would come over to Seay's house, they always

went straight to see him. (TT 10/2, at 891:16-21). His wife testified that, "he was very, very good to the grandchildren." (TT 10/2, at 891:20-21).

As adults, the children were best friends with each other and their parents. (TT 10/2, at 875:18-21). His daughter lived only 15 miles away. (TT 10/2, at 869:4-5). Seay was even close to his son-in-law, which Keene described as one of his best friends. (TT 10/2, at 863:21-22). That was a value that Seay instilled in the family: "it's something that Dad made us always know that we had one another and that we needed to put love first beyond any kind of feelings that we might would have." (TT 10/2, at 863:22-25).

Keene testified that even as adults, she and her brothers still went to their father for "every decision." (TT 10/2, at 875:10-15). He was always there for them and would help them with whatever they needed. (TT 10/2, at 890:2-12). Seay instilled his Christian faith in his family, which they all relied on in coping with his illness and death. (TT 10/2, at 862:14-24). Seay was also a role model for his children in terms of his generosity. Keene described that when Seay decided to sell his boat because he could no longer go fishing, he sold it to a young police officer for a very small price and told him that he appreciated his service. (TT 10/2, at 872:12-873:2).

All of Keene's children helped take care of him. Keene stayed with her father throughout his illness. (TT 10/2, at 864:1-9). Seay's youngest son, Justin, moved back home to help take care of Seay when he got sick. (TT 10/2, at 889:2-9). Seay's oldest son, Dennis, Jr., was also there for him. (TT 10/2, at 889:2-9).

Keene took him to Emory for his many doctor visits and treatments, which sometimes required overnight stays. (TT 10/2, at 867:24-868:21). She had to take off work to do it, but she treasured the time she got to spend with him. (TT 10/2, at 867:24-868:21).

Every night, Keene would come to see her father after she put her own family to bed. (TT 10/2, at 868:22-869:13). She would get into bed beside him and they would watch TV together. (TT 10/2, at 868:22-869:13). She would pet his hand until he went to sleep. (TT 10/2, at 868:22-869:13).

As noted above, his family saw him in extreme pain during the course of his illness. Keene testified that when his lung collapsed "he would be just screaming and crying." (TT 10/2, at 866:15-17). Keene said that he suffered "worse than I can imagine anybody suffering." (TT 10/2, at 874:21-24).

Even when Seay was very sick, he tried very hard to reassure his family, especially his grandchildren:

[H]e was always very determined to let the kids know that he was okay, even when he wasn't. And when they would come in, he would ask them to approach him. And he would always put his hand out. He always wanted to hold their hands.

And he would tell them that it's going to be okay. It's going to be all right. Papa is okay. And of course they knew differently. But he was just always extremely positive. He fought from the very beginning until the very end.

((TT 10/2, at 864:21-865:5).

If Seay had not developed mesothelioma, he would have had a life expectancy of almost 14 years. (Kradin Video Depo., at 43:14-44:19). Keene testified that the hardest part of losing her father is that she will have to live so long without seeing

him again. (TT 10/2, at 875:22-876:1). She and her daughters wear necklaces with an impression of her father's fingerprint. (TT 10/2, at 875:2-9).

A relatively recent case from New Jersey provides a helpful point of comparison. In *Buttitta v. Allied Signal, Inc.*, 2010 N.J. Super. Unpub. LEXIS 703, *2-3, 2010 WL 1427273 (App. Div. Apr. 5, 2010) (**Exhibit R**), the jury awarded in a mesothelioma case \$8,000,000 for pain and suffering, \$2,000,000 for loss of consortium, \$9,281,660 for loss of earnings, \$2,030,544 for loss of services, and \$3,000,000 for each of their three daughters for loss of parental care and guidance—or a total of \$9 million solely for loss of parental care and guidance. Remittitur was only sought, and was denied, on loss of parental care and guidance. *Id.* The case demonstrates that an award of several million dollars for multiple children is in fact quite reasonable when supported by the evidence. The *Buttitta* children were minors, and they were awarded close to twice as much as the Seay family received in this case. But the Seay family was extraordinarily close and the children went to their father for “every decision,” and the jury’s award quite reasonably reflected that.

IV. The Award of \$2 Million in Punitive Damages Is Supported by the Evidence.

Like the amount of actual damages, the amount of punitive damages “remains largely within the discretion of the finder of fact, as reviewed by the trial judge.” *Welch v. Epstein*, 342 S.C. 279, 305, 536 S.E.2d 408, 421 (Ct. App. 2000). Celanese has made no showing in support of its argument that the award of \$2 million in punitive damages is excessive. Instead, its arguments—in this motion for new trial

nisi remittitur—concern only whether there was evidence to support any award of punitive damages. The jury's punitive damages award rests on a firm foundation.

By the time Seay began working at the Celanese plant in approximately 1971, Celanese knew that working with asbestos products could cause fatal disease. Seay admits such actual knowledge as of the passage of the OSHA asbestos regulations in 1971-72. Celanese specified and supplied asbestos insulation, gaskets, and packing for use in maintaining its equipment. Yet Celanese did nothing to warn or protect contract workers like Seay who were using asbestos products at the Celanese plant.

In 1964, Dr. Irving Selikoff organized a conference of researchers studying asbestos-related diseases, including mesothelioma. (Exhibit D, TT 10/1 AM, at 602:11-23). The medical director of Celanese, Dr. Dixon, attended the 1964 Selikoff conference on asbestos-related diseases. (Exhibit N, Laubly Video Depo., at 49:20-50:2; Exhibit J, TT 10/7 PM, at 1331:16-23). Dr. Selikoff's conference was a major milestone in the development of understanding about asbestos-related diseases, and all the conference papers were published in a well-publicized book. (TT 10/1 AM, at 602:17-605:25). One of the papers published in the Selikoff conference book was by W.C. Hueper, and it stated that workers who were even only intermittently exposed to asbestos were at risk. (TT 10/1 AM, at 603:6-604:14, 607:11-609:9). He listed a number of types of asbestos products that posed a risk, including block insulation, pipe covering, gaskets, and pump packings. (TT 10/1 AM, at 609:10-25).

Bruce Bowyer testified as the corporate representative of Celanese. (TT 10/7 PM, at 1242:25-1243:3, 1279:21-1280:2). Celanese was founded in the 1930s. (TT 10/7

PM, at 1290:11-13). It was a large company, with about 2,000 employees at the Spartanburg plant alone. (TT 10/7 PM, at 1290:14-1291:1). Celanese manufactured an asbestos-containing product called Celanex at its plant in Bishop, Texas, from 1971 until about 1980. (TT 10/7 PM, at 1319:10-1320:17).

Celanese was aware of all laws and regulations that applied to its plants. (TT 10/7 PM, at 1300:3-7). It had a plant in Bishop, Texas prior to the 1970s. (TT 10/7 PM, at 1300:18-21). As of 1958, Texas had an occupational health regulation that limited asbestos exposures to 5 mppcf and distinguished asbestos from a nuisance dust. (TT 10/7 PM, at 1301:2-1302:21).

The OSHA regulations applied to Celanese. (TT 10/1 AM, at 637:6-17). Celanese was aware of the OSHA asbestos regulations. (TT 10/7 PM, at 1300:12-17). In 1971, OSHA's first act was to pass an emergency asbestos standard. (TT 10/1 AM, at 610:17-611:21). It required employers to keep asbestos exposures below an average TLV of 12 fibers/cc. (TT 10/1 AM, at 631:2-14, 632:1-633:14). That was lowered to 5 fibers/cc in 1972 and 2 fibers/cc in 1976. (TT 10/1 AM, at 633:15-634:19). In addition, short-term exposures could never exceed 10 fibers/cc. (TT 10/1 AM, at 634:20-635:20). In its regulations, OSHA stated that these exposure limits were not designed to protect against all cancer and that some cancers would still occur at these exposure levels. (TT 10/1 AM, at 636:9-637:5). The OSHA asbestos regulations also required warnings, dust measurements, medical examinations, showers, separate lockers, and other measures. (TT 10/1 AM, at 631:17-25).

As of 1951, Celanese was a member of the National Safety Council (NSC). (Laubly Video Depo., at 29:7-12; TT 10/7 PM, at 1304:5-1306:6). Celanese received NSC publications, including the National Safety News and the Transactions of the NSC. (Laubly Video Depo., at 29:7-12, 29:19-30:7; TT 10/7 PM, at 1307:15-19). The Chairman of Celanese, Harold Blancke, was an NSC member as of 1965. (TT 10/7 PM, at 1311:23-1312:17). The safety director for Celanese, Glen Flemming, was relatively active in the NSC as of 1966, and remained a member into at least the late 1970s. (Laubly Video Depo., at 29:19-30:7, 31:1-4).

In 1951, at an NSC conference where a Celanese employee was present, the NSC published an article stating that, "it is generally agreed that the most important sources of industrial disease of the lungs are free or uncombined silica and asbestos." (TT 10/7 PM, at 1306:7-14). That article was available to Celanese. (TT 10/7 PM, at 1307:12-14).

In 1957-58, the chemical section of the NSC published an article stating that industry opposes research into occupational diseases because it is "more afraid of the possibility of paying compensation benefits than it is that workers will die from lack of proper information and adequate precaution." (TT 10/7 PM, at 1307:20-1309:1). Further, the asbestos industry in particular resisted full-scale scientific study of asbestos-related lung cancer. (TT 10/7 PM, at 1309:2-14).

In 1956 or 1959, the NSC Accident Prevention Manual for Industrial Operations reported that inhalation of asbestos dust could cause disease and that prevention of the disease could be achieved through dust control. (TT 10/7 PM, at

1309:22-1311:13). Further, the NSC stated that a maximum concentration of 5 mppcf had been proposed. (TT 10/7 PM, at 1311:4-13).

Celanese was a member of the Industrial Hygiene Foundation (IHF) from 1952 to 1976. (Laubly Video Depo., at 28:11-13; TT 10/7 PM, at 1312:18-1313:15). Charles Laubly, who was employed as an industrial hygienist with Celanese from 1966 to 1979, testified that he received and read IHF publications, including the Industrial Hygiene Digest. (Laubly Video Depo., at 5:6-9, 11:12-15, 18:15-19:3; TT 10/7 PM, at 1313:16-24). As of 1949, Laubly had personal knowledge that exposure to asbestos could cause asbestosis and that asbestosis could be fatal. (Laubly Video Depo., at 22:7-5, 38:5-7). In the 1950s, he was aware that local exhaust ventilation was one method for controlling dust exposures. (Laubly Video Depo., at 26:19-25).

Laubly testified that Celanese received the Industrial Hygiene Digest. (Laubly Video Depo., at 28:11-16). He forwarded IHF publications to Celanese's corporate library. (Laubly Video Depo., at 16:17-17:3). One purpose of the library was to provide a way to keep abreast of the changing issues in industrial hygiene and safety. (Laubly Video Depo., at 33:23-34:1). Celanese employees from any plant had access to materials in the corporate library. (Laubly Video Depo., at 17:24-18:5).

The Industrial Hygiene Digest was a monthly compilation of abstracts of new medical articles. (TT 10/7 PM, at 1314:7-1315:24). In 1953, one IHF publication listed three new articles on asbestos-related disease—two on asbestosis and one on cancer. (TT 10/7 PM, at 1314:18-1316:22). In September 1955, the IHF published an abstract of the 1955 publication that established asbestos exposure causes lung cancer. (TT

10/7 PM, at 1317:6-1318:7). Medical abstracts about asbestos-related diseases, including mesothelioma, were subsequently published by the IHF in February 1956, April 1957, 1964, May 1966, August 1966, September 1966, February 1967, and March 1969. (TT 10/7 PM, at 1318:8-1319:1, 1320:20-1322:23, 1323:2-1330:8, 1332:9-1334:13). Most of those publications had multiple abstracts about asbestos-related diseases. Some of the abstracts published in 1964 and 1967 pertained to the risk of mesothelioma among insulators specifically. (TT 10/7 PM, at 1321:7-1323:1, 1329:12-1330:4).

Bowyer agreed that prior to OSHA there were "a bunch" of articles stating that asbestos can cause asbestosis, lung cancer, and mesothelioma. (TT 10/7 PM, at 1330:9-19).

In 1970, Union Carbide sent a report to Celanese informing it that mesothelioma could "occur in individuals with histories of only slight exposures." (TT 10/7 PM, at 1358:16-1361:3). Further, "[f]rom the data available, it appears that the TLV of 5 million particles per cubic foot is not low enough to protect against mesothelioma, and it is quite possible that 2 million particles per cubic foot is not either." (TT 10/7 PM, at 1360:20-1361:3).

In 1977, an internal Celanese memorandum acknowledged that research studies over the previous ten years had "raised serious questions concerning human exposure to cancer-producing agents," and that some researchers had suggested that, "there is no safe exposure to a human carcinogen." (TT 10/7 PM, at 1361:7-1363:25).

Celanese had control of the plant, the asbestos materials in it, and the capacity to provide asbestos warnings. Celanese owned the Spartanburg plant where Seay worked. (TT 10/7 PM, at 1298:4-6). Celanese owned the equipment at the plant. (TT 10/7 PM, at 1298:7-8). Celanese owned the pipe lines that went from one piece of equipment to another. (TT 10/7 PM, at 1298:9-11). Celanese owned the insulation. (TT 10/7 PM, at 1298:12-13). Celanese owned the gaskets. (TT 10/7 PM, at 1298:14-15). Celanese owned the packing. (TT 10/7 PM, at 1298:16-17). Celanese owned the walls at the plant. (TT 10/7 PM, at 1298:18-20). Celanese could have put up signs on its own walls at any time. (TT 10/7 PM, at 1298:25-1299:2). If Daniel had wanted to put a sign on the wall, it would have had to get permission from Celanese. (TT 10/7 PM, at 1298:21-24, 1405:3-6).

Celanese controlled the materials that Daniel used. The maintenance service contracts between Daniel and Celanese provided that Celanese had complete access to all the work Daniel was doing on Celanese property. (TT 10/7 PM, at 1291:2-1292:7). The contracts specified that purchase orders for materials were issues in the name of Celanese. (TT 10/7 PM, at 1293:3-6). If Celanese had pertinent safety policies in place, Daniel employees were required to follow them. (TT 10/7 PM, at 1293:21-24). Celanese, not contractors, specified what materials were to be used for the insulation and gaskets in its plants. (TT 10/7 PM, at 1347:12-1348:24, 1350:21-1351:1). Asbestos gaskets were specified for the Spartanburg plant. (TT 10/7 PM, at 1347:12-1349:21). Spartanburg also used asbestos-containing calcium silicate pipe insulation. (TT 10/7 PM, at 1351:6-18).

In 1949, Celanese tested several different gasket materials and determined that Teflon performed the best. (TT 10/7 PM, at 1339:5-1340:24). However, for costs reasons, Celanese decided to use asbestos gaskets instead. (TT 10/7 PM, at 1339:5-1344:24). Celanese was still using asbestos gaskets for high temperature applications in 1988. (TT 10/7 PM, at 1390:2-23).

Celanese claims that it discontinued the use of asbestos insulation in 1973 due to OSHA regulations. (TT 10/7 PM, at 1261:15-22). However, up until at least 1978, asbestos insulation was still present on many of the high temperature lines at Spartanburg. (TT 10/7 PM, at 1269:3-14, 1351:6-18)).

Seay's daily work assignments came from Celanese, either directly or via his Daniel supervisor who got his instructions from Celanese. (TT 9/30 PM, at 462:16-463:1, 516:10-517:1; Seay Video Depo., at 66:10-15). Bowyer acknowledged that, "Celanese decided what insulation work might need to be done [on a given] day." (TT 10/7 PM, at 1287:9-12). Celanese determined when the work is to be done, where it's to be done, and how it's to be done. (TT 10/7 PM, at 1288:17-22).

Celanese had a "pretty huge supply room" that stocked all the spare parts and materials needed for maintenance of the equipment at the plant. (TT 9/30 PM, at 452:5-453:7, 517:13-518:4). The supply room was run by Celanese, and Celanese ordered all the parts and materials that were stocked for on-site use. (TT 9/30 PM, at 452:5-11, 455:1-9). When Seay needed a spare part, he would consult the Celanese parts book to find the part number he needed, and then ask for the part by number in the supply room. (Seay Video Depo., at 55:9-56:1; Thompson Video Depo. at 118:9-

119:12). Celanese supplied the asbestos insulation used at the plant. (Thompson Video Depo., at 64:15-21, 66:8-21). Seay got asbestos sheet gaskets (and other asbestos materials) from the Celanese supply room. (Thompson Video Depo., at 57:8-22).

Celanese agrees that contract workers should be told about hazardous substances in use on its premises. (TT 10/7 PM, at 1364:3-1365:16). Yet Celanese never warned Seay about the dangers of asbestos exposure. (TT 9/30 PM, at 464:11-18; Seay Video Depo., at 64:16-23; Thompson Video Depo., at 68:18-23). In the 1970s, Celanese did not warn contractors not to use abrasive techniques to remove asbestos gaskets, or provide that non-asbestos gaskets should be used when gaskets could not be removed without the potential release of asbestos fibers. (TT 10/7 PM, at 1392:5-1393:17).

As of 1963, Celanese in fact had a policy of not putting information about hazardous products in writing due to a concern that written evidence of its knowledge of the danger could later be used in lawsuits. (Exhibit Q, Plaintiffs' Ex. 821; TT 10/7 PM, at 1395:2-1399:15, 1413:16-19). Its policy was to only communicate hazard information orally so as to avoid a paper trail. That policy was signed by the president of Celanese. (TT 10/7 PM, at 1398:8-22). Bowyer could not say whether that policy had been changed as of 1978. (TT 10/7 PM, at 1399:1-15).

There were no asbestos warning signs posted anywhere at the Celanese plant. (Exhibit C, TT 9/30 PM, at 503:21-25; Seay Video Depo., at 64:16-23). Nothing in the OSHA asbestos regulations prevented Celanese from posting warning signs in areas

where they knew asbestos materials were present. (TT 10/1 PM, at 825:17-826:6). Bowyer acknowledged that Celanese could have tested the pipe insulation to determine the areas where asbestos insulation was present, but it never did so. (TT 10/7 PM, at 1352:13-1353:15, 1357:18-1358:1). Celanese did not inform contract workers about the areas where asbestos pipe insulation was present. (TT 10/7 PM, at 1357:18-1358:1). Celanese did not require the use of respirators or masks when working around asbestos dust. (TT 9/30 PM, at 463:2-6; Thompson Video Depo., at 68:7-16).

During Seay's years of employment at the Spartanburg plant, Daniel employees did not attend the safety meetings that Celanese held for its own workers. (TT 10/7 PM, at 1346:11-20). However, as of 1962, some Celanese plants did have a practice of requiring contract workers to attend regular plant safety meetings and that suggestion was circulated in the Celanese "accident and fire prevention reference for new and existing plants and laboratories." (TT 10/7 PM, at 1345:7-1346:10).

Celanese had a shared responsibility for worker safety. (TT 10/1 PM, at 824:8-11). As of 1980, Celanese had a policy of "assert[ing] protection of the health and safety not only of its employees, but also of the employees of operations or maintenance contractors or other contractors, where appropriate, who routinely perform services at Celanese facilities." (TT 10/7 PM, at 1379:8-1381:15, 1383:7-24). As of 1980, its hazard communication policy provided that contract employees would be given the same health and safety information about products and materials at Celanese that Celanese would provide to its own employees if they were performing

the work. (TT 10/7 PM, at 1384:22-1385:25). Bowyer agreed that it was good corporate policy to work with contractors to ensure the safety of contract employees. (TT 10/7 PM, at 1382:23-1383:6, 1393:18-1394:5).

In 1991, Celanese had a contractor safety program providing that contractors could not remove insulation before finding out from Celanese whether the insulation was asbestos-free. (TT 10/7 PM, at 1400:11-1401:16). Celanese was also responsible for evaluating insulation and determining how and who would remove it. (TT 10/7 PM, at 1400:11-1401:16). Removal of asbestos insulation was required to be done according to the plant asbestos removal procedure. (TT 10/7 PM, at 1400:11-1401:16). Contractors were forbidden from removing asbestos insulation not identified and cleared for removal by Celanese. (TT 10/7 PM, at 1400:11-1401:16). Bowyer agreed that those were all good corporate policies. (TT 10/7 PM, at 1400:11-1401:16). Celanese could have put those policies in place in the 1960s and 1970s. (TT 10/7 PM, at 1402:11-15).

During the years of Seay's employment, Bowyer admitted that Celanese could have tagged lines that contained asbestos insulation and warned contractors not to touch lines and equipment in the tagged areas. (TT 10/7 PM, at 1404:2-5). Celanese could have put up signs stating that contractors should not touch insulation in tagged areas because asbestos can cause cancer, disability, and death. (TT 10/7 PM, at 1404:13-18). Celanese could have posted warning signs that gaskets may contain asbestos and that contractors should not begin work with gaskets until cleared by Celanese. (TT 10/7 PM, at 1404:19-23). Celanese could have put a sign stating that

asbestos exposure could be deadly and that wet down methods, vacuums, and respirators should be utilized. (TT 10/7 PM, at 1404:24-1405:2).

If Celanese had implemented a policy that contract workers should avoid areas with asbestos insulation at the Celanese plant, that would have helped prevent Seay's mesothelioma. (TT 10/1 PM, at 824:20-825:3). If Celanese had implemented any safety rules pertaining to areas of the plant where asbestos was present, then Daniel could have passed that policy information to Seay as it was required to do under the contracts between Daniel and Celanese. (TT 10/1 PM, at 826:21-827:7).

While no formula or standard is mandated for the assessment of punitive damages, a number of factors have been found relevant, including:

- (1) the character of the defendant's acts;
- (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause;
- (3) defendant's degree of culpability;
- (4) the punishment that should be imposed;
- (5) duration of the conduct;
- (6) defendant's awareness or concealment;
- (7) the existence of similar past conduct;
- (8) likelihood the award will deter the defendant or others from like conduct;
- (9) whether the award is reasonably related to the harm likely to result from such conduct; and
- (10) defendant's wealth or ability to pay.

Mellen v. Lane, 377 S.C. 261, 290, 659 S.E.2d 236, 251-52 (Ct. App. 2008). *See also Welch v. Epstein*, 342 S.C. 279, 307-308, 536 S.E.2d 408, 423 (Ct. App. 2000) (defendant's wealth is relevant to punitive damage award, but "evidence of net worth is not a prerequisite to a punitive damage award"). The jury was instructed to

consider these factors (TT 10/8 AM, at 1748:14-1750:12), and an examination of evidence cited above reflects that the jury did consider these factors.

Much higher punitive damage awards have been upheld in South Carolina. For example, an award of \$3,900,000 in punitive damages was found not unreasonable against an individual surgeon with a net worth of \$2,811,788, a monthly salary of \$60,000, and an estimated yearly bonus of \$534,000. *Welch v. Epstein*, 342 S.C. 279, 305, 536 S.E.2d 408, 421 (Ct. App. 2000).

And in mesothelioma cases, higher punitive damage awards are common because of the reprehensible conduct of many asbestos defendants. For example, in *Izell v. Union Carbide Corp.*, 231 Cal. App. 4th 962, 982, 180 Cal. Rptr. 3d 382, 399 (Cal. App. 2d Dist. 2014), the court upheld an \$18 million punitive damages award in conjunction with a compensatory damages award remitted to \$6 million. In *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485-89 (Fla. 1999), the court upheld a \$31 million punitive damage award in conjunction with a \$1.8 million compensatory damage award. The court affirmed the district court's decision that the punitive damage award, over 17 times the amount of compensatory damages, was justified as an exception to the statutory cap on punitive damages of three times the compensatory damages. *Id.*

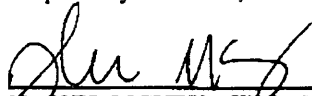
In the *Garvin* case, this Court remitted a punitive damage award of \$11 million to \$3.5 million against another asbestos defendant to "comport[] with due process." Order, *Garvin v. AGCO Corp.*, at 39. In this case, Celanese has not even suggested that the punitive damage award raises due process concerns. Indeed, it would be

laughable to suggest a constitutional problem in this punitive damage award. The punitive damage award in this case is equal to the award of damages on the survival claim and is less than 15 percent of the total award made by the jury. Certainly, this award, entered against a corporation that knew of the risk to people like Seay but nevertheless exposed him to the asbestos that would eventually, and horribly, take his life, is not excessive and should be allowed to stand.

CONCLUSION

The damage awards in this case were well supported by the evidence, and Celanese has shown no compelling reasons to reduce them. Therefore, Plaintiffs respectfully ask that the Court deny Defendant's motion for new trial *nisi remittitur*.

Respectfully submitted,



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CNA HOLDINGS, LLC
Defendant.

287, 356 S.E.2d 123, 127 (Ct. App. 1987). A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. See *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460 (1978). The trial court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. *Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 9, 466 S.E.2d 727, 731, (1996); *Swicegood*, 379 S.C. at 355, 665 S.E.2d at 215-16.

ARGUMENTS AND AUTHORITIES

I. The evidence supports the jury's negligence finding against Celanese.

The evidence that Celanese was negligent, and that its negligence caused decedent Dennis Seay's ("Seay") mesothelioma, was overwhelming. As Celanese has not pointed to any particular deficiency in the evidence, Plaintiffs address the evidence supporting the duty, breach, and causation elements of negligence. The damages element is addressed elsewhere in this response. All exhibit references are to Plaintiffs' Master Exhibits filed in support of their responses to all three post-trial motions in this case.

A. Seay was exposed to asbestos at the Celanese plant for nine years.

Seay was employed by Daniel Construction Company ("Daniel") from about 1969 until about 1978. (Ex. L, Court Ex. 1, Seay Video Depo., 1/17/14, at 24:8-9¹; Ex. C, TT 9/30 PM, at 444:10-445:4). Seay worked at the Hoechst Celanese ("Celanese") fiber plant in Spartanburg, South Carolina, during his entire employment with Daniel. (Seay Video Depo., at 24:20-25:5).

Seay began as a millwright helper, and after six months he was promoted to millwright. (TT 9/30 PM, at 446:13; Seay Video Depo., at 25:13-23). As a millwright, Seay's primary duties were making repairs and performing preventative maintenance on equipment such as condensers, pumps, and valves. (TT 9/30 PM, at 445:5-11, 445:20-25, 446:18-447:3; Seay Video Depo., at 26:25-27:6, 28:10-18, 61:9-62:2, 63:24-64:5). On average, preventive maintenance was performed on most equipment once or twice a year. (TT 9/30 PM, at 513:3-16).

Seay worked full-time, plus there was a lot of overtime when there were shutdowns. (Seay Video Depo., at 26:12-24, 27:7-11). Shutdowns involved shutting down an entire line and when that happened Seay had to work 100-hour weeks. (Seay Video Depo., at 62:3-23). During shutdowns, Seay did extra work on pumps and valves. (Seay Video Depo., at 63:4-8).

Seay's co-worker, Ronnie Thompson, also testified via videotaped deposition (Ex. M, Court Ex. 2, Thompson Video Depo., 6/27/14). Thompson worked side-by-side with Seay at Celanese from 1973 to 1975. (Thompson Video Depo., at 94:3-18,

¹ Citations to the videotaped deposition testimony played in court is to the transcript page and line numbers.

96:1-5, 113:25-114:19). They worked as millwrights together. (Thompson Video Depo., at 91:10-12, 92:22-93:1).

Seay testified that he was exposed to asbestos from his work at Celanese. (Seay Video Depo., at 23:17-25). In fact, Seay's only source of asbestos exposure was his work at Celanese. (Seay Video Depo., at 23:17-25; TT 9/30 PM, at 460:16-20).

Seay worked with and around asbestos insulation, gaskets, and packing when repairing equipment at Celanese. (Seay Video Depo., at 27:12-28:5, 35:14-37:17). Celanese does not deny that asbestos insulation, gaskets, and packing were used at its plant in the early 1970s. (Ex. J, TT 10/7 PM, at 1260:14-18). Celanese continued to use asbestos insulation until 1973. (TT 10/7 PM, at 1261:15-22).

1. Insulation

There were three main types of lines at the plant: steam lines, Dowtherm lines, and chill water lines. (TT 9/30 PM, at 509:16-21). There were "miles and miles of steam lines" at the Celanese plant. (TT 9/30 PM, at 509:22-25). All of the steam lines and Dowtherm pipelines at Celanese were insulated with asbestos insulation. (TT 9/30 PM, at 456:19-24, 459:6-10; Seay Video Depo., at 58:19-22).

Seay had to tear off "a lot" of exterior pipe insulation in order to access the pumps and valves he needed to repair. (TT 9/30 PM, at 458:11-15, 468:3-7; Thompson Video Depo., at 65:18-21, 108:21-109:6). Thompson estimated that they had to remove insulation about 50% of the time. (Thompson Video Depo., at 124:20-125:3). The pipes were insulated all the way up to the flange connection, and the insulation covered the nuts and bolts on the equipment. (TT 9/30 PM, at 458:20-

459:5). He had to tear, chisel, saw, and brush the asbestos insulation off in order to get a wrench onto the nut to loosen the flange. (TT 9/30 PM, at 458:20-459:5, 466:7-467:4, 505:1-11, 536:8-537:22). He had to tear back the insulation just to change a gasket. (TT 9/30 PM, at 458:20-459:5). It was dusty when Seay tore off asbestos pipe insulation. (TT 9/30 PM, at 469:10-17; Thompson Video Depo., at 124:14-18).

Seay also tore insulation off the boilers and attached piping at Celanese. (TT 9/30 PM, at 507:24-508:11). He also tore insulation off the degassers and reactors. (TT 9/30 PM, at 521:14-524).

Seay had to clean up his work area after he removed the insulation. (TT 9/30 PM, at 525:15-526:9).

Usually, the insulators reinstalled the insulation after he tore it off to do his maintenance work. (TT 9/30 PM, at 523:2-9). Seay saw the insulators mix asbestos cement mud in a bucket, and apply it with a trowel. (TT 9/30 PM, at 465:12-25). He also saw the insulators use an insulating cloth on the pipes that they called asbestos. (TT 9/30 PM, at 465:17-25).

Seay sometimes worked around the insulators. (TT 9/30 PM, at 456:5-14, 527:1-20; Seay Video Depo., at 58:25-60:7; Thompson Video Depo., at 65:2-15). When they were working on the same line, Seay would be within 10 feet of the insulators. (TT 9/30 PM, at 527:17-20). There was dust generated by the insulators' work. (Seay Video Depo., at 59:21-60:7). It was a daily occurrence for him to be around the dust from pipe insulation used by the insulator group. (TT 9/30 PM, at 482:23-483:22). Most of the plant had grated floors and a vacuum fan system that

drew air upwards, so if insulators were working on lower floors he would get a dose of asbestos insulation dust. (TT 9/30 PM, at 506:10-507:6; Seay Video Depo., at 60:16-61:7).

Plaintiffs' expert in occupational medicine, Dr. Edwin Holstein, testified that the asbestos insulation used by and around Seay is known to contain both chrysotile and amosite asbestos fibers. (Ex. D, TT 10/1 AM, at 606:1-19). Holstein also testified about the range of asbestos fiber release that has been measured and reported in the scientific literature for the type of work practices with asbestos insulation that are at issue in this case, including removing, cutting, and bystander exposure. (Ex. E, TT 10/1 PM, at 699:19-703:16). Holstein testified that measurements from work with asbestos insulation range from less than 1 fiber per cubic centimeter of air (fiber/cc) up to hundreds of fibers/cc. (TT 10/1 PM, at 699:19-700:8). Holstein testified that, based on Seay and Thompson's description of their work with and around asbestos insulation, Seay's range of exposure would be .1 fiber/cc to 100 fibers/cc. (TT 10/1 PM, at 701:7-14). Because the average exposure for insulators has been reported to be 6 fibers/cc, and Seay was often only a bystander to insulation work, in Holstein's opinion Seay's average exposure to asbestos insulation at Celanese was 4 fibers/cc. (TT 10/1 PM, at 702:11-703:16).

By comparison, the background level of asbestos in the ambient air is only 0.00005 fibers/cc. (TT 10/1 AM, at 642:19-643:24). In other words, for every 500,000 cubic centimeters, there would only be 5 asbestos fibers. An exposure of 1 fiber/cc is thus 20,000 times above background. (TT 10/1 AM, at 644:11-645:4). On many

occasions, Seay's asbestos exposures were far in excess of the background levels. (TT 10/1 AM, at 645:5-9).

2. Gaskets

There were gaskets on most of the equipment that Seay maintained at Celanese. (Seay Video Depo., at 28:8-23; Thompson Video Depo., at 62:24-63:1). Every time Seay and Thompson worked together, they replaced gaskets. (Thompson Video Depo., at 114:15-19).

Seay was able to tell the difference between gaskets made from asbestos and gaskets made from other materials such as Teflon, cork, metal, spiral wound metallic, copper, and asbestos. (TT 9/30 PM, at 475:21-477:6; Seay Video Depo., at 29:25-30:8). He identified asbestos gaskets by their appearance and because they were commonly referred to as asbestos gaskets. (TT 9/30 PM, at 501:24-502:16).

Thompson could similarly differentiate an asbestos gasket from other types of gaskets. (Thompson Video Depo., at 61:2-23). He testified that asbestos gaskets were used on the majority of pumps and valves at Celanese. (Thompson Video Depo., at 62:24-63:1).

Seay usually had to make flange gaskets for the valves and pumps. (TT 9/30 PM, at 475:14-20). Most of the time when making valves for a valve or pump he used a sheet gasket. (TT 9/30 PM, at 477:7-12; Seay Video Depo., at 30:17-31:3). He testified that all of the sheet gaskets he worked with were asbestos. (TT 9/30 PM, at 477:2-12).

Seay recalled four brands of asbestos gaskets, including John Crane. (TT 9/30

PM, at 493:17-22, 494:4-7, 497:20-498:2; Seay Video Depo., at 31:15-32:3). Thompson remembered that they "always used that John Crane." (Thompson Video Depo., at 120:10-13). Seay testified that he cut John Crane sheet gaskets once or twice a week throughout the entire nine years of his employment at Celanese. (TT 9/30 PM, at 495:8-12, 496:1-16). Thompson identified several specific style numbers of the John Crane sheet gaskets cut by Seay, including style no. 333 and style no. 2112. (Thompson Video Depo., at 57:18-58:3, 61:24-62:22).

When Seay was assigned to cut asbestos sheet gaskets, he would spend four to six hours cutting out a large supply because they used so many of them. (TT 9/30 PM, at 498:8-23). Either Seay or another millwright had to cut gaskets once or twice a week. (TT 9/30 PM, at 495:8-25, 496:21-25). To cut out a gasket, Seay put the sheet gasket on a piece of plywood and used a transit type razor blade with a needle point on it. (TT 9/30 PM, at 497:1-11; Thompson Video Depo., at 58:17-24). He would trace the gasket shape on the sheet and punch it out or cut it out. (TT 9/30 PM, at 497:1-14, 534:9-535:1; Seay Video Depo., at 31:4-14). Sometimes it would take 30 or 40 minutes to cut out a gasket. (TT 9/30 PM, at 497:15-19). Cutting gaskets from asbestos sheet gasket material was dusty. (Thompson Video Depo., at 59:8-60:9).

When Seay removed gaskets, he usually had to scrape and work to get the gasket off. (TT 9/30 PM, at 491:5-492:4, 532:14-533:8; Seay Video Depo., at 40:4-41:4). The gaskets usually adhered to the metal, but it was important to get the surface clean before putting in a new gasket. (Seay Video Depo., at 41:7-21). Seay explained that he had to "scrape and scrape and scrape, and then you brush and

brush to get the old gasket off." (Seay Video Depo., at 41:19-21). He had to scrape out the gaskets about 95% of the time because he was generally working on hot systems. (TT 9/30 PM, at 501:12-16). He used a putty knife, wire brushes, and drill motors, depending on how badly the gasket was stuck. (TT 9/30 PM, at 499:5-23; Seay Video Depo., at 27:12-28:5, 42:6-24, 43:14-45:19). When removing flange gaskets from steam lines or Dowtherm lines, the gasket had "literally got baked in there." (TT 9/30 PM, at 491:15-22). Seay explained that, "[i]t was a very strenuous job if it was on the steam line." (TT 9/30 PM, at 537:2-22).

It would sometimes take at least an hour or longer to remove the gasket and clean the flange. (TT 9/30 PM, at 501:17-23). There was "a whole lot of dust" created from the process of removing a gasket from a pump or valve. (TT 9/30 PM, at 534:2-6; Seay Video Depo., at 47:10-23).

Most of the gaskets that Seay removed were ones that he or other millwrights had fabricated and installed themselves. (TT 9/30 PM, at 534:7-10).

Thompson testified that every time Seay worked on the vacuum condensers, he had to remove and install a new gasket. (Thompson Video Depo., at 53:24-55:1, 56:20-57:4). The condensers had to be cleaned once every three weeks and there were 15 condensers, meaning one condenser needed to be cleaned out every day. (Thompson Video Depo., at 55:3-21, 60:10-16, 125:24-126:5). That was true for the entire time he worked at Celanese. (Thompson Video Depo., at 60:10-25, 127:20-24). Seay cleaned out a condenser about once a week. (Thompson Video Depo., at 127:2-11).

All the gaskets on the condensers were asbestos-containing. (Thompson Video Depo., at 63:4-17). The gasket on the condenser was 24 inches in diameter. (Thompson Video Depo., at 55:23-25). Thompson specifically remembered Seay cutting John Crane 333 gaskets for the condensers. (Thompson Video Depo., at 58:14-16). Seay cut John Crane 333 gaskets every time he had to replace a gasket on a condenser. (Thompson Video Depo., at 58:25-59:7). Cutting the sheet gaskets created visible dust that Seay breathed. (Thompson Video Depo., at 59:8-16). After he was cut the sheet gaskets, Seay had to clean up his work area. (Thompson Video Depo., at 59:20-60:4).

There were thousands of valves at the Celanese Spartanburg plant. (Seay Video Depo., at 53:5-10). Seay worked on valves once or twice a day, which he characterized as "pretty often." (TT 9/30 PM, at 472:17-20). On valves, there were two asbestos gaskets on the flanges and one on the valve bonnet. (Seay Video Depo., at 39:2-7, 39:11-15; TT 9/30 PM, at 489:10-16). There were about two-hundred pumps at Celanese. Seay Video Depo., at 53:11-14). He worked on pumps and gearboxes, respectively, about once every week or two on average. (TT 9/30 PM, at 471:24-472:7). There were times when he worked on the same pump or valve more than once. (Seay Video Depo., at 54:7-11).

Seay also worked in close vicinity to other Daniel millwrights when they were changing asbestos gaskets and packing on valves and pumps. (Seay Video Depo., at 53:23-54:5). It got "pretty dusty" when a lot of gasket and insulation repairs were going on at the same time. (Seay Video Depo., at 59:21-60:7).

The John Crane sheet gaskets used by Seay contained chrysotile and crocidolite asbestos. (TT 10/1 AM, at 606:20-607:10). Style 333 contained 60-80% chrysotile asbestos. (Ex. P, Plaintiffs' Ex. 1084b; TT 10/1 PM, at 709:17-710:10). John Crane style 2112 contained crocidolite asbestos. (TT 10/1 PM, at 710:11-18).

Holstein testified that, according to the industrial hygiene literature, cutting new gaskets results in asbestos exposures from .1 fiber/cc to 2 fibers/cc. (TT 10/1 PM, at 713:16-25). For reference, only 1 fiber/cc would be 20,000 times above background level. (TT 10/1 PM, at 714:1-7). Removing asbestos gaskets with the tools that Seay used, including putty knives, wire brushes, and power wire brushes, generates asbestos exposures between .1 fiber/cc and 31 fibers/cc. (TT 10/1 PM, at 714:17-716:14). The high end of the range, 31 fibers/cc, is from power wire brushing, and that would be 622,000 times above background levels. (TT 10/1 PM, at 716:15-717:5). On the lower end, a study funded by John Crane measured exposures from gasket removal at .166 fibers/cc, which is still 3,320 times above background levels. (TT 10/1 PM, at 721:15-722:18).

In Holstein's opinion, when Seay was working with asbestos gaskets his exposures would have exceeded the short-term limits set by the Occupational Safety and Health Administration (OSHA) on many, but not all, occasions that he was using a power wire brush and even occasionally when he was using a hand wire brush to remove asbestos gaskets. (TT 10/1 PM, at 718:6-16). Once the OSHA Threshold Limit Value (TLV) dropped to 2 fibers/cc in 1976, it is possible that Seay was exposed in excess of OSHA limits. (TT 10/1 PM, at 718:24-719:5).

3. Packing

Seay routinely worked with asbestos packing on valves, pumps, and degassers. (Seay Video Depo., at 33:12-34:6, 35:14-37:17). Seay used square packing and rope packing, and it all had asbestos in it. (TT 9/30 PM, at 481:2-11).

When Seay removed the packing from a valve or pump, he used a screw-type tool or a packing puller. (TT 9/30 PM, at 481:15-482:4; Seay Video Depo., at 49:17-50:8, 51:19-52:2). When he removed the old packing, it was often brittle and dried out. (TT 9/30 PM, at 480:8-20). He used compressed air to completely remove all the old packing from the valve stem. (Seay Video Depo., at 50:9-17, 51:19-52:2).

It would take Seay about an hour or an hour-and-a-half for the whole process—remove the insulation, replace the packing, and clean up his work area. Seay Depo., 11/20/13, at 79:7-80:20, 126:8-22. The removal of asbestos packing created dust. (Seay Video Depo., at 51:11-17).

B. Celanese owed a duty to Seay as an invitee.

The parties agreed that Seay was an invitee on the premises owned by Celanese. (TT 10/8, at 1710:25-1711:3). Celanese therefore owed Seay a duty of utmost care. (TT 10/8, at 1711:23-1715:23). "The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Sims v. Giles*, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001). The landowner has a duty to warn an invitee of latent or hidden dangers of which the landowner has knowledge or should have knowledge. *Id.*

Celanese's duty was an active or affirmative duty. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). "It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him." *Id.* Celanese did not have to foresee the precise manner in which the injuries were sustained, as long as there is a "reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range." *Id.* It is, therefore, a jury question whether the defendant had provided reasonably safe premises. *Id.*

C. Celanese breached its duty to Seay by creating a dangerous condition on its property and taking no action to protect or warn Seay.

By the time Seay began working at the Celanese plant in approximately 1969, Celanese knew or should have known that working with asbestos products could cause fatal disease. Seay admits such actual knowledge as of the passage of the OSHA asbestos regulations in 1971-72. Celanese specified and supplied asbestos insulation, gaskets, and packing for use in maintaining its equipment. Yet Celanese did nothing to warn or protect contract workers like Seay who were using asbestos products at the Celanese plant. This evidence would easily allow a jury to conclude that Celanese was negligent.

1. General information available to Celanese.

Holstein testified at length about the historical information available to Celanese regarding the dangers of asbestos exposure. By 1964, there were about 700 scientific and medical articles on the health effects of asbestos. (TT 10/1 AM, at

579:12-25). The first article showing that asbestos could cause fatal illness was published in 1898. (TT 10/1 AM, at 580:20-581:11). In 1930, Merewether and Price published the first epidemiological study showing an increased incidence of asbestos-related disease among textile workers in England. (TT 10/1 AM, at 582:5-21). They wrote that asbestos-related disease could be prevented or diminished by reducing exposure to asbestos dust. (TT 10/1 AM, at 582:22-583:10).

The 1930 Merewether and Price article was also significant because it outlined a number of simple methods for reducing the hazard. (TT 10/1 AM, at 583:20-586:20). First, an alternative to asbestos should be used if available. (TT 10/1 AM, at 583:20-24). Second, wet down methods should be used to reduce dust. (TT 10/1 AM, at 583:25-584:3). Third, exhaust ventilation can be used to reduce dust. (TT 10/1 AM, at 584:4-11). Fourth, separating or isolating workers using asbestos from other workers can reduce the risk to bystanders. (TT 10/1 AM, at 584:14-585:6). Fifth, providing respiratory protection to asbestos workers to filter out hazardous dust. (TT 10/1 AM, at 585:7-10). Finally, and "very importantly," Merewether and Price recommended that education of the worker was key because workers are less likely to follow precautionary measures unless they know the reason for doing so. (TT 10/1 AM, at 585:11-586:20).

Holstein testified that all of the recommendations that Merewether and Price made in 1930 still remain the essential methods for reducing the risk of asbestos-related disease today. (TT 10/1 AM, at 586:21-587:1). This article was available in medical libraries in the United States. (TT 10/1 AM, at 587:14-19).

In this and a follow-up article they also found that the hazard was not particular to the textile industry but would affect workers in any industry where workers abraded asbestos products. (TT 10/1 AM, at 583:11-19, 587:20-590:10). Gaskets were listed among the products listed as potentially hazardous if abraded. (TT 10/1 AM, at 589:14-590:10).

In 1938, an article published by the United States Public Health Service, based on a study of South Carolina textile workers, recommended that asbestos exposures be kept below a particular air concentration of 5 million particles per cubic foot (mppcf) of air. (TT 10/1 AM, at 592:23-595:23). In the next ten years, a number of states adopted that standard as the limit for occupational exposure. (TT 10/1 AM, at 595:24-596:12).

Articles about asbestos-related lung cancer were published in 1935, 1949, and 1955, and by 1955 it was definitively established that asbestos exposure could cause lung cancer. (TT 10/1 AM, at 590:14-591:3, 597:18-599:24). By 1960, with the publication of a case series by Wagner, it was established beyond any reasonable doubt that asbestos exposure could cause mesothelioma. (TT 10/1 AM, at 600:1-601:20, 610:7-11).

2. Celanese had actual knowledge of the risks of asbestos exposure.

In 1964, Dr. Irving Selikoff organized a conference of researchers studying asbestos-related diseases, including mesothelioma. (TT 10/1 AM, at 602:11-23). Dr. Selikoff's conference was a major milestone in the development of understanding about asbestos-related diseases, and all the conference papers were published in a

well-publicized book. (TT 10/1 AM, at 602:17-605:25). One of the papers published in the Selikoff conference book was by W.C. Hueper, and it stated that workers who were even only intermittently exposed to asbestos were at risk. (TT 10/1 AM, at 603:6-604:14, 607:11-609:9). He listed a number of types of asbestos products that posed a risk, including block insulation, pipe covering, gaskets, and pump packings. (TT 10/1 AM, at 609:10-25).

The medical director of Celanese, Dr. Dixon, attended the 1964 Selikoff conference on asbestos-related diseases. (Laubly Video Depo., at 49:20-50:2; TT 10/7 PM, at 1331:16-23).

Bruce Bowyer testified as the corporate representative of Celanese. (TT 10/7 PM, at 1242:25-1243:3, 1279:21-1280:2). Celanese was founded in the 1930s. (TT 10/7 PM, at 1290:11-13). It was a large company, with about 2,000 employees at the Spartanburg plant alone. (TT 10/7 PM, at 1290:14-1291:1). Celanese manufactured an asbestos-containing product called Celanex at its plant in Bishop, Texas, from 1971 until about 1980. (TT 10/7 PM, at 1319:10-1320:17).

Celanese was aware of all laws and regulations that applied to its plants. (TT 10/7 PM, at 1300:3-7). It had a plant in Bishop, Texas prior to the 1970s. (TT 10/7 PM, at 1300:18-21). As of 1958, Texas had an occupational health regulation that limited asbestos exposures to 5 mppcf and distinguished asbestos from a nuisance dust. (TT 10/7 PM, at 1301:2-1302:21).

The OSHA regulations applied to Celanese. (TT 10/1 AM, at 637:6-17). Celanese was aware of the OSHA asbestos regulations. (TT 10/7 PM, at 1300:12-17).

In 1971, OSHA's first act was to pass an emergency asbestos standard. (TT 10/1 AM, at 610:17-611:21). It required employers to keep asbestos exposures below an average TLV of 12 fibers/cc. (TT 10/1 AM, at 631:2-14, 632:1-633:14). That was lowered to 5 fibers/cc in 1972 and 2 fibers/cc in 1976. (TT 10/1 AM, at 633:15-634:19). In addition, short-term exposures could never exceed 10 fibers/cc. (TT 10/1 AM, at 634:20-635:20). In its regulations, OSHA stated that these exposure limits were not designed to protect against all cancer and that some cancers would still occur at these exposure levels. (TT 10/1 AM, at 636:9-637:5). The OSHA asbestos regulations also required warnings, dust measurements, medical examinations, showers, separate lockers, and other measures. (TT 10/1 AM, at 631:17-25).

As of 1951, Celanese was a member of the National Safety Council (NSC). (Ex. N, Court Exhibit 4, Laubly Video Depo., at 29:7-12; TT 10/7 PM, at 1304:5-1306:6). Celanese received NSC publications, including the National Safety News and the Transactions of the NSC. (Laubly Video Depo., at 29:7-12, 29:19-30:7; TT 10/7 PM, at 1307:15-19). The Chairman of Celanese, Harold Blancke, was an NSC member as of 1965. (TT 10/7 PM, at 1311:23-1312:17). The safety director for Celanese, Glen Flemming, was relatively active in the NSC as of 1966, and remained a member into at least the late 1970s. (Laubly Video Depo., at 29:19-30:7, 31:1-4).

In 1951, at an NSC conference where a Celanese employee was present, the NSC published an article stating that, "it is generally agreed that the most important sources of industrial disease of the lungs are free or uncombined silica

and asbestos." (TT 10/7 PM, at 1306:7-14). That article was available to Celanese. (TT 10/7 PM, at 1307:12-14).

In 1957-58, the chemical section of the NSC published an article stating that industry opposes research into occupational diseases because it is "more afraid of the possibility of paying compensation benefits than it is that workers will die from lack of proper information and adequate precaution." (TT 10/7 PM, at 1307:20-1309:1). Further, the asbestos industry in particular resisted full-scale scientific study of asbestos-related lung cancer. (TT 10/7 PM, at 1309:2-14).

In 1956 or 1959, the NSC Accident Prevention Manual for Industrial Operations reported that inhalation of asbestos dust could cause disease and that prevention of the disease could be achieved through dust control. (TT 10/7 PM, at 1309:22-1311:13). Further, the NSC stated that a maximum concentration of 5 mppcf had been proposed. (TT 10/7 PM, at 1311:4-13).

Celanese was a member of the Industrial Hygiene Foundation (IHF) from 1952 to 1976. (Laubly Video Depo., at 28:11-13; TT 10/7 PM, at 1312:18-1313:15). Charles Laubly, who was employed as an industrial hygienist with Celanese from 1966 to 1979, testified that he received and read IHF publications, including the Industrial Hygiene Digest. (Laubly Video Depo., at 5:6-9, 11:12-15, 18:15-19:3; TT 10/7 PM, at 1313:16-24). As of 1949, Laubly had personal knowledge that exposure to asbestos could cause asbestosis and that asbestosis could be fatal. (Laubly Video Depo., at 22:7-5, 38:5-7). In the 1950s, he was aware that local exhaust ventilation was one method for controlling dust exposures. (Laubly Video Depo., at 26:19-25).

By the time Laubly arrived at Celanese in 1966, he knew that asbestos could cause asbestosis. (Laubly Video Depo., at 106:11-13).

Laubly testified that Celanese received the Industrial Hygiene Digest. (Laubly Video Depo., at 28:11-16). He forwarded IHF publications to Celanese's corporate library. (Laubly Video Depo., at 16:17-17:3). One purpose of the library was to provide a way to keep abreast of the changing issues in industrial hygiene and safety. (Laubly Video Depo., at 33:23-34:1). Celanese employees from any plant had access to materials in the corporate library. (Laubly Video Depo., at 17:24-18:5).

The Industrial Hygiene Digest was a monthly compilation of abstracts of new medical articles. (TT 10/7 PM, at 1314:7-1315:24). In 1953, one IHF publication listed three new articles on asbestos-related disease—two on asbestosis and one on cancer. (TT 10/7 PM, at 1314:18-1316:22). In September 1955, the IHF published an abstract of the 1955 publication that established asbestos exposure causes lung cancer. (TT 10/7 PM, at 1317:6-1318:7). Medical abstracts about asbestos-related diseases, including mesothelioma, were subsequently published by the IHF in February 1956, April 1957, 1964, May 1966, August 1966, September 1966, February 1967, and March 1969. (TT 10/7 PM, at 1318:8-1319:1, 1320:20-1322:23, 1323:2-1330:8, 1332:9-1334:13). Most of those publications had multiple abstracts about asbestos-related diseases. Some of the abstracts published in 1964 and 1967 pertained to the risk of mesothelioma among insulators specifically. (TT 10/7 PM, at 1321:7-1323:1, 1329:12-1330:4).

Bowyer agreed that prior to OSHA there were "a bunch" of articles stating that asbestos can cause asbestosis, lung cancer, and mesothelioma. (TT 10/7 PM, at 1330:9-19).

In 1970, Union Carbide sent a report to Celanese informing it that mesothelioma could "occur in individuals with histories of only slight exposures." (TT 10/7 PM, at 1358:16-1361:3). Further, "[f]rom the data available, it appears that the TLV of 5 million particles per cubic foot is not low enough to protect against mesothelioma, and it is quite possible that 2 million particles per cubic foot is not either." (TT 10/7 PM, at 1360:20-1361:3).

In 1977, an internal Celanese memorandum acknowledged that research studies over the previous ten years had "raised serious questions concerning human exposure to cancer-producing agents," and that some researchers had suggested that, "there is no safe exposure to a human carcinogen." (TT 10/7 PM, at 1361:7-1363:25).

3. Asbestos was not considered a nuisance dust even in the 1960s.

Bowyer claimed that, prior to the OSHA asbestos regulations, asbestos was considered a nuisance dust. (TT 10/7 PM, at 1299:6-12). The evidence completely refuted this assertion. Dr. Holstein testified that asbestos was not considered a nuisance dust prior to OSHA. (TT 10/1 AM, at 611:22-612:10). Publications from the American Conference of Governmental Industrial Hygienists (ACGIH) in 1946 and 1966 did not categorize asbestos as a nuisance dust, and set TLVs for asbestos that

were ten times lower than that allowed for nuisance dusts. (TT 10/1 AM, at 612:11-22, 614:5-617:14).

4. Celanese provided asbestos products to Seay and other workers but did not warn or protect them from the hazards.

Celanese owned the Spartanburg plant where Seay worked. (TT 10/7 PM, at 1298:4-6). Celanese owned the equipment at the plant. (TT 10/7 PM, at 1298:7-8). Celanese owned the pipe lines that went from one piece of equipment to another. (TT 10/7 PM, at 1298:9-11). Celanese owned the insulation. (TT 10/7 PM, at 1298:12-13). Celanese owned the gaskets. (TT 10/7 PM, at 1298:14-15). Celanese owned the packing. (TT 10/7 PM, at 1298:16-17).

Celanese owned the walls at the plant. (TT 10/7 PM, at 1298:18-20). Celanese could have put up signs on its own walls at any time. (TT 10/7 PM, at 1298:25-1299:2). If Daniel had wanted to put a sign on the wall, it would have had to get permission from Celanese. (TT 10/7 PM, at 1298:21-24, 1405:3-6).

The maintenance service contracts between Daniel and Celanese provided that Celanese had complete access to all the work Daniel was doing on Celanese property. (TT 10/7 PM, at 1291:2-1292:7). The contracts specified that purchase orders for materials were issues in the name of Celanese. (TT 10/7 PM, at 1293:3-6). If Celanese had pertinent safety policies in place, Daniel employees were required to follow them. (TT 10/7 PM, at 1293:21-24).

Celanese, not contractors, specified what materials were to be used for the insulation and gaskets in its plants. (TT 10/7 PM, at 1347:12-1348:24, 1350:21-1351:1). The witness for Daniel, Don Buck, testified that even though Daniel built

the Celanese plant, Celanese designed the plant and specified all the equipment and materials that went into the plant. (TT 10/8, at 1526:14-24). Daniel was obliged to follow Celanese's plant design specifications. (TT 10/8, at 1526:22-25).

Asbestos gaskets were specified for the Spartanburg plant. (TT 10/7 PM, at 1347:12-1349:21). Spartanburg also used asbestos-containing calcium silicate pipe insulation. (TT 10/7 PM, at 1351:6-18).

In 1949, Celanese tested several different gasket materials and determined that Teflon performed the best. (TT 10/7 PM, at 1339:5-1340:24). However, for costs reasons, Celanese decided to use asbestos gaskets instead. (TT 10/7 PM, at 1339:5-1344:24). Celanese was still using asbestos gaskets for high temperature applications in 1988. (TT 10/7 PM, at 1390:2-23).

Celanese claims that it discontinued the use of asbestos insulation in 1973 due to OSHA regulations. (TT 10/7 PM, at 1261:15-22). However, up until at least 1978, asbestos insulation was still present on many of the high temperature lines at Spartanburg. (TT 10/7 PM, at 1269:3-14, 1351:6-18)).

Seay's daily work assignments came from Celanese, either directly or via his Daniel supervisor who got his instructions from Celanese. (TT 9/30 PM, at 462:16-463:1, 516:10-517:1; Seay Video Depo., at 66:10-15). Bowyer acknowledged that, "Celanese decided what insulation work might need to be done [on a given] day." (TT 10/7 PM, at 1287:9-12). Celanese determined when the work is to be done, where it's to be done, and how it's to be done. (TT 10/7 PM, at 1288:17-22).

Celanese had a "pretty huge supply room" that stocked all the spare parts and materials needed for maintenance of the equipment at the plant. (TT 9/30 PM, at 452:5-453:7, 517:13-518:4). The supply room was run by Celanese and Celanese ordered all the parts and materials that were stocked for on-site use. (TT 9/30 PM, at 452:5-11, 455:1-9). When Seay needed a spare part, he would consult the Celanese parts book to find the part number he needed, and then ask for the part by number in the supply room. (Seay Video Depo., at 55:9-56:1; Thompson Video Depo. at 118:9-119:12). Celanese supplied the asbestos insulation used at the plant. (Thompson Video Depo., at 64:15-21, 66:8-21). Seay got asbestos sheet gaskets (and other asbestos materials) from the Celanese supply room. (Thompson Video Depo., at 57:8-22).

Celanese agrees that contract workers should be told about hazardous substances in use on its premises. (TT 10/7 PM, at 1364:3-1365:16). Yet Celanese never warned Seay about the dangers of asbestos exposure. (TT 9/30 PM, at 464:11-18; Seay Video Depo., at 64:16-23; Thompson Video Depo., at 68:18-23). In the 1970s, Celanese did not warn contractors not to use abrasive techniques to remove asbestos gaskets, or provide that non-asbestos gaskets should be used when gaskets could not be removed without the potential release of asbestos fibers. (TT 10/7 PM, at 1392:5-1393:17).

As of 1963, Celanese in fact had a policy of not putting information about hazardous products in writing due to a concern that written evidence of its knowledge of the danger could later be used in lawsuits. (Ex. Q, Plaintiffs' Ex. 821;

TT 10/7 PM, at 1395:2-1399:15, 1413:16-19). Its policy was to only communicate hazard information orally so as to avoid a paper trail. That policy was signed by the president of Celanese. (TT 10/7 PM, at 1398:8-22). Bowyer could not say whether that policy had been changed as of 1978. (TT 10/7 PM, at 1399:1-15). It is doubtful given that in the 1970s Celanese had an official policy that it would not give workers written interpretive statements of asbestos sampling results. (TT 10/7 PM, at 1370:20-1373:8). Further, if an employee requested hazard information on a particular product, the plant supervisor was instructed to state that the data was inconclusive, no matter what the product was. (TT 10/7 PM, at 1373:10-1375:2).

There were no asbestos warning signs posted anywhere at the Celanese plant. (TT 9/30 PM, at 503:21-25; Seay Video Depo., at 64:16-23). Nothing in the OSHA asbestos regulations prevented Celanese from posting warning signs in areas where they knew asbestos materials were present. (TT 10/1 PM, at 825:17-826:6). Bowyer acknowledged that Celanese could have tested the pipe insulation to determine the areas where asbestos insulation was present, but it never did so. (TT 10/7 PM, at 1352:13-1353:15, 1357:18-1358:1). Celanese did not inform contract workers about the areas where asbestos pipe insulation was present. (TT 10/7 PM, at 1357:18-1358:1). Celanese did not require the use of respirators or masks when working around asbestos dust. (TT 9/30 PM, at 463:2-6; Thompson Video Depo., at 68:7-16).

During Seay's years of employment at the Spartanburg plant, Daniel employees did not attend the safety meetings that Celanese held for its own

workers. (TT 10/7 PM, at 1346:11-20). However, as of 1962, some Celanese plants did have a practice of requiring contract workers to attend regular plant safety meetings and that suggestion was circulated in the Celanese "accident and fire prevention reference for new and existing plants and laboratories." (TT 10/7 PM, at 1345:7-1346:10).

Celanese had a shared responsibility for worker safety. (TT 10/1 PM, at 824:8-11). Celanese had a contractual obligation to audit Daniel's safety and health program at the Spartanburg plant. (TT 10/8 at 1532:11-21). There is no evidence that Celanese ever performed those safety audits of Daniel at Spartanburg in the 1970s. (TT 10/8 at 1532:11-21).

As of 1980, Celanese had a policy of "assert[ing] protection of the health and safety not only of its employees, but also of the employees of operations or maintenance contractors or other contractors, where appropriate, who routinely perform services at Celanese facilities." (TT 10/7 PM, at 1379:8-1381:15, 1383:7-24). As of 1980, its hazard communication policy provided that contract employees would be given the same health and safety information about products and materials at Celanese that Celanese would provide to its own employees if they were performing the work. (TT 10/7 PM, at 1384:22-1385:25). Bowyer agreed that it was good corporate policy to work with contractors to ensure the safety of contract employees. (TT 10/7 PM, at 1382:23-1383:6, 1393:18-1394:5).

Charles Laubly, an industrial hygienist at Celanese in the 1960s and 1970s, had no knowledge of any measures being taken by Celanese to prevent maintenance

employees from being exposed to asbestos. (Laubly Video Depo., at 84:4-17). Daniel's representative, Don Buck, testified that he is not aware of any evidence that Celanese ever tagged asbestos insulation at the Spartanburg plant during the 1970s. (Ex. K, TT 10/8 at 1533:12-17). Daniel would have welcomed such information about when they needed to take precautions. (TT 10/8 at 1533:12-1534:2).

In 1991, Celanese had a contractor safety program providing that contractors could not remove insulation before finding out from Celanese whether the insulation was asbestos-free. (TT 10/7 PM, at 1400:11-1401:16). Celanese was also responsible for evaluating insulation and determining how and who would remove it. (TT 10/7 PM, at 1400:11-1401:16). Removal of asbestos insulation was required to be done according to the plant asbestos removal procedure. (TT 10/7 PM, at 1400:11-1401:16). Contractors were forbidden from removing asbestos insulation not identified and cleared for removal by Celanese. (TT 10/7 PM, at 1400:11-1401:16). Bowyer agreed that those were all good corporate policies. (TT 10/7 PM, at 1400:11-1401:16). Celanese could have put those policies in place in the 1960s and 1970s. (TT 10/7 PM, at 1402:11-15).

During the years of Seay's employment, Bowyer admitted that Celanese could have tagged lines that contained asbestos insulation and warned contractors not to touch lines and equipment in the tagged areas. (TT 10/7 PM, at 1404:2-5). Celanese could have put up signs stating that contractors should not touch insulation in tagged areas because asbestos can cause cancer, disability, and death.

(TT 10/7 PM, at 1404:13-18). Celanese could have posted warning signs that gaskets may contain asbestos and that contractors should not begin work with gaskets until cleared by Celanese. (TT 10/7 PM, at 1404:19-23). Celanese could have put a sign stating that asbestos exposure could be deadly and that wet down methods, vacuums, and respirators should be utilized. (TT 10/7 PM, at 1404:24-1405:2).

If Celanese had implemented a policy that contract workers should avoid areas with asbestos insulation at the Celanese plant, that would have helped prevent Seay's mesothelioma. (TT 10/1 PM, at 824:20-825:3). If Celanese had implemented any safety rules pertaining to areas of the plant where asbestos was present, then Daniel could have passed that policy information to Seay as it was required to do under the contracts between Daniel and Celanese. (TT 10/1 PM, at 826:21-827:7).

D. Seay's mesothelioma was caused by his exposure to asbestos at Celanese.

There is no dispute that Seay had mesothelioma. (Ex. O, Court Exhibit 5, Kradin Video Depo., at 32:24-34:1; Ex. I, TT 10/7 AM, at 1183:12-21, 1188:9-23). There was no dispute that Seay's mesothelioma was caused by asbestos exposure. (TT 10/7 AM, at 1184:1-24, 1188:9-23). The evidence was that Seay died of malignant pleural mesothelioma caused by asbestos exposure. (TT 10/1 AM, at 566:17-567:17; Kradin Video Depo., at 15:14-24, 44:20-25, 48:1-9). Seay died in December 2014, at the age of 70. (Kradin Video Depo., at 32:21-22, 42:1-3).

Dr. Richard Kradin, Plaintiffs' medical expert who is a practicing pulmonologist and pathologist, testified that Seay had a history of substantial

exposures to asbestos insulation, gaskets, and packing at Celanese and that these exposures were substantial factors in causing his mesothelioma. (Kradin Video Depo., at 7:14-8:2, 13:7-9, 16:3-17:1, 20:3-21, 26:18-27:8, 31:11-25).

Holstein similarly offered the opinion that, "his mesothelioma was caused by the action of the exposures to asbestos that he had, which were pretty much limited to the period of time when he was working at Hoescht Celanese." (TT 10/1 AM, at 567:14-17). Specifically, Seay's work around insulation was a substantial factor in the development of his mesothelioma. (TT 10/1 AM, at 647:14-20). His work with gaskets was a substantial factor in causing his mesothelioma. (TT 10/1 AM, at 647:21-23).

Celanese offered no testimony to contradict the opinions of Plaintiffs' experts. Even defense expert Dr. Victor Roggli is of the opinion that Seay's exposure to asbestos insulation was a substantial factor in causing his mesothelioma. (TT 10/7 AM, at 1188:24-1189:7). Defense expert Dr. James Crapo similarly testified that Seay had an asbestos-caused mesothelioma and that his exposure to insulating products at Celanese created his risk for mesothelioma. (Ex. T, Crapo Video Depo., at 142:22-143:7).

II. The evidence supports the jury's damages award for Plaintiffs' survival action.

A new trial absolute should only be granted if the "verdict is so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was motivated by passion, caprice, prejudice, or some other improper consideration" *Freeman v. A. & M. Mobile Home Sales*, 293 S.C.

255, 259, 359 S.E.2d 532, 535 (Ct. App. 1987). "In other words, to warrant a new trial absolute, the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E. 2d 758, 761 (Ct. App. 2000) (quoting *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993)). The verdict must be "so shocking as to manifestly show the jury was moved by considerations not founded on the evidence and/or the instructions of the trial judge." *Krepps by Krepps v. Ausen*, 324 S.C 597, 608, 479 S.E.2d 290, 295 (Ct. App. 1996). Relatively brief jury deliberations are not an indication that the verdict was the result of an improper influence. See *Becker*, 339 S.C. at 636, 529 S.E.2d at 762.

When a verdict falls within the range of evidence, it should not be disturbed on the ground of excessiveness. *Wright v. Craft*, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006). Rather, a jury award can only justify a new trial absolute if it is "flagrantly outrageous and extravagant," *Freeman*, 293 S.C. at 259, 359 S.E.2d at 535 (quoting *Beasley v. Ford Motor Co.*, 237 S.C. 506, 512, 117 S.E.2d 863, 866 (1961)), or "shocks the conscience of the court." *Smalls*, 339 S.C. at 217, 528 S.E.2d at 687.

It is well-established that the jury's determination of damages must be afforded substantial deference. See *Rush*, 310 S.C. at 379, 426 S.E.2d at 805; *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); *Krepps*, 324 S.C. at 607, 479 S.E.2d at 295. South Carolina courts have recognized that placing a value

on pain and suffering is not easy or subject to mathematical certainty. *Smalls*, 339 S.C. at 218, 528 S.E.2d at 687.

The jury's survival damages award of \$2 million is supported by the evidence of substantial injuries suffered by Seay. Seay was diagnosed with cancer in August 2013. (Seay Video Depo., at 11:24-12:8). Seay had suffered with a lot of pain in his chest and lungs for quite a while before his diagnosis. (Seay Video Depo., at 12:11-20). Seay had to have fluid drained from his lungs eleven separate times, which involved cutting his side and putting a drainage tube in. (Seay Video Depo., at 13:7-18). At the time of his deposition in January 2014 he had two broken ribs that could not be repaired because his doctors were concerned about cutting him open again. (Seay Video Depo., at 13:18-22).

In the months leading up to his mesothelioma diagnosis, Seay suffered a collapsed lung on three separate occasions. (Seay Video Depo., at 13:23-15:22). Each time required an operation to re-inflate his lung. (Seay Video Depo., at 13:23-15:22). After the first two surgeries he was told he did not have cancer. (Seay Video Depo., at 13:23-15:6).

When Seay was diagnosed with mesothelioma after the third surgery, his doctor told him that he only had 12 to 18 months to live. (Seay Video Depo., at 15:21-16:1). Seay said the news "hit me like a tractor and trailer truck had run over me or something," because after the other two operations he had been told he was cancer free. (Seay Video Depo., at 16:2-4). He testified that, to be "hit with

something like that afterwards and tell me my lifespan was that short, it was a terrific blow." (Seay Video Depo., at 16:2-10).

Seay underwent chemotherapy that made him "terribly sick." (Seay Video Depo., at 16:23-17:14). He got so sick he had to discontinue the chemotherapy treatment. (Seay Video Depo., at 17:8-14). He had a lot of serious problems with dehydration after his diagnosis. He had to go to the hospital three times a week for fluids, and was even hospitalized several times for dehydration. (Seay Video Depo., at 17:15-18:3).

After his third lung operation, Seay never really recovered physically. (Seay Video Depo., at 18:18-22). Before that, he was able to walk around some, but he testified that, "in the last couple of months, I haven't had no life other than sitting in this chair and going to the doctor and laying in the bed." (Seay Video Depo., at 18:22-19:3).

Seay testified that he "stay[ed] in pain all the time." (Seay Video Depo., at 19:4-5). He had completely lost his appetite and every time he tried to eat something he could not keep food down. (Seay Video Depo., at 19:6-17).

Seay's pain was so severe that when he tried to sleep he laid awake in pain most of the night:

Q. Sir, how has your sleeping changed as a result of your cancer?

A. Well, I go to bed at night, I'm hurting so bad, I -- I take pain medication but it don't ease it. And I lay there 'til 1:00 or 2:00 in the morning and I doze off.

And it's -- trying to lay in bed, I've got so much scar tissue from this -- these surgeries I've had. I haven't laid on this side in over a year. I can't lay on this side. And there's so much scar

tissue everywhere from all that surgery, because they cut me three times and all three times they cut in the same area, and there's so much scar tissue there, can't get comfortable in the bed. You just lay there and suffer until you just get numb, and once you get numb you might doze off a little while. It's -- it's been pretty bad.

(Seay Video Depo., at 20:2-18).

Prior to his mesothelioma diagnosis, Seay led a very active life. Although he retired right before he turned 65, he came out of retirement almost immediately, worked another year, and then went to a schedule of working full-time about six months each year. (Seay Video Depo., at 20:19-21:10, 70:5-25). He became too sick to work and had to quit. (Seay Video Depo., at 21:7-10). He testified that he had planned to keep working indefinitely and that if he had not developed mesothelioma he would "be working today." (Seay Video Depo., at 71:13-24).

Seay was strong and in very good physical shape before his mesothelioma diagnosis. (Seay Video Depo., at 22:23-23:9). He used to stay active with hobbies like fishing and working in his yard every day. (Seay Video Depo., at 21:11-22:22). He took great pride in having a beautiful yard and garden. (Seay Video Depo., at 22:1-22). He testified that, "I enjoy getting out and working in the yard and -- and all of that. And I just don't have that kind of life no more. And I miss it and I wished I had it back." (Seay Video Depo., at 21:18-21).

Every year Seay and his entire family, including children and grandchildren, took trips to the mountains and to the beach. (Seay Video Depo., at 72:11-20). He could no longer take those trips after he got sick. (Seay Video Depo., at 72:18-73:12). The whole family really missed taking those vacations together, and his

grandchildren would even ask him when they were going to go on a trip to the mountains again. (Seay Video Depo., at 72:18-73:12).

Seay testified that the hardest part about having mesothelioma was knowing he was going to die soon. (Seay Video Depo., at 78:6-14.) He also said that he was in pain 24 hours a day and that because of the constant pain it had been a "terrible, terrible year." (Seay Video Depo., at 78:15-79:7). At times he was in such agony that he was hoping and praying to die, but at the same time he wanted to be healed so he could have more a little more time with his family. (Seay Video Depo., at 79:8-15).

His daughter, Angie Keene, testified that Seay was in a lot of pain when he his lung collapsed. (Ex. F, TT 10/2, at 866:14-17). She said that she had never seen her father cry, but that when he his lung collapsed "he would be just screaming and crying." (TT 10/2, at 866:15-17). She described that when he had to go in for the third surgery, it was really terrible:

The surgery was going to be excruciating. And they – where they cut him, they broke two ribs. And he had also cut through a lot of nerves that couldn't heal. And no pain medicine could help. And he had to endure that for another month or so before it collapsed again.

(TT 10/2, at 866:22-867:2).

Kradin testified that Seay's disease was incurable. (Kradin Video Depo., at 34:7-12, 37:22-23). He was treated with a number of surgeries and chemotherapy, but those measures were not taken to cure him but to try to make him more comfortable for the little time he had left:

[Seay] was treated in a fairly standard way for this disease, which is essentially incurable. So all of his treatment was, for all intents and purposes, what we call palliative, which is just meant to make him more comfortable and extend his life by a short period of time.

So he had a talc pleurodesis, as mentioned. He had chest tubes placed. He had several pneumothoraces, as I've already noted. He had the decortication procedure. He then had chemotherapy. All of these things were meant to reduce his pain, help prolong his life, but ultimately he died as would be expected from this disorder.

(Kradin Video Depo., at 34:7-19). Seay had at least 8 pneumothoraces, which is a condition where air accumulates around the lung. (Kradin Video Depo., at 32:4-15). That is treated by inserting a chest tube to evacuate the air. (Kradin Video Depo., at 32:4-15). Seay had a decortication procedure that involved removing the lining of his lung. (Kradin Video Depo., at 32:18-20, 37:4-20).

Seay also had multiple thoracentesis procedures to remove fluid from the pleural space around the lungs. (Kradin Video Depo., at 38:16-39:4). Kradin explained that,

Mesotheliomas, in addition to being a space-occupying mass, tend to produce an inordinate amount of fluid as they grow, and this often requires multiple procedures to remove the fluid in order to make it more comfortable for the patient to breathe as the fluid tends to collapse the underlying lung.

So in this case, multiple thoracentesis were performed. Multiple efforts at evacuating air, which had ruptured into the pleural space had been performed, and ultimately there were efforts to close the pleural space by the talc pleurodesis.

(Kradin Video Depo., at 38:19-39:4).

Kradin testified that Seay's death from mesothelioma occurred primarily through suffocation:

Q. Okay. Can you explain to the jury how the mesothelioma tumor actually -- actually kills somebody?

A. There are many ways in which malignant mesothelioma contributes to one's death. Again, probably the primary mode is through suffocation. So as we've mentioned, the tumor grows around the lung. It grows pretty much as a rind, very much like an orange peel around the pulp of an orange, and it becomes increasingly thickened, and as a result, the underlying lung becomes constricted, and the individual has increasing difficulties with shortness of breath and breathing.

In addition, like other forms of cancer, patients tend to lose weight. Their appetite is poor. The chemotherapies and other treatments they use for pain relief also diminish an individual's appetite. There's a wasting phenomena that occurs with cancer.

There's a phenomena of the tumor becoming -- encroaching on the large vessels of the chest, including the aorta and the vena cava, so they interfere with circulation. So all of these things contribute ultimately to the demise in patients who have this disease.

(Kradin Video Depo., at 46:2-25). The wasting phenomenon is that diminished appetite causes the body to become debilitated. (Kradin Video Depo., at 47:1-10).

Damages in a survival action include recovery for the deceased's conscious pain and suffering and medical expenses. *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000). The parties stipulated that Seay's medical bills were \$280,457.91. (TT 10/2 AM, at 854:10-13).

The evidence of Seay's continuous, intense pain for more than a year prior to his death certainly supports the jury's award for survival damages in this case. The evidence clearly showed that Seay underwent great physical agony, as well as extreme emotional and mental distress. He had to live with the knowledge that his disease was fatal and incurable, and suffer progressive physical disablement that

prevented him from doing the things he loved. The evidence was more than sufficient to support the jury's \$2 million award for survival damages.

III. The evidence supports the jury's damages award for Plaintiffs' wrongful death action.

"Unlike a number of other states, South Carolina's Wrongful Death Act has been interpreted by this Court to extend beyond pecuniary damages to beneficiaries. Mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship are recoverable in a wrongful death action." *Garner v. Houck*, 312 S.C. 481, 487-88, 435 S.E.2d 847, 850 (1993) (citing *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972)). The Court charged the jury on the damages that could be awarded under the wrongful death claim:

Whenever someone's death is proximately caused by the wrongful act or negligence of another, the law allows their heirs to recover, and the personal representative of the estate may bring an action for the wrongful death and has a right to recover actual damages for this wrongful death. It is not necessary to show the money value of the deceased's life since the direct proof of the value of a human life is not possible. What is reasonable compensation is left to your sound discretion and judgment.

Our legislature has come up with a life expectancy table that may be considered by you along with the other evidence in the case that you might believe bears on Mr. Seay's life expectancy, including his occupation, habits, and health at the time of his death, but that table states that his life expectancy at the time of his death for a 70-year-old male was 13 years.

Now, a wrongful death action also includes damages recoverable from mental shock and suffering and wounded feelings, grief, sorrow, loss of companionship, loss of use and comfort and society of the deceased, including loss of his experience, knowledge and judgment in managing the affairs for himself and his beneficiaries. It is not necessary to show the

exact amount of damages suffered by the beneficiary or the beneficiary suffered a monetary loss.

In addition, the person for whose benefit the action is brought does not have to be dependent on the deceased for support in order to recover under the wrongful death statute. The companionship and society of a spouse or parent are not articles of commerce that can be weighed or measured, bought or sold. No one is competent to testify to their value, and there are no markets for them. The amount of compensation is determined by you based on your common sense and judgment after reviewing and weighing the evidence.

(TT 10/8 AM, at 1719:17-1721:21) (emphasis added).

Celanese has failed to offer any particular reason for its contention that there is insufficient evidence to support the jury's wrongful death award. Testimony about the losses of Seay's family came from his daughter, Angie Keene, and his widow, Linda Seay. Seay had three children—a daughter and two sons—and six grandchildren. (TT 10/2, at 859:17-19, 860:15-21). His wife and daughter described a very rich family life. Keene testified that, "Dad was absolutely amazing. He always showed us love." (TT 10/2, at 862:1-2). The family spent a lot of time together and always got along very well. (TT 10/2, at 862:7-13, 863:16-25). Every year, they took a trip to the beach together with the kids and grandkids. (TT 10/2, at 887:24-888:3). When the grandchildren would come over to Seay's house, they always went straight to see him. (TT 10/2, at 891:16-21). His wife testified that, "he was very, very good to the grandchildren." (TT 10/2, at 891:20-21).

As adults, the children were best friends with each other and their parents. (TT 10/2, at 875:18-21). His daughter lived only 15 miles away. (TT 10/2, at 869:4-5). Seay was even close to his son-in-law, which Keene described as one of his best

friends. (TT 10/2, at 863:21-22). That was a value that Seay instilled in the family: "it's something that Dad made us always know that we had one another and that we needed to put love first beyond any kind of feelings that we might would have." (TT 10/2, at 863:22-25).

Keene testified that even as adults, she and her brothers still went to their father for "every decision." (TT 10/2, at 875:10-15). He was always there for them and would help them with whatever they needed. (TT 10/2, at 890:2-12). Seay instilled his Christian faith in his family, which they all relied on in coping with his illness and death. (TT 10/2, at 862:14-24). Seay was also a role model for his children in terms of his generosity. Keene described that when Seay decided to sell his boat because he could no longer go fishing, he sold it to a young police officer for a very small price and told him that he appreciated his service. (TT 10/2, at 872:12-873:2).

All of Keene's children helped take care of him. Keene stayed with her father throughout his illness. (TT 10/2, at 864:1-9). Seay's youngest son, Justin, moved back home to help take care of Seay when he got sick. (TT 10/2, at 889:2-9). Seay's oldest son, Dennis, Jr., was also there for him. (TT 10/2, at 889:2-9).

Keene took him to Emory for his many doctor visits and treatments, which sometimes required overnight stays. (TT 10/2, at 867:24-868:21). She had to take off work to do it, but she treasured the time she got to spend with him. (TT 10/2, at 867:24-868:21).

Every night, Keene would come to see her father after she put her own family to bed. (TT 10/2, at 868:22-869:13). She would get into bed beside him and they would watch TV together. (TT 10/2, at 868:22-869:13). She would pet his hand until he went to sleep. (TT 10/2, at 868:22-869:13).

As noted above, his family saw him in extreme pain during the course of his illness. Keene testified that when he his lung collapsed "he would be just screaming and crying." (TT 10/2, at 866:15-17). Keene said that he suffered "worse than I can imagine anybody suffering." (TT 10/2, at 874:21-24).

Even when Seay was very sick, he tried very hard to reassure his family, especially his grandchildren:

[H]e was always very determined to let the kids know that he was okay, even when he wasn't. And when they would come in, he would ask them to approach him. And he would always put his hand out. He always wanted to hold their hands.

And he would tell them that it's going to be okay. It's going to be all right. Papa is okay. And of course they knew differently. But he was just always extremely positive. He fought from the very beginning until the very end.

((TT 10/2, at 864:21-865:5).

If Seay had not developed mesothelioma, he would have had a life expectancy of almost 14 years. (Kradin Video Depo., at 43:14-44:19). Keene testified that the hardest part of losing her father is that she will have to live so long without seeing him again. (TT 10/2, at 875:22-876:1). She and her daughters wear necklaces with an impression of her father's fingerprint. (TT 10/2, at 875:2-9).

The jury's \$5 million award for wrongful death damages is a reasonable measure of the suffering his family endured during his illness and will continue to

endure as their loss continues into a future without their father. The evidence showed that Seay's children were exceptionally close to him, even as adults, and that they continued to value his love, comfort, and advice up until the time of his death. They feel his absence acutely and have suffered tremendous grief. Considering that Seay's heirs have lost an 13 additional years with their father due to his difficult and untimely death, the jury's award is supported by the evidence in this case.

IV. The evidence supports the jury's damages award for Plaintiffs' loss of consortium action.

Damages for loss of consortium compensate the plaintiff for the loss of a spouse's "companionship, aid, society and services." S.C. Code Ann. § 15-75-20. "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." *Preer v. Mims*, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996) (citing S.C. Code Ann. § 15-75-20).

As this Court charged the jury, Mrs. Seay was entitled to damages for the loss of her relationship with her husband:

Now, the plaintiff Mrs. Seay also claims loss of consortium because of injuries received by her husband. The companionship for society of a spouse are, again, article -- not articles of commerce that can be weighed or measured or bought or sold. No one is competent to testify to their value. ***There's no way we can determine the market price, and, again, the plaintiff is entitled to compensation and money for their loss.*** Loss of consortium includes services provided by the other spouse, love, companionship, affection, society, sexual relations, comfort, solace, and guidance. ***Plaintiff is entitled to recover the value of those services of her spouse which were lost, including the loss of society and companionship in her home*** and for any expenses for the care and treatment to her spouse, including medical expenses reasonably incurred.

(TT 10/8 AM, at 1721:22-1722:18) (emphasis added).

Linda and Dennis Seay were married for 47 years. (TT 10/2, at 884:13-20). Their daughter described them as best friends. (TT 10/2, at 875:15-17). They did not have a lot of other friends and "[t]hey were just together, just the two of them." (TT 10/2, at 875:15-17). Linda Seay confirmed that, testifying that, "[w]e were just together all the time." (TT 10/2, at 889:18-19). They always wanted to be together. (TT 10/2, at 889:20-22). When she was eight months pregnant she went on a fishing trip with Seay, "just to be with him." (TT 10/2, at 889:16-18).

They met when they were young and Linda's parents owned a fruit market in Knoxville, Tennessee. (TT 10/2, at 885:3-887:5). Seay delivered peaches to the market and one day asked her if she wanted to ride to Hendersonville to pick up more peaches. (TT 10/2, at 885:3-887:5). They drove all the way to Spartanburg and she spent the night with a friend of his. (TT 10/2, at 885:3-887:5). The next morning, they decided to get married. (TT 10/2, at 885:3-887:5). They got married after only knowing each other for two days. (TT 10/2, at 885:3-887:5).

Seay always worked to support them. (TT 10/2, at 889:23-890:1). He also spent a lot of time tending his yard and garden, doing such a beautiful job that people would stop and ask for the name of their landscaper. (TT 10/2, at 890:13-20).

Seay's wife, Linda, took care of him when he was sick. (TT 10/2, at 869:14-870:5). He always wanted her right beside him. (TT 10/2, at 870:4-5). He wanted to maintain a dignified appearance and asked her to shave him every day. (TT 10/2, at 892:19-893:6).

Toward the end, Seay's mind started to go and he was having such trouble breathing that he was convinced his breathing tube was crimped even though it was not. (TT 10/2, at 871:17-872:11). Every night, in the middle of the night, Linda Seay would have to crawl under his bed to fix the tubes, even though they were perfectly fine. (TT 10/2, at 871:17-872:11).

Linda Seay misses her husband terribly. She testified:

I just miss talking with him. I mean, you know, we talked all the time. We had -- we would -- I mean, we were together for 48 years. We -- I didn't have friends. He didn't have friends. We were just together all the time. And I miss talking to him.

Sometimes I talk to him when I -- when -- knowing he's not even there.

(TT 10/2 at 893:16-23). She said they used to take drives into the country about every other Sunday, and that she really misses that. (TT 10/2 at 894:3-7). She said, "I just sit there at night. And it's terrible." (TT 10/2 at 894:7-8). Her whole life she always looked forward to telling Seay about anything that happened in her life, but now she thinks about wanting to do that and he's not there and "[it] is really terrible." (TT 10/2 at 894:13-25).

The jury's \$5 million loss of consortium award recognized the extraordinarily deep and abiding relationship that Linda Seay had with her husband for 47 years. They were practically inseparable and her testimony conveyed that she is lost without him. Seay's early death from mesothelioma has deprived her of at least 13 years they should have had together. The jury rightly awarded a substantial sum for Linda Seay's enormous loss of Seay's love and companionship. As with its challenges to the other damages awards, Celanese offers only boilerplate language

but no actual argument as to why the jury's award is unsupported by the trial record. Its perfunctory challenge should be rejected.

V. The evidence supports the jury's finding that Celanese was willful, wanton, and reckless.

Here, the jury had voluminous evidence supporting its finding that Celanese's conduct was willful, wanton, or reckless. As the jury was instructed, willfulness is the conscious failure to exercise due care. (TT 10/8 at 1746:17-1750:12); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15 (Ct. App. 2000).

First, the jury had ample evidence of Celanese's actual knowledge of the danger both before and after the start of Seay's employment with Celanese in 1969. This evidence is set forth in Sections I.C.1 and I.C.2 above. Celanese's medical director, Dr. Dixon, attended an entire conference on asbestos-related diseases in 1964. Celanese's industrial hygienist Charles Laubly had actual knowledge that asbestos could cause fatal disease when he started with Celanese in 1966. Celanese was receiving publications from the NSC and IHF throughout the 1950s and 1960s with numerous medical abstracts about mesothelioma and other asbestos-related diseases, and the evidence is that those publications were kept in Celanese's library. In 1970, Union Carbide told Celanese that mesothelioma was caused by slight exposure and the PEL was not protective. In 1971, Celanese undeniably learned through OSHA that asbestos exposure was so dangerous that exposures had to be kept to a minimum through numerous work practices to reduce dust.

Even though it had actual knowledge of the danger, Celanese specified and purchased asbestos insulation, gaskets, and packing for contractors to use on its property. It had alternatives available to asbestos gaskets but chose to use asbestos throughout Seay's tenure at Celanese. The reason was to save money over the better performing, but more expensive, Teflon gaskets. Choosing cost savings over workers' lives is the very definition of recklessness and conscious indifference.

There was also evidence that Celanese made a deliberate decision to conceal the hazards of asbestos exposures from those working on its property. Its policy was not to place any information about hazardous products in writing. This policy was continued throughout the 1970s, when Celanese decided not to give employees interpretive statements of sampling results, and to claim, as a matter of policy, that hazard information was inconclusive.

Further, the evidence further showed, as set forth in Section I.C.4, that even though they required asbestos insulating materials, and knew working with those materials could cause fatal diseases, Celanese did exactly nothing to protect contract workers like Seay who worked with those asbestos materials on a daily basis. Celanese had no work practice requirements for asbestos, and never audited Daniel to see if they were implementing measures to protect their workers from the asbestos products that Celanese purchased and required for use on Celanese property. Celanese never warned, even though it was the only one with the power to post warning signs on its premises. Celanese did not invite contract workers to safety meetings, even though some plants had implemented such a practice years

before Seay went to work at Celanese. These failures continued throughout Seay's nine-year tenure at Celanese. Celanese's decision not to protect or warn Seay continued for *many years* after OSHA was the law of the land. The jury correctly concluded that Celanese's conduct rose to the level of conscious failure to exercise due care for Seay's health and safety and conscious indifference to the fatal consequences of working with asbestos products on its property.

VI. The evidence supports the jury's punitive damages award against Celanese.

"[P]unitive damages serve at least three important purposes: punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights." *Clark v. Cantrell*, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000). The amount of the punitive damages award is largely within the discretion of the jury, and, like the compensatory award, is entitled to substantial deference. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309-10, 457 S.E.2d 603, 608 (1995).

Celanese has not challenged the constitutionality of the award. Nevertheless, out of an abundance of caution, Plaintiffs will set forth the reasons the award complies with the Due Process Clause. See *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity

between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). See *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Reprehensibility is the most important consideration. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. A number of factors are relevant to reprehensibility, including whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *Id.*

The facts regarding Seay's terrible illness and death, the suffering and grief of his family, and the reckless nature of Celanese's conduct, are outlined above. The jury recognized that Seay's horrific injuries and damages resulted from Celanese's callous actions in continuing to use asbestos products when there were available alternatives, and deliberately concealing the nature of the danger from contract workers like Seay. This was not isolated conduct, but continued for almost a decade, including many years after OSHA unquestionably required warnings and precautionary measures from Celanese. The jury's assessment is appropriate

considering the devastating losses the Seay family has suffered due to Celanese's outrageous and repetitive conduct.

By any measure, the jury's punitive damages award of \$2 million is quite modest. It is a fraction of the entire compensatory award of \$12 million, and equal to the \$2 million survival damages award alone. The award is thus far below the presumptively constitutional 3-to-1 ratio set by the South Carolina legislature in S.C. Code Ann. §15-32-530. Plaintiffs also note that the award is below the remitted award of \$3.5 million against valve manufacturer Crane Co. allowed by this Court last year in *Garvin v. Crane Co.*, C.A. No. 2012-CP-40-6675 (Ct. Comm. Pleas Nov. 14, 2014).

Given the outrageousness of Celanese's conduct, and that it endured for the nine years of Seay's employment, the jury's award serves the punishment, deterrence, and compensatory purposes outlined by the South Carolina Supreme Court. Celanese's argument that there is insufficient evidence to support it should therefore be rejected.

VII. There was no undue prejudice caused by Juror 16.

Celanese contends that the jury engaged in "improper discussions" around the statement by Juror 16 that he worked at the same plant and in the same job as Seay. There is absolutely no evidence to support this contention, and Celanese cites none.

When a party alleges irregularities in the jury's deliberations, "[t]he test is whether there is reason to suppose outside influences affected the jury's verdict."

Parker v. Evening Post Publ. Co., 317 S.C. 236, 248, 452 S.E.2d 640, 647 (Ct. App. 1994). The trial court may evaluate such a claim based on its "opportunity to view the trial, the character and intelligence of the jurors, and to consider whether the verdict, in light of the evidence, has so little support as to indicate corrupt or improper influence." *Id.*

There is simply no evidence that any outside influences affected the jury's verdict in this case. Juror 16 stated in voir dire, in front of the entire jury panel, that he works at the Auriga Polymers plant that used to be Hoechst Celanese. (Ex. A, TT 9/29 AM at 127:7-20). When asked if he had any opinions about Celanese that would affect his ability to be fair and impartial, he said he did not. (TT 9/29 AM at 127:21-128:1). Later, on Day 4 of trial, Juror 16 approached the Court with a concern that he worked at the same plant as Seay and had the same maintenance job repairing equipment on the stretch lines. (TT 10/1 AM, at 619:15-620:5). The only thing he told the other jurors was that he worked at the same plant as Seay did. (TT 10/1 AM, at 622:19-23). As argued at trial, the jury already had that information and there was no improper communication of information outside the record. (TT 10/1 AM, at 626:25-627:10; TT 10/1 PM, at 684:6-685:23).

Based on Juror's 16 explanation of the limited nature of what he had told the other jurors, the Court determined that there had not been any kind of premature deliberation. (TT 10/1 AM, at 627:13-21). When the issue came up again in the afternoon session, the Court again determined that, "[t]here's no evidence of any taint to the panel or premature deliberations." (TT 10/1 PM, at 686:15-17). This

Court agreed that the conversation with other jurors was limited to the fact that he worked at the former Celanese plant, and that had already been disclosed. (TT 10/1 PM, at 686:17-20).

When Juror 16 was questioned further, he stated that he has also told the jurors that he worked on the same stretch lines as Seay. (TT 10/1 PM, at 690:7-691:4). Although someone asked him about the use of asbestos, he did not answer. (TT 10/1 PM, at 690:22-691:10). One of the jurors reminded them they are not supposed to be discussing the case, and the jury complied with that instruction and did not discuss the matter further. (TT 10/1 PM, at 690:22-691:10). This Court noted that the jury had followed his instructions not to discuss the case, and again found no evidence of premature deliberation. (TT 10/1 PM, at 696:1-21). The Court determined that there was no prejudice to either side's right to a fair trial based on Juror 16's presence on the jury up to the point at which he was dismissed. (TT 10/1 PM, at 696:17-21).

Celanese has offered no evidence, or legal argument, that challenges this Court's reasoned conclusion that no outside evidence was offered by Juror 16 or improperly considered by the jury. It has completely failed to demonstrate that a new trial is warranted on this ground.

VIII. The jury was properly charged on South Carolina premises liability law.

Celanese contends that the jury should only have been charged under the superior knowledge language of *Lanier Constr. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 681 S.E.2d 909 (Ct. App. 2009) and that the standard premises liability law

does not apply to independent contractors such as Seay. Celanese's argument fails for two reasons.

First, this argument has been waived. Counsel for Celanese *agreed* to Plaintiffs' jury instructions on premises liability. At the charge conference there were lengthy back-and-forth discussions about whether the *Lanier* superior knowledge language should be included, and whether the pattern instructions on premises liability proposed by Plaintiffs were appropriate in this case. (TT 10/7 PM, at 1430-1464). At the end of that discussion, defense counsel Lane Young stated he was fine with Plaintiffs' premises liability instructions as long as the *Lanier* language was included:

THE COURT: Which point are you talking about? What -- what contractor case?

MR. YOUNG: Lanier.

THE COURT: Okay.

MR. YOUNG: Judge.

THE COURT: Yes, sir.

MR. YOUNG: I -- I think that we can -- we can give the -- well, obviously, it's your decision, but if we go with the plaintiffs' premises liability charge, I'd just like to have one -- one of the contractor charges just to put that principle in front of the jury.

THE COURT: Okay.

MR. YOUNG: And I just -- I don't want us to have to spend the night here arguing over this. And I think that either 14, 15, or 16 should be charged and not -- 16A and 16B are from other jurisdictions, Judge. I mean, not that it matters, but this absolutely is the law in Georgia. And --

THE COURT: Well, that might be because y'all are corrupted by the Napoleonic code somewhat.

MR. YOUNG: Well, I think that probably 14 or 15 most accurately reflect the premise that we're seeking to get a charge on. So we could give 14 or 15. *Then we would agree to their charge – their premises liability charge.*

(TT 10/7 PM, at 1455:15-1456:17).

It was decided that the jury would be instructed from the first sentence of Celanese's proposed instruction number 14, and the last sentence of Celanese's proposed instruction number 15. (TT 10/7 PM, at 1464:9-14). Indeed, the jury was given those exact proposed instructions regarding the superior knowledge requirement. (TT 10/8, at 1716:25-1717:15; *Ex. S, Celanese Requests to Charge*, at 18-19). Celanese thus bargained for, and received, the instructions it wanted in exchange for its agreement to Plaintiffs' premises liability instructions.

Even if Celanese had not waived this issue, it is wrong on the law. There is nothing in *Lanier* suggesting that a premises owner does not a duty of care to an invitee when a contractor is involved. *Lanier* clearly holds, consistent with black letter South Carolina law, that a landowner owes a duty of care to its invitees. 384 S.C. at 279. "A property owner owes an invitee or business visitor the duty or exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty." *Id.* (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004)). *Lanier* followed other South Carolina cases holding that a general contractor may *also* owe a duty of care to invitees. *Id.* at 279 (following *Sides* and *Larimore v. Carolina Power & Light*, 340

S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). A general contractor only owes a duty to invitees, however, if it has superior knowledge of the danger. *See id.* at 279-80. In *Lanier*, a subcontractor invited onto the property by the general contractor was considered the general contractor's invitee and the property owner did not owe a duty because it lacked superior knowledge of the danger as compared to the general contractor. *See id.* at 281. The *Lanier* opinion also stated that the property owner had discharged its duty to warn by warning the general contractor. *See id.*

Plaintiffs do not believe *Lanier* has any application in this case at all given that this case does not involve a subcontractor invited by a general contractor.² Regardless of any duty that Daniel may have owed to Seay, Celanese owed a duty to Seay as an invitee. The parties *agreed* that Seay was an invitee on Celanese's property. (TT 10/8, at 1710:25-1711:3). There is absolutely no evidence that Celanese discharged its duty by warning Daniel, and Celanese has not even argued as much. The general premises liability instructions that as the premises owner Celanese owed a duty to its invitees were therefore entirely correct and were properly given to the jury in this case.

IX. Plaintiffs' counsel did not publish unauthorized audio to the jury.

Celanese complains that Plaintiffs' counsel published "unauthorized audio" to the jury consisting of a five-second clip of Seay in obvious pain and begging Jesus for help. First, Celanese has completely failed to show that this video clip was "unauthorized." Plaintiffs' counsel disclosed this video in pre-trial discovery and

² Celanese apparently takes the position that Daniel owed Seay a duty as a general contractor, but has cited no law recognizing that an employer has premises liability to its own employees.

notified defense counsel that he planned to play a portion of the clip in which Seay mentioned Jesus. (Ex. G, TT 10/6 AM, at 904:23-907:4, 909:7-20).

Second, Celanese waived any objection by failing to make a contemporaneous objection. "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). If Celanese truly believed the video of Seay to be "unauthorized" or "severely prejudicial," it should have objected at the time the video was played. Counsel for Celanese claims that he did not object because he thought the video "had been cleared with someone else on the defense side," again suggesting that the video was not in fact particularly objectionable. Not only did Celanese fail to object at the time, it failed to object at any time on the day the clip was played. Celanese only decided to voice an objection four days later, after a long weekend break. It thus failed to preserve its objection.

Finally, Celanese has failed to show any undue prejudice from this clip. The lack of contemporaneous objection suggests that the clip was not in fact "severely prejudicial" to Celanese. Moreover, the jury heard a lot of other evidence in this case establishing that Seay died an agonizingly painful death from mesothelioma. This was an undisputed fact in this case. Celanese also fails to explain how invoking the name of Jesus makes the video clip objectionable or unduly prejudicial. The jury had already heard evidence that Seay was a Christian and relied on his faith during

his illness. (TT 10/2, at 862:14-21). Celanese has simply failed to demonstrate any undue prejudice from this evidence.

X. The Courts' evidentiary rulings were not erroneous.

Celanese contends that the admission of Plaintiffs' Exhibit 821 (Ex. Q hereto) was "severely prejudicial" and "harmful error." This document is an internal Celanese memorandum from 1963 in which Celanese states its policy not to put any research about hazardous products in writing for fear of liability. Celanese has not explained how this document is inadmissible under South Carolina law. The standard is not whether evidence is "severely prejudicial," but whether the probative value of evidence is outweighed by the danger of *unfair* prejudice. S.C. R. Evid. 403.

Celanese's conduct regarding the presence of hazardous products on its property is the central issue in this case. This 1963 Celanese memorandum is highly probative of Celanese's callous attitude toward warning about dangerous products on its property. Celanese has not argued that there is anything "unfair" about the admission of this 1963 memorandum, and nor could it. These are its own statements about its own internal policies on providing warnings and the statements were presented in the context of the entire document. Celanese has failed to show that the admission of this document was erroneous.

Celanese also complains that Plaintiffs should not have been permitted to publish to the jury numerous documents regarding Celanese's knowledge about the hazards of asbestos exposure prior to and during Seay's employment. It again

argues that it was error to allow publication because the documents are "severely prejudicial." This is not a reason to exclude relevant evidence: "Evidence cannot be excluded simply because it is prejudicial. Almost all evidence is prejudicial to somebody. Saying evidence is prejudicial is another way of saying it is relevant." *State v. Bostick*, 307 S.C. 226, 229, 414 S.E.2d 175, 177 (Ct. App. 1992).

Evidence of Celanese's knowledge and conduct with regard to the dangers of asbestos exposure and the use of asbestos products on its premises is unquestionably relevant to Plaintiff's premises liability claims. "To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Pringle v. SLR, Inc.*, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) (quoting *Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988)).

The South Carolina Supreme Court has recognized that evidence of constructive knowledge of the danger is relevant to a premises liability claim. See *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009) (reversing summary judgment for premises owner because "evidence show[ed] that Respondent knew or should have known that a dangerous condition existed on its premises and that invitees would have to encounter this condition"); *JKT Co. v. Hardwick*, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("documents prepared by

Celotex employees ... constituted admissions which were decidedly relevant to the issue whether Celotex knew or should have known those materials were defective"); *see also Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 341, 626 S.E.2d 716, 726 (N.C. Ct. App. 2006) (finding sufficient evidence of employer's constructive knowledge of asbestos risk from medical literature, defendant's membership in industrial organization "whose publications and annual meeting minutes acknowledged the danger of asbestos exposure beginning in 1937" and documents from defendant's files about asbestos risks).

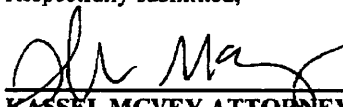
There can be no serious question that the documents at issue were highly probative of Celanese's knowledge and conduct regarding asbestos products on its premises. Celanese has failed to show that the probative nature of the documents was outweighed by any unfair prejudice. The Court therefore correctly ruled at trial that these documents were properly published to the jury.

XI. Justice was served by the jury's verdict.

Celanese has provided no argument in support of its contention that "justice was not served by the jury's verdict." This is merely boilerplate language that cannot support a new trial in the absence of specific argument. As demonstrated at length herein, the evidence at trial was more than sufficient to support the jury's findings that Celanese was negligent, wanton, willful, and reckless, and that its damages awards were justified by the record.

Plaintiffs therefore respectfully ask the Court to deny Celanese's motion for new trial absolute.

Respectfully submitted,



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Dennis Seay

23 A. Ma'am?
24 Q. Have you been diagnosed with a cancer?
25 A. Yes, I have. I have been diagnosed with a
00012:01 cancer with -- that asbestos cancer, I can't hardly
02 pronounce it -- mesothelioma.
03 Q. Mesothelioma?
04 A. Right. And --
05 Q. Do you recall when you were diagnosed with
06 mesothelioma?
07 A. I was diagnosed with that here back, I
08 believe it was in August, this past August. But I've
09 been going to the doctors for years with the same
10 symptoms, and they --
11 Q. Could you just describe to the Jury your
12 symptoms that you had leading up to your diagnosis?
13 A. Leading up to it, I have been having a lot
14 of pain in here, right here, and I'd describe it
15 pain, right here, every time I went to the doctor.
16 And they would X-ray me and -- and check me and --
17 and they would diagnose it as COPD or -- or
18 congestive heart failure is their only -- after a
19 long period of time, their only conclusion that they
20 could come up with. Do you want me to continue on
21 that line?
22 Q. Sure. So after you first started seeing
23 doctors, did any of your symptoms change leading up
24 to your diagnosis in August of 2013?
25 A. No, they were all the same. Just for the
00013:01 last four, five years, been the same symptoms when I
02 went to the doctor.
03 Q. Can you show the Jury, just generally in
04 your body, where is your cancer?
05 A. It's -- right now it's all in here, over
06 here.
07 Q. And did you ever have fluid in your lungs at
08 any point?
09 A. Yes. They drew off fluids several times.
10 Q. Can you explain to the Jury the procedure
11 that they did to drain that fluid from your lungs?
12 A. They would cut my side and put a tube in and
13 drain it in this container.
14 Q. Do you recall on how many occasions you have
15 had to do that?
16 A. Roughly, counting the last three that I had
17 in me at one time in my side, there's been 11 times,
18 I think, that I have had tubes put in my side. I'm
19 sitting here now with two broke ribs that can't be
20 fixed because they don't want to go in there and cut
21 me no more. And so I'm sitting with two broke ribs
22 right now on account of that.
23 Q. Sir, did you ever have any surgeries
24 relating to your cancer?
25 A. I've had three lung surgeries.
00014:01 Q. And can you explain to the Jury a little bit
02 about what those surgeries were?
03 A. Well, the first one -- like I say, I kept
04 complaining of these same symptoms. So I was at the
05 emergency room complaining with the same symptom, and
06 they X-rayed me and it showed a -- a very, very small
07 pneumothorax, and they put a tube in me and sent me
08 home. I came home with it in me and kept -- kept it
09 there for 12 days. Well, they took it out, and I
10 kept having the same symptoms.
11 So I went to a lung doctor, Mendoza, and he
12 X-rayed me and he said my lung was -- he showed me
13 it was very, very small, just barely could tell,

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Appendix_02086

Dennis Seay

14 pneumothorax. So he sent me back to the doctor.
15 Well, he sent me to the doctor and the doctor decided
16 to operate on me.
17 So he operated on me and he told me that --
18 took a biopsy while he was in there. He said, sir,
19 you don't have cancer, that's one thing you don't
20 have to worry about. And he inflated my lung back
21 up, and I came back home.
22 Well, about three weeks later it was
23 collapsed again. So they put a tube in for 14 more
24 days, and it was still showing a small thorax, so he
25 operated on me again. And he said for sure that
00015:01 time -- he took another biopsy and said, sure, that I
02 wouldn't have to worry about my lung no more as long
03 as I live. And the second biopsy, he said, no
04 cancer. He said, you can feel good about that.
05 Well, I did feel good about that, but my symptoms
06 kept on along that line.
07 And I had an appointment with a lung
08 specialist at Emory University in Georgia. He had
09 did some 30 -- does some 30 lung transplants a year.
10 So I went down there to the lung doctor down there,
11 and he checked me for COPD. He said I didn't have
12 COPD. He says, A, you hardly have any -- anything
13 concerning that. So he sent me to a lung surgeon.
14 I went to the lung surgeon, and he -- he
15 decided he was going to have to -- under his
16 determination, he said that somewhere along the line
17 they used what they called talc on my lung, and it
18 had frozen my lung in a collapsed position like an
19 umbrella, and my lung wouldn't function, and I
20 couldn't inhale or exhale because my lungs froze
21 there. So he operated on me and straightened that
22 out. And he came to me the day we was leaving, he
23 said, sir, he says, I started to come tell you last
24 night but I didn't want to ruin your night, he said,
25 you have got asbestos cancer, and he says, if you get
00016:01 treatment, you've got 12 to 18 months to live.
02 Q. How did that news make you feel?
03 A. Oh, it hit me like a tractor and trailer
04 truck had run over me or something. Because, see, I
05 had been told -- I been -- I'd done went through two
06 bad lung operations and was told both times that's
07 one thing I didn't have to worry about and that was
08 cancer, and then hit with a -- hit with something
09 like that afterwards and tell me my lifespan was that
10 short, it was a terrific blow.
11 (Exhibit No. 4 was marked for
12 identification.)
13 Q. And I'm going to show you a photo that you
14 have given, and if you can take a look at that, it's
15 Exhibit 4.
16 A. Yes, that's where -- that's just in that one
17 area there where they cut me. There's a whole lot
18 more than that, but that's one area right there, the
19 last -- last surgery I had right there.
20 Q. So that's a scar that you have on the side
21 of your body?
22 A. Right.
23 Q. Sir, since your diagnosis, have you had any
24 treatments for your cancer?
25 A. Yes. I've had chemo. I started taking -- I
00017:01 started taking chemo in -- at Emory. And it was so
02 hard driving down there and spending the night down
03 there and -- and sick, getting sick and all of that,
04 you know, so I asked the doctor down there at Emory

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Appendix_02087

Dennis Seay

05 would it be all right to transfer those treatments up
06 here. So after two treatments down there, I came up
07 here and started my treatments up here.
08 Q. How did the chemotherapy, how did that make
09 you feel?
10 A. Oh, it made me terribly sick. And in fact,
11 it's been going on five weeks now since I had any
12 chemo. We just put it off and probably will stop it
13 completely now. But I haven't had a chemo treatment
14 now in five weeks because of that.
15 I've been -- I've been going to the
16 hospital, started out two times a week getting
17 fluids, then I had to go in there and they had to
18 give me a pint of blood, and then they increased the
19 fluid. I've been going three times a week on Monday,
20 Wednesday and Fridays and giving me fluids, and it
21 seems to help giving me those fluids, keeps me from
22 dehydrating that bad, and it seems to help some.
23 Q. Sir, you have recently had some
24 hospitalizations; is that true?
25 A. Yes. I've been in the hospital, in the last
00018:01 month or two, maybe three times.
02 Q. And what were those hospitalizations for?
03 A. Dehydration. I was dehydrated.
04 Q. Sir, you had a doctor's appointment this
05 morning; is that right?
06 A. Yes, I did.
07 Q. You had a doctor's appointment yesterday
08 morning; is that right?
09 A. Yes, I did.
10 Q. What news did the doctor give you yesterday?
11 A. The doctor yesterday told me that he
12 recommended stopping any and all X-rays. It's
13 unusual, just completely stopping anything. And he
14 was going to call hospice -- hospice, and turn me
15 over to them, in which they have already called and
16 they're supposed to come out and see me Monday. That
17 was his recommendation.
18 Q. Sir, on a daily basis, can you describe for
19 the Jury, how do you feel?
20 A. Well, on a daily basis, since my last
21 operation, I haven't recovered from it, I haven't
22 been able to do anything. Up 'til that point, I was
23 able to maybe get out and walk to the mailbox and
24 walk around a little bit and sort of enjoy the warmth
25 out there and the green grass and all of that. But
00019:01 in the last couple of months, I haven't had no life
02 other than sitting in this chair and going to the
03 doctor and laying in the bed.
04 Q. Sir, are you in pain?
05 A. I stay in pain all the time.
06 Q. How has your appetite been?
07 A. I've lost my appetite. I get so hungry
08 and -- it's been unbelievable. There's probably been
09 50 people bring every kind of food imaginable to this
10 house two or three times a week, and here I am, every
11 time I take a bite of something, I get sick as you
12 can get. And it just lays in my stomach and turns
13 and turns and turns until I throw it up, and then I
14 get hungry again and go through the same cycle again.
15 And they just keep bringing that food in here and --
16 and enticing me to eat, but I just hadn't had no
17 appetite.
18 Q. Have you lost weight since your diagnosis?
19 A. I have lost -- I was up to about 240, and
20 I'm down to about -- I got down to about 217. And

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Appendix_02088

Dennis Seay

21 all these people bring this food here like I'm
22 talking about, I'm back up -- and taking all these
23 fluids on top of that, I'm back up to about 226 now.
24 So I have gained, in the last two or three weeks, a
25 little bit of weight on account of taking all these
00020:01 fluids.
02 Q. Sir, how has your sleeping changed as a
03 result of your cancer?
04 A. Well, I go to bed at night, I'm hurting so
05 bad, I -- I take pain medication but it don't ease
06 it. And I lay there 'til 1:00 or 2:00 in the morning
07 and I doze off.
08 And it's -- trying to lay in bed, I've got
09 so much scar tissue from this -- these surgeries I've
10 had. I haven't laid on this side in over a year. I
11 can't lay on this side. And there's so much scar
12 tissue everywhere from all that surgery, because they
13 cut me three times and all three times they cut in
14 the same area, and there's so much scar tissue there,
15 can't get comfortable in the bed. You just lay there
16 and suffer until you just get numb, and once you get
17 numb you might doze off a little while. It's -- it's
18 been pretty bad.
19 Q. We've talked a little bit about how your
20 life is today. Prior to your cancer, can you explain
21 to the Jury a little bit about what your life was
22 like?
23 A. Prior to the cancer, I -- I retired right
24 before I was 65. And the company I was working for,
25 after I retired for two months and I drew two
00021:01 Social Security checks, the company come out and
02 asked me would I come back and work another year. So
03 I paid Social Security back, the money they had paid
04 me, and I went back and worked another year.
05 And since that point, they had told me to
06 come in and work any and all I wanted to work after
07 retirement. Well, I went in and worked every year
08 the limit of what I could make. I would work from
09 December to June, somewhere like that. And then I
10 got so bad with this, I couldn't do that no more.
11 And I was enjoying going fishing. I bought
12 me a boat. And I enjoy fishing. I bought me a
13 big -- big bass boat. And got to where I couldn't --
14 couldn't take my boat and unload it and load it back,
15 and couldn't sit in the boat that long. So I just
16 sold my boat here about six months ago. And I've had
17 no life of activities since.
18 I mean, I enjoy life. I enjoy getting out
19 and working in the yard and -- and all of that. And
20 I just don't have that kind of life no more. And I
21 miss it and I wished I had it back.
22 Q. How many times were you able to go fishing
23 on your boat?
24 A. I went maybe, in a year's time, maybe three
25 or four times.
00022:01 Q. And other than fishing, you mentioned your
02 garden. I understand that your neighbors have talked
03 to you about how well you kept up your garden in the
04 past.
05 A. Yes, I kept a garden around back. And I
06 worked -- and you wouldn't believe it now, looking
07 out there now, but I worked in the yard, and every --
08 every -- all the neighbors and everybody's always
09 coming over here and telling me how pretty my yard
10 looked. It stayed green; just full, thick coat. And
11 in the wintertime I would sow rye everywhere, and I

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12 had pretty green-staying grass in the wintertime, and
13 everybody would stop, coming up.

14 And I had flowers set out everywhere. I'd
15 set flowers out front and got hanging baskets
16 everywhere and -- and then people would just stop out
17 there on the side of the road and tell me how
18 beautiful it looked down through there. But you
19 wouldn't believe it today because I've got -- been
20 sick, and I dropped all of that, and it don't look
21 like anybody lives here that's got any interest in
22 the outside now, but I did have.

23 Q. Other than being active and going fishing
24 and working outside, could you tell the Jury,
25 generally, how was your health prior to your
00023:01 diagnosis?

02 A. Prior to my -- prior to I come down with
03 this, I could -- not exaggerating or bragging -- but
04 I could pick up 200 pounds, and walk to here -- I
05 would walk 100 yards with it if I wanted to. I mean,
06 I was just strong, and I thought I was the healthiest
07 man in the world. And I made the statement several
08 times, I never was going to get old. But how wrong I
09 was. I was terribly wrong.

10 Q. Sir, did any of your doctors tell you what
11 they thought caused your cancer?

12 A. They said it was from asbestos.

13 Q. Since hearing that, have you thought back in
14 your life to the times where you believe you were
15 exposed to asbestos?

16 A. Yes, I have.

17 Q. Generally, can you tell the Jury, when in
18 your life do you believe you were exposed to
19 asbestos?

2. PAGE 23:21 TO 24:09 (RUNNING 00:00:37.976)

21 THE WITNESS: I thought back, and
22 the only place -- the only place that I worked
23 around asbestos or was exposed to it, I believe,
24 was Hoechst Fibers, which is Hoechst Celanese,
25 same thing.

00024:01 BY MS. PRYOR:

02 Q. Sir, I'm going to ask you a few questions
03 about that.

04 A. Yeah.

05 Q. Did you want to take a break or are you okay
06 to continue?

07 A. No, go ahead, I'm okay.

08 Q. Sir, did you ever work directly for Hoechst?

09 A. No. I worked for Daniels Construction.

3. PAGE 24:14 TO 27:15 (RUNNING 00:04:15.590)

14 Q. While you were working for Daniels
15 Construction, what locations or facilities did you
16 work?

17 A. I worked in Staple A, stretch line, PIV and
18 pump shaft, pump shop, and then on crimpers out in
19 the new lines on -- on Staple B.

20 Q. So correct me if I'm wrong, but it sounds
21 like when you were working for Daniels, the site or
22 facility that you did work at was for Hoechst
23 Celanese or Hoechst Fibers; is that right?

24 A. Yes.

25 Q. Other than Hoechst, did you work at any
00025:01 other facilities while you were working for Daniels?

02 A. No.

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03 Q. Sir, what type of facility was the Hoechst
04 Fibers facility?
05 A. It made fiber. It made fiber. It's --
06 looks like a cotton material that they mixed with
07 cotton to make different -- different clothing and
08 all those stuff and everything out of it.
09 Q. And what was Daniels, what was their role
10 over at Hoechst?
11 A. Daniels' role was to maintain equipment and
12 keep the equipment running.
13 Q. What job titles did you have while you
14 worked for Daniels?
15 A. I started out at Hoechst as a millwright
16 helper, but I was only like that for about four, five
17 months, and they moved me up to a millwright. Then
18 again, I'm not bragging, but after about two years --
19 they classified you over there, they would do a job
20 study of you, and I was classified out of 400 and
21 something millwrights on that job -- in the mid '70s
22 I was classified as the number one millwright on that
23 job site.
24 Q. So for the first four to five months you
25 were a millwright's helper --
00026:01 A. Yes.
02 Q. -- and then for the remainder of the period
03 that you worked for Daniels you were a millwright; is
04 that right?
05 A. Right.
06 Q. Generally, can you explain to the Jury what
07 your job duties were as a millwright's helper?
08 A. As a millwright's helper, I worked with a
09 millwright out there on the job site; whatever he
10 tells me to do or whatever he needs to do, I would
11 help him or he would show me how to do it.
12 Q. What were your hours when you worked as a
13 millwright's helper?
14 A. It was from -- I believe it was, back then,
15 it was from 7:00 to 3:30 or 4:00.,
16 Q. How many days a week would that be?
17 A. Five days a week. But there was a lot of
18 overtime involved on account of breakdowns and
19 shutdowns and all of that.
20 Q. So the minimum amount of time you were there
21 would be from 7:00 to 3:30?,
22 A. Right.
23 Q. Five days a week, sometimes more?
24 A. (Witness nodded head.)
25 Q. Sir, when you were a millwright, generally,
00027:01 what were your job duties?
02 A. My job duties was anything concerning
03 equipment out on the floor that tears up or needs
04 preventative maintenance pulled on it or whatever.
05 And that was basically anywhere in the plant site
06 there.
07 Q. Did you have the same hours when you were a
08 millwright as you had --
09 A. Yes.
10 Q. -- when you were a millwright's helper?
11 A. Yes.
12 Q. Sir, how do you believe you were exposed to
13 asbestos when you were either a millwright's helper
14 or a millwright working and performing maintenance on
15 the equipment?

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4. PAGE 27:17 TO 28:23 (RUNNING 00:01:54.936)

17 THE WITNESS: After thinking back,
18 when you -- when you went in the plant over
19 there, all your -- all your steam lines and
20 Dowtherm lines and all that was insulated with
21 asbestos. And all these gaskets on all your
22 piping was asbestos gaskets.
23 And the reason I was -- I believed
24 the reason I was exposed to it most of all is
25 these gaskets sticking to the surface of flanges
00028:01 and all, and you're having to chisel and sand
02 and -- and take wire brushes and brush it off and
03 all of that, so hard to get it off most of the
04 time. I believe I was exposed pretty bad from
05 that, that way.
06 BY MS. PRYOR:
07 Q. And, sir, let me jump in there.
08 As you were a millwright's helper and
09 millwright, you said you were working on equipment.
10 What -- can you give the Jury an idea of what types
11 of equipment you would be working on?
12 A. Oh, we would work on valves, we would work
13 on -- well, they had degassers in there, extruders in
14 there, if you want a name, reactors, all kind of
15 PIVs. You had crimpers, you had what you call set
16 techs up on stretch line -- that's where you stretch
17 the material -- and then you had these cutters, your
18 balers. It was a pretty -- pretty big operation.
19 Q. And you mentioned one of the ways that you
20 thought you were exposed to asbestos was from working
21 with gaskets. Would those be gaskets associated with
22 those pieces of equipment?
23 A. Yes.

5. PAGE 29:01 TO 30:02 (RUNNING 00:01:42.265)

00029:01 Q. Sir, could you explain to the Jury, who may
02 not be familiar, just generally, what is a gasket?
03 A. A gasket is a type of material that you use
04 to seal an area to keep it from leaking any fluids or
05 air or steam or whatever out of it. That's mostly
06 what it's for.
07 Q. Other than asbestos gaskets, were there
08 different -- different materials that gaskets were
09 made out of?
10 A. Sure, there was different materials. But,
11 for instance, on -- on the degasser, we had this
12 compartment up here, it required a silver tone gasket
13 which was made out of silver, and it was sort of
14 air -- air compressed to whether it's tighten it up,
15 torque it in, you could draw in on that surrogated
16 (sic) surface seal. We did have some gaskets like
17 that, but they were made out of silver -- silver --
18 silver tone.
19 Q. And other than silver gaskets, were there
20 some copper-type gaskets?
21 A. Yes, there was a very few, not many. I may
22 have used one or two, not -- not -- it wasn't -- most
23 of my gasket working was made from gasket material,
24 if I made the gaskets myself.
25 Q. And I guess my point is, is: Could you tell
00030:01 the difference between different types of gasket
02 material by looking at them?

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06 everything. That's what I used to do it with.
07 Q. Where did those replacement kits come from?
08 A. Come from the manufacturey (sic).
09 Q. So, for example, if you were working on a
10 Crane valve and you needed replacement parts for
11 that, you went to the supply room and matched up the
12 numbers to a replacement kit that was provided by
13 Crane?
14 A. Right.

49. PAGE 56:18 TO 57:01 (RUNNING 00:00:18.022)

18 Q. And would that be similar to other
19 manufacturers? So if you went in looking for
20 replacement parts for an Ingersoll Rand pump, you
21 would go in and you would figure out where -- where
22 the I.D. number was?
23 A. Yes.
24 Q. And then you would get the replacement parts
25 that Ingersoll Rand would provide?
00057:01 A. Yes.

50. PAGE 57:04 TO 57:07 (RUNNING 00:00:07.458)

04 Q. Was this a matter of practice that you did
05 and was in place for all the pieces of equipment that
06 were at the facility?
07 A. Yes.

51. PAGE 57:09 TO 58:01 (RUNNING 00:01:18.903)

09 THE WITNESS: That was -- that was
10 a matter of practice for everybody on the job
11 site. They would -- we -- we -- we didn't -- we
12 didn't pre-fab any -- any gaskets that we needed
13 or packing or anything as far as it being on a
14 valve or a pump or -- or a PIV or whatever. We
15 didn't manufacture it there at the shop unless
16 there were no kit or anything available, and then
17 you would, you know, resort to making it
18 yourself.
19 But that was already preset in the
20 supply room. Everything was set up and
21 everything had two or three -- at least three --
22 spare samples of this one particular item to
23 where they don't ever run out, and -- and that
24 was just practice for the whole -- whole plant
25 site. It was a very, very huge supply room, and
00058:01 they had a huge inventory of spare parts.

52. PAGE 58:19 TO 58:22 (RUNNING 00:00:11.304)

19 Q. Sir, you mentioned that some of the piping
20 at the Hoechst facility was -- had asbestos
21 insulation around that. Do you recall that, sir?
22 A. Yes.

53. PAGE 58:25 TO 59:03 (RUNNING 00:00:06.344)

25 Q. Were you ever around insulators when they
00059:01 would be insulating pipe --
02 A. Yes.
03 Q. -- at the Hoechst facility?

54. PAGE 59:05 TO 59:24 (RUNNING 00:01:06.257)

05 THE WITNESS: Yes. When we were
06 working in there and insulators was working,
07 there was no -- no separation in there. You're
08 liable to be -- you're liable to be in there

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09 working, the insulators working here, you're
10 liable to have sheet metal workers right over
11 here, you would have three or four different --
12 different crews of people working in the same
13 general area at one time.

14 BY MS. PRYOR:

15 Q. And generally, what would they be
16 insulating?

17 A. Insulating either a vessel or -- or a shaft
18 or a pump under some of these vessels, and the
19 vessels their self or insulating pipe where somebody
20 has tore the insulation off.

21 Q. You -- you've described work as far as
22 insulators insulating different pieces of equipment
23 and other co-workers removing and replacing gasket
24 material from pieces of equipment.

55. PAGE 60:02 TO 60:05 (RUNNING 00:00:07.557)

02 Q. Generally, what are -- what were the
03 conditions of the facility when everybody was doing
04 that kind of work?

05 A. It was pretty --

56. PAGE 60:07 TO 60:20 (RUNNING 00:00:40.122)

07 THE WITNESS: -- pretty dusty.

08 BY MS. PRYOR:

09 Q. And what was the flooring made out of at
10 that facility?

11 A. Part of it was -- part of it was cement and
12 then part of it was grating, a grated floor.

13 Q. And which floors were grated?

14 A. From the second -- second, third and fourth
15 floor had grating on part of it.

16 Q. So if someone was working on a piece of
17 equipment on the second floor or the third floor, if
18 material or debris from that equipment or from that
19 insulation or from those gaskets or packing were
20 falling down, where would they go?

57. PAGE 60:22 TO 64:02 (RUNNING 00:04:04.572)

22 THE WITNESS: Oh, well, most of
23 the time the -- the -- where the grating was,
24 most of the time it was a vacuum upward. And if
25 you was working -- if somebody was working on the
00061:01 second floor and working on something creating
02 dust, and you was working on the third floor
03 right above them there, you would be getting the
04 full wind of it because -- seemed like when you
05 got that grating floor and different stories
06 high, it's always like a chimney, you know,
07 it's -- everything is rising in the air.

08 BY MS. PRYOR:

09 Q. And, sir, when you're working on pumps and
10 valves on occasions when maybe that work was
11 necessary, so emergency repairs, is that one type of
12 occasion?

13 A. Yes.

14 Q. You also mentioned preventative maintenance.
15 Can you explain to the Jury what that is?

16 A. Preventative maintenance, we would have it
17 pretty often on -- on an individual line. We
18 would -- we would -- they would come around the day
19 before or we would go around the day before and we
20 would look at different pieces of equipment and see
21 what looks like it might, in the near future, require

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10 of work that Hoechst employees were expected to do?
11 A. No, they didn't do nothing like that.
12 Q. What was the role of the Hoechst employees
13 at that facility?
14 A. Hoechst just was strictly production
15 workers. They maintained the lines running the
16 material through; that's all they did.
17 Q. And again, generally, what was the role of
18 the Daniels' employees at the facility?
19 A. What we did is maintained equipment to keep
20 it running as far as working on it, repairing it or
21 whatever or installing new equipment.
22 Q. And so as far as kind of a division, Hoechst
23 employees were in charge of the actual operation or
24 production of either the fibers or the chemicals, and
25 Daniels employees were in charge of the maintenance;
00068:01 is that --
02 A. Correct.
03 Q. -- accurate?
04 Did you participate in the operation of any
05 of the equipment?
06 A. No.
07 Q. Would you say that the work that Daniels
08 performed at Hoechst, would you say that that's
09 significantly different than what the role and the
10 work of the Hoechst employees were?
11 A. Yes.
12 Q. You have had a previous deposition in this
13 case, and in that deposition you were asked about
14 whether or not entire lines were needing to be shut
15 down during times of maintenance. Do you recall
16 those questions?
17 A. Yes.
18 Q. Would there be auxiliary lines at the
19 facility so that if there was a shutdown on a
20 particular line, the process moved through an
21 auxiliary line while work was being done on this
22 line?

64. PAGE 68:24 TO 69:23 (RUNNING 00:00:58.718)

24 THE WITNESS: No. It was -- when
25 you shut a line down, that line -- if you're
00069:01 shutting a whole complete line down, I'm talking
02 about from spinning, you continued running the
03 stretch line, you wasn't shutting it down. But
04 if you was shutting spinning down to do
05 preventative maintenance, you would want to shut
06 that whole line down and do it on from spinning
07 through stretch to where you wouldn't have two
08 shutdowns, you would only have the one.
09 BY MS. PRYOR:
10 Q. And I guess my question is: Would you agree
11 that maintenance and work on equipment was occurring
12 on a continual basis --
13 A. Yes.
14 Q. -- at the facility?
15 Would you also agree that if everything had
16 to be shut down during the times of maintenance that
17 there would be zero production ever, if that was the
18 case?
19 A. Yes.
20 Q. So there were times where you could work on
21 equipment and the entire facility wouldn't be shut
22 down when that work was happening?
23 A. Correct.

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18 that correct?
19 A. Correct.
20 Q. And so if there was something that broke, it
21 would be a Daniel employee that fixed it, right?
22 A. Yes.
23 Q. And the repairs that you made, were those
24 important to the continued operation of Hoechst?

69. PAGE 77:01 TO 77:12 (RUNNING 00:00:23.171)

00077:01 THE WITNESS: Yes, it was.
02 BY MR. HAWKINS:
03 Q. And you talked about some preventative
04 maintenance. Was that preventative maintenance
05 necessary to the continued operation of the plant?
06 A. Very much so.
07 Q. Okay. And you talked about a supply room, I
08 believe. Is that what you called it?
09 A. Yes.
10 Q. And the parts that were in that supply room,
11 were they essential to the -- allow you to make your
12 repairs to equipment?

70. PAGE 77:14 TO 77:14 (RUNNING 00:00:01.048)

14 THE WITNESS: Yes, sir.

71. PAGE 78:02 TO 80:10 (RUNNING 00:03:56.308)

02 Q. Sir, I just have one more question for you.
03 This time a year ago, did you ever imagine that you
04 would be diagnosed with a fatal cancer?
05 A. No, I certainly didn't.
06 Q. What's the hardest part about having
07 mesothelioma?
08 A. Well, the hardest part about it is
09 knowing -- the very hardest part about it is knowing
10 that you're going to leave here, definitely going to
11 leave here, and you know it's going to be soon. You
12 don't know when. And you try your best to keep your
13 hopes up and be strong for your family and grandkids
14 and all. It's hard. It's hard.
15 Hurt, hurt 24 hours. I don't know about
16 these other cancers, I don't know how they are, but
17 this cancer is in my lining, I believe it's all in my
18 stomach now, and when they cut on me over here so
19 much, it's got over in that area now. And -- and,
20 you know, some -- some -- some doctors will tell you
21 that this cancer is only in your lungs. That's not
22 so. Nowhere near is that so. It can get spread in
23 other areas from operation, when you're operated on.
24 And I have terrible, terrible pains, and I
25 have terrible, terrible scar tissue problems. I have
00079:01 like marbles that big around all in my back that I
02 lay down on every night. And I can't lay on this
03 side, period. Not any -- I haven't laid on it. From
04 all those operations. And lay on this one side,
05 trying to get comfortable, and you get on your back,
06 and it's like you have laid down on a bunch of
07 marbles. It's been a terrible, terrible year.
08 I mean, one day I'm hoping, praying the Lord
09 to go ahead and take me home today, don't -- just
10 don't let me suffer no more; take me home today. And
11 then I get to thinking about my family and my
12 grandkids and all, then I'm praying to the good Lord
13 to just heal me, let me stay here a little longer
14 where I can enjoy my grandkids and all just a little
15 more.

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25 any different than when you are testifying in a court
00015:01 case than they would be in your teaching setting or
02 anything like that?
03 A. I would say no, and I hope not.

3. PAGE 15:04 TO 16:04 (RUNNING 00:00:50.792)

04 Q. Okay. All right. I'm going to start at
05 the end and go backwards. Did you review medical
06 records for Mr. Seay?
07 A. I did.
08 Q. Did you review three volumes of his
09 deposition?
10 A. I did.
11 Q. Did you review the deposition of Ronnie
12 Thompson?
13 A. I did.
14 Q. Okay. And what disease was Mr. Seay
15 diagnosed with?
16 A. Mr. Seay ultimately had a malignant
17 mesothelioma of the right chest that went on to cause
18 his death.
19 Q. Was it a mesothelioma of the pleura?
20 A. Yes.
21 Q. Okay. And do you have an opinion as to
22 what caused his mesothelioma?
23 A. His mesothelioma was caused by his
24 cumulative occupational exposures to asbestos.
25 Q. Were you able to tell from reading the
00016:01 deposition testimony in the case that he had a
02 history of occupational exposure to asbestos?
03 A. Yes. Mr. Seay had a clear history of
04 exposure to asbestos from many years.

4. PAGE 16:05 TO 16:07 (RUNNING 00:00:02.982)

05 Q. Okay. He worked at a place called
06 Celanese, right?
07 A. Yes.

5. PAGE 16:11 TO 16:13 (RUNNING 00:00:04.536)

11 Q. And were you able to determine whether or
12 not he had occupational exposure while working at
13 Celanese?

6. PAGE 16:16 TO 18:04 (RUNNING 00:01:32.443)

16 A. In his deposition, he reported that he
17 worked at Celanese from the late 1960s through the
18 1970s, and that during that time he was exposed to
19 asbestos.
20 Q. Generally speaking, what was your
21 understanding of what he did?
22 A. He worked as -- largely as a maintenance
23 worker for what was called Daniel Construction, and
24 he worked with a variety of asbestos-containing
25 products, which are listed in my report, including
00017:01 gaskets and valves, pumps. Material like that.
02 Q. Okay. And you're making reference to your
03 report there, correct?
04 A. I am, yes.
05 Q. All right. Now, you're not an industrial
06 hygienist, right?
07 A. No, I am not.
08 Q. Okay. You're a medical doctor, true?
09 A. I am.
10 Q. Okay. You're not Mr. Seay's medical
11 doctor, right?

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<i>Celanese</i> CORPORATION OF AMERICA ADMINISTRATIVE PROCEDURES		
Section	1	GENERAL ADMINISTRATION
A. P. No.	1-18	HANDLING MATTERS RELATING TO COMMERCIAL HAZARDS
Effective	February, 1963	
		A.P. No 1-18

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1 COMMERCIAL HAZARDS COMMITTEE

under this the committee has no jurisdiction

It is the function of the Commercial Hazards Committee to decide what action the Corporation should take to safeguard itself, its employees and others against hazards brought to the attention of the Committee and relating to the manufacture and sale of the Corporation's products.

The Committee is composed of the Medical Director as Chairman, one or two representatives to be appointed by the President of each of the divisional companies, a representative of the Safety Department, and a representative of the Legal Department as Secretary.

The Committee meets on call of the Chairman. Company representatives are not required to attend meetings or discuss matters not affecting their company, and are not permitted to vote on such matters. Where unanimity cannot be achieved among participating members as to the action to be taken, the matter will be submitted to the Secretary of the Corporation for final decision.

2 ADMINISTRATIVE RESPONSIBILITIES

2.1 Medical Director

To make determinations as to the nature and extent of toxic and dermatitic hazards to health or life. To maintain a central file of all related correspondence and tests on matters coming before the Committee, in such detail as the Legal Department may deem sufficient for use in the event of legal attack.

2.2 Division Representative(s)

To familiarize themselves with the problems involved in requests they present to the Committee on behalf of their respective division and to this end consult with their division personnel.

2.3 Manager of Testing Department

To make determinations, subject to the approval of the President of his Company, as to the hazards other than toxicity or dermatitis - such as flammability, explosion or corrosion - arising from the use or handling of the product by persons other than the Corporation's employees.

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Effective	February, 1963		

3 DETERMINATION OF COMMERCIAL HAZARDS WITH RESPECT TO NEW OR MATERIALLY ALTERED PRODUCTS (CONTD.)

desirable, and (d) whether, in his opinion, warning labels are desirable, together with proposed language for such labels. Where other commercial hazards, such as flammability, explosion or corrosion may be involved, the Chairman will, after obtaining the advise of the Company representatives on the Commercial Hazards Committee, refer the problem to the Corporate Safety Director for determination and report to the Commercial Hazards Committee.

The report of the Chairman will be considered at the next meeting of the Commercial Hazards Committee, and the members thereof representing the affected Companies and Departments of the Corporation will, when necessary, consult with the appropriate personnel as to the problems and report back to the Committee the recommendations of their Companies and Departments. Decisions will thereupon be made as to what, if any, action the Corporation will take to guard against the hazards involved. Decisions will include such matters as whether toxicological tests are to be made, whether the recommended label is to be approved as submitted or with certain changes, and what protective language, if any is to be included in technical bulletins and sales literature. They will also include statements of the precautions, if any, which will be required of employees in handling the products within the Corporation. If it is determined to have tests performed, the laboratory selected to perform them shall first be approved by the Medical Director.

Two copies of final proof of all labels will be submitted to the Chairman of the Committee before the label is printed. If the proof conforms to the labeling as approved by the Committee, one copy will be initialed by the Chairman and returned as authorization for printing. If proof does not conform to the labeling as so approved, the Chairman will so notify the person submitting it, who will either make the necessary changes or request submission to the full Committee for reconsideration.

Any request for the reprinting of an established precautionary label need not be submitted to the Chairman for consideration by the Committee provided the request for reprinting is of a label which the Committee has approved and there has been no change in the product or the circumstances surrounding the original approval by the Committee. It shall be the responsibility of the person ordering reprints to satisfy himself that the form of label which is ordered is the latest one which has been approved by the Committee. In cases of doubt it shall be his responsibility to contact the Chairman of the Committee.

SEAY_HAMMETT002222

RoA_2065

Appendix_02100

Celanese CORPORATION OF AMERICA ADMINISTRATIVE PROCEDURES			Page 5
Section	1	GENERAL ADMINISTRATION	
A. P. No.	1-18	HANDLING MATTERS RELATING TO COMMERCIAL HAZARDS	A.P. No 1-18
Effective	February, 1963		

7 PROVISIONS AS TO INTERIM COMMUNICATIONS RELATING TO HAZARDOUS PRODUCTS

The Corporation finds it necessary from time to time to conduct tests and investigations concerning the possibility of hazards involved in the use, handling or sale of chemicals or other products. This may occur when new or changed products are under consideration, when complaints are received from customers or others regarding hazards or injuries, or if injuries occur within the Corporation.

As research and testing work is performed in the above situations, interim reports are written, often based on incomplete information and containing conclusions which will be modified as the studies progress. These reports occasionally result in a substantial amount of controversy expressed in correspondence which is rather generally circulated. This presents a serious legal hazard. In the event that claims or suits against the Corporation should later be brought involving the product in question, plaintiffs could serve subpoenas on the Corporation requiring the production of all documents bearing on such a situation, and statements regarding the hazardous nature of the product, even though incorrect, could be used against the Corporation.

For these reasons, it is most desirable to keep interim reports and correspondence on such subjects to a minimum and to avoid all general correspondence relating to such matters. This is not intended to prevent or curtail the circulation of final conclusions or determinations by the individuals made responsible therefor under Item 2. As an aid to achieving this result, the following precautions will be observed:

Written communications concerning hazards to person or property will be confined to the minimum absolutely necessary, and will be in the form of confidential memoranda. Preferably, communications will be conducted orally whenever feasible.

Such communications as must be written will be confined to factual data and statements of their inevitable significance, and will omit all opinions or speculation. The latter will be communicated orally.

Such communications concerning hazards to person or property as are necessary will be issued by the department performing the work on which the report is based, and will be directed through channels to the Corporation's Medical Director and the Legal Department, and no other copy (except that of the issuing department) will be made. It will be the responsibility of the Department Manager orally to advise and consult with interested members of other departments.

Inquiries by Company Presidents and other interested parties as to the hazardous qualities of our products and recommended action thereon will be directed only to the appropriate person, department or committee designated in Item 2.

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RoA_2066

Appendix_02101

1 H04NEN
ARLOTTE-2

ELANESE CORPORATION OF AMERICA
522 Fifth Avenue
New York 36, New York

XX

October 12, 1956
Revised September 28, 1962*

ORGANIZATION CIRCULAR

SUBJECT: COMMERCIAL HAZARDS COMMITTEE AND AUTHORITIES
FOR DETERMINATION OF COMMERCIAL HAZARDS

EFFECTIVE DATE: October 15, 1962

OBJECTIVES: To establish and apply on a Corporation-wide basis, policies relating to the evaluation, mitigation and avoidance of commercial hazards in the manufacture and sale of the Corporation's products, including the obtaining and appraisal of toxicological data and the approval of warning labels.

PERSONS AND DEPARTMENTS RESPONSIBLE FOR DETERMINATION OF COMMERCIAL HAZARDS:

Medical Director

It will be the responsibility of the Medical Director to make determinations as to the nature and extent of toxic and dermatitic hazards to health or life.

Manager of Testing Department

It will be the responsibility of the Manager of the Department performing the tests on the product, subject to the approval of the President of his Company, to make determinations as to hazards other than toxicity or dermatitis, such as flammability, explosion or corrosion, arising from the use or handling of the product by persons other than the Corporation's employees.

Safety Director

It will be the responsibility of the Safety Director to make determinations as to the hazards to employees arising out of their employment, subject to any applicable conclusions of the Medical Director, and, for hazards other than toxicity or dermatitis, of the appropriate Company President, or Department Manager.

Legal Department

It will be the responsibility of the Legal Department to make final conclusions as to actual or potential legal liability of the Corporation and the requirements of the law relating to the advertising, sale and use of hazardous products.

*Revised only to reflect
organizational changes

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Appendix_02102

FUNCTIONS OF COMMERCIAL
HAZARDS COMMITTEE:

It will be the function of the Commercial Hazards Committee, based on the determination of commercial hazards by the responsible persons and departments or outside testing agencies, to decide what action the Corporation should take to guard against the hazards involved, as by making tests and using specific warning labels and protective language in bulletins and sales literature.

COMPOSITION OF
COMMERCIAL HAZARDS
COMMITTEE:

The Committee will consist of the Medical Director as Chairman, one or two representatives to be appointed by the President of each of the divisional companies, a representative of the Safety Department and a representative of the Legal Department, to be appointed by the Safety Director and General Attorney respectively.

METHOD OF OPERATION:

The Committee shall meet on call of the Chairman.

All members of the Committee will have equal voice in its deliberations, except that members representing Companies not affected by any matter under consideration will not vote on the issues relating to such matter. Company representatives will not be required to attend meetings as to which the agenda contains no matters affecting their Company. A quorum will consist of a majority of the members required to attend the particular meeting. No matter will be determined at any meeting not attended by a representative of all Companies affected by such matter; and no matter will be determined except by unanimous agreement of those present and entitled to vote on such matter.

Where unanimity cannot be achieved, the matter will be submitted to the Secretary of the Corporation for final decision, if requested by any member of the Committee entitled to vote on the matter.

The representative of the Legal Department will act as Secretary of the Committee. His duties will be:

- 1) To receive all suggestions and supporting data submitted to him for the agenda.
- 2) To prepare and issue copies of the agenda to all members, indicating for each item the objective to be reached at the meeting.
- 3) To prepare and issue copies of the minutes of each meeting.

SEAY_HAMMETT002225

RoA_2068

Copies of the agenda with supporting documents attached will be distributed one week in advance of each meeting, and copies of the Minutes of each meeting will be distributed not later than one week after the meeting to all members of the Committee.

Minutes will be written in condensed form so as to:

- 1) Highlight the problem areas of each item.
- 2) Record significant solutions discussed and decisions made by the Committee.
- 3) Record action to be taken by individual members of the Committee.

Matters will be brought to the attention of the Committee in accordance with the provisions of the Procedural Circular entitled "Procedure for Handling Matters Relating to Commercial Hazards."

A central file on all matters coming before the Committee will be permanently maintained in the office of the Chairman at the Corporation's Headquarters. Copies of all related correspondence and memoranda, including intermediate and final tests, will be maintained in this file in such detail as the Legal Department may deem sufficient for use as evidence in the event of legal attack.

COPIES OF CIRCULAR:

Executives, Department Heads, Plant Managers, District Managers and General Managers of Foreign Subsidiaries.


President

SEAY_HAMMETT002226

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Appendix_02104

L I MORNER
LOTTE-2

CELANESE CORPORATION OF AMERICA
522 Fifth Avenue
New York 36, New York

PROCEDURAL CIRCULAR

October 12, 1956
Revised September 28, 1962*

SUBJECT: PROCEDURE FOR HANDLING MATTERS RELATING
TO COMMERCIAL HAZARDS

L. I. H.

NOV 1 1962

EFFECTIVE DATE: October 15, 1962

1. Determination of Commercial Hazards With Respect to New or Materially
Altered Products

At any time when the Corporation commences the use, development or production of any chemical or other product which could present a commercial hazard to health or safety, or if previously used chemicals or other products are altered in any way which might present a new hazard of such nature, the Company Departmental Manager having supervision of the project, or his designee, will immediately submit to the Company representative on the Commercial Hazards Committee, who will forward to the Chairman, on a form to be supplied by such Committee, a request for determination as to tests, labels and protective language to be employed. The form will be designed to elicit all pertinent hazard information. A request for a new or revised label will be accompanied by proposed copy and layout.

Upon receipt of such request, the Chairman will assemble such data relating to possible commercial hazards of the product as may be available, and will submit the same to the Secretary of the Commercial Hazards Committee, with comments as to (a) whether and what commercial hazards may exist, including toxicity and dermatitis, (b) whether and what toxicological or dermatitic tests should be performed, (c) whether warnings in technical or sales bulletins are desirable, and (d) whether, in his opinion, warning labels are desirable, together with proposed language for such labels. Where other commercial hazards, such as flammability, explosion or corrosion may be involved, the Chairman will, after obtaining the advice of the Company representatives on the Commercial Hazards Committee, refer the problem to the Corporate Safety Director for determination and report to the Commercial Hazards Committee.

The report of the Chairman will be considered at the next meeting of the Commercial Hazards Committee, and the members thereof representing the affected Companies and Departments of the Corporation will, when necessary, consult with the appropriate personnel as to the problems and report back to the Committee the recommendations of their Companies and Departments. Decisions will thereupon be made as to what, if any, action the Corporation will take to guard against the hazards involved. Decisions will include such matters as whether toxicological tests are to be made, whether the recommended label is to be approved as submitted or with certain changes, and what protective language, if any, is to be included in technical bulletins and sales literature. They will also include statements of the

*Revised only to reflect
organizational changes

SEAY_HAMMETT002227

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Appendix_02105

precautions, if any, which will be required of employees in handling the products within the Corporation. If it is determined to have tests performed, the laboratory selected to perform them shall first be approved by the Medical Director.

Two copies of final proof of all labels will be submitted to the Chairman of the Committee before the label is printed. If the proof conforms to the labeling as approved by the Committee, one copy will be initialed by the Chairman and returned as authorization for printing. If proof does not conform to the labeling as so approved, the Chairman will so notify the person submitting it, who will either make the necessary changes or request submission to the full Committee for reconsideration.

Any request for the reprinting of an established precautionary label need not be submitted to the Chairman for consideration by the Committee provided the request for reprinting is of a label which the Committee has approved and there has been no change in the product or the circumstances surrounding the original approval by the Committee. It shall be the responsibility of the person ordering reprints to satisfy himself that the form of label which is ordered is the latest one which has been approved by the Committee. In cases of doubt it shall be his responsibility to contact the Chairman of the Committee.

No statements in advertising, letters, or any literature issued with regard to a Corporation product shall be inconsistent with precautionary statements which have been prescribed by the Commercial Hazards Committee for the product.

II. Decision of Commercial Hazards Committee as to Labeling Prerequisite to Shipment of Certain Corporation Products.

No chemical or other product of the Corporation which could present a commercial hazard to health or safety, including samples and intermediates, will be shipped outside the plant or laboratory, nor will such product be offered for sale, advertised, or described in Corporation literature without first obtaining precautionary labeling directions from the Commercial Hazards Committee. In cases of special necessity, when time does not permit a full evaluation of the hazards, the Chairman may temporarily authorize shipment or sale under general warning labels prescribed for such purpose by the Committee.

III. Inquiries Within the Corporation Concerning Protection of Employees.

The Corporation's Medical Director will advise and answer inquiries regarding toxic and dermatitic hazards and sound industrial hygiene practices for employees within the Corporation. The Medical Director will maintain close liaison with the Safety Department.

Literature for use within or without the Corporation relating to toxicity, dermatitis, and similar hazards, will be submitted by the Medical Director of the Corporation to the Legal Department for review, together with all necessary data, in order that statements circulated may be appropriate to furnish reasonable protection to the Corporation from legal liability.

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Appendix_02106

IV. Outside Inquiries Concerning Toxicity and Other Commercial Hazards.

Outside inquiries concerning toxicity and other commercial hazards will be referred initially to the appropriate Sales Manager. Where toxicity or dermatitis is involved, the Sales Manager will promptly refer such inquiries, through one of the Company representatives on the Commercial Hazards Committee, to the Medical Director for advice. It will be the responsibility of the Medical Director to consult with the Legal Department if the inquiry is of a non-routine nature. Where it appears to the Sales Manager that any outside inquiries involve possible claims against the Corporation, he will also refer them immediately and directly to the Legal Department for advice on handling. The Medical Director and the Legal Department will keep the Commercial Hazards Committee informed as to all such inquiries.

V. Provisions as to Interim Communications Relating to Hazardous Products.

The Corporation finds it necessary from time to time to conduct tests and investigations concerning the possibility of hazards involved in the use, handling or sale of chemicals or other products. This may occur when new or changed products are under consideration, when complaints are received from customers or others regarding hazards or injuries, or if injuries occur within the Corporation.

As research and testing work is performed in the above situations, interim reports are written, often based on incomplete information and containing conclusions which will be modified as the studies progress. These reports occasionally result in a substantial amount of controversy expressed in correspondence which is rather generally circulated. This presents a serious legal hazard. In the event that claims or suits against the Corporation should later be brought involving the product in question, plaintiffs could serve subpoenas on the Corporation requiring the production of all documents bearing on such a situation, and statements regarding the hazardous nature of the product, even though incorrect, could be used against the Corporation.

For these reasons, it is most desirable to keep interim reports and correspondence on such subjects to a minimum and to avoid all general correspondence relating to such matters. This is not intended to prevent or curtail the circulation of final conclusions or determinations by the individuals made responsible therefor under the Organization Circular entitled "Commercial Hazards Committee and Authorities for Determination of Commercial Hazards." As an aid to achieving this result, the following precautions will be observed:

1. Written communications concerning hazards to person or property will be confined to the minimum absolutely necessary, and will be in the form of confidential memoranda. Preferably, communications will be conducted orally whenever feasible.

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Appendix_02107

October 12, 1956
Revised September 28, 1962

2. Such communications as must be written will be confined to factual data and statements of their inevitable significance, and will omit all opinions or speculation. The latter will be communicated orally.
3. Such communications concerning hazards to person or property as are necessary will be issued by the department performing the work on which the report is based, and will be directed through channels to the Corporation's Medical Director and the Legal Department, and no other copy (except that of the issuing department) will be made. It will be the responsibility of the Department Manager orally to advise and consult with interested members of other departments.
4. Inquiries by Company Presidents and other interested parties as to the hazardous qualities of our products and recommended action thereon will be directed only to the appropriate person, department or committee designated in the Organization Circular entitled "Commercial Hazards Committee and Authorities for Determination of Commercial Hazards."

COPIES OF Executives, Department Heads, Plant Managers, District Managers
CIRCULAR: and General Managers of Foreign Subsidiaries.


President

SEAY_HAMMETT002230

RoA_2073

Appendix_02108

Dennis Seay

09 Q And that those who have it suffer greatly
10 before they expire; is that fair?
11 A That's a -- it's a bad cancer. It has a
12 lot of pain, requires a lot of pain medication.
13 Q Did you review Mr. Seay's medical
14 records?
15 A I did.
16 Q Did you see that he had, I think, around
17 10 times he had a collapsed lung?
18 A I didn't count the number, but he did
19 have collapsed lungs, yes.
20 Q And, okay. And when a person's lung
21 collapses, how does that make them feel?
22 A Usually they get short breath, is the
23 primary symptom. They have difficulty breathing.
24 Q And, sir, you don't dispute, do you, that
25 Mr. Seay suffered enormously as a result of his
00146:01 mesothelioma?
02 A I don't dispute that, no.

29. PAGE 146:18 TO 146:22 (RUNNING 00:00:09.129)

18 Q Dr. Crapo, this is Thomas Burns.
19 A Yes.
20 Q First of all, I would like to apologize
21 if I was saying "Mr. Seay" instead of "Mr. Seay." That
22 was not an intentional mistake by me.

30. PAGE 158:10 TO 159:17 (RUNNING 00:01:20.402)

10 Q Finally, to get you back to why we came
11 here to you, which was mesothelioma, gaskets and
12 packing. Has anything that you discussed with
13 Mr. Panatier, during his questions, changed any of the
14 opinions that you expressed to this jury earlier today,
15 about the ability of chrysotile-containing gaskets and
16 packing to cause mesothelioma?
17 A No.
18 Q And I thought we handled this when you
19 were talking on direct, obviously it's theoretical
20 math. When you are talking about 5,000 years, just
21 like it's theoretical math, if you are saying you're
22 exposed to the two fibers on the OSHA model, and
23 there's some sort of risk?
24 A Yes.
25 Q Is this something where you want to be
00159:01 able to come to a jury and say, ah-ha, it would take
02 5,000 years? What was the point you were trying to
03 make, when you go through the fiber/cc years and
04 exposures?
05 A When one uses that calculation, one is
06 just trying to show that there's no reasonable
07 exposure, in a human lifetime, that could cause that
08 disease, with low-dose chrysotile. And the same thing
09 is true, if you look at the regulatory model, when you
10 look at really low dose.
11 So, assume a linear response that gives
12 risk of low dose. It is not reasonable. It's just to
13 show that that math shows those things, but that the
14 math is really only a vehicle to help you understand,
15 when it's low levels of chrysotile, within a normal
16 human experience and lifetime, it does not cause this
17 disease.

31. PAGE 162:16 TO 164:02 (RUNNING 00:01:47.685)

16 Q Okay. We talked a lot about what level
17 of asbestos you believe someone would need to inhale

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Angela D. Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay	)	C/A No. 2013-CP-42-03915
	)	
<i>Plaintiffs,</i>	)	Defendant CNA Holdings, LLC's Motion for a New Trial <i>Nisi Remittitur</i>
	)	
vs.	)	
	)	
3M Company, et al.,	)	
	)	
<i>Defendants.</i>	)	

Defendant CNA Holdings, LLC respectfully requests that if the Court denies its motion for new trial absolute and its motion for judgment notwithstanding the verdict, the Court grant a new trial *nisi remittitur* for the following reasons:

Argument and Authorities

The jury's damage findings in this case were grossly excessive based on the facts and the law. But even when a verdict is not "grossly excessive" and "shocking" to the conscience, a trial court still has discretion to grant a new trial *nisi remittitur* "when the verdict indicates the jury was unduly liberal in determining damages." *Becker v. Wal-Mart Stores, Inc.*, 529 S.E.2d 758, 761 (S.C. Ct. App. 2000); *see also Hicks v. Herring*, 144 S.E.2d 151, 154 (S.C. 1965) ("If the trial judge, in the exercise of his discretion, is convinced that the amount awarded is overliberal, he has the authority and corresponding duty to reduce the verdict by order *nisi*."). The appellate courts will defer to this Court's judgment regarding the question of whether the damages are excessive. *See Daniel v. Sharpe Const. Co., Inc.*, 244 S.E.2d 312, 314 (S.C. 1978).

As this Court implicitly recognized in *Garvin v. AGCO Corp., et al.*, a jury "may not abandon analysis for sympathy for a suffering plaintiff and treat

an injury as though it were a winning lottery ticket." *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993). When considering the excessiveness of an award, courts must look to the "circumstances of the particular case presented for consideration." *Freeman v. A. & M Mobile Home Sales, Inc.*, 359 S.E.2d 532, 535 (S.C. Ct. App. 1987).

Among the factors courts have considered in determining that *nisi remittitur* was appropriate are a plaintiff's age and life expectancy, the nature of the diagnosed condition, the amount of medical expenses incurred as a result of that condition, and the degree of impairment involved with the condition. *See Becker*, 529 S.E.2d at 762. Here, all of those factors suggest a reduction in the jury's award. Mr. Seay was 70 years old at the time of his death and had a life expectancy of 13.8 years. He was a cigarette smoker and suffered from diseases unrelated to his alleged asbestos exposure, including chronic obstructive pulmonary disease and coronary heart disease. The amount of medical expenses incurred on account of his condition was stipulated to be \$280,457.91, which is over 42 times less than the amount of compensatory damages the jury awarded.

The jury's awards of \$5 million for wrongful death and \$5 million for loss of consortium are particularly excessive. *Cf. Welch v. Epstein*, 536 S.E.2d 408 (S.C. Ct. App. 2000). In *Epstein*, the Court of Appeals approved an award of \$3 million for a wrongful death claim. There, evidence established that the pecuniary loss resulting from the decedent's death was \$630,690. At the time of his death, the decedent was only 37 years old and his widow was only 28 years old. Their two children were eight and six. Mr. Seay, on the other hand, was 70 years old at the time of his death, and there was no evidence of pecuniary loss as a result of his death. His wife was 66 years old at the time of his

death, and his surviving children were all adults at the time of his death. None of the children were financially dependent on Mr. Seay.

By way of further comparison, in 1995, a jury in New Jersey returned a verdict of \$315,000 for a decedent who died at age 71 from mesothelioma. *McKee v. Owens Corning Fiberglas*, 1995 WL 17998925 (N.J. Super. L.) (Verdict and Settlement Summary). The decedent lived for 11 months after he was diagnosed. The plaintiff maintained that during this period, the pain and suffering was particularly severe. The cancer was detected in July. The plaintiff's expert pulmonologist related that as of that November, the tumor had encased the lung and was exerting pressure on the muscular and skeletal tissue, causing very substantial pain in the back and shoulder areas.

The evidence disclosed that commencing in January, the decedent had undergone a protocol of three chemotherapy cycles. The plaintiff maintained that although the decedent became quite ill as a result of the chemotherapy, it had no effect on the cancer itself. The plaintiff contended that during the final months of his life, the pain and suffering was particularly extensive. The plaintiff's pathologist testified that as of April, the tumor had actually compressed the lung to 50% of its original size. The decedent required extensive amounts of pain killing medication for 3-4 months prior to his death in May.

The widow testified that the emotional turmoil was severe and was heightened by the anger stemming from the fact that the decedent had quit smoking some 30 years earlier, was not a drinker and had lived an over-all healthy life to no avail. The plaintiff further contended that the decedent had taken an early retirement to spend time with his family, including 18 grandchildren and nine great-grandchildren and the plaintiff argued that the inability to enjoy his family increased the pain and suffering. The plaintiff also con-

tended that prior to his death, the decedent was extremely concerned for his wife's welfare after he died.

The jury awarded \$250,000 for pain and suffering, \$50,000 to the wife for loss of consortium between the time of the diagnosis and death, and \$15,000 for wrongful death. *See also Harold v. Owens Corning Fiberglas*, 1992 WL 12715308 (Mass. Super. 1992) (Verdict and Settlement Summary) (for death of 42-year mesothelioma victim, jury returned verdict of: \$325,000 for decedent's pain and suffering; \$150,000 for wife's loss of consortium; wrongful death damages of \$600,000 to wife and \$150,000 to each of decedent's four children); *Simpkins v. Keene Corp.*, 1993 WL 819712 (N.J. Super. 1993) (Verdict and Settlement Summary) (for death of 69 year old mesothelioma victim, jury awarded \$1,350,000 for pain and suffering, \$125,000 for wrongful death, and \$540,000 to wife for loss of consortium).

More recently, in a 2011 mesothelioma case, the New York Appellate Division reduced an award for past pain and suffering from \$3,650,000 to \$1,500,000 and an award for loss of consortium from \$1,670,000 to \$260,900. *Penn v. Amchem Prods.*, 85 A.D.3d 475,477 (N.Y. App. Div. 2011). In 2012, a Pennsylvania jury awarded \$650,000 for a wrongful death claim by the survivors of a 67-year old man who died six months after his mesothelioma diagnosis. *Estate of Serven v. John Crane Inc.*, 2012 WL 8751702 (Pa. Com. Pl. 2012) (Verdict and Settlement Summary). And in 2007, a jury returned a total verdict of \$4 million for the claims of a man who died of mesothelioma at age 64 and his surviving wife. Before his death, he underwent chemotherapy, radiation therapy, and invasive surgery. *Casale v. A.O. Smith Wather Prods. Co.*, 2007 WL 4938195 (N.Y. Sup. 2007) (Verdict and Settlement Summary). Other damage verdicts in recent years have also been much lower than the damages found by the jury here. *See, e.g.:*

- *Nash v. A.W. Chesterton, Inc.*, 2014 WL 7671989 (N.Y. Sup. 2014) (for death of 81 year old mesothelioma victim, jury awarded wife \$200,000 for loss of consortium and \$1,500,000 in wrongful death damages);
- *Monaco v. Kaiser Gypsum Co., Inc.*, 2012 WL 8499342 (Cal. Super. Ct. 2012) (verdict for 63 year old mesothelioma victim was \$479,228 in past and future economic damages and \$1,500,000 in non-economic damages);
- *Clemmer v. John Crane Inc.*, 2006 WL 7070932 (Cal. Super. Ct. 2006) (Verdict and Settlement Summary) (damages for mesothelioma claim were \$1,100,000 in non-economic damages, \$550,000 in economic damages, and \$250,000 for loss of consortium);
- *Berning v. Allied Signal, Inc.*, 2002 WL 31932088 (Cal. Sup. 2002) (Verdict and Settlement Summary) (verdict for 77 year old mesothelioma victim was \$1,125,579 for pain and suffering).

Furthermore, the jury's award of \$2 million in punitive damages is patently excessive. In fact, there are no punitive-damages facts in this case. Celanese hired well-respected contractor Daniel to perform ALL of the maintenance work at its plant and reasonably relied on Daniel's experience, knowledge, and expertise. Daniel, Mr. Seay's employer, controlled the means, methods, and details of his work and was directly responsible for his safety. Daniel installed, maintained, and otherwise handled all asbestos in the plant, and in doing so, it was obligated under its contracts with Celanese to comply with OSHA. There was no evidence or suggestion that Daniel did not comply with OSHA. Celanese was responsible for its own employees and ensured that they did not create any exposures to Daniel employees from the polyester manufacturing process. Daniel, on the other hand, installed all of the asbestos-containing materials in the plant and maintained all of the asbestos-containing materials in the plant. There is no evidence that any Celanese employee handled asbestos so as to expose Mr. Seay.

In light of the precedents discussed above, this Court, in *Garvin v. AGCO Corp., et al.*, rightly decided to reduce a \$10 million verdict for the plaintiff from \$10 million to \$1.5 million and the punitive damages verdict from \$11 million to \$3.5 million. The jury awarded Mr. Garvin's wife \$1 million, which the Court did not reduce. In this case, the Court should, at the very least, reduce the award for survival damages from \$2 million to \$1.5 million and the wrongful death and loss of consortium damages from \$5 million each to \$1 million each. As for punitive damages, the evidence does not support an award of any amount. But if the Court disagrees, it should reduce the award of punitive damages from \$2 million to no more than \$50,000.

Conclusion

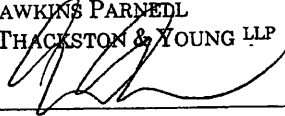
The Court should grant this motion and reduce the award for survival damages from \$2 million to \$1.5 million and the wrongful death and loss of consortium damages from \$5 million each to \$1 million each. The Court should render judgment n.o.v. on punitive damages, but if the Court disagrees, it should reduce the award of punitive damages from \$2 million to \$50,000.

[SIGNATURE ON FOLLOWING PAGE]

CLERK OF COURT
2015 OCT 16 PM 12:54
JAMES E. L. CROLEY

This 16th day of October 2015.

HAWKINS PARNELL
THACKSTON & YOUNG LLP


Elaine Shofner
South Carolina Bar No. 100501
H. Lane Young
Georgia Bar No. 781950
(Admitted Pro Hac Vice)
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lyoung@hptylaw.com
scollier@hptylaw.com

2015 OCT 16 PM 12:54
H. HOFF BLANKLEY

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Angela D. Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay	)	C/A No. 2013-CP-42-03915
	)	
<i>Plaintiffs,</i>	)	Defendant CNA Holdings, LLC's
	)	Motion for New Trial Absolute
vs.	)	
	)	
3M Company, et al.,	)	
	)	
<i>Defendants.</i>	)	

Defendant CNA Holdings, LLC files this motion for new trial absolute under SCRCP 59 and respectfully shows the Court as follows:

I.

The Court should order a new trial because there is insufficient evidence to support the jury's finding that "Celanese was negligent and its negligence was a proximate cause of the plaintiff's injuries and damages."

II.

The Court should order a new trial because there is insufficient evidence to support the jury's award of \$2,000,000 in actual damages for Plaintiffs' survival action, and the award is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.

III.

The Court should order a new trial because there is insufficient evidence to support the jury's award of \$5,000,000 in actual damages for Plaintiffs' wrongful death action, and the award is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.

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Appendix_02117

IV.

The Court should order a new trial because there is insufficient evidence to support the jury's award of \$5,000,000 in actual damages for Plaintiffs' loss of consortium action, and the award is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.

V.

The Court should order a new trial because there is insufficient evidence to support the jury's finding that "Celanese was willful, wanton, and reckless."

VI.

The Court should order a new trial because there is insufficient evidence to support the jury's award of \$2,000,000 in punitive damages, and the award is shockingly disproportionate to the injuries suffered and the conduct of the defendant and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.

VII.

The Court should order a new trial because the jury was tainted by juror number 16 who revealed in the middle of trial that he works at the same plant the decedent worked at and has the same job the decedent had. Upon learning this information, the jury engaged in improper discussions and premature deliberations severely prejudicing CNA Holdings, LLC.

VIII.

The Court should order a new trial because the jury was improperly charged on premises liability under South Carolina law. The jury should have been instructed only under *Lanier Const. Co. v. Bailey & Yobs, Inc.*, 681 S.E.2d 909, 912 (S.C. Ct. App. 2009), that the plaintiffs had to prove that CNA Holdings' knowledge of the hazards of Daniel's work with asbestos was superior to that of the decedent's

employer, Daniels. The standard premises liability instructions given by the Court should not have been given under the facts of this case, which involved claims by an employee of an independent contractor with expertise and experience in handling the allegedly dangerous conditions on the premises.

IX.

The Court should order a new trial because Plaintiffs' counsel published unauthorized audio to the jury when showing them a video of the deceased. Plaintiffs' counsel did not disclose the nature of the video and did not disclose that there would be audio, yet when the video played, the jury heard, "Help me, Jesus. Lord, help me, Jesus. Oh help me, Jesus." (Trial Transcript, Oct. 2, 2015, at 31:7-18). This was severely prejudicial to CNA Holdings and was harmful error.

X.

The Court should order a new trial because the Court erred in admitting Plaintiffs' exhibit 821 over CNA Holdings' objections. This was severely prejudicial to CNA Holdings and was harmful error. The Court also erred in allowing Plaintiffs' counsel to publish numerous documents to the jury over CNA Holdings' objections during Plaintiffs' counsel's cross examination of Bruce Bowyer. These documents were not admissible in this case as they were irrelevant, outside of the relevant time period, and more prejudicial than probative. These documents included:

1. State of Texas Occupational Health Regulations.
2. State of New York Occupational Health Regulations.
3. National Safety Council Transactions 1951.
4. Chemical Section 1958.
5. National Safety Council Accident Prevention Manual for Industrial Operations.
6. 1965 National Safety Congress Transactions.
7. Industrial Hygiene Digest 1953.

8. Mortality from lung cancer in asbestos workers by Richard Doll, 1955.
9. Industrial Hygiene Digest 1957.
10. Industrial Hygiene Digest 1964.
11. Industrial Hygiene Digest 1966.
12. Industrial Hygiene Digest 1966 May.
13. Industrial Hygiene Digest 1966 August.
14. Industrial Hygiene Digest 1966 September.
15. Industrial Hygiene Digest 1966 October.
16. Industrial Hygiene Digest 1967 February.
17. Dec. 7, 1949 Celanese Corporation of America Chemcel plant operating technical report.
18. Celanese accident and fire prevention reference for new and existing plants and laboratories.
19. Engineering standard for fittings, gaskets, bolting materials, selection charts.
20. Engineering standard, gasket specification, Crane 888, Belmont 588.
21. Correspondence from Union Carbide to William Freed.
22. September 19, 1977 Proposed Policy Statements.
23. February 13, 1978 Occupational Health Policies and Guidelines memo.
24. April 18, 1978 memo.
25. April 11, 1988 memo.
26. May 21, 1979 memo.
27. General administration on health and safety affairs, 1980.
28. November 7, 1988 Asbestos Gaskets.
29. 1963 Celanese Corporation of America, administrative procedures.

Permitting these documents to be published to the jury individually and collectively severely prejudiced CNA Holdings and was harmful error.

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Appendix_02120

XI.

The Court should order a new trial because justice was not served by the jury's verdict, and the evidence did not justify the result. The jury's verdict is contrary to the fair preponderance of the evidence.

Conclusion

For the foregoing reasons, the Court should grant a new trial absolute.

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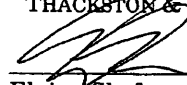
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H. HOFFER BLAUGLEY

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Appendix_02121

This 16th day of October 2015.

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RoA_2087

Appendix_02122

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
Angela D. Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay	)	C/A No. 2013-CP-42-03915
<i>Plaintiffs,</i>	)	Defendant CNA Holdings, LLC's Motion For Judgment Not Withstanding the Verdict
vs.	)	
3M Company, et al.,	)	
<i>Defendants.</i>	)	

Defendant CNA Holdings, LLC files this motion for judgment notwithstanding the verdict under SCRCP 50 and requests the Court vacate the jury's verdict and enter JNOV in favor of CNA Holdings or grant any other appropriate relief to which CNA Holdings shows it is entitled to.¹ A JNOV in favor CNA Holdings is appropriate because:

- (1) Plaintiffs failed to establish causation.
- (2) Plaintiffs failed to establish CNA Holdings had superior knowledge than the decedent's employer regarding the dangers of asbestos as required by South Carolina law.
- (3) Decedent was a statutory employee of CNA Holdings under South Carolina law; therefore, decedent's recourse was limited to bringing a claim under the Workers' Compensation Act.
- (4) Plaintiffs failed to present any evidence showing willful and wanton conduct on the part of the defendant.

¹ CNA Holdings, LLC presents only certain case dispositive issues and issues regarding damages awarded CNA Holdings reserves the right to present more, or different, issues for review on appeal. See *Wilder Corp. v. Wilke*, 497 S.E.2d 731, 734 (S.C. 1998).

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Appendix_02123

1. Plaintiffs failed to establish causation.

As the Court stated in its charge to the jury, to recover against CNA Holdings, Plaintiffs were required to prove that CNA Holdings "was negligent and, that such negligence, if any, was a substantial factor in bringing about [decedent's] injury. . . . Conduct is not a substantial factor in causing injury if the same injury would have occurred without that conduct." Plaintiff failed to prove that CNA Holdings was negligent, much less that decedent's injury would not have occurred without CNA Holdings' alleged negligence. Plaintiffs introduced no evidence, and there was no evidence to support an inference, that decedent would not have contracted mesothelioma if he had never worked at CNA Holdings' plant. In the absence of such evidence, the jury's verdict cannot stand and CNA Holding is entitled to a judgment notwithstanding the verdict.

2. Plaintiffs failed to establish CNA Holdings had knowledge superior to that of the decedent's employer regarding the dangers of asbestos.

South Carolina law is clear: in premises liability cases such as this one, the plaintiff must prove that the premises owner had knowledge superior to that of the decedent's employer regarding the hazards of asbestos. *Lanier Construction Co. v. Bailey & Yobs, Inc.*, 681 S.E.2d 909, 912 (S.C. Ct. App. 2009); *Sides v. Greenville Hospital System*, 607 S.E.2d 362, 365 (S.C. Ct. App. 2004); *Larimore v. Carolina Power & Light*, 531 S.E.2d 535, 540 (S.C. Ct. App. 2000). If the premises owner does not have superior knowledge, then the premises owner does not have a duty to warn. *Id.* Here, there was no evidence that CNA Holdings had knowledge superior to that of the decedent's employer, Daniel Construction, regarding the hazards of asbestos. CNA Holdings, therefore, owed no duty to decedent and could not have been negligent as a matter of law.

3. Decedent was a statutory employee of CNA Holdings under South Carolina law.

The evidence showed that the activity performed by decedent and his employer was a necessary, essential part of CNA Holdings' plant's operations, without which, the plant would not have been operational. Further, the evidence showed that the activity performed by decedent and his employer was also performed by CNA Holdings' own employees. Without this work, no polyester fiber would have been produced as no machines would have been running.

It is undisputed that under South Carolina law, when an employee of a contractor is injured while performing work that was part of a premises owner's "trade, business or occupation" the contractor's employees are deemed "statutory employees" of the premises owner and are covered by the South Carolina Workers' Compensation Act. S.C. Code Ann. § 42-1-400; *see also Edens v. Bellini*, 359 S.C. 433, 445 (2004) (citing *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168; 584 S.E.2d 398 (2003); *Neese v. Michelin Tire Corp.*, 324 S.C. 465, 478 S.E.2d 91 (1996), overruled on other grounds, *Abbott v. The Limited, Inc.*, 338 S.C. 161; 526 S.E.2d 513 (2000)). Decedent's recourse against CNA Holdings, therefore, is limited to a workers' compensation claim.

4. Plaintiffs failed to establish willful and wanton conduct.

To obtain punitive damages, a plaintiff must meet "the highest burden of proof known to the civil law." *Mellen v. Lane*, 659 S.E.2d 236, 251 (S.C. Ct. App. 2008). Punitive damages "can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Id.* For purposes of awarding punitive damages, the term "reckless" is more than mere negligence—it "implies the doing of a negligent act knowingly; it is a conscious failure to exercise due care." *Keeter v. Alpine Towers Int'l, Inc.*, 730 S.E.2d 890, 898-99 (S.C. Ct. App. 2012); *see also Cody v. Bank of America, N.A.*, 720 S.E.2d 473, 480 (S.C. Ct. App. 2011) (noting it is the

"present consciousness of wrongdoing that justifies the assessment of punitive damages").

Here, the jury should have never been permitted to assess the "wantonness" of CNA Holdings conduct and award punitive damages because Plaintiffs failed to introduce any evidence supporting a finding that CNA Holdings acted wantonly and willfully with respect to the safety of Mr. Seay. Plaintiffs produced no evidence, let alone clear and convincing evidence, that CNA Holdings "knowingly" engaged in negligent acts or was conscious of some wrongdoing on its part as South Carolina law requires for the imposition of punitive damages. On the contrary, the evidence showed that CNA Holdings reasonably and justifiably believed that Daniel would protect Mr. Seay.

Conclusion

For the foregoing reasons, the Court should vacate the jury's verdict and enter JNOV in favor of CNA Holdings or grant any other appropriate relief to which CNA Holdings shows it is entitled to.

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This 16th day of October 2015.

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no right to seek workers' compensation for pulmonary occupational diseases contracted more than two years after exposure. First, CNA points out that the South Carolina Workers' Compensation Act ("Act") contains a two-year statute of limitations that runs from the date of diagnosis. S.C. Code Ann. § 42-15-40. While this is a correct statement of the law, it has no impact on the application of S.C. Code Ann. § 42-11-70, which defines the types of occupational diseases that are compensable under the Act. With the exception of diseases caused by exposure to ionizing radiation, occupational diseases are only compensable if they are "contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years." S.C. Code Ann. § 42-11-70.

Section 52-15-40 is not incompatible with Section 42-11-70—it is simply an additional provision governing workers' compensation claims for occupational disease. If an occupational disease is contracted within one year of exposure, or two years of exposure for pulmonary diseases, then there is a claim under the Act that must be brought within the two-year statute of limitations established by Section 52-15-40. An employee could contract their pulmonary disease within two years after exposure, and then wait another two years to file their claim. But Section 52-15-40 cannot create or revive a claim that has been foreclosed because the disease was not contracted within the time frame required by Section 42-11-70. The case law treats these two provisions as entirely separate requirements. *See, e.g., Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 294-96, 519 S.E.2d 583, 597-98 (Ct. App. 1999).

CNA is also mistaken about the application of Section 42-11-70 in an asbestos case. The Appellate Review Panel of the South Carolina Workers' Compensation Commission has held that the "plain meaning" of Section 42-11-70 is "clear and unambiguous" in restricting claims for

pulmonary occupational diseases to those contracted within two years of exposure. Exhibit A, *Truax v. Daniel Construction/Fluor Daniel*, 2009 SC Wrk. Comp. LEXIS 30, at *5-*6 (S.C. Work. Comp. Comm. App. Panel Jul6, 2006). The court found that the legislature clearly intended to foreclose workers' compensation claims for latent diseases contracted more than two years after exposure:

S.C. Code Ann. § 42-11-70 is abundantly clear in its intent to disallow compensation for disability or death for an occupational disease of a pulmonary nature that is not contracted within two years of the date of the last injurious exposure. Notwithstanding the latency period of asbestos related diseases such as asbestosis, the legislature has never amended this provision and its intent is abundantly explicit. Any doubt as to the intent of the legislature to exclude any pulmonary related diseases from compensation unless contracted within two years of the Claimant's last exposure is removed when looking at the lone exception to this rule, that being for ionizing radiation.

Id. at *6 (emphasis added).

In *Truax*, the Appellate Review Panel found that the claimant had failed to prove that he had sustained a compensable occupational disease pursuant to the requirements of Section 42-11-70, given that his asbestos exposure occurred between 1969 and 1972 but he did not develop asbestosis until 2006. See *id.* at *4-*8. The Panel found that "it is impossible to reconcile the thirty-two (32) year gap in this case between the Claimant's last date of employment (1972), and the date he 'contracted' his disease (i.e. became disabled) in 2006." *Id.* at *7. The Panel specifically addressed the meaning of the word "contracted" as used in the statute, finding that it was not synonymous with the time of "exposure":

With 32 years between the last exposure to asbestos and the onset of symptoms, the only way the Claimant could have "contracted" asbestosis within two years of his last exposure, or 1974, is if the legislature intended for "contracted" to equate to exposure. If the legislature intended "contracted" to equate to exposure, then there would have been no need to amend the statute to carve out an exception for ionizing radiation as this disease would have already been covered under the current wording.

Id. at *6-*7.

CNA is entirely incorrect in its contention that “[t]he term ‘contracted’ is not the same as ‘diagnosed.’” Surreply at 2. The Appellate Review Panel has in fact held that these terms are the same under Section 42-11-70. In *Gibson v. Westinghouse Electric Corp.*, 2006 SC Wrk. Comp. LEXIS 895 (S.C. Work. Comp. Comm. App. Panel July 26, 2006), Exhibit B, the claimant’s last exposure to asbestos occurred in 1995 during his employment with Westinghouse, but he did not develop an asbestos-related lung disease until 2003. See *id.* at *1-*2. The Appellate Review Panel found that the claimant was not entitled to benefits under the Act because his “disease was not contracted until in excess of two (2) years after he retired from Westinghouse.” *Id.* at 20. In analyzing the meaning of “contracted” in Section 42-11-70, the Panel began by noting that the Supreme Court had settled this issue in holding that, “[t]he term ‘contracted’ is a term of art which has been defined for compensation purposes in occupational disease cases as ‘disablement or death.’” *Id.* at *21 (quoting *Vespers v. Springs Mills, Inc.*, 276 S.C. 94, 275 S.E.2d 882 (S.C. 1981)). The Panel determined that in interpreting Section 42-11-70, “an ordinary and unambiguous meaning should be assigned to the word contracting, i.e. when the disease manifests itself and/or disables the claimant.” *Id.* at *22 (emphasis added). Equating contraction of a disease with manifestation of the disease is the only logical reading of the statute:

A straightforward reading of the statute supports the definition of “contracted” in *Vespers* (supra). Our legislature could not have intended that the word “contracted” to be synonymous with “exposure”. If it did so, there would be no logical purpose for enacting the statute in the first place. The language references two distinct events: (1) exposure and (2) contracting the occupational disease. Since exposure and contracting the disease are distinct, and not the same, an ordinary and unambiguous meaning should be assigned to the word contracting, i.e. when the disease manifests itself and/or disables the claimant. The legislature chose to make compensability dependent on their being less than one (or two) year(s) between exposure and contraction of the disease.

Id. at *21-22.

The Panel further determined that the legislature had made a deliberate decision to disallow workers' compensation benefits for latent occupational diseases for public policy reasons: "The Appellate Review Panel finds that the purpose of 42-11-70 is to protect the employer against claims too old to be fairly investigated and defended. Accordingly this statute should be read to effectuate the legislative intent to reasonably limit an employer's period of potential liability for workers' compensation benefits." *Id.* at *22. An employee's remedy for injuries caused by latent diseases is therefore in the tort system.

Although CNA cited a 2008 Workers' Compensation Commission case in which benefits were awarded for mesothelioma, *Powell v. Yeargin Construction Co.*, that case did not provide any analysis of Section 42-11-70 and simply assumed that the plaintiff's disease was contracted within two years of his exposure. *Powell* is completely contrary to the reasoning and holdings of *Truax* and *Gibson* that a disease is not contracted until it has manifested, and that manifestation more than two years after exposure means the disease is not compensable under the Act.

As in *Truax* and *Gibson*, Plaintiffs do not have the right to workers' compensation benefits from CNA because Seay's mesothelioma manifested more than two years after his exposure to asbestos at Hoescht Celanese. He does not have a compensable disease within the meaning of Section 42-11-70, and may therefore pursue his tort remedies against CNA.

II. CNA has failed to show workers' compensation coverage.

In its Reply, CNA incorrectly contends that it is "undisputed" that it "always" had workers' compensation insurance coverage during the years of Seay's employment. On the contrary, Plaintiffs have disputed this point and CNA has completely failed to meet its burden to provide proof of coverage during all relevant years. The affidavit CNA submitted from Garry

Allen, the Global Claims Manager of Celanese Corp., is not sufficient to establish the required coverage. Mr. Allen located some workers' compensation policies for the years 1967 to 1972, but has not shown Hoechst Celanese was covered during the remaining years of Seay's employment, from 1973 to 1978. He makes the bald statement that "Hoechst Celanese maintained workers' compensation coverage during the entirety of Mr. Seay's and Mr. Hammett's employment," but does not provide any foundation for this statement—it is not based on his personal knowledge or on historical documents. Such an unsupported averment does not constitute competent evidence of insurance coverage and does not satisfy CNA's burden of demonstrating that it may invoke the exclusive remedy provision of the Act.

In addition, CNA's reliance on its contracts with Daniel is unavailing. The fact that it agreed to reimburse Daniel for Daniel's obligation to carry workers' compensation insurance does not prove that CNA itself had workers' compensation insurance. CNA and Daniel each had a separate responsibility to secure payment of workers' compensation benefits. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 329, 523 S.E.2d 766, 774 (1999).

Of course, CNA may only claim tort immunity if it has complied with the requirements of the Act. S.C. Code Ann. § 42-5-40; *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999). By failing to provide proof that it secured workers' compensation insurance, CNA loses immunity under the Act's exclusive remedy provision. *Harrell*, 337 S.C. at 327, 523 S.E.2d at 773.

For the foregoing reasons, the Court should find that Hoechst Celanese may not invoke the exclusive remedy provision of the Workers' Compensation Act. Its motion to dismiss, or in the alternative, motion for summary judgment, should be denied.

Respectfully submitted,


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ATTORNEYS FOR PLAINTIFFS

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EXHIBIT A

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Appendix_02135

2009 SC Wrk. Comp. LEXIS 30

Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission

March 23, 2009, Decided; March 27, 2009, Filed; March 23, 2009, Decided

W.C.C. FILE NO. 0411701

Reporter

2009 SC Wrk. Comp. LEXIS 30

CHESTER TRUAX, Employee, Claimant/Respondent/Appellant,

v.

**DANIEL CONSTRUCTION/FLUOR DANIEL, Employer, AND ST. PAUL
TRAVELERS INSURANCE COMPANY, Carrier,
Defendants/Appellants/Respondents**

Prior History:

Appellate Panel Review held in Columbia, South Carolina, on January 27, 2009, per notices timely and properly served upon all parties of interest.

Core Terms

claimant, asbestosis, disability, occupational disease, exposure, compensation rate, two year, permanently, disease, exposure to asbestos, burden of proof, carrier

Counsel

Claimant/Respondent/Appellant represented by M. Terry Haseldon, Esquire, of Spartanburg, South Carolina.

Defendants/Appellants/Respondents represented by T. Jefferson Goodwyn, Jr., Esquire, of Columbia, South Carolina.

Panel: DAVID HUFFSTETLER, COMMISSIONER; G. BRYAN LYNDON, COMMISSIONER

Opinion By: DAVID HUFFSTETLER, G. BRYAN LYNDON

Opinion

[*1]

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter came before the South Carolina Workers' Compensation Full Commission on January 27, 2009, on appeal by both parties from the Decision and Order of Commissioner Derrick L. Williams. In his Order dated September 17, 2008, Commissioner Williams found Claimant's asbestosis a compensable occupational disease. He went on to find that the Claimant was permanently and totally disabled, but not from the compensable occupational disease, but from a combination of the occupational disease and C.O.P.D., which he developed from smoking over the course of his lifetime.

Because Commissioner Williams found that the Claimant was not permanently and totally disabled from the compensable occupational disease, he was left to assign permanency based on disability ratings to the each lung. He assigned a disability

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rating to each lung of 40% which equated to 160 weeks per lung for a total of 320 weeks. Commissioner Williams also Ordered the Defendants to be responsible for all causally related future medical care pursuant to S.C. Code Ann. § 42-15-60 and *Dodge v Broccoli, Clark, Lavnan, Inc.*, 334 S.C. 574 (Ct App. 1999). [*2]

The Claimant alleges he sustained an occupational disease from asbestos exposure while working for the Employer from 1970-1972. Defendants denied the claim based in part on the provision in S.C. Code Ann. § 42-11-70, requiring the occupational disease to be contracted within two years of the last exposure to the employment related condition that causes the particular disease, in this case, asbestosis.

The Claimant also asserts that his compensation rate should be related to his average weekly wage at the time of disability. The Defendants took the position that if the claim was found compensable, that the applicable compensation rate should be limited to the maximum compensation rate for the last date the Claimant worked for the Employer, which was 1972. The Commissioner agreed with the Defendants and set the compensation rate at \$ 63.00, which was the maximum compensation rate for 1972.

By Appeal, the Defendants respectfully submit the following:

1. Did the Single Commissioner err in finding that the Claimant contracted asbestosis while working for the Employer from 1969-1972, when there is no medical evidence in the record to support such a finding?
2. Did the Single Commissioner [*3] err in finding that the Claimant contracted asbestosis within two years of his last exposure to asbestos under S.C. Code Ann. §42-11-70, when there is no medical or other evidence in the record to support such a finding?
3. Did the Single Commissioner err in finding that the greater weight of the evidence supported a finding that the claimant contracted asbestosis within two years of his last exposure to asbestos?
4. Did the Single Commissioner err in finding that the claimant filed a timely claim under the appropriate Statute of Limitations when the claimant alleged that he contracted asbestosis within 2 years of his last exposure, or by 1974, in this case?
5. Did the Single Commissioner err in ordering the Employer/Carrier to reimburse the claimant's health insurance carrier and Medicare for bills previously paid when the Act provides that the Employer/Carrier is only responsible to directly pay the medical providers at the fee scheduled rates?
6. Did the Single Commissioner err in awarding *Dodge* medicals when the Claimant was not found to be permanently and totally disabled due to the work related injury, was awarded 40% to each lung, and there was no medical evidence in the [*4] record indicating that future treatment would tend to lessen the claimant's period of disability?
7. Did the Single Commissioner err in finding that future medical treatment would tend to lessen the claimant's period of disability when the claimant is permanently and totally disabled regardless of any further medical treatment?

By appeal, the Claimant respectfully submits the following:

1. Did the Single Commissioner err in ruling Claimant's average weekly wage and compensation rate should be based upon his earning at the time he last worked for Daniel Construction in 1972?
2. Did the Single Commissioner err in failing to find that Claimant is entitled to compensation for total and permanent disability as a result of asbestosis?
3. Did the Single Commissioner err in failing to award temporary total compensation?

In an appellate review, the Panel shall, pursuant to S C Code Ann. § 42-17-50 (1985), review the Award, weight the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner. After careful review in the instant [*5] case, the Commission has determined that the Single Commissioner erred in finding the claimant

carried his burden of proving that he sustained a compensable occupational disease pursuant to the requirements outlined in S.C. Code Ann. § 42-11-70. Accordingly, the Single Commissioner's Findings of Fact and Conclusions of Law, as they relate to the compensability of this claim and payment of benefits by the defendants, are hereby reversed. Those Findings of Fact and Conclusions of Law related to claimant's compensation rate are affirmed.

FINDINGS OF FACT:

1. All parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. The venue for the hearing is proper in Columbia, South Carolina.
3. Notice of the hearing was timely and properly served on all parties of interest.
4. The Single Commissioner erred in finding the claimant met his burden of proving he sustained a compensable occupational disease pursuant to S.C. Code Ann. § 42-11-70.
5. Under the "plain meaning" rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Ruiney*, 341 S.C. 79, 533 S.E. 2d 578 (2000); [*6] *Bayle v. S.C. Dept. of Transportation*, 344 S.C. at 122, 542 S.E. 2d at 739. S.C. Code Ann. § 42-11-70 is abundantly clear in its intent to disallow compensation for disability or death for an occupational disease of a pulmonary nature that is not contracted within two years of the date of the last injurious exposure. Notwithstanding the latency period of asbestos related diseases such as asbestosis, the legislature has never amended this provision and its intent is abundantly explicit. Any doubt as to the intent of the legislature to exclude any pulmonary related diseases from compensation unless contracted within two years of the Claimant's last exposure is removed when looking at the lone exception to this rule, that being for ionizing radiation.
6. With 32 years between the last exposure to asbestos and the onset of symptoms, the only way the Claimant could have "contracted" asbestosis within two years of his last exposure, or 1974, is if the legislature intended for "contracted" to equate to exposure. If the legislature intended "contracted" to equate to exposure, then there would have been no need to amend the statute to carve out an exception for [*7] ionizing radiation as this disease would have already been covered under the current wording.
7. Under the plain language of S.C. Code Ann. § 42-11-70, it is impossible to reconcile the thirty-two (32) year gap in this case between the Claimant's last date of employment (1972), and the date he "contracted" his disease (i.e. became disabled) in 2006. As discussed by the authors of *The Law of Workers' Compensation in South Carolina* (4th ed.), this period "simply bars actions in which causation between the injurious exposure and the onset of disability is too attenuated to afford the parties a reasonable opportunity to prepare, investigate, and prove their arguments and defenses without resorting to speculation or conjecture" (7-24).
8. In this case, the long delay has meant that the employer representatives are no longer available, the personnel records and any pertinent test results are likewise unavailable, and at least one of the involved insurance carriers has become insolvent. These extenuating circumstances vividly illustrate the reasoning for having a two year statute of limitations in place, whether by the provisions of S.C. Code Ann. § 42-15-40 or by § 42-11-70.
9. The Single [*8] Commissioner found that the Claimant contracted asbestosis during his employment with Daniel Construction between 1969 and 1972 (Finding of Fact # 8), while not developing symptoms of asbestosis until more than 30 years later in June 2004 (Finding of Fact # 9). No medical evidence was cited in the Order supporting Finding of Fact # 8 finding that the asbestosis was "contracted" between 1969 and 1972, and the greater weight of evidence in the record does not support this Finding. As a result, the Claimant has not met his burden of proof in showing that the occupational disease was contracted within two (2) years of his last exposure in 1972, as required under S.C. Code Ann. § 42-11-70.
10. The Single Commissioner's Findings of Fact and Conclusions of Law related to claimant's contraction of asbestosis from working at Daniel Construction Company within two (2) years of his last exposure to asbestosis, are hereby reversed.
11. Accordingly, this claim is not compensable and the Defendants are not responsible for payment of workers' compensation benefits to the claimant for this alleged occupational disease.

12. Based upon claimant's earnings record which was submitted into evidence before [*9] the Single Commissioner, as well as claimant's testimony before the Single Commissioner, claimant's compensation rate in this claim is \$ 63.00, which was the maximum compensation rate in 1972.

Based upon the foregoing Findings of Fact, are the following:

CONCLUSIONS OF LAW

1. Under S.C. Code Ann. § 42-3-20 and § 42-3-180 (1985), the Commission has jurisdiction over the parties to hear the issues in dispute.
2. Under S.C. Code Ann. § 42-1-130, the Claimant is a covered employee.
3. Under S.C. Code Ann. § 42-1-140, Daniel Construction Company is a covered employer.
4. Under S.C. Code Ann. § 42-1-150, there was an employer/employee relationship between the parties at the time in question.
5. Under S.C. Code Ann. § 42-17-20, venue in Columbia, South Carolina was proper and agreed to by the parties.
6. Under S.C. Code Ann. § 1-23-320(b) and Regulation 67-607, notice of the Hearing was timely and properly served upon all parties of interest.
7. Under S.C. Code Ann. § 42-11-70, claimant failed to meet his burden of proving he contracted asbestosis within two (2) years after his last exposure to asbestosis at Daniel Construction in 1972. Therefore, his claim is denied.
8. The [*10] Finding of Fact and Conclusion of Law finding the claimant's compensation rate to be \$ 63.00, the maximum compensation rate from 1972, is affirmed.

ORDER

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner filed in the above-captioned matter on September 17, 2008, is hereby reversed as to all Findings of Fact and Conclusions of Law related to claimant contracting asbestosis within two (2) years after his last exposure to asbestos at Daniel Construction in 1972, as required under S.C. Code Ann. § 42-11-70. Therefore, as the claimant did not satisfy the requirements set forth in S.C. Code Ann. § 42-11-70, the claimant is not entitled to any benefits for this claim.

IT IS FURTHER ORDERED that the Finding of Fact and Conclusion of Law in the Single Commissioner's Order setting claimant's compensation rate at \$ 63.00, are hereby affirmed.

AND IT IS SO ORDERED.

REVERSED IN PART AND AFFIRMED IN PART.

South Carolina Workers' Compensation Commission

Concur By: ANDREA POPE ROCHE, COMMISSIONER

Concur:

I agree with the majority in their interpretation of S.C. Code Ann. § 42-11-70. Nevertheless, I find that S.C. Code Ann. § 42-11-70, is an affirmative defense. Therefore, [*11] the burden of proof is on the Defendants to prove the Claimant did not contract the disease within two (2) years after his last exposure to asbestos. There was no evidence in the record regarding when the Claimant contracted his occupational disease.

EXHIBIT B

RoA_2105

Appendix_02140

2006 SC Wrk. Comp. LEXIS 895

Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission

July 26, 2006, Decided; January 24, 2007, Filed; July 26, 2006, Decided

W.C.C. FILE NO. 0319071

Reporter

2006 SC Wrk. Comp. LEXIS 895

NORMAN GIBSON, Employee, Claimant

v.

WESTINGHOUSE ELECTRIC CORPORATION, Carrier, Defendant

Prior History:

Appellate Panel Review held in Columbia, South Carolina, On July 26, 2006, per notices timely and properly served upon All parties of interest.

Core Terms

claimant, occupational disease, disability, exposure, workers' compensation, appellate review, retire, disease, plant, weekly wage, asbestos, defendant appellant, occupational, cigarette, diagnose, workers' compensation benefits, pulmonary disease, two year, lung, legislative intent, lung disease, pension

Counsel

Claimant/Respondent represented by Jeffrey T. Eaddy, Esquire, of Charleston, South Carolina

Defendant/Appellant represented by R. Daniel Addison, Esquire, of Columbia, South Carolina

Panel: G. BRYAN LYNDON, COMMISSIONER; SUSAN S. BARDEN, COMMISSIONER; ANDREA POPE ROCHE, COMMISSIONER

Opinion By: G. BRYAN LYNDON, SUSAN S. BARDEN, ANDREA POPE ROCHE

Opinion

[*1]

STATEMENT OF THE CASE

This case was heard before Commissioner J. Michelle Childs on August 22, 2005. This claim arises out of allegations by the claimant that he has sustained an occupational disease as a result of exposure to both asbestos, volatile organic compounds and other chemicals while working for Westinghouse Electric Corporation, as well as a claim for injury by accident for this same exposure. The claimant/ respondent last worked for Westinghouse in 1995. The claimant/ respondent retired from the plant and began receiving a retirement pension from Westinghouse starting in the year 1995. The claimant/ respondent's allegations are that his last injurious exposure occurred on the last day he worked at the plant in 1995. The claimant/ respondent alleges continuous exposure to both asbestos materials as well as the chemicals present within the plant through his last day of work.

RoA_2106

Appendix_02141

By order and decision dated February 22, 2006, the Single Commissioner found *inter alia* that the claimant/ respondent had sustained an occupational disease as found under S.C. Code Ann. § 42-11-10 and awarded the claimant/ respondent benefits pursuant to S.C. Code Ann. §§ 42-9-30, 42-11-20, and 42-15-60. [*2]

The defendant/appellant timely appealed this decision and order to the Full Commission and argued that the Single Commissioner erred in the following respects:

1. In finding that the claimant/ respondent has sustained an occupational disease arising out of and in the course of his employment with Westinghouse;
2. In finding that the claimant/ respondent had sustained an injury by accident arising out of and in the course of his employment with Westinghouse;
3. In finding that the claimant/ respondent was entitled to disability as a result of that occupational disease, if he had an occupational disease;
4. In finding that the claimant/ respondent was entitled to permanent partial disability if the claimant sustained an injury by accident;
5. In setting the claimant/ respondent's average weekly wage and compensation rate at his alleged earnings at the time of the medical diagnosis in June, 2003;
6. In finding that a retired person such as the claimant/ respondent can prove disability under the definition of disability under the South Carolina Workers' Compensation Act;
7. In making an award when the evidence, per the Commission's own order, shows that the claimant/ respondent [*3] left his employment in 1995 and did not contract any disease (occupational or otherwise) until in excess of two years after he left such employment, all in derogation of § 42-11-70.

A review hearing was held on July 25, 2006, before the undersigned Appellate Review Panel. The Appellate Review Panel finds the defendant/appellant's brief and legal arguments persuasive on all points and adopts the following findings of fact as referenced in the defendant/appellant's brief and incorporated herein as follows:

1. The claimant/ respondent did not prove that he sustained an occupational disease arising out of and in the course of his employment with Westinghouse.

The Appellate Review Panel finds that the claimant/ respondent did not sustain an occupational disease arising out of and in the course of his employment with Westinghouse. The claimant/ respondent is a lifelong smoker with heavy amount of cigarette usage during his smoking history. The competent medical evidence suggests that the claimant/ respondent's problems are all due to his cigarette usage.

Dr. Galphin, a teaching professional pulmonologist at both MUSC and the South Carolina School of Medicine, had the claimant/ respondent [*4] diagnosed with a high resolution CT scan. The evidence in the record supports that a high resolution CT scan is the best diagnostic tool to determine the existence of asbestos lung disease. Dr. Galphin found that the claimant/ respondent did not have asbestos related lung disease, and that the claimant's lung problems arose from his long history of cigarette abuse.

Dr. Boylan, a physician appointed by the Single Commissioner for an examination pursuant to S.C. Code Ann. § 42-17-30, determined that the claimant/ respondent did have some lung problems, which she asserted came from both the cigarette use and possible asbestos exposure. However, Dr. Boylan based the asbestos related lung disease findings upon the statements from Dr. Fechter's records, including Dr. Fechter's B-reading x-ray report of the claimant/ respondent's lungs. Dr. Boylan did note the claimant/ respondent had received a high resolution CT scan which did not show any specific problems. Dr. Boylan seemed to place more value on the ILO B-reading x-ray to describe that the claimant/ respondent has sustained occupational lung disease, even though both Dr. Fechter and Dr. Galphin testified that the high resolution CT scan [*5] as the modern "gold standard" state-of-the-art method of determining whether there is lung damage from asbestos.

Dr. Boylan's report did indicate that the claimant/ respondent had significant exposure to cigarette smoke and that a large part of his problems are most likely related to his cigarette smoking. Her opinion of the asbestos related lung disease is primarily based upon the ILO B-reading from Dr. Ray Herron. The Appellate Review Panel finds that the reading from Dr. Herron is not credible and does not place any weight on this evidence.

The evidence supports that the claimant/ respondent had been receiving medical treatment from competent medical professions in the period from 1995 through 2003 including treatment by his family physician for problems related to his breathing issues as caused by cigarette abuse. There was no credible medical evidence to suggest that the claimant/ respondent was suffering from anything other than chronic obstructive pulmonary disease related to his long term cigarette abuse, and that evidence continues to remain the same today. The medical evidence supporting his alleged occupational disease is, at best, a guessing game by the medical professionals [*6] involved.

2. The claimant/ respondent did not prove that he sustained an injury by accident arising out of and in the course and scope of his employment with Westinghouse.

The Appellate Review Panel finds that the claimant/ respondent did not sustain an injury by accident arising out of and in the course of his employment with Westinghouse. The claimant/ respondent has attempted to use an amalgam of both the occupational disease statute and the injury by accident statute to create a situation where he can seek compensability for exposure under an occupational disease theory, and then be awarded benefits under an injury by accident theory. Adopting the claimant/ respondent's theory would require that the Appellate Review Panel ignore the Legislature's clearly spelled out intentions.

The claimant/ respondent clearly alleges an occupational injury and therefore, must proceed under S.C. Code Ann. § 42-11-10 *et seq.* The allegations of the claimant/ respondent clearly are that he has sustained a pulmonary disease as a result of chronic occupational exposure at the plant in Hampton. He does not make any allegation of an injury by accident on any particular date, other than a last [*7] injurious exposure date from his last date of work at the plant in 1995. It is only when lung damage is sustained on a specific date that the injury by accident paradigm applies. Grayson v. Gulf Oil Co., 292 SC 528, 357 SE2d 478 (Ct App 1987). If the claimant/ respondent had alleged a specific date of injury, obviously the statute of limitations would have precluded his claim. If he did indeed have a date of injury, it could not have occurred beyond February, 1995. Clearly, to bring a specific injury claim, he would have been required to have filed a claim by February, 1997, which of course did not occur.

The claimant/ respondent's argument is that he was not made aware of his "injury by accident" until he was diagnosed by Dr. Fechter in 2003. The "date of diagnosis" is primarily used in occupational disease situations. Had the claimant/ respondent sustained some particular injury on a specific date, and was not aware of the effects of that injury until some diagnosis down the road, his allegations would carry more weight. However, in this particular case, the claimant/ respondent performed his normal work, was exposed at the same varying [*8] levels of materials in the plant during every day of employment and then retired. On February of 1995, the claimant did not receive a medical opinion and it was not until 2003, that he obtained the opinion of Dr. Fechter, which stated that the claimant had developed a disease due to continuous exposure over the course of his employment.

All of the claimant/ respondent's testimony referred to the fact that he was constantly exposed to the various materials within the plant. It is impossible for the Appellate Review Panel to make a determination other than that the claimant has alleged occupational exposure which would potentially entitle him to benefits under the occupational disease statute. Accordingly, it was improper for the claimant/ respondent to be found to have sustained an injury by accident.

3. The claimant/ respondent did not prove he was entitled to disability as a result of an occupational disease, if he sustained an occupational disease.

The Appellate Review Panel finds that the claimant/ respondent is not entitled to disability as a result of an occupational disease under S.C. Code Ann. § 42-11-60 since the claimant/ respondent did not prove general disability under [*9] S.C. Code Ann. § 42-9-10 or § 42-9-20.

When a claimant alleges a pulmonary disease arising out of the inhalation of organic or inorganic dust or fumes, the claimant must seek benefits as specified in this particular statute. This statute is very clear on its face and the Appellate Review Panel finds that it must give the legislative intent its due respect. Because the claimant/ respondent has made absolutely no attempts to seek employment since his retirement, he clearly can prove neither general disability nor loss of earning capacity.

4. The claimant/ respondent did not have *earnings* as contemplated under the South Carolina Workers' Compensation Act at the time of the medical diagnosis in June 2003.

The Appellate Review Panel finds that the claimant/ respondent did not have earnings in 2003 as contemplated within the meaning of the South Carolina Workers' Compensation Act. The key applicable language in S.C. Code Ann. § 42-1-40 is the word *earnings*. The average weekly wage was meant to be defined based upon what a claimant was earning, or could be earning, were it not for the problems resulting from his injury. In the case at hand, the claimant/ respondent was [*10] not earning anything in 2003, his alleged date of diagnosis. The claimant/ respondent was a retired individual and had no intention of working to earn any money. The South Carolina Workers' Compensation Act clearly states that earnings are the wages paid to an employee as a result of his employment.

Retirement and pension benefits are not earnings. The Internal Revenue Service Code specifically recognizes that Social Security benefits and pension benefits are not earnings, as found in IRS Code § 3121(v)2. For tax purposes, retirement benefits and pension benefits are treated as other income and not earnings. The claimant/ respondent's pension and retirement income are not earnings as contemplated under the South Carolina Workers' Act in § 42-1-40.

If the Appellate Review Panel sees fit to use the claimant/ respondent's average weekly wage as of his "diagnosis" in June, 2003, the average weekly wage would actually have to be \$ 0.00 as the claimant/ respondent had absolutely no earnings in 2003.

The South Carolina Supreme Court dealt with a similar fact situation in *Bennett v. Gary Smith Builders*, 245 S.E.2d 129 (1978). Mr. Bennett was a retiree who was [*11] drawing his Social Security retirement. Bennett also continued working for his same employer on a part time basis earning approximately \$ 2,500 per year (the maximum amount of earnings allowed by the Social Security Administration before any diminishing of his Social Security retirement payments). The Supreme Court indicated that it was unfair to the employer to allow the claimant's average weekly wage to be based on anything other than the earnings that he had received for the wages paid by his employer, the maximum annual income of \$ 2,500 allowed by the Social Security Administration. Obviously, the Supreme Court did not give any credit to the claimant's retirement payments as made by the Social Security Administration.

Because Mr. Gibson actually has no earnings in the 52 weeks prior to June, 2003, the decision from *Bennett* dictates that Mr. Gibson would only be entitled to an average weekly wage of \$ 0.00 as he clearly had no wage related earnings in that period.

If the claimant/ respondent were entitled to an award, the only other proper method of calculating the average weekly wage in this claim would be for the Appellate Review Panel to use the claimant/ respondent's average [*12] weekly wage and compensation rate from his last year of work with Westinghouse, the 52 weeks preceding the date of injury. Per the claimant/ respondent's allegations of injury, this date has to be his last date of employment, February 1, 1995, as that would be the date of last allegedly injurious exposure, if any occurred. Accordingly, pursuant to S.C. Code Ann. § 42-1-40, the claimant/ respondent's last wages paid and earnings received were in the 52 weeks prior to the alleged last date of injurious exposure, February 1, 1995, and therefore his average weekly wage and compensation rate should be based upon the Form 20 as submitted by the employer.

5. The claimant/ respondent cannot prove disability under the South Carolina Workers' Compensation Act since he is a retired individual and has not made any reasonable effort to obtain employment.

The Appellate Review Panel finds that the claimant/ respondent, a retired individual, cannot prove disability under the South Carolina Workers' Compensation Act. To receive benefits under the South Carolina Workers' Compensation Act,

"the employee has the burden of showing that he could neither hold any other employment nor locate another job." [*13] Nettles v. Spartanburg School District # 7, 535 S.E.2d 146 (Ct. App. 2000). The burden of proving causation rests upon the claimant. This burden can only be met by evidence that the claimant has made reasonable efforts to obtain employment and has failed because of an injury produced handicap. Shealy v. Algernon Blair, Inc., 156 S.E. 2d 646 (1967), (citing Coleman v. Qualtrix Concrete Products, Inc., 142 S.E.2d 43 (1961)). Whether a claimant is entitled to disability benefits depends in part on a showing that he has been unable to get work because of his physical condition that naturally follows, "claimant must prove that he has made reasonable efforts to secure employment". Coleman, Id. (citing Larsons Workers' Compensation Law, Volume II, Section 57-66.)

The claimant/ respondent alleges that he is disabled for purposes of the South Carolina Workers' Compensation Act and as such should be entitled to benefits under the Act. The claimant/ respondent's allegations rest upon the findings of Dr. Cary Fechter, the claimant/ respondent's expert, which found that he had a degree of lung problems [*14] which interfered with his ability to work.

The Coleman and Shealy cases are the seminal cases for establishing what a claimant must prove to be able to receive general disability in South Carolina. In the claim at hand, the claimant/ respondent has attempted to circumvent the true and clear intent of the legislature by convincing the Single Commissioner to erroneously agree to provide him benefits under the Scheduled Loss Table found at S.C. Code Ann. § 42-9-30. The claimant/ respondent must proceed with this matter as an occupational disease, as his allegations clearly fit within the confines of S.C. Code Ann. § 42-11-10 et seq. S.C. Code Ann. § 42-11-60, requires the claimant only is entitled to benefits when the claimant is generally disabled under S.C. Code Ann. § 42-9-10 or has a loss of earning capacity under S.C. Code Ann. § 42-9-20.

The claimant/ respondent did not prove that he is generally disabled or that he has any loss of earning capacity. In his own testimony, he has stated very clearly that he retired in 1995 and had absolutely no intention of seeking any other gainful employment. He cannot meet the requirements of Nettles, Shealy and Coleman, which require [*15] that he must prove his inability to work by trying to actually find work. Obviously, the claimant/ respondent has no intention of trying to work.

6. The Single Commissioner erred in awarding any benefits under S.C. Code Ann. 42-9-30.

The Single Commissioner erred in awarding disability under § 42-9-30, a decision which would clearly abrogates legislative intent. The Single Commissioner, in her order, relied on Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002), to award PPD under § 42-9-30. This was in error. The Pee decision specifically dealt with a CTS case and allowed a claimant to proceed under the injury by accident statute for CTS. The Supreme Court found that a CTS claimant sustains new injuries every day which are physical in nature. In Pee, the Supreme Court was not bound by the requirements of § 42-11-60 and the corresponding remainder of § 42-11-10 et seq. regarding an occupational disease in South Carolina. CTS was not contemplated by our legislature in drafting § 42-11-10 et seq. However, the opposite is true in the case at bar.

The claimant/ respondent allegations are that he sustained exposure during his [*16] work at the plant in Hampton, South Carolina. His exposure over time was to both asbestos related materials and chemical fumes. To indicate that this type of injury is anything other than an occupational disease completely flies in the face of logic and totally abrogates the legislative intent of having an occupational disease statute. It is wholly illogical to indicate that a claimant is able to seek benefits for "repeated" pulmonary injuries by calling it some other name.

The claimant/ respondent's alleged condition is clearly that he sustained a pulmonary related occupational disease resulting from long term exposure to both asbestos and other organic and inorganic materials at the plant in Hampton. If the claimant/ respondent was able to obtain any disability in this case, which we find he is not, it must be under the confines of S.C. Code Ann. § 42-11-60, which requires that he prove that he is generally disabled or has a loss of earning capacity, which he has not proven in this case. Accordingly, the claimant/ respondent is not entitled to any disability in this case.

7. The defendant/appellant is entitled to credit for the payments made to the claimant/ respondent prior [*17] to the allegations of his workers' compensation injury.

The Appellate Review Panel finds that the defendant/appellant should be entitled to a credit for the payments made to the claimant/ respondent prior to the allegations of his workers' compensation injury. This claimant/ respondent has received

well in excess of \$ 100,000 in disability payments from Westinghouse since the time he left the plant in 1995. The claimant/ respondent continues to receive these payments, which are paid directly by Westinghouse. (Westinghouse is totally self insured for these matters) The claimant/ respondent also received medical benefits through a health plan funded by Westinghouse subsequent to his departure from the plant in 1995.

The Single Commissioner decided, in error, that the defendant/appellant is not entitled to a credit presumably upon the arguments of the claimant/ respondent pursuant to *Muir v. C.R. Bard, Inc.*, 519 S.E.2d 583 (Ct. App. 1999), that the payments were not made in lieu of workers' compensation benefits and that therefore the defendant/appellant was not entitled to credit for those payments. This argument is contradicted by the fact that the [*18] claimant/ respondent was not seeking any workers' compensation benefits until he filed a claim against Westinghouse in 2003, after he had received an opinion from Dr. Fechter.

It is absolutely unfair to rule that an employer, who has absolutely no knowledge of a potential workers' compensation claim, and who in good faith pays a very large sum of money to an individual, should then be penalized for being a good employer. By not allowing a credit for the payments made during the period from the separation of employment through the date of diagnosis flies in the face of logic and fair play.

The *Muir* decision indicates that for prior payments to be deductible from an award, the payments must have been made with reference to liability under the provisions of the Workers' Compensation Act and intended to be in lieu of workers' compensation benefits. The Court in *Muir* indicated "the intent with which such payments are made becomes important." Obviously, the intention of Westinghouse could not be to pay in lieu of workers' compensation benefits as there was no claim for workers' compensation benefits until 2003. The only intention of Westinghouse was to pay these benefits as a good [*19] employer, prior to the allegations of workers' compensation injuries made in the year 2003.

Under the Workers' Compensation Act, Westinghouse is only required to pay compensation when it had knowledge of the injury or death. S.C. Code Ann. § 42-9-230. Pursuant to this section, knowledge is the important aspect as the statute reads "the first installment of compensation payable...is due...after the employer has knowledge of the injury or death." Without knowledge of the injury it is illogical to assume that the defendant/appellant had an obligation to pay benefits when it did not know that benefits were due and under the Workers' Compensation Statute had absolutely no obligation to pay benefits.

It is extremely unfair to require that an employer read a potential claimant's mind and predict the future in order to receive credit for any payments made prior to an allegation by claimant of a workers' compensation injury. There is no evidence that the defendant/appellant had knowledge of the claimant/ respondent's potential workers' compensation claim from the years 1995 until the summer of 2003, and at a minimum, the defendant/appellant should be given credit for all benefits [*20] paid during that period as those payments were made in good faith as a good employer trying to take care of their employees.

8. The claimant/ respondent did not prove that he contracted an occupational/ pulmonary disease within two years after the date of last exposure.

The Appellate Review Panel finds that the claimant/ respondent is not entitled to benefits under the South Carolina Workers' Compensation Act when the evidence supports that if the claimant/ respondent contracted a disease, such disease was not contracted until in excess of two (2) years after he retired from Westinghouse.

Pursuant to S.C. Code Ann. § 42-11-70, neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic dusts the period shall be two years.

The credible evidence in the records supports that if the claimant/ respondent contracted an occupational/ pulmonary [*21] disease, same was contracted more than two years after he had retired from Westinghouse. A question arises as to whether the word "contracted" as used in the statute may be construed the acquisition of the disease at the time symptoms and disability occur, or at the time of exposure. The answer is settled by established case law in South Carolina.

Our supreme court has previously issued a definition of the word "contracted" in workers' compensation cases in *Vespers v. Springs Mills, Inc.*, 275 SE2d 882, 276 S.C. 94 (S.C. 1981). Justice Ness wrote:

"The term "contracted" is a term of art which has been defined for compensation purposes in occupational disease cases as "disablement or death."

A straightforward reading of the statute supports the definition of "contracted" in *Vespers* (supra). Our legislature could not have intended that the word "contracted" to be synonymous with "exposure". If it did so, there would be no logical purpose for enacting the statute in the first place. The language references two distinct events; (1) exposure and (2) contracting the occupational disease. Since exposure and contracting the disease are [*22] distinct, and not the same, an ordinary and unambiguous meaning should be assigned to the word contracting, i.e. when the disease manifests itself and/or disables the claimant. The legislature chose to make compensability dependent on their being less than one (or two) year(s) between exposure and contraction of the disease.

The Appellate Review Panel finds that the purpose of 42-11-70 is to protect the employer against claims too old to be fairly investigated and defended. Accordingly this statute should be read to effectuate the legislative intent to reasonably limit an employer's period of potential liability for workers' compensation benefits. In determining the legislature's intent, consideration should be given to the necessity for the law, the evils sought to be remedied, and the purpose to be achieved. *Stewart v. The Industrial Comm'n*, 115 Ill.2d 337, 105 Ill.Dec. 215, 504 N.E.2d 84 (1987) (finding that Illinois has a valid state interest in its statute of repose for occupational diseases).

CONCLUSIONS OF LAW

In an appellate review, the Appellate Review Panel shall pursuant to S.C. Code Ann. § 42-17-50, review the award, weigh the evidence [*23] as presented at the initial hearing, and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

Based upon a review of the foregoing, the Appellate Review Panel reverses the Order of February 22, 2006, and sets forth the follow Conclusions of Law:

1. Pursuant to S.C. Code Ann. § 42-11-10, the claimant/ respondent did not prove that he sustained an occupational disease arising out of and in the course of his employment with Westinghouse;
2. Pursuant to S.C. Code Ann. § 42-9-30, the claimant/ respondent did not prove that he sustained an injury by accident arising out of and in the course and scope of his employment with Westinghouse;
3. Pursuant to S.C. Code Ann. § 42-11-60, the claimant/ respondent is not entitled to disability as a result of an occupational disease, if the claimant/ respondent sustained an occupational disease.
4. Pursuant to S.C. Code Ann. § 42-1-40, the claimant/ respondent's average weekly wage and compensation rate is not based on his alleged earnings at the time of the medical diagnosis in June, 2003;
5. Pursuant to S.C. Code Ann. [*24] § 42-11-60, the claimant/ respondent, a retired individual, did not prove disability under the South Carolina Workers' Compensation Act;
6. Pursuant to S.C. Code Ann. § 42-9-210, the defendant/appellant is entitled to credit for the payments made to the claimant/ respondent prior to the allegations of his workers' compensation injury; and
7. Pursuant to S.C. Code Ann. 42-11-70, the claimant/ respondent did not prove that he contracted an occupational/ pulmonary disease within two years after the date of last exposure.

IT IS THEREFORE, ORDERED that the Decision and Order of the Single Commissioner is hereby reversed with no remand for a new hearing.

AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION APPELLATE REVIEW PANEL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Angela D. Keene, Individually and as	)	C/A No. 2013-CP-42-03915
Personal Representative of the Estate of	)	
Dennis Seay, Deceased, and Linda Seay,	)	
	)	Defendant CNA Holdings, LLC's, Surreply
Plaintiffs,	)	in Support of its Supplemental and
	)	Amended Motion to Dismiss for Failure to
vs.	)	State a Claim, or in the Alternative, Motion
	)	for Summary Judgment Based on the
3M COMPANY., <i>et al.</i> ,	)	Statutory Employee Doctrine
	)	
Defendants.	)	

DEFENDANT CNA HOLDINGS, LLC'S, SURREPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Plaintiffs are not barred from seeking a workers' compensation claim for their alleged injuries. A claimant has a two-year period for filing a claim under the South Carolina Workers' Compensation Act. *See* S.C. Code Ann. § 42-15-40. "[F]or occupational disease claims the two-year period does not begin to run until the employee concerned has been diagnosed definitely as having an occupational disease and has been notified of the diagnosis." S.C. Code Ann. § 42-15-40. Additionally, the Supreme Court of South Carolina has similarly held that this two-year limitations period does not begin to run until a claimant receives both a "definitive diagnosis" and that the claimant has become "totally disabled." *See Bailey v. Covil Corp.*, 354 S.E.2d 35, 36 (S.C. 1986). As Mr. Seay was diagnosed with mesothelioma in August 2013, Plaintiffs are not barred from filing a workers' compensation claim.

Plaintiffs erroneously rely on S.C. Code Ann. § 42-11-70 in arguing they do not have a right to compensation under the Act. (Plfs' Resp., pp. 6-8). Simply, this provision has no bearing on the issue at hand. This provision requires a claimant to establish that his occupational disease

was "contracted" within at least two years of the last exposure. *See* S.C. Code Ann. § 42-11-70. The term "contracted" is not the same as "diagnosed" — as Plaintiffs apparently believe. This provision certainly does not bar Plaintiffs from recovering under the Act. In fact, the South Carolina Workers' Compensation Commission has determined that § 42-11-70 did not bar a claim where the claimant was diagnosed with mesothelioma more than thirty years after his last exposure to asbestos. *See Powell v. Yeargin Construction Company, et. al.* 2008 WL 5066355 (S.C. Work.Comp.Comm., July 3, 2008).

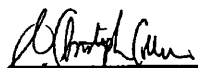
As such, Plaintiffs' argument that "no remedy" is available through workers' compensation is without merit. The two-year limitations period has yet to expire, to this date. Plaintiffs' reliance on § 42-11-70 is not relevant to the present issue and does not bar them from seeking relief under the South Carolina Workers' Compensation Act.

Conclusion

CNA requests that this Court grant its Supplemental and Amended Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, and all other and further appropriate relief.

This the 21st day of July, 2015.

HAWKINS PARNELL THACKSTON & YOUNG^{LLP}



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Admitted pro hac vice

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Corporation*

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Angela D. Keene, Individually and as	)	C/A No. 2013-CP-42-03915
Personal Representative of the Estate of	)	
Dennis Seay, Deceased, and Linda Seay,	)	
Plaintiffs,	)	
	)	<u>DEFENDANT CNA HOLDINGS, LLC'S,</u>
vs.	)	<u>MOTION FOR PARTIAL SUMMARY</u>
	)	<u>JUDGMENT AS TO VARIOUS ISSUES</u>
3M COMPANY., <i>et al.</i> ,	)	<u>AND CLAIMS AGAINST CNA</u>
	)	
Defendants.	)	

COMES NOW, CNA Holdings, LLC, identified in the caption as "CNA Holdings, LLC (sued individually and as successor to Hoechst Celanese Corporation)" ("Hoechst Celanese" or "Defendant"), and moves this Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting partial summary judgment as to various issues on the ground that there are no material issues of fact and Hoechst Celanese is entitled to summary judgment as a matter of law.

The issues on which partial summary judgment is sought include the First, Second, Third, Fourth, Fifth, Sixth and Seventh causes of Action:

- Any claims as to strict liability and warranty against Hoechst Celanese, because Hoechst Celanese may only be liable under a premises liability negligence theory. *See, e.g., Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014) ("[C]laims against a hospital for injuries caused by falling ceiling tiles or improperly maintained hallways or parking lots sound in ordinary negligence, and specifically in premises liability.") (citations omitted); *Wintersteen v. Food Lion, Inc.*, 336 S.C. 132, 136, 518 S.E.2d 828, 829-30 (Ct. App. 1999) (discussing "[t]he negligence which must . . . be proved by the plaintiff" in a slip-and-fall premises liability case) (quoting *Pennington v. Zayre Corp.*, 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); *see also In Re: Breast Implant Product Liab. Litig.*, 337 S.C. 540, 503 S.E.2d 445 (1998) (holding that Doctors, because they predominantly perform a service, may not be liable in strict liability or warranty with regard to allegedly defective breast implants); *Madison v. Amer. Home Products. Corp.*, 358 S.C. 449, 595 S.E.2d 493 (2004) (holding that pharmacists

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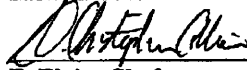
predominantly provide a service and thus are not subject to claims of strict liability with regard to drugs they disperse in filling prescriptions); *Duncan v. CRS Serrine Engineers, Inc.*, 337 S.C. 537, 524 S.E.2d 115, n.3 (Ct. App. 1999) (noting that defendant Fluor Daniel provided predominantly services to plant owner and was not subject to claims for strict liability and warranty); *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 565, 658 S.E.2d 80, 90 (2008) ("In South Carolina, it is firmly established that the strict liability statute applies only to sales of products and not to the provision of services.").

2. Any post-exposure or post-sale or retro-active duty to warn. *See, e.g., Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) (holding that a product must be "measured against a standard existing at the time of sale or against reasonable customer expectations held at the time of sale") (internal quotation and citation omitted); *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 17 (2010) ("The first rule provides that whether a product is defective must be measured against information known at the time the product was placed into the stream of commerce. When a claim is asserted against a manufacturer, post-manufacture evidence is generally not admissible."); *Campbell v. Gala Indus.*, No. 6:04-2036, 2006 U.S. Dist. LEXIS 26606, at *13-14 (D.S.C. April 20, 2006) (Harwell, J) ("[T]he court grants summary judgment for Gala on the ground that there is no post-sale duty to retrofit or recommend.")
3. Any claim of fraudulent misrepresentation. *See, e.g., First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 71, 451 S.E.2d 907, 912 (Ct. App. 1994) (Setting forth the nine required elements of fraudulent misrepresentation under South Carolina law).
4. Any claim other than negligence and the separate causes of action that may accompany a negligence claim which only set forth damages such as the wrongful death, survival, and loss of consortium claims.

This the 17th day of July, 2015.

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Counsel for Defendant CNA Holdings, LLC,
identified in the caption as "CNA Holdings, LLC
(sued individually and as successor to Hoechst
Celanese Corporation)"

M. HOPE BLACILE

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL
CIRCUIT

Angela D. Keene, Individually and as) C/A No. 2013-CP-42-03915
Personal Representative of the Estate of)
Dennis Seay, Deceased, and Linda Seay,)
Plaintiffs,) Defendant CNA Holdings, LLC's Reply
vs.) Brief In Support Of Its Supplemental
3M COMPANY., *et al.*,) And Amended Motion To Dismiss For
Defendants.) Failure To State A Claim, Or In The
Alternative, Motion For Summary
Judgment Based On The Statutory
Employee Doctrine

Defendant CNA Holdings, LLC, identified in the caption as "CNA Holdings, LLC (sued individually and as successor to Hoechst Celanese Corporation)" ("Hoechst Celanese" or "Defendant") files this Reply Brief in Support of Its Supplemental and Amended Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine.

Introduction and Brief Statement of Pertinent Facts

Plaintiffs allege that Plaintiffs' Decedent, Dennis Seay, worked with or around various asbestos-containing materials while employed at various job sites, including Hoechst Celanese in Spartanburg, South Carolina. Mr. Seay worked at Hoechst Celanese for Daniel Construction Company ("Daniel") from the third quarter of 1971 until 1980, according to his Social Security records.¹ Mr. Seay was a millwright, and he was responsible for repairs and preventive maintenance work on equipment at Hoechst Celanese. Mr. Seay subsequently developed mesothelioma.

¹ Mr. Seay testified that he worked at Hoechst Celanese for Daniel Construction Company ("Daniel") from 1969 until about 1978.

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Plaintiffs assert that Hoechst Celanese has failed to show that it had tort immunity under the exclusive provision of the South Carolina Workers' Compensation Act ("the Act"). See S.C. Code § 42-1-540. They rely on *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999), to suggest that an employer who fails to secure workers' compensation coverage as required by the Act loses its immunity under the South Carolina Workers' Compensation Law's exclusive remedy provision and may be sued in tort.

As shown in Hoechst Celanese's initial brief, for a company to avail itself of the protections afforded by the Act, a company must (i) subscribe to approved insurance coverage, or (ii) receive permission from the South Carolina Workers' Compensation Commission to self-insure the risk. S.C. Code § 42-5-20. Hoechst Celanese obtained workers' compensation insurance, which allows Hoechst Celanese to avail itself of tort immunity under the Act. Hoechst Celanese's compliance is evidenced through the existence of the "Workmen's Compensation and Employers' Liability Policies," attached hereto as Ex. A.

This inquiry should not even be reached, however, as the Maintenance Services Contracts between Hoechst Celanese and Daniel clearly show that Hoechst Celanese reimbursed Daniel for workers' compensation costs incurred by Daniel. The Maintenance Services Contracts between Hoechst Celanese (referred to as the "owner") and the maintenance and millwright division of Daniel International (referred to as

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"contractor") specifically states in Section 4 (c) Payroll Costs that "The owner shall reimburse for workmans' compensation."²

Also, Hoechst Celanese has demonstrated that Mr. Seay is a statutory employee. As delineated by South Carolina courts, Mr. Seay only is required to qualify under one of the three criteria to be a statutory employee.³ Plaintiffs are incorrect in asserting that Mr. Seay's work of maintaining equipment for Hoechst Celanese was not part of its business of manufacturing synthetic fibers and resins. Without this maintenance, the Hoechst Celanese plant would not be able to run to manufacture synthetic fibers and resins; therefore, the maintenance performed by Mr. Seay was necessarily "important" and a "necessary, essential, and integral part of the owner's business." Further, without this maintenance by Mr. Seay, which was an "integral" part of Hoechst Celanese's business, the Hoechst Celanese plant could not function. Even if Hoechst Celanese is required to meet all three

² CNA Holdings, LLC, previously filed its Memorandum of Law in Support of its Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine on September 10, 2014, which included The Maintenance Contracts, Exs. I-M.

³ South Carolina courts have set forth the following test to determine whether the activity of an employee of a subcontractor is sufficient to make him a "statutory employee": (1) The activity of the subcontractor is an important part of the owner's trade or business, (2) The activity performed by the subcontractor is a necessary, essential, and integral part of the owner's business; or (3) The identical activity performed by the subcontractor has been performed by employees of the owner. *Voss*, 482 S.E.2d at 586 (citing *Smith v. T. H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E. 2d 439, 440 (1991)); *Edens v. Bellini*, 359 S.C. 433, 443, 597 S.E.2d 863, 868 (S.C. Ct. App. 2004) (citing *Boone v. Huntington and Guerry Elec. Co.*, 311 S.C. 550, 430 S.E.2d 507 (1993)); *Riden v. Kemet Elec. Corp.*, 313 S.C. 261, 437 S.E.2d 156 (1993); *Meyer v. Piggy Wiggly No. 24, Inc.*, 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000) (holding there are three tests used to determine whether an employee was "engaged in an activity that is part of the owner's trade, business, or occupation"); *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 318, 391 S.E.2d 731, 732 (1990) (holding the test used to determine if one is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner.")). "If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner." *Voss* at 567 (citing *Riden*, 427 S.E. 2d at 156-158) (emphasis added). "Any doubts as to a worker's status are to be resolved in favor of coverage under the Act." *Id.*

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tests, it can meet test three because the identical activity performed by Mr. Seay has been performed by Hoechst Celanese employees.⁴

Plaintiffs twist the testimony of Mr. Bruce Bowyer and Dr. Frederick Toca in an effort to support their argument that maintenance of equipment at Hoechst Celanese's facility was somehow not a necessary, essential, or integral part of Hoechst Celanese's business. Hoechst Celanese agrees with Mr. Bowyer that the business of its facility was the manufacture of synthetic fibers and resins. But as Mr. Bowyer also testified, Hoechst Celanese could not carry on its business if its equipment was not kept in sound condition. Again, maintenance was, by its very definition, a necessary part of Hoechst Celanese's trade, business, or occupation.

Plaintiffs cite to the testimony of Dr. Toca from another, unrelated case where he stated that "maintenance would not have been part of the overall mission of the company." In presenting this evidence, Plaintiffs incorrectly attempt to divorce maintenance as an integral part of Hoechst Celanese's business. Even if Dr. Toca's deposition had been taken in this case, the Court will notice that on reading the excerpts from Dr. Toca, Plaintiffs simply cherry-picked snippets of Dr. Toca's overall testimony in an effort to convince the Court that the testimony stands for a proposition favorable to their cause.

Garry Allen is the Global Claims Manager of Celanese Corporation. Ex. B. Allen Aff. ¶ 2. He conducted a diligent search of Hoechst Celanese's historical worker's compensation policies, and he found a true and accurate copy of the policies that he located to date that pertain to the following periods: 8/12/67-8/12/68, 8/12/68-8/12/70, 8/12/69-11/01/71, and 10/12/70-11/11/72. Allen Aff. ¶ 4. Hoechst Celanese maintained worker's

⁴ CNA Holdings, LLC, previously filed its Memorandum of Law in Support of its Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine on September 10, 2014, which included the original affidavit of Bruce Bowyer, Esq.

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compensation coverage during the entirety of Mr. Seay's employment but, due to the passage of time, it has been unable to locate the specific policies for each year. Allen Aff. ¶ 5. It is undisputed that Hoechst Celanese has always maintained the proper and adequate workers' compensation insurance required under South Carolina's Workers' Compensation Law. Allen Aff. ¶ 6. The policies were located in Hoechst Celanese's files and were created and maintained in the ordinary course of Hoechst Celanese's business activities. Allen Aff. ¶ 7.

As will be shown below, Plaintiffs have failed to offer the necessary proof as to why Hoechst Celanese should not be provided protection under the Act, especially in light of the proof that because Hoechst Celanese secured the payment of compensation as prescribed in S.C. Code Ann. § 42-5-10 (1985). For these reasons, Hoechst Celanese's Motion is due to be granted.

Argument and Citation to Authority

- I. Hoechst Celanese is entitled to protection under the South Carolina Workers' Compensation Law as it maintained adequate workers' compensation insurance.**

Hoechst Celanese may avail itself of tort immunity under the Act's exclusive remedy provision because it secured the payment of compensation as prescribed by the Act. S.C. Code Ann. § 42-5-10 (1985).

Every employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or mutual insurance association formed by a group of employers so authorized or shall furnish to the commission satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due as provided for in this title. The commission may, under such rules and regulations as it may prescribe, permit two or more employers or businesses of a similar nature to enter into agreements to pool their

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liabilities under the Workers' Compensation Law for the purpose of qualifying as self-insurers.

S.C. Code Ann. § 42-5-20 (Supp. 1998).

Under both *Harrell* and S.C. Code Ann. § 42-5-10, Hoechst Celanese is entitled to tort immunity because it secured workers' compensation coverage. Plaintiffs are wrong when they assert that Hoechst Celanese cannot invoke the Act's exclusive remedy provision. Hoechst Celanese can establish that during Mr. Seay's employment, it had workers' compensation insurance, as shown by those policies attached hereto in Ex. A.

It is undisputed that Hoechst Celanese has always maintained the proper and adequate workers' compensation insurance required under South Carolina's Workers' Compensation Law. Allen Aff. ¶ 6. The policies were located in Hoechst Celanese's files and were created and maintained in the ordinary course of Hoechst Celanese's business activities. Allen Aff. ¶ 7.

Unlike the employer in *Harrell*, Hoechst Celanese contracted with Aetna to provide workers' compensation coverage, as evidenced by those policies contained in Ex. A. The relevant policies specifically name South Carolina as a state where the insurance policy, subject to statutory requirements, will cover workers' compensation claims.⁵ Specific terms in these policies include language stating that "Insurance will cover any occupational diseases through workers' compensation," the insurance coverage applies to all persons considered employees under statutory law, and the policies apply to persons entitled to receive workers' compensation benefits under South Carolina law.

⁵ The policies that Hoechst Celanese has been asked to locate to date pertain to the following periods and are attached hereto as Exhibit A: 8/12/67-8/12/68, 8/12/68-8/12/70, 8/12/69-11/01/71, and 8/12/71-11/11/72. Hoechst Celanese asserts that it maintained workers' compensation coverage during the entirety of Mr. Seay's employment but, due to the passage of time, it has been unable to locate the specific policies for each year.

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Unlike the employer in *Harrell*, Hoechst Celanese complied with its separate statutory duty to maintain its own workers' compensation insurance. Also, Hoechst Celanese's Maintenance Services Contracts, attached to its initial brief,⁶ shows that Hoechst Celanese reimbursed Daniel for worker's compensation and thus paid to cover each Daniel millwright working on its premises, including Mr. Seay. In *Harrell*, there is no mention of the employer reimbursing the contractor for worker's compensation.

The Maintenance Services Contracts between Hoechst Celanese (referred to as the "owner") and the maintenance and millwright division of Daniel International (referred to as the "contractor") specifically state in Section 4 (c) Payroll Costs that: "The owner shall reimburse for workmans' compensation." Thus, because Hoechst Celanese can show that it fulfilled its own statutory duty to maintain workers' compensation insurance, and because its maintenance contract reflects that it was contractually obligated to reimburse Daniel for workers' compensation insurance for Daniel's employees, Hoechst Celanese may avail itself of tort immunity under the Act's exclusive remedy provision.

II. Mr. Seay was a "Statutory Employee" of Hoechst Celanese.

The question of statutory employment status turns on whether the work performed by the subcontractor is "part of [the owner's] trade, business or occupation". *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 484 (2003). Hoechst Celanese has demonstrated that Mr. Seay was a statutory employee.

⁶ CNA Holdings, LLC, previously filed its Memorandum of Law in Support of its Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine on September 10, 2014, which included The Maintenance Contracts, Exs. I-M.

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This Court has heard several Motions to Dismiss based on the "statutory employee defense" in cases with similar fact patterns.⁷ In each case, the Court held that the contractor performing maintenance and construction were statutory employees. The Court should make the same finding with respect to Mr. Seay in the instant case.

Plaintiffs ignore that Hoechst Celanese only has to meet one of the three tests to determine whether Mr. Seay is a statutory employee. Mr. Seay's work as a maintenance millwright clearly meets tests one and two because his work (i) was an important part of the Hoechst Celanese's trade or business, and (ii) was a necessary, essential, and integral part of the owner's business. Common sense dictates that, without this maintenance, the Hoechst Celanese plant would not be able to successfully run to manufacture synthetic fibers and resins. In fact, when Mr. Seay was employed at Hoechst Celanese, it did not have its own maintenance workers. Hence, the maintenance performed by Mr. Seay was both "important" and "necessary, essential, and integral part of the owner's business." Further, without this maintenance, the Hoechst Celanese plant could not function.

Plaintiffs twist the testimony of Mr. Bruce Bowyer and Dr. Frederick Toca to support their argument that maintenance of equipment at Hoechst Celanese's facility was somehow not a necessary, essential, or integral part of Hoechst Celanese's business. Hoechst Celanese agrees that the business of its facility was the manufacture of synthetic fibers and

⁷ CNA Holdings, LLC's Memorandum of Law in Support of its Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine. See, e.g., Ex. D, Order Granting Mot. To Dismiss in *Ewing v. A.W. Chesterton Co., et al.* (the court found a pipefitter assisting with maintenance and construction was a statutory employee because his work was part of the owner's trade or business); see also Exs. E and F, respectively, Duke Mot. To Dismiss and Order Granting Duke's Motion in *Bumgardner v. ABB, Inc., et al.* For example, in *Ewing*, a plaintiff was employed by Daniel and worked as a pipefitter at a DuPont facility. See Ex. D, p. 2. The plaintiff's duties included installing pipes and tying those new pipes into existing lines. *Id.*, p. 2. Similar to Hoechst Celanese, DuPont's business was manufacturing various synthetic fibers. DuPont hired contractors like Daniel to assist in the construction, maintenance, repair and upgrades at its facility. *Id.*, p. 5. This is the precise situation in the instant case.

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resins. But as Mr. Bowyer also testified, Hoechst Celanese could not carry on its business if its equipment was not kept in sound condition. Again, maintenance was, by its very definition, a necessary part of Hoechst Celanese's trade, business, or occupation.

Hoechst Celanese does not have to meet test three because the test for statutory employees requires only one of the three tests to be met. Thus, test three is irrelevant. But even if Hoechst Celanese were required to meet all three tests, it can do so because the identical activity performed by Mr. Seay has been performed by Hoechst Celanese employees. In the later years, Hoechst Celanese hired the Daniel contractors into their staff, so that the same contractors performing maintenance were also employed by Hoechst Celanese.⁸ Therefore, Mr. Seay's work at Hoechst Celanese qualifies him as a statutory employee.

Plaintiffs cite to the testimony of Dr. Toca from another, unrelated case where he stated that "maintenance would not have been part of the overall mission of the company." This attempt to divorce maintenance as an integral part of Hoechst Celanese's business is meritless. The Court will notice that Plaintiffs simply cherry-picked snippets of Dr. Toca's overall testimony in an effort to convince the Court that the testimony stands for a proposition favorable to their cause.

Plaintiffs cite to several cases dealing with delivery-truck drivers. Those courts held that the delivery of materials was not a "part or process" of the defendants' businesses, and the plaintiffs could not be classified as statutory employees. Those cases are not instructive as to the relevant issue in this matter—maintenance work—and the cases do not discuss whether maintenance work is an integral part of a business' operations.

⁸ CNA Holdings, LLC, previously filed its Memorandum of Law in Support of its Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine on September 10, 2014, which included the original affidavit of Bruce Bowyer, Esq.

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Plaintiffs cite to *Olmstead* where the defendant was in the business of designing and manufacturing fiberglass products. The Court reasoned that a worker involved in transporting the company's fiberglass was not a statutory employee because the defendant was not in the transportation business—it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. *Id.* at 426, 581 S.E.2d at 486. Here, in manufacturing synthetic fibers, the Hoechst-Celanese plant could not operate without maintenance work. Not only was the maintenance of the equipment critical, it was a “part or process” of its synthetic fibers manufacturing business.

In sum, Mr. Seay qualifies a statutory employee of Hoechst Celanese. His work as a maintenance millwright involved performing ongoing maintenance and repairs to equipment and process line systems in the Hoechst Celanese facility. This work was a vital and important part of Hoechst Celanese's business. Because of its size and the nature of its business, the Hoechst Celanese facility required ongoing maintenance. The mass production of synthetic fibers and resins required numerous pieces of equipment and piping systems to run properly and efficiently. The maintenance and repair of the equipment was necessary to the continued production of the materials manufactured at the Hoechst Celanese facility. Thus, the maintenance work that Daniel employees, such as Mr. Seay, performed was a necessary, essential, and integral part of Hoechst Celanese's business; therefore, this Court should find that Mr. Seay was a statutory employee of Hoechst Celanese.

Although Hoechst Celanese does not have to meet test three because the test for statutory employees requires only one of the tests to be met, it can do so because the identical activity performed by Mr. Seay has been performed by Hoechst Celanese.

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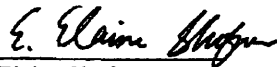
employees. In the later years, Hoechst Celanese hired the Daniel contractors into their staff, so that the same contractors performing maintenance were also employed by Hoechst Celanese. Therefore, Mr. Seay's work at Hoechst Celanese qualifies him as a statutory employee.

Conclusion

Because Mr. Seay was a statutory employee of Hoechst Celanese, his remedy for alleged injuries from work at the facility is limited to a workers' compensation claim. Thus, this case should be dismissed as to Hoechst Celanese because it is barred by the exclusive remedy provisions of the South Carolina Workers' Compensation Law. *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (1992). Mr. Seay's worker's compensation claim rests exclusively with the Workers' Compensation Commission. *See, e.g., Wheeler v. Morrison Machinery Co.*, 313 S.C. 440, 438 S.E.2d 264 (1993).

Respectfully, submitted this the 30th day of June, 2015.

HAWKINS PARNELL
THACKSTON & YOUNG ^{LLP}



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EXHIBIT A

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Appendix_02164



THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

Part 2

This Declarations page, with "Policy Provisions - Part 1," completes the below numbered
WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

DECLARATIONS

Policy Form C-2174

Policy No. 04C 131582 sc

1. Name of Insured and Address
Individual () Partnership () Corporation (X)
Other:

HYSTRON FIBERS, INC.
ROOM 956, DELAWARE TRUST BLDG.,
WILMINGTON, DEL.

Locations—All usual workplaces of the insured at or from which operations covered by this policy are conducted are located at the above address unless otherwise stated herein:

2. Policy Period: From 8/12/67 To 8/12/68
12:01 A.M., standard time at the address of the Insured as stated herein.

3. Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states:

SOUTH CAROLINA

4. Classification of Operations	Code No.	Premium Basis	Rates	Estimated Annual Premium
Entries in this item, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy.		Estimated Total Annual Remuneration	Per \$100 of Remuneration	
SEE SCHEDULES.				
If applicable, type () Loss Constant 'X' in proper block () Expense Constant () Loss & Expense Constant				
* Clerical Office Employees N.O.C.	8810			
* Salesmen, Collectors or Messengers—outside	8742			
* Drivers, Chauffeurs and their Helpers N.O.C.—commercial (* if not specifically included above)	7380			

Minimum Premium \$

Deposit Premium \$

Total Estimated Annual Premium \$

If indicated herein, interim adjustments of premiums shall be made: () Semi-Annually (X) Quarterly () Monthly

If the policy period is more than one year and the premium is payable in installments,
\$ is payable in advance, \$ on the first anniversary, and \$ on the second anniversary.

Numbers of endorsements forming a part
of this policy on its effective date: SEE ATTACHED

5. Limit of Liability for Coverage B—Employers' Liability

, subject to all the terms of this policy having reference thereto.

J. A. MONTGOMERY, Inc.

Counter-signed BY

Thomas Dias

(C-2174-a)

RoA_2130

Appendix_02165



THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115



Workmen's Compensation and Employers' Liability Policy

Workmen's Compensation and Employers' Liability Policy

PLANNED FOR YOUR PROTECTION BY

the policy with the

P.S.*



*** P.S. stands for our Personal Service as an independent business firm — and for the coast to coast service of the entire Aetna Casualty organization.**

THE AETNA CASUALTY AND SURETY COMPANY
HARTFORD, CONNECTICUT 06115

Help us to help you. Report all accidents or losses promptly.

SHORT RATE TABLE

If the insurance has been in force less than one year, the Company may retain the stated percentage of the full annual premium for the number of days the insurance has been in force.

If the insurance has been in force more than one year, the Company may retain from the premium one full annual premium, plus pro rata of the remainder of the policy premium for the number of days in excess of twelve months that the insurance has been in force.

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5%	37-40	21%	95-98	37%	154-156	53%	219-223	69%	292-296	85%
2	6	41-43	22	99-102	38	157-160	54	224-228	70	297-301	86
3-4	7	44-47	23	103-105	39	161-164	55	229-233	71	302-305	87
5-6	8	48-51	24	106-109	40	165-167	56	234-237	72	306-310	88
7-8	9	52-54	25	110-113	41	168-171	57	238-241	73	311-314	89
9-10	10	55-58	26	114-116	42	172-175	58	242-246	74	315-319	90
11-12	11	59-62 (2 mos.)	27	117-120	43	176-178	59	247-250	75	320-323	91
13-14	12	63-63	28	121-124 (4 mos.)	44	179-182	60	251-255	76	324-328	92
15-16	13	66-69	29	125-127	45	183-187	61	256-260	77	329-333	93
17-18	14	70-73	30	128-131	46	188-191	62	261-264	78	333-337 (11 mos.)	94
19-20	15	74-76	31	132-135	47	193-196	63	265-269	79	338-342	95
21-22	16	77-80	32	136-138	48	197-200	64	270-273 (9 mos.)	80	343-346	96
23-24	17	81-83	33	139-143	49	201-203	65	274-278	81	347-351	97
25-29	18	84-87	34	143-146	50	206-209	66	279-283	82	352-355	98
30-32 (1 mo.)	19	88-91 (3 mos.)	35	147-149	51	210-214 (7 mos.)	67	283-287	83	356-360	99
33-36	20	92-94	36	150-153 (5 mos.)	52	215-218	68	288-292	84	361-365 (12 mos.)	100

(C-2174) ("C" Form)

The Aetna Casualty and Surety Company

(A stock insurance company, herein called the Company)

Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage A—Workmen's Compensation

To pay promptly when due all compensation and other benefits required of the Insured by the workmen's compensation law.

Coverage B—Employers' Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained in the United States of America, its territories or possessions, or Canada by any employee of the Insured arising out of and in the course of his employment by the Insured either in operations in a state designated in item 3 of the declarations or in operations necessary or incidental thereto.

II. Defense, Settlement, Supplementary Payments

As respects the insurance afforded by the other terms of this policy the Company shall:

- defend any proceeding against the Insured seeking such benefits and any suit against the Insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended proceeding or suit, but without any obligation to apply for or furnish any such bonds;
- pay all expenses incurred by the Company, all costs taxed against the Insured in any such proceeding or suit and all interest accruing after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

This policy does not apply:

- to operations conducted at or from any workplace not described in item 1, 2 or 4 of the declarations if the Insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;
- unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;
- under Coverage B, to liability assumed by the Insured under any contract or agreement;
- under Coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee employed in violation of law, or (2) with respect to any employee employed in violation

(d) reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the amounts payable under Coverage A or the applicable limit of liability under Coverage B.

III. Definitions

(a) **Workmen's Compensation Law.** The unqualified term "workmen's compensation law" means the workmen's compensation law and any occupational disease law of a state designated in item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.

(b) **State.** The word "state" means any State or Territory of the United States of America and the District of Columbia.

(c) **Bodily Injury by Accident; Bodily Injury by Disease.** The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."

(d) **Assault and Battery.** Under Coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the Insured.

IV. Application of Policy

This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the Insured, in conditions causing the disease occurs during the policy period.

EXCLUSIONS

of law with the knowledge or acquiescence of the Insured or any executive officer thereof;

(e) under Coverage B, to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the Insured for damages because of such injury or death resulting therefrom;

(f) under Coverage B, to any obligation for which the Insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

CONDITIONS

[Unless otherwise noted, the conditions apply to all coverages]

1. **Premium.**—The premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the Company. This policy is issued by the Company and accepted by the Insured with the agreement that if any change in classifications, rates or rating plans is or becomes applicable to this policy under any law regulating this insurance or because of any amendments affecting the benefits provided by the workmen's compensation law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the Company, earned during the policy period by (a) all executive officers and other employees of the Insured engaged in operations covered by this policy, and (b) any other person performing work which may render the Company liable under this policy for injury to or death of such person in accordance with the workmen's compensation law. "Remuneration" shall include the remuneration of any person within division (b) foregoing if the Insured maintains evidence satisfactory to the Company that the payment of compensation and other benefits under such law to such person is secured by other valid and collectible insurance or by any other undertaking approved by the governmental agency having jurisdiction thereof.

(Continued on page 2)

If the declarations provide for adjustment of premium on other than an annual basis, the Insured shall pay the deposit premium to the Company upon the inception of this policy and thereafter interim premiums shall be computed in accordance with the manuals in use by the Company and paid by the Insured promptly after the end of each interval specified in the declarations. The deposit premium shall be retained by the Company until termination of this policy and credited to the final premium adjustment.

The Insured shall maintain records of the information necessary for premium computation on the bases stated in the declarations, and shall send copies of such records to the Company at the end of the policy period and at such times during the policy period as the Company may direct. If the Insured does not furnish records of the remuneration of persons within division (b) of the definition of remuneration foregoing, the remuneration of such persons shall be computed in accordance with the manuals in use by the Company.

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the rules, rates, rating plans, premiums and minimum premiums applicable to this insurance in accordance with the manuals in use by the Company. If the earned premium thus computed exceeds the premium previously paid, the Insured shall pay the excess to the Company; if less, the Company shall return to the Insured the unearned portion paid by the Insured. All premiums shall be fully earned whether any workmen's compensation law, or any part thereof, is or shall be declared invalid or unconstitutional.

2. Partnership or Joint Venture as Insured.—If the Insured is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an Insured only while he is acting within the scope of his duties as such partner or member.

3. Inspection and Audit.—The Company and any rating authority having jurisdiction by law shall each be permitted to inspect the workplaces, machinery and equipment covered by this policy and to examine and audit the Insured's books, vouchers, contracts, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof and within three years after termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

Notice of Injury.—When an injury occurs written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the injury, the names and addresses of the injured and of available witnesses.

5. Notice of Claim or Suit.—If claim is made or suit or other proceeding is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation of the Insured.—The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits or proceedings. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and other services at the time of injury as are required by the workmen's compensation law.

7. Statutory Provisions.—Coverage A.—The Company shall be directly and primarily liable to any person entitled to the benefits of the workmen's compensation law under this policy. The obligations of the Company may be enforced by such person, or for his benefit by any agency authorized by law, whether against the Company alone or jointly with the Insured. Bankruptcy or insolvency of the Insured or of the Insured's estate, or any default of the Insured, shall not relieve the Company of any of its obligations under Coverage A.

As between the employee and the Company, notice or knowledge of the injury on the part of the Insured shall be notice or knowledge, as the case may be, on the part of the Company; the jurisdiction of the Insured, for the purposes of the workmen's compensation law, shall be jurisdiction of the Company and the Company shall in all things be bound by and subject to the findings, judgments, awards, decrees, orders or decisions rendered by the Insured in the form and manner provided by such law and within the terms, limitations and provisions of this policy not inconsistent with such law.

All of the provisions of the workmen's compensation law shall be and remain a part of this policy as fully and completely as if written herein, so far as they apply to compensation and other benefits provided by this policy and to special taxes, payments into security or other special funds,

and assessments required of or levied against compensation insurance carriers under such law.

The Insured shall reimburse the Company for any payments required of the Company under the workmen's compensation law, in excess of the benefits regularly provided by such law, solely because of injury to (a) any employee by reason of the serious and wilful misconduct of the Insured, or (b) any employee employed by the Insured in violation of law with the knowledge or acquiescence of the Insured or any executive officer thereof.

Nothing herein shall relieve the Insured of the obligations imposed upon the Insured by the other terms of this policy.

8. Limits of Liability.—Coverage B.—The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in Coverage B include damages for care and loss of services and damages for which the Insured is liable by reason of suits or claims brought against the Insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the Insured arising out of and in the course of their employment. The limit of liability stated in the declarations for Coverage B is the total limit of the Company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by one or more employees in any one accident. The limit of liability stated in the declarations for Coverage B is the total limit of the Company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by one or more employees of the Insured in operations in any one state designated in item 3 of the declarations or in operations necessary or incidental thereto.

The inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

9. Action Against Company.—Coverage B.—No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations under Coverage B.

10. Other Insurance.—If the Insured has other insurance against a loss covered by this policy, the Company shall not be liable to the Insured hereunder for a greater proportion of such loss than the amount which would have been payable under this policy, had no such other insurance existed, bears to the sum of said amount and the amounts which would have been payable under each other policy applicable to such loss, had each such policy been the only policy so applicable.

11. Subrogation.—In the event of any payment under this policy, the Company shall be subrogated to all rights of recovery therefor of the Insured and any person entitled to the benefits of this policy against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

12. Changes.—Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or stop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

13. Assignment.—Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. If, however, during the policy period the Insured shall die, and written notice is given to the Company within thirty days after the date of such death, this policy shall cover the Insured's legal representative as Insured; provided that notice of cancellation addressed to the Insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

14. Cancellation.—This policy may be cancelled by the Insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the Insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient

(Continued on page 3)

proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Insured or by the Company shall be equivalent to mailing.

If the Insured cancels, unless the manuals in use by the Company otherwise provide, earned premium shall be (1) computed in accordance with customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Insured.

When the insurance under the workmen's compensation law may not be cancelled except in accordance with such law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

15. Terms of Policy Conformed to Statute—Coverage A— Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

16. Long Term Policy— If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the Company with respect to classifications of operations for which this policy provides a per capita premium basis, to the following provisions:

(a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the Company;

(b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable for such period in accordance with the manuals in use by the Company.

17. Declarations— By acceptance of this policy the Insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The Aetna Casualty and Surety Company has caused this policy to be signed by its President and a Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the Company.

Howard G. Moore
Secretary.

John A. Rice
President

RoA_2134

Appendix_02169

Schedule—Workmen's Compensation and Employers' Liability Insurance:

Location of Operations	Classification Symbol	Code No.	Estimated Remuneration	Rate per \$100 of Remuneration	Estimated Premium

QUARTERLY
ADJUSTMENT

P.O. BOX 5889
SPARTANBURG, S.C.

A	8810
B	8742

INCREASED LIMITS COVERAGE B

—SOUTH CAROLINA—

(C-1763-C) 2/66

RoA_2135

Appendix_02170

**(Workmen's Compensation and Employer's Liability Insurance)
PREMIUM DISCOUNT ENDORSEMENT**

It is agreed that

1. **Standard Premium; Total Standard Premium.** The premium for each state in which the policies designated in Paragraph 3 hereof are effective, computed in accordance with the provisions of such policies, other than this or any other premium discount endorsement and exclusive of the application of any retrospective rating plan, any automatic premium adjustment endorsement, or any premium return plan endorsement shall be known as the Standard Premium for that state. The sum of such Standard Premiums for all states in which such policies are effective shall be known as the Total Standard Premium.

2. **Computation of Premium Discount.**

- (a) If none of the Standard Premiums for the states named in the Table of States is subject to retrospective rating the Standard Premium for each such state shall be subject to the applicable discount stated in the Table of Premium Discount Percentages for that state.
- (b) So much of the Total Standard Premium as is subject to retrospective rating shall not be subject to discount. If a portion of the Standard Premiums for such states is subject to a retrospective rating plan, the discount on that portion of such premiums not subject to retrospective rating shall be the difference between (i) the discount which would be obtained in (a) foregoing if none of the Total Standard Premium were subject to retrospective rating, and (ii) the discount which would be obtained in (a) if only premium subject to retrospective rating were included in the computations.

3. **Schedule.**

Policy Numbers

Estimated Standard Premium

04C131582SC

Total:

Table of States	Table of Premium Discount Percentages	Table of States	Table of Premium Discount Percentages
S.C.	I.		

The number entered in the column "Table of Premium Discount Percentages" refers to the Table of Premium Discount Percentages in use by the Company, applicable to the designated state and approved by the insurance authorities having jurisdiction.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 2.

Named Insured

Additional Premium \$

Return Premium \$

J. A. MONTGOMERY, Inc.

THE AETNA CASUALTY AND SURETY COMPANY

THE STANDARD FIRE INSURANCE COMPANY

Hartford, Connecticut

Countersigned by

Richard B. White
(Authorized Representative)
Asst. Vice Pres.

AGENCY/BRANCH	CODE	NAME	C O M M	PAY.	TAX DIS.	YEARS TYPE	POLICY EFF. DATE	DATE TYPED AND INITIALS	STAT PLAN	TERRITORY STATE
COUNTERSIGNING CODES		OFFICE CODE	C/S CODE			E	POLICY EXPIRY DATE		8	

C-1600-C 1-67

RoA 2136

Appendix_02171

**CLASSIFICATION
SYMBOL**

CLASSIFICATION OF OPERATIONS

CODE NUMBER

A

CLERICAL OFFICE EMPLOYEES N.O.C.

8810

B

SALESMEN, COLLECTORS OR MESSENGERS-OUTSIDE

8742

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective

Policy No.

Endorsement No. 1.

Named Insured

PREMIUM:

Additional \$

Return \$

J. A. MONTGOMERY, Inc.

The Aetna Casualty and Surety Company

The Standard Fire Insurance Company

Hartford, Connecticut

Countersigned BY

Richard B. White

Am't. Vice Pres.

Authorized Agent

John A. Rice
President

(90455-B) 1/65

RoA_2137

Appendix_02172

Workmen's Compensation and Employers' Liability Policy

ALL STATES ENDORSEMENT

A. In the event the Insured undertakes operations in any state not designated in item 3 of the declarations, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming, the Company agrees as follows:

1. To reimburse the Insured for all compensation and other benefits required of the Insured under the workmen's compensation or occupational disease law of such state.
2. Such insurance as is afforded by the policy under Coverage B also applies to bodily injury by accident or disease, including death at any time resulting therefrom, sustained by any employee of the Insured arising out of and in the course of his employment in operations in such state or in operations necessary or incidental thereto.
3. Such insurance as is afforded by the policy by virtue of this endorsement does not apply to such operations if the Insured has, under any workmen's compensation or occupational disease law, other insurance for such operations or is a qualified self-insurer therefor, or has affirmatively rejected the workmen's compensation or occupational disease law applicable to such operations.

B. The agreements in Paragraph A foregoing are subject to the following conditions:

1. The Insured shall give notice to the Company before or within a reasonable time after the commencement of such operations, but failure to give such notice shall not invalidate the insurance afforded by this endorsement.
2. The Insured shall, if requested by the Company, take whatever action is necessary to bring himself within the workmen's compensation and occupational disease laws of such state with respect to such operations. The Company shall thereupon issue, in the form required by such laws, and the Insured shall accept workmen's compensation coverage under such laws, and such insurance as is afforded by this endorsement with respect to such operations shall thereupon terminate.
3. The premium bases and rates for the classifications of operations in such state or operations necessary or incidental thereto shall be those which would have been applicable under the manuals in use by the Company had Coverage A of the policy applied to such operations and the premium for the insurance afforded by this endorsement shall be computed accordingly, subject to the provisions of Condition 1 of the policy.
4. The word "State" as used in this endorsement means any State of the United States of America and the District of Columbia.

C. Such insurance as is afforded by the policy by virtue of this endorsement shall not apply:

1. To injury to or death of the master or a member of the crew of any vessel; or
2. To fines or penalties imposed on the Insured for failure to comply with the requirements of any workmen's compensation law.

D. The insurance afforded by the policy by virtue of this endorsement shall not constitute workmen's compensation insurance as required of an employer under the laws of any state.

E. All of the provisions of the policy, except Coverage A of Insuring Agreement I and Conditions 7 and 15, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective

Policy No.

Endorsement No. 3.

Named Insured

J. A. MONTGOMERY, Inc.

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

Richard B. White

Authorized Agent
Hon. L. Vice Pres.

John A. Rice
President

(C-2002-C) 2-67

RoA 2138

Appendix_02173

All other terms and conditions remain unchanged.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.
(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 8/12/67 Policy No. 04C131582 Endorsement No. 5
Named Insured HYSTRON FIBERS, INC.
PREMIUM:
Additional \$ Return \$

J. A. MONTGOMERY, Inc.,

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned BY

Richard B. White
Asst. Vice Pres.

Authorized Agent

John A. Rice
President

(20455-B) 1/65

RoA 2139

Appendix_02174



AUDIT ADJUSTMENT INVOICE

INSURED

ADDRESS

PAGE 2 OF 3

LOCATION

DATE

POLICY NO. (Office Code) - Symbol - Serial No. - Suffix	AGENCY BROKER	CODE	AUDIT PERIOD	CANC. ☐
G 131582 SC				

TERRITORY			CLASS DESCRIPTION	CLASS CODE	BASIS OF PREMIUM	RATE	PREMIUM
STATE	DATE	TAX EXEMPT					

(AA-1609-B) 5-68

id

ADDITIONAL PREMIUMS SHOULD BE PAID PROMPTLY

RoA_2140

Appendix_02175

AUDIT ADJUSTMENT INVOICE

INSURED Hyston Fibers Inc.

ADDRESS

PAGE 1 OF 3

LOCATION

DATE January 13, 1969

POLICY NO. (Office Code - Symbol - Serial No. - Suffix)			AGENCY BROKER		CODE		AUDIT PERIOD		CANC ☐	
4 G 131582 SC					4614		5-12-68		8-12-68	
TERRITORY			CLASS DESCRIPTION		CLASS CODE		BASIS OF PREMIUM		RATE	
STATE	RATE	TAX DISTRICT							PREMIUM	

[illegible]

(AA-1609-B) 5-68

id

ADDITIONAL PREMIUMS SHOULD BE PAID PROMPTLY

RoA 2142

Appendix_02177

RoA_2143

Appendix_02178



These DECLARATIONS and Endorsements, with the general provisions, complete this

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY For

1. NAME OF INSURED AND ADDRESS — HYSTRON FIBERS INC.
— 485 LEXINGTON AVE.
— N.Y.C., N.Y.

POLICY NUMBER
01C 101077 CR
☐ Individual ☐ Partnership ☒ Corporation
☐ Other:

(Show Number and Street or RFD, City, State and Zip Code)

Locations—All usual workplaces of the insured at or from which operations covered by this policy are conducted are located at the above address unless otherwise stated herein:

SEE SCHEDULES

2. POLICY PERIOD ————— From 10-12-70 to 11-1-71 12:01 A.M.
Standard Time at the address of the insured as stated herein.

3. Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states:

SOUTH CAROLINA

4. Classification of Operations
Entries in this item, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy.

- Clerical Office Employees N.O.C.
- Salesmen, Collectors or Messengers—outside
- Drivers, Chauffeurs and their Helpers N.O.C.—commercial (* If not specifically included below)

Code Numbers	Premium Basis Estimated Total Annual Remuneration	Rates Per \$100 of Remuneration	Estimated Annual Premium
8810			
8742			
7380			

SEE SCHEDULES

If policy subject to three-year fixed rate manual rules type 'X' in this block ☐

If applicable, type ☐ Loss Constant
"X" in proper block ☐ Expense Constant ☐ Loss & Expense Constant

MINIMUM PREMIUM ▶ \$	DEPOSIT PREMIUM ▶ \$	TOTAL ESTIMATED ANNUAL PREMIUM ▶ \$
If indicated herein, interim adjustments of premiums shall be made: ☐ Semi-Annually ☐ Quarterly ☐ Monthly Endorsements made part of the policy (designated by Endorsement number): SEE C2027-B		3 Year Policy Installments Payable: In Advance ▶ \$ 1st Anniversary ▶ \$ 2nd Anniversary ▶ \$

5. Limit of Liability for Coverage B—Employers' Liability: \$
subject to all the terms of this policy having reference thereto.

Countersigned by

THE AETNA CASUALTY AND SURETY COMPANY
(A stock insurance company, herein called the Company)

Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. COVERAGE A — WORKMEN'S COMPENSATION

To pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law.

COVERAGE B — EMPLOYERS' LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in a state designated in item 3 of the declarations or in operations necessary or incidental thereto.

II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

As respects the insurance afforded by the other terms of this policy the Company shall:

- (a) defend any proceeding against the insured seeking such benefits and any suit against the insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended proceeding or suit, but without any obligation to apply for or furnish any such bonds;
- (c) pay all expenses incurred by the Company, all costs taxed against the insured in any such proceeding or suit and all interest accruing after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment, as does not exceed the limit of the Company's liability thereon;

- (d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the amounts payable under Coverage A or the applicable limit of liability under Coverage B.

III. DEFINITIONS

- (a) **Workmen's Compensation Law.** The unqualified term "workmen's compensation law" means the workmen's compensation law and any occupational disease law of a state designated in item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.
- (b) **State.** The word "state" means any State or Territory of the United States of America and the District of Columbia.
- (c) **Bodily Injury by Accident; Bodily Injury by Disease.** The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."
- (d) **Assault and Battery.** Under Coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

IV. APPLICATION OF POLICY

This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

- (a) to operations conducted at or from any workplace not described in item 1, 2 or 4 of the declarations if the insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;
- (b) unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;
- (c) under Coverage B, to liability assumed by the insured under any contract or agreement, but this exclusion does not apply to a warranty that work performed by or on behalf of the insured will be done in a workmanlike manner;
- (d) under Coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee em-

ployed in violation of law, or (2) with respect to any employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof;

- (e) under Coverage B, to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages because of such injury or death resulting therefrom;
- (f) under Coverage B, to any obligation for which the insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

CONDITIONS

[Unless otherwise noted, the conditions apply to all coverages]

- 1. **PREMIUM.**—The premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the Company. This policy is issued by the Company and accepted by the insured with the agreement that if any change in classifications, rates or rating plans is or becomes applicable to this policy under any law regulating this insurance or because of any amendments affecting the benefits provided by the workmen's compensation law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the Company, earned during the policy period by (a) all executive officers and other employees of the insured engaged in operations covered by this policy, and (b) any other person performing work which may render the Company liable under this policy for injury to or death of such person in accordance with the workmen's compensation law. "Remuneration" shall not include the remuneration of any person within division (b) foregoing if the insured maintains evidence satisfactory to the Company that the payment of compensation and other benefits under such law to such person is secured by other valid and

(CONTINUED ON CG-28-2 PAGES 2 & 3)

collectible insurance or by any other undertaking approved by the governmental agency having jurisdiction thereof.

If the declarations provide for adjustment of premium on other than an annual basis, the insured shall pay the deposit premium to the Company upon the inception of this policy and thereafter interim premiums shall be computed in accordance with the manuals in use by the Company and paid by the insured promptly after the end of each interval specified in the declarations. The deposit premium shall be retained by the Company until termination of this policy and credited to the final premium adjustment.

The insured shall maintain records of the information necessary for premium computation on the bases stated in the declarations, and shall send copies of such records to the Company at the end of the policy period and at such times during the policy period as the Company may direct. If the insured does not furnish records of the remuneration of persons within division (b) of the definition of remuneration foregoing, the remuneration of such persons shall be computed in accordance with the manuals in use by the Company.

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the rules, rates, rating plans, premiums and minimum premiums applicable to this insurance in accordance with the manuals in use by the Company. If the earned premium thus computed exceeds the premium previously paid, the insured shall pay the excess to the Company; if less, the Company shall return to the insured the unearned portion paid by the insured. All premiums shall be fully earned whether any workmen's compensation law, or any part thereof, is or shall be declared invalid or unconstitutional.

2. PARTNERSHIP OR JOINT VENTURE AS INSURED—

If the insured is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an insured only while he is acting within the scope of his duties as such partner or member.

3. INSPECTION AND AUDIT—The Company and any rating authority having jurisdiction by law shall each be permitted but not obligated to inspect at any reasonable time the workplaces, operations, machinery and equipment covered by this policy. Neither the right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such workplaces, operations, machinery or equipment are safe.

The Company and any rating authority having jurisdiction by law shall each be permitted to examine and audit the insured's payroll records, general ledger, disbursements, vouchers, contracts, tax reports and all other books, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof and within three years after termination of this policy, as far as they show or tend to show or verify the amount of remuneration or other premium basis, or relate to the subject matter of this insurance.

4. NOTICE OF INJURY—When an injury occurs written notice shall be given by or on behalf of the insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the injury, the names and addresses of the injured and of available witnesses.

5. NOTICE OF CLAIM OR SUIT—If claim is made or suit or other proceeding is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

6. ASSISTANCE AND COOPERATION OF THE INSURED—The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits, or proceedings. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and other services at the time of injury as are required by the workmen's compensation law.

7. STATUTORY PROVISIONS—

The Company shall be directly and primarily liable to any person entitled to the benefits of the workmen's compensation law under this policy. The obligations of the Company may be enforced by such person, or for his benefit by any agency authorized by law, whether against the Company alone or jointly with the insured.

Bankruptcy or insolvency of the insured or of the insured's estate, or any default of the insured, shall not relieve the Company of any of its obligations under Coverage A.

As between the employee and the Company, notice or knowledge of the injury on the part of the insured shall be notice or knowledge, as the case may be, on the part of the Company; the jurisdiction of the insured, for the purposes of the workmen's compensation law, shall be jurisdiction of the Company and the Company shall in all things be bound by and subject to the findings, judgments, awards, decrees, orders or decisions rendered against the insured in the form and manner provided by such law and within the terms, limitations and provisions of this policy not inconsistent with such law.

All of the provisions of the workmen's compensation law shall be and remain a part of this policy as fully and completely as if written herein, so far as they apply to compensation and other benefits provided by this policy and to special taxes, payments into security or other special funds, and assessments required of or levied against compensation insurance carriers under such law.

The insured shall reimburse the Company for any payments required of the Company under the workmen's compensation law, in excess of the benefits regularly provided by such law, solely because of injury to (a) any employee by reason of the serious and willful misconduct of the insured, or (b) any employee employed by the insured in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof.

Nothing herein shall relieve the insured of the obligations imposed upon the insured by the other terms of this policy.

8. LIMITS OF LIABILITY—

The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in Coverage B include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. The limit of liability stated in the declarations for Coverage B is the total limit of the Company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by one or more employees in any one accident. The limit of liability stated in the declarations for Coverage B is the total limit of the Company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by one or more employees of the insured in operations in any one state designated in item 3 of the declarations or in operations necessary or incidental thereto. The inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability.

9. ACTION AGAINST COMPANY—

No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations under Coverage B.

10. OTHER INSURANCE—If the insured has other insurance against a loss covered by this policy, the Company shall not be liable to the insured hereunder for a greater proportion of such loss than the amount which would have been payable under this policy, had no such other insurance existed, bears to the sum of said amount and the amounts which would have been payable under each other policy applicable to such loss, had each such policy been the only policy so applicable.

11. SUBROGATION—In the event of any payment under this policy, the Company shall be subrogated to all rights of recovery thereafter of the insured and any person entitled to the benefits of this policy against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

12. CHANGES—Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

13. ASSIGNMENT—Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the Company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancellation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

14. CANCELLATION—This policy may be cancelled by the insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the Company shall be equivalent to mailing.

If the insured cancels, unless the manuals in use by the Company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

When the insurance under the workmen's compensation law may not be cancelled except in accordance with such law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

15. TERMS OF POLICY CONFORMED TO STATUTE—COVERAGE A— Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

16. LONG TERM POLICY—If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the Company with respect to classifications of operations for which this policy provides a per capita premium basis, to the following provisions:

(a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the Company;

(b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable for such period in accordance with the manuals in use by the Company.

17. DECLARATIONS—By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The Aetna Casualty And Surety Company has caused this policy to be signed by its President and a Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the Company.

Howard G. Moore
Secretary

John A. Rice
President

SHORT RATE TABLE

Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium
1	5%	37	21%	73	39%	109	54%	145	69%	181	82%
2	6	38	22	74	40	110	55	146	70	182	83
3	7	39	23	75	41	111	56	147	71	183	84
4	8	40	24	76	42	112	57	148	72	184	85
5	9	41	25	77	43	113	58	149	73	185	86
6	10	42	26	78	44	114	59	150	74	186	87
7	11	43	27	79	45	115	60	151	75	187	88
8	12	44	28	80	46	116	61	152	76	188	89
9	13	45	29	81	47	117	62	153	77	189	90
10	14	46	30	82	48	118	63	154	78	190	91
11	15	47	31	83	49	119	64	155	79	191	92
12	16	48	32	84	50	120	65	156	80	192	93
13	17	49	33	85	51	121	66	157	81	193	94
14	18	50	34	86	52	122	67	158	82	194	95
15	19	51	35	87	53	123	68	159	83	195	96
16	20	52	36	88	54	124	69	160	84	196	97
17	21	53	37	89	55	125	70	161	85	197	98
18	22	54	38	90	56	126	71	162	86	198	99
19	23	55	39	91	57	127	72	163	87	199	100
20	24	56	40	92	58	128	73	164	88	200	101
21	25	57	41	93	59	129	74	165	89	201	102
22	26	58	42	94	60	130	75	166	90	202	103
23	27	59	43	95	61	131	76	167	91	203	104
24	28	60	44	96	62	132	77	168	92	204	105
25	29	61	45	97	63	133	78	169	93	205	106
26	30	62	46	98	64	134	79	170	94	206	107
27	31	63	47	99	65	135	80	171	95	207	108
28	32	64	48	100	66	136	81	172	96	208	109
29	33	65	49	101	67	137	82	173	97	209	110
30	34	66	50	102	68	138	83	174	98	210	111
31	35	67	51	103	69	139	84	175	99	211	112
32	36	68	52	104	70	140	85	176	100	212	113
33	37	69	53	105	71	141	86	177	101	213	114
34	38	70	54	106	72	142	87	178	102	214	115
35	39	71	55	107	73	143	88	179	103	215	116
36	40	72	56	108	74	144	89	180	104	216	117
37	41	73	57	109	75	145	90	181	105	217	118
38	42	74	58	110	76	146	91	182	106	218	119
39	43	75	59	111	77	147	92	183	107	219	120
40	44	76	60	112	78	148	93	184	108	220	121
41	45	77	61	113	79	149	94	185	109	221	122
42	46	78	62	114	80	150	95	186	110	222	123
43	47	79	63	115	81	151	96	187	111	223	124
44	48	80	64	116	82	152	97	188	112	224	125
45	49	81	65	117	83	153	98	189	113	225	126
46	50	82	66	118	84	154	99	190	114	226	127
47	51	83	67	119	85	155	100	191	115	227	128
48	52	84	68	120	86	156	101	192	116	228	129
49	53	85	69	121	87	157	102	193	117	229	130
50	54	86	70	122	88	158	103	194	118	230	131
51	55	87	71	123	89	159	104	195	119	231	132
52	56	88	72	124	90	160	105	196	120	232	133
53	57	89	73	125	91	161	106	197	121	233	134
54	58	90	74	126	92	162	107	198	122	234	135
55	59	91	75	127	93	163	108	199	123	235	136
56	60	92	76	128	94	164	109	200	124	236	137
57	61	93	77	129	95	165	110	201	125	237	138
58	62	94	78	130	96	166	111	202	126	238	139
59	63	95	79	131	97	167	112	203	127	239	140
60	64	96	80	132	98	168	113	204	128	240	141
61	65	97	81	133	99	169	114	205	129	241	142
62	66	98	82	134	100	170	115	206	130	242	143
63	67	99	83	135	101	171	116	207	131	243	144
64	68	100	84	136	102	172	117	208	132	244	145
65	69	101	85	137	103	173	118	209	133	245	146
66	70	102	86	138	104	174	119	210	134	246	147
67	71	103	87	139	105	175	120	211	135	247	148
68	72	104	88	140	106	176	121	212	136	248	149
69	73	105	89	141	107	177	122	213	137	249	150
70	74	106	90	142	108	178	123	214	138	250	151
71	75	107	91	143	109	179	124	215	139	251	152
72	76	108	92	144	110	180	125	216	140	252	153
73	77	109	93	145	111	181	126	217	141	253	154
74	78	110	94	146	112	182	127	218	142	254	155
75	79	111	95	147	113	183	128	219	143	255	156
76	80	112	96	148	114	184	129	220	144	256	157
77	81	113	97	149	115	185	130	221	145	257	158
78	82	114	98	150	116	186	131	222	146	258	159
79	83	115	99	151	117	187	132	223	147	259	160
80	84	116	100	152	118	188	133	224	148	260	161
81	85	117	101	153	119	189	134	225	149	261	162
82	86	118	102	154	120	190	135	226	150	262	163
83	87	119	103	155	121	191	136	227	151	263	164
84	88	120	104	156	122	192	137	228	152	264	165
85	89	121	105	157	123	193	138	229	153	265	166
86	90	122	106	158	124	194	139	230	154	266	167
87	91	123	107	159	125	195	140	231	155	267	168
88	92	124	108	160	126	196	141	232	156	268	169
89	93	125	109	161	127	197	142	233	157	269	170
90	94	126	110	162	128	198	143	234	158	270	171
91	95	127	111	163	129	199	144	235	159	271	172
92	96	128	112	164	130	200	145	236	160	272	173
93	97	129	113	165	131	201	146	237	161	273	174
94	98	130	114	166	132	202	147	238	162	274	175
95	99	131	115	167	133	203	148	239	163	275	176
96	100	132	116	168	134	204	149	240	164	276	177
97		133	117	169	135	205	150	241	165	277	178
98		134	118	170	136	206	151	242	166	278	179
99		135	119	171	137	207	152	243	167	279	180
100		136	120	172	138	208	153	244	168	280	181
101		137	121	173	139	209	154	245	169	281	182
102		138	122	174	140	210	155	246	170	282	183
103		139	123	175	141	211	156	247	171	283	184
104		140	124	176	142	212	157	248	172	284	185
105		141	125	177	143	213	158	249	173	285	186
106		142	126	178	144	214	159	250	174	286	187
107		143	127	179	145	215	160	251	175	287	188
108		144	128	180	146	216	161	252	176	288	189
109		145	129	181	147	217	162	253	177	289	190
110		146	130	182	148	218	163	254	178	290	191
111		147	131	183	149	219	164	255	179	291	192
112		148	132	184	150	220	165	256	180	292	193
113		149	133	185	151	221	166	257	181	293	194
114		150	134	186	152	222	167	258	182	294	195
115		151	135	187	153	223	168	259	183	295	196
116		152	136	188	154	224	169	260	184	296	197
117		153	137	189	155	225	170	261	185	297	198
118		154	138	190	156	226	171	262	186	298	199
119		155	139	191	157	227	172	263	187	299	200
120		156	140	192	158	228	173	264	188	300	201
121		157	141	193	159	229	174	265	189		
122		158	142	194	160	230	175	266	190		
123		159	143	195	161	231	176	267	191		
124		160	144	196	162	232	177	268	192		
125		161	145	197	163	233	178	269	193		
126		162	146	198	164	234	179	270	194		
127		163	147	199	165	235	180	271	195		
128		164	148	200	166	236	181	272	196		
129		165	149	201	167	237	182	273	197		
130		166	150	202	168	238	183	274	198		
131											

TABLE I - PREMIUM SUBJECT TO PLAN D, LIMITATIONS, LOSS CONVERSION FACTOR, STATE TAX MULTIPLIERS, EXCESS LOSS PREMIUM FACTORS

1. THE PREMIUM FOR THE FOLLOWING POLICIES IS TO BE COMPUTED IN ACCORDANCE WITH THE PROVISIONS OF RETROSPECTIVE RATING PLAN D IN ALL STATES WHERE SUCH PLAN IS OR BECOMES APPLICABLE ON AN INTERSTATE BASIS, SUBJECT TO THE LIMITATIONS SPECIFIED HEREIN:

LIST OF POLICIES: 01C101077 CR

2. COMPENSATION LOSS LIMITATION IS

3. LOSS CONVERSION FACTOR IS

4. TAX MULTIPLIERS (STATE)

EXCESS LOSS PREMIUM FACTORS

NAME OF STATE	WORKMEN'S COMPENSATION & EMPLOYERS LIABILITY	WORKMEN'S COMPENSATION AND EMPLOYERS LIABILITY

S.CAR.

TABLE II - PERCENTAGES TO DETERMINE BASIC, MINIMUM AND MAXIMUM PREMIUMS.

THE BASIC PREMIUM, THE MINIMUM PREMIUM AND THE MAXIMUM PREMIUM FOR INSURANCE SUBJECT TO PLAN D ARE PERCENTAGES OF THE STANDARD PREMIUM FOR SUCH INSURANCE. SUCH PERCENTAGES ARE COMPUTED INITIALLY UPON AN ESTIMATE OF THE STANDARD PREMIUM AND FINALLY UPON THE EARNED STANDARD PREMIUM FOR SUCH INSURANCE. IF THE STANDARD PREMIUM LIES BETWEEN ANY TWO OF THE FIGURES ON THE "STANDARD PREMIUM" LINE, THE PERCENTAGE APPLICABLE SHALL BE OBTAINED BY LINEAR INTERPOLATION TO THE NEAREST ONE-TENTH OF 1%.

	PERCENTAGES OF STANDARD PREMIUM		
	50% OR LESS	100%	150% OR MORE
STANDARD PREMIUM			
MINIMUM PREMIUM			
MAXIMUM PREMIUM			

OTHER

* (BASIC + (ELPF) (LCF) X TAX MULT.

RoA_2148

Workmen's Compensation and Employers' Liability Policy

ALL STATES ENDORSEMENT

A. In the event the Insured undertakes operations in any state not designated in item 3 of the declarations, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming, the Company agrees as follows:

1. To reimburse the Insured for all compensation and other benefits required of the Insured under the workmen's compensation or occupational disease law of such state.
2. Such insurance as is afforded by the policy under Coverage B also applies to bodily injury by accident or disease, including death at any time resulting therefrom, sustained by any employee of the Insured arising out of and in the course of his employment in operations in such state or in operations necessary or incidental thereto.
3. Such insurance as is afforded by the policy by virtue of this endorsement does not apply to such operations if the Insured has, under any workmen's compensation or occupational disease law, other insurance for such operations or is a qualified self-insurer therefor, or has affirmatively rejected the workmen's compensation or occupational disease law applicable to such operations.

B. The agreements in Paragraph A foregoing are subject to the following conditions:

1. The Insured shall give notice to the Company before or within a reasonable time after the commencement of such operations, but failure to give such notice shall not invalidate the insurance afforded by this endorsement.
2. The Insured shall, if requested by the Company, take whatever action is necessary to bring himself within the workmen's compensation and occupational disease laws of such state with respect to such operations. The Company shall thereupon issue, in the form required by such laws, and the Insured shall accept workmen's compensation coverage under such laws, and such insurance as is afforded by this endorsement with respect to such operations shall thereupon terminate.
3. The premium bases and rates for the classifications of operations in such state or operations necessary or incidental thereto shall be those which would have been applicable under the manuals in use by the Company had Coverage A of the policy applied to such operations and the premium for the insurance afforded by this endorsement shall be computed accordingly, subject to the provisions of Condition 1 of the policy.
4. The word "State" as used in this endorsement means any State of the United States of America and the District of Columbia.

C. Such insurance as is afforded by the policy by virtue of this endorsement shall not apply:

1. To injury to or death of the master or a member of the crew of any vessel; or
2. To fines or penalties imposed on the Insured for failure to comply with the requirements of any workmen's compensation law.

D. The insurance afforded by the policy by virtue of this endorsement shall not constitute workmen's compensation insurance as required of an employer under the laws of any state.

E. All of the provisions of the policy, except Coverage A of Insuring Agreement I and Conditions 7 and 15, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective

Policy No.

Endorsement No.

Named Insured

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned

Authorized Agent

President

IC-203-C 2-67

RoA_2149

Appendix_02184

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

Alabama _____
Alaska _____
Arkansas _____
California _____
Colorado _____
Connecticut _____
Delaware _____
District of Columbia _____
Florida _____
Georgia _____
Hawaii _____
Idaho _____
Illinois _____
Indiana _____
Iowa _____
Kansas _____
Kentucky _____
Louisiana _____
Maine _____
Maryland _____
Massachusetts _____
Michigan _____
Minnesota _____
Mississippi _____
Missouri _____
Montana _____
Nebraska _____
New Hampshire _____
New Jersey _____
New Mexico _____
New York _____
North Carolina _____
Oklahoma _____
Oregon _____
Pennsylvania _____
Rhode Island _____
South Carolina C1763C; CC395; CC549
South Dakota _____
Tennessee _____
Texas _____
Utah _____
Vermont _____
Virginia _____
Washington _____
Wisconsin _____

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy.

THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
Hartford, Connecticut

John A. Rice
President

(C-2027-B) 1-66

RoA_2150

Appendix_02185

Schedule—Workmen's Compensation and Employers' Liability Insurance:

SOUTH CAROLINA

Location of Operations	Classification Symbol	Code No.	Estimated Remuneration	Rate per \$100 of Remuneration	Estimated Premium
39					
STATE OF S.C.					
TEXTILE FIBER PLANT					
TEXTILE FIBER MFG.-SYNTHETIC		2305			
SALESMEN, COLLECTORS OR MESSENGERS-OUTSIDE		8742			
CLERICAL OFFICE EMPLOYEES-NOC		8810			
ADDITIONAL MEDICAL (1.5%)					
EXPERIENCE MODIFICATION					
DIFFERENCE DUE TO EXPERIENCE MODIFICATION					

IC-1763-1-CI 2/66

RoA_2151

Appendix_02186

Schedule—Workmen's Compensation and Employers' Liability Insurance:

Location of Operations	Classification Symbol	Code No.	Estimated Remuneration	Rate per \$100 of Remuneration	Estimated Premium

SPARTENBURG, S.C.

DMT PLANT

CLERICAL OFFICE EMPLOYEES 8810

CHEMICAL MFG. 4809

ADDITIONAL MEDICAL (1.5%)

EXPERIENCE MODIFICATION
DIFFERENCE DUE TO EXPERIENCE MODIFICATION

Workmen's Compensation and Employers' Liability Policy
ADDITIONAL MEDICAL COVERAGE ENDORSEMENT

SCHEDULE

1. LIMITS OF LIABILITY EACH PERSON	2. APPLICATION OF ENDORSEMENT			3. PREMIUM
	COLUMN 1	COLUMN 2	COLUMN 3	
	S.C.			b. The minimum premium for this endorsement is ~~10%~~

It is agreed that:

- In addition to any medical benefits provided in the applicable compensation law, the Company will also pay the reasonable cost of any additional medical, surgical, nursing or hospital services, medical or surgical apparatus or appliances, including prosthetic devices, and medicines which in the opinion of the Company are reasonably necessary for the treatment of bodily injury sustained by any person who is entitled, on account of such injury, to the compensation and other benefits required of the insured under such law and afforded by the policy under Coverage A, or who is entitled to such benefits under other terms of the policy.
- The limit of liability stated in item 1 of the schedule as applicable to "each person" is the total limit of the Company's liability under this endorsement for all expenses incurred on account of each person for whom benefits are payable under Paragraph 1 above.
- As a condition precedent to any payment by the Company under Paragraph 1 the injured person or, in the event of his incapacity, his legal representative shall, if requested

by the Company, execute an agreement of indemnity which shall entitle the Company to reimbursement for the amount of such payment or payments out of such person's share of the proceeds of any recovery, whether by settlement or judgment, made against any person or organization, other than the insured, which is or may be liable on account of such injury.

- This endorsement applies only to persons entitled under the policy to receive the benefits provided by the workmen's compensation laws of the states listed in item 2 of the schedule.
- The premium for the insurance afforded by this endorsement for operations subject to the workmen's compensation law of any state listed in item 2 of the schedule shall be determined in accordance with the additional medical coverage rules shown in the Company's manuals, and, with respect to states listed in Column 1, shall be that percentage of the policy premium shown in item 3 of the schedule, and, with respect to states listed in Column 2, shall be the percentage of the policy premium stated in Column 3.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective _____ Policy No. _____ Endorsement No. **1**
 Named Insured _____
 Additional Premium \$ _____ Return Premium \$ _____

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
 Hartford, Connecticut

Countersigned by _____

(Authorized Representative)

AGENCY/ BROKER	CODE	NAME	ED-88-2EON	PAYT	TAX DIST.	TRANS. TYPE	LINE OF BUSINESS	C A P	POLICY EFF. DATE	DATE TYPED AND INITIALS
COUNTERSIGNING CODES	OFFICE CODE	C/S CODE				E			POLICY EXP. DATE	
STAT. PLAN	TERR. STATE								FILE DEPT.	UND. APP. UND. PROC.

(CC-395) Ed. 7-67

RoA_2153

Appendix_02188

Workmen's Compensation and Employers' Liability Policy

VOLUNTARY COMPENSATION ENDORSEMENT

SCHEDULE

1. GROUP OF EMPLOYEES	STATE OF OPERATIONS	DESIGNATED WORKMEN'S COMPENSATION LAW
ALL EMPLOYEES	ANYWHERE IN U.S.A.	STATE OF HIRE

2. Limits of Liability	Bodily Injury by Accident	Bodily Injury by Disease
	each employee \$	each employee \$
	each accident \$	aggregate disease \$ (per state)

It is agreed that:

1. Insuring Agreement I of the policy is amended by adding thereto an additional coverage as follows:

Coverage C — Voluntary Compensation. To pay or behalf of the insured, if any employee within a group of employees described in the schedule shall sustain injury, including death resulting therefrom, while employed by the insured in operations in a state specified opposite the description of such group of employees, under circumstances which would have rendered the insured liable for compensation if the injured employee and the insured had been subject to the workmen's compensation law designated in the schedule with respect to such employment, an amount equal to the compensation and other benefits which would have been payable under such law had the injured employee and the insured been subject to such law with respect to such employment.

2. The policy does not apply under Coverage C to injury or death which gives rise to a valid claim under any workmen's compensation or occupational disease law.

3. The policy applies under Coverage C only to injury or death.

(a) sustained in the United States of America, its territories or possessions, or Canada, or

(b) sustained while temporarily outside the United States of America, its territories or possessions, or Canada if the injured employee is a citizen or resident of the United States or Canada; but Coverage C does not apply to any suit brought in or any judgment rendered by any court outside the United States of America, its territories or possessions, or Canada or to an action on such judgment wherever brought.

4. The benefits payable under Coverage C on account of such injury shall be paid to such person or persons as would have been entitled thereto under the designated workmen's compensation law, provided, however, that as a condition precedent to any such payment, the injured employee, or in the event of his incapacity, his legal representative, or, in the event of his death, his

legal representative or the person or persons entitled to sue therefor, shall (1) execute such full and binding release of all claims against the insured and the Company on account of such injury or death as may be required by the Company, and (2) assign to the Company all claims or judgments or the proceeds thereof which he or they may have or recover against any person who or organization which is or may be liable on account of such injury or death and execute such other documents as the Company may require to enable it to enforce such rights or collect such proceeds. The Company shall have full power to enforce such rights under any such assignment in its own name or in the name of the injured employee, or to make such negotiations and settlement as may be deemed expedient by the Company, but the Company shall not be obligated to enforce such rights in the event of any recovery or settlement the Company shall pay the proceeds thereof, less payments hereunder and all expenses incident to such recovery or settlement, to the person or persons entitled thereto.

5. If any person entitled to payment under Coverage C shall refuse to accept such payment and to comply with the terms and conditions set forth above or if any person shall commence any proceedings at law, in equity or in admiralty, except for such payment, seeking damages from the insured or the Company on account of such injury, the Company's liability under Coverage C with respect to such injury is thereupon terminated.

6. With respect to injury or death to which Coverage C is applicable, or would have been applicable except for paragraph 5 foregoing, the limit of the Company's liability under Coverage B shall be determined in accordance with the following provision, and Condition 8 of the policy is amended accordingly:

Limits of Liability — Coverage B — The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom", in Coverage B, include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured

(Continued on reverse)

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 4

Named Insured

The Aetna Casualty and Surety Company

The Standard Fire Insurance Company

Hartford, Connecticut

Countersigned by

(Authorized Representative)

(CC-397-B) 5-69

CAT. 186061
Printed in U.S.A.

RoA 2154

Appendix_02189

by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. The limit of liability stated in Item 2 of the schedule as applicable to "each employee" is the total limit of the Company's liability for all damages because of bodily injury by accident, including death resulting therefrom, sustained by one employee in any one accident; and, subject to the foregoing provision respecting "each employee", the limit of liability stated in Item 2 of the schedule as applicable to "each accident" is the total limit of the Company's liability for all damages because of bodily injury, including death resulting therefrom, sustained by two or more employees in any one accident.

The limit of liability stated in Item 2 of the schedule as

applicable to "each employee" is the total limit of the Company's liability for all damages because of bodily injury by disease, including death resulting therefrom, sustained by one employee; and, subject to the foregoing provision respecting "each employee", the limit of liability stated in Item 2 of the schedule as applicable to "aggregate disease" is the total limit of the Company's liability for all damages because of bodily injury by disease, including death resulting therefrom, sustained by employees in operations in any one state. The limits of liability stated herein are in lieu of and shall not be cumulative with any limit of liability stated elsewhere in the policy. The inclusion of more than one insured shall not operate to increase the limits of the Company's liability.

VOLUNTARY COMPENSATION ENDORSEMENT
(FOREIGN COVERAGE)

IT IS AGREED THAT WITH RESPECT TO THE HEREINAFTER DESIGNATED GROUP OF EMPLOYEES, ITEM I OF THE VOLUNTARY COMPENSATION ENDORSEMENT ATTACHED TO THIS POLICY IS AMENDED TO READ:

THE POLICY APPLIES UNDER COVERAGE C TO INJURY TO OR DEATH SUSTAINED OUTSIDE THE UNITED STATES OF AMERICA, ITS TERRITORIES OR POSSESSIONS OR CANADA, PROVIDED ANY CLAIM OR SUIT IS INSTITUTED WITHIN THE CONTINENTAL UNITED STATES OF AMERICA.

GROUP OF EMPLOYEES

STATE OF OPERATIONS

DESIGNATED WORKMEN'S
COMPENSATION LAW

EMPLOYEES WHO CONTRACT OF HIRE
IS EXECUTED IN THE UNITED STATES
WHILE OPERATING IN COUNTRIES OTHER
THAN THE UNITED STATES OF AMERICA
AS INCIDENT TO THEIR EMPLOYMENT IN
THE BUSINESS OF THE INSURED.

NOT APPLICABLE

STATE OF HIRE

THE COMPANY HEREBY GIVES THE INSURED NOTICE THAT THE UNDERTAKING INCORPORATED IN THIS ENDORSEMENT DOES NOT AND WILL NOT CONSTITUTE LEGAL INSURANCE OF THE INSURED'S OBLIGATION UNDER THE WORKMEN'S COMPENSATION LAW OF ANY FOREIGN COMPANY OR POLITICAL SUBDIVISION THEREOF. NO PENALTY PROVIDED FOR FAILURE TO COMPLY WITH ANY SUCH COMPENSATION LAW IS ASSUMED BY THIS ENDORSEMENT.

REPATRIATION: THE COMPANY AGREES TO REIMBURSE THE EMPLOYER FOR SUCH ADDITIONAL EXPENSES AS REASONABLY MAY BE INCURRED OVER AND ABOVE NORMAL TRANSPORTATION COST FOR REPATRIATION OF EMPLOYEES SUFFERING FROM INJURIES OR DISEASES COVERED UNDER COVERAGE C (INCLUDING THE BODIES OF EMPLOYEES INJURED FATALLY) FROM THE DESIGNATED COUNTRY AND LOCATION OF OPERATIONS TO THE DESTINATION IN THE U.S.A. OR CANADA, IT BEING UNDERSTOOD THAT SUCH INJURIES MUST MAKE REPATRIATION NECESSARY IN THE OPINION OF COMPETENT MEDICAL AUTHORITIES. THE LIABILITY OF THE COMPANY HEREUNDER SHALL BE LIMITED TO THE SUM OF WITH RESPECT TO ANY ONE EMPLOYEE.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.
(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective
Named Insured
Additional Premium \$

Policy No.

Endorsement No. 5

Return Premium \$

BI PD
In Advance \$
1st Annuity \$
2nd Annuity \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Consigned by

(Authorized Representative)

(50455-8) 7-69

CAT. 189456
Printed in U.S.A.

RoA_2156

Appendix_02191

CONDITION NO. 14 OF THE POLICY AMENDED
IN PART

IT IS AGREED THAT THE WORDS "TEN (10) DAYS" IN CONDITION 14 OF THE
POLICY ARE AMENDED TO READ "THIRTY (30) DAYS".

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the
policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective
Named Insured
Additional Premium \$

Policy No.

Endorsement No. 6

Return Premium \$

In Advance \$
1st Annuity \$
2nd Annuity \$

PD

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Counter-signed by

(Authorized Representative)

(90455-B) 7-69

CAT. 189456
Printed in U.S.A.

RoA_2157

Appendix_02192

Workmen's Compensation and Employers' Liability Policy

RETROSPECTIVE PREMIUM ENDORSEMENT — ONE YEAR — PLAN D

It is agreed that this endorsement applies to the policies designated in Table I below, subject to the following provisions:

1. Final Premium. The final premium for such policies is the sum of:

- (a) the premium for the insurance not subject to Plan D, as specified in Table I, computed in accordance with the provisions of such policies, other than this endorsement, and
- (b) the premium for the insurance subject to Plan D, as specified in Table I, hereinafter referred to as the retrospective premium.

2. Retrospective Premium. The retrospective premium shall be the sum of:

- (a) the basic premiums for each state,
- (b) the excess loss premiums for each state, and
- (c) the converted losses for each state,

each multiplied by the applicable state tax multiplier. The retrospective premium shall be subject to the minimum retrospective premium and to the maximum retrospective premium.

3. Definition of Terms Used in the Computation of the Retrospective Premium.

- (a) "Standard premium" means the premium for the insurance subject to Plan D computed in accordance with the provisions of the policies, other than this endorsement and exclusive of the application of any premium discount endorsement.
- (b) "Basic premiums" means the amounts obtained by applying to each portion of the standard premium the basic premium percentage stated in Table II as applicable thereto.
- (c) "Excess loss premiums" means the sum of:
 - (1) the amounts obtained by applying to that portion of the standard premium under workmen's compensation and employers' liability policies for each state for which a factor is entered in the Excess Loss Premium Factors (Workmen's Compensation) column of Table I, the applicable factor times the applicable loss conversion factor,
 - (2) the amounts obtained by applying to that portion of the standard premium for liability insurance under general liability and automobile liability policies, the factor stated in the Excess Loss Premium Factors (Liability) column of Table I, times the applicable loss conversion factor, and
 - (3) the amounts obtained by applying to that portion of the standard premium for automobile physical damage insurance, the factor stated in the Excess Loss Premium Factors (Physical Damage) column of Table I, times the applicable loss conversion factor.
- (d) "Incurred losses" means the sum of:
 - (1) all losses, including medical, actually paid,
 - (2) reserves for unpaid losses as estimated by the Company,
 - (3) premiums on bonds paid for by the Company in accordance with the provisions of the policies,
 - (4) interest accruing after entry of a judgment against the insured,
 - (5) allocated loss adjustment expenses, and
 - (6) expenses incurred in seeking recovery against a third party

under the insurance subject to Plan D, provided:

- (i) as respects the insurance afforded under any workmen's compensation and employers' liability policy:
 - (a) item (3) above shall not apply,
 - (b) item (5) above shall apply as respects employers' liability coverage only,
 - (c) item (6) above shall apply only if recovery is obtained against the third party, and
 - (ii) items (3), (4), and (5) above shall not apply as respects automobile physical damage insurance.
- (e) "Compensation loss limitation", if stated in Table I, means the limit of incurred losses to be included in computing the retrospective premium under the workmen's compensation and employers' liability policies designated in Table I as subject to Plan D, applicable to any state for which a factor is shown in the Excess Loss Premium Factors (Workmen's Compensation) column of Table I, arising out of bodily injury by accident or disease, including death at any time resulting therefrom, sustained by one or more employees in a single accident. For the purpose of this definition, incurred losses arising out of bodily injury by disease, including death at any time resulting therefrom, sustained by any one employee shall be deemed to arise out of a single accident. If, during the policy period,
- (i) the insured engages in operations in any state for which this policy affords insurance but for which no factor is shown in the Excess Loss Premium Factors (Workmen's Compensation) column of Table I, and
 - (ii) on the date this endorsement becomes applicable with respect to any such additional state, there is a loss limitation with respect to all states specifically insured under the policy and subject to Plan D, and
 - (iii) the insured is eligible to elect such loss limitation in such additional state,
- such loss limitation shall also apply to incurred losses pertaining to such additional state. The excess loss premium factor applicable to such additional state, determined in accordance with the manuals in use by the Company, shall be deemed to be entered in Table I.
- (f) "Combined liability loss limitation", if stated in Table I, means the over-all limit of incurred losses to be included in computing the retrospective premium for general liability and automobile liability insurance afforded under any policy designated in Table I as subject to Plan D, arising out of a single accident.
- (g) "Automobile physical damage loss limitation", if stated in Table I, means the limit of incurred losses to be included in computing the retrospective premium for the automobile physical damage insurance afforded under any policy designated in Table I as subject to Plan D, arising out of any one occurrence.
- (h) "Loss conversion factor" means the factor designated in Table I.
- (i) "Converted losses" means the incurred losses multiplied by the applicable loss conversion factor.
- (j) "State tax multiplier" means the applicable factor stated in the State Tax Multiplier Table in Table I.
- (k) "Minimum retrospective premium" is the amount obtained by the application of the minimum premium percentage stated in Table II to the standard premium.
- (l) "Maximum retrospective premium" is the amount obtained by the application of the maximum premium percentage stated in Table II to the standard premium.

(CC-430) 11-67

(Continued on reverse side)

RoA_2158

4. Payments and Computations of Premium for Insurance Subject to Plan D.

(a) **Standard Premium.** The named Insured shall pay the standard premium to the Company in accordance with the provisions of the policies, other than this endorsement, specifying the manner of premium payment.

(b) **Retrospective Premiums.** A computation of the retrospective premium, based upon incurred losses valued as of a date six months after termination of the policies, shall be made by the Company as soon as practicable after such valuation date. The premium so computed shall be the final retrospective premium if (1) all claims have been closed or it is apparent that the retrospective premium will exceed the maximum retrospective premium, and (2) within ninety days from approval of such computation by the organization having jurisdiction, the Company, with the agreement of the named Insured, requests of such organization that the computation be final.

If such computation is not final, a further computation of the retrospective premium, based upon incurred losses valued as of a date eighteen months after termination of the policies, shall be made by the Company as soon as practicable after such valuation date. Such further computation shall be final unless, within ninety days from approval of such computation by the organization having jurisdiction, the Company or the named Insured requests of such organization that a further computation be authorized. Any subsequent computations, to be made only at intervals of twelve months, shall each be subject to a similar procedure.

If the named Insured disposes of his entire interest in the operations covered by the policies, or makes an assignment for the benefit of creditors, or is in a legal proceeding reorganized or declared bankrupt or insolvent, and if the retrospective premium as of the date of such change of status is greater than the standard premium for insurance to such date, the Company may

compute the retrospective premium as of such date, as soon as practicable thereafter.

After each computation, if the premium thus computed exceeds the premium paid for insurance subject to Plan D, the named Insured shall pay the difference to the Company; if less, the Company shall return the difference to the named Insured.

5. Cancellation.

In the event of cancellation by the named Insured of the policies designated in Table 1, the premium for insurance subject to Plan D shall be determined in accordance with the provisions of this endorsement, provided:

(a) In computing the basic premiums and excess loss premiums for each state, the standard premium shall be computed at short rates in accordance with the customary short rate table and procedure; the minimum retrospective premium shall be the standard premium so computed.

(b) In computing the maximum retrospective premium, the standard premium shall be computed pro rata for the period the policies were in force and then extended pro rata to the normal expiration date of the policies.

In the event of cancellation by the Company of such policies the premium for insurance subject to Plan D shall be determined in accordance with the provisions of this endorsement, provided if such cancellation is because of non-payment of premium by the named Insured, in computing the maximum retrospective premium the standard premium shall be computed pro rata for the period the policies were in force and then extended pro rata to the normal expiration date of the policies.

In the event of cancellation of insurance on a part of the named Insured's operations the retrospective premium shall be computed in accordance with the rules of Retrospective Rating Plan D which were in effect upon the effective date of the policies.

RETROSPECTIVE RATING

IT IS AGREED THAT THE PREMIUMS AND LOSSES FOR EMPLOYEES OF THE DMT
PLANT LOCATED IN SPARTENBURG, S.C., SHALL NOT BE USED IN THE
COMPUTATION OF THE RETROSPECTIVE PREMIUM.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.
(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective
Named Insured
Additional Premium \$

Policy No.
Return Premium \$

Endorsement No. 8

BI PD

In Advance \$
1st Anniv. \$
2nd Anniv. \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

(Authorized Representative)

(00455-B) 7-69

CAT. 189456
Printed in U.S.A.

RoA_2160

IN CONSIDERATION OF A RETURN PREMIUM OF
THE POLICY IS AMENDED FROM AN ANNUAL BASIS TO A
PREDETERMINED INTERIM ADJUSTMENT OF PREMIUM BASIS.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective 10/12/70 Policy No. 01C101077 CR Endorsement No.
Named Insured HYSTRON FIBERS INC.
Additional Premium \$

Return Premium \$

In Advance \$
1st Anniv. \$
2nd Anniv. \$

BI

FD

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

(Authorized Representative)

(90453-B) 7-69

CAT. 100456
Printed in U.S.A.

RoA_2161

Appendix_02196

IN CONSIDERATION OF AN ADDITIONAL PREMIUM OF THE
POLICY IS AMENDED TO A PREDETERMINED INTERIM ADJUSTMENT
OF PREMIUM BASIS PREMIUM WILL BE DUE IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective 10/12/70
Named Insured HYSTON FIBERS INC.
Additional Premium \$

Policy No. 01C101077 CR

Endorsement No.

Return Premium \$

BI

PD

In Advance \$
1st Anniv \$
2nd Anniv \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

(Authorized Representative)

MS-80 7-69

CAT. 180/56
Printed in U.S.A.

RoA_2162

Appendix_02197

JOHNSON & HIGGINS
CASUALTY DEPARTMENT
95 Wall Street, New York, N. Y. 10005

NOTICE OF CHANGE OF RATE

Date: November 20, 1970

Insured: Hyston Fibers Inc.

State(s) involved: Interstate

Rating Applicable to WORKMEN'S COMPENSATION INSURANCE Effective: August 12, 1970

New Modification: _____ Former Modification: _____

Adjusted Rates for Principal Premium-
Producing Classifications:—

New Rate

Former Rate

State of
South Carolina
Code #2305

The above rate comparison for just one of your important rating classifications is for exhibit purposes only. Actually the policy shows the full "Manual" rate for the classifications applicable and your new experience modification is then applied to the premium so developed.

These rates contemplate statutory coverage. They do not include certain loadings (applicable in some states) for Extra-legal Medical Benefits, increased limits of Employer's Liability coverage, etc.

Analysis:

We have received and mechanically checked the renewal modification as promulgated by the Interstate Compensation Rating Bureau. The increase in the debit modification is due to an increase in the actual incurred losses from _____ in last years rating to _____ in this year's rating.

The manual rate increased from _____ last year to _____ this year. Due to the unfavorable modification the adjusted rate increased approximately _____

50150-1M-8-70

L. Brady
L. Brady
Actuarial Section

RoA_2163

Appendix_02198

ADVICE OF INSURANCE
JOHNSON & HIGGINS

Established 1845

INSURANCE BROKERS - AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

620

EXK1.

CABLE ADDRESS "KEROZEN"

95 WALL ST., NEW YORK, N. Y. 10005
TEL. 944-3100 - AREA CODE 212

To: Mr. A. D. Korwek, Asst. Sec./Asst. Treas.
Hoechst Fibers Incorporated
485 Lexington Avenue
New York, N. Y. 10017

November 11, 1971

Dear Sir:

In accordance with your instructions, coverage has been bound and endorsements have been ordered for the policies listed herein, making the following changes, effective: November 1, 1971

Amend the name of the insured to read:

Hoechst Fibers Incorporated

Name of Insured: Hystrom Fibers Incorporated

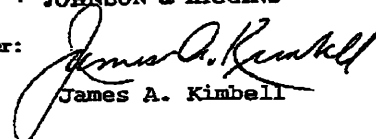
Policy Numbers: Renewal of #01C101077
Renewal of #01AL158170

The endorsements are now being prepared by the Underwriters and will be sent to you in the near future.

Yours very truly,

JOHNSON & HIGGINS

Per:


James A. Kimbell

IMPORTANT NOTICE
If there is any inaccuracy in the changes requested as described above, please advise immediately.

ENDORSEMENTS

SCMA

RoA_2164

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE

EXCLUSION OF MARITIME LIABILITY

It is agreed that the policy does not apply to injury, including death resulting therefrom, sustained by a master or a member of the crew of any vessel.

C

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise noted herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

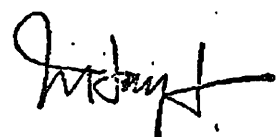
Policy No.

Endorsement No. 3

Named insured

Additional Premium \$

Return Premium \$



The Aetna Casualty and Surety Company
The Standard Fire Insurance Company

Counterparted by

RoA_2165

ADVICE OF INSURANCE
JOHNSON & HIGGINS

Established 1845

INSURANCE BROKERS-AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

621

CXKI

CABLE ADDRESS

85 WALL ST., NEW YORK, N. Y. 10005
TEL. 944-3160 AREA CODE 212

November 11, 1971

TO: Mr. A. D. Korwek, Asst. Sec./Asst. Treas.
Hoechst Fibers Incorporated
485 Lexington Avenue
New York, New York 10017
Dear Sir:

In accordance with your instructions, we have arranged insurance
attaching from November 1, 1971 and expiring November 1, 1972
ON: (1) Workmen's Compensation & Employers Liability renewing
Policy #01C-101077 on a 1 year Retrospective Plan D
including the DMT Plant.

Name of Insured: Hoechst Fibers Incorporated (Formerly Hyston Fibers)
Address of Insured: 485 Lexington Ave., New York Interest of Insured:
N.Y.
Location of Risk: as expiring

Limits of Liability

Additional Coverages

Workmen's Compensation —
Employer's Liability —
Bodily Injury —)
Property Damage —)
)
)

The policy (or policies) are being prepared and will be forwarded to you in the near future.

Yours very truly,

IMPORTANT NOTICE
If there be any inaccuracy in the
above description of the insurance
required, please advise immediately.

JOHNSON & HIGGINS.

Per

James A. Kimbell
James A. Kimbell

WORKMEN'S COMPENSATION AND GENERAL LIABILITY

2535AD—

RoA_2166

RoA_2167

Appendix_02202



These DECLARATIONS and Endorsements, with the general provisions, complete this

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

WORKMEN'S COMPENSATION AND EMPLOYERS'
LIABILITY POLICY For

1. NAME OF INSURED AND ADDRESS
HYSTRON FIBERS INC.
485 LEXINGTON AVE.
NYC, NY

POLICY NUMBER—
01C 95527 CR
☐ Individual ☐ Partnership ☒ Corporation
☐ Other:

(Show Number and Street or RFD, City, State and Zip Code)

Locations—All usual workplaces of the insured at or from which operations covered by this policy are conducted are located at the above address unless otherwise stated herein:
SEE SCHEDULES

2. POLICY PERIOD → From 8/12/69 to 8/12/70 12:01 A.M.
Standard Time at the address of the insured as stated herein.

3. Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states:
SOUTH CAROLINA

4. Classification of Operations
Entries in this item, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy.
• Clerical Office Employees N.O.C.
• Salesmen, Collectors or Messengers—outside
• Drivers, Chauffeurs and their Helpers N.O.C.—commercial
(* if not specifically included below)

Code Numbers	Premium Basis Estimated Total Annual Remuneration	Rates Per \$100 of Remuneration	Estimated Annual Premium
8810			
8742			
7380			

SEE SCHEDULES

If policy subject to three-year fixed rate manual rules type 'X' in this block ☐

If applicable, type ☐ Loss Constant
'X' in proper block ☐ Expense Constant ☐ Loss & Expense Constant

MINIMUM PREMIUM ▶	\$	DEPOSIT PREMIUM ▶	\$	TOTAL ESTIMATED ANNUAL PREMIUM ▶	\$
If indicated herein, Interim adjustments of premiums shall be made: ☐ Semi-Annually ☒ Quarterly ☐ Monthly Endorsements made part of the policy (designated by Endorsement number): SEE C2027B				3 Year Policy Installments Payable:	
				In Advance ▶	\$
				1st Anniversary ▶	\$
				2nd Anniversary ▶	\$

5. Limit of Liability for Coverage B—Employers' Liability: \$
subject to all the terms of this policy having reference thereto.

Countersigned by

(CC-26) ED. 10-67

Printed in U.S.A.

RoA_2168

THE AETNA CASUALTY AND SURETY COMPANY
(A stock insurance company, herein called the Company)

Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. COVERAGE A -- WORKMEN'S COMPENSATION

To pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law.

COVERAGE B -- EMPLOYERS' LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in a state designated in item 3 of the declarations or in operations necessary or incidental thereto.

II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

As respects the insurance afforded by the other terms of this policy the Company shall:

- (a) defend any proceeding against the insured seeking such benefits and any suit against the insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended proceeding or suit, but without any obligation to apply for or furnish any such bonds;
- (c) pay all expenses incurred by the Company, all costs taxed against the insured in any such proceeding or suit and all interest accruing after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

- (d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the amounts payable under Coverage A or the applicable limit of liability under Coverage B.

III. DEFINITIONS

- (a) Workmen's Compensation Law. The unqualified term "workmen's compensation law" means the workmen's compensation law and any occupational disease law of a state designated in item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.
- (b) State. The word "state" means any State or Territory of the United States of America and the District of Columbia.
- (c) Bodily Injury by Accident; Bodily Injury by Disease. The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease, as results directly from a bodily injury by accident, is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."
- (d) Assault and Battery. Under Coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

IV. APPLICATION OF POLICY

This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

- (a) to operations conducted at or from any workplace not described in item 1, 2 or 4 of the declarations if the insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;
- (b) unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;
- (c) under Coverage B, to liability assumed by the insured under any contract or agreement, but this exclusion does not apply to a warranty that work performed by or on behalf of the insured will be done in a workmanlike manner;
- (d) under Coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee em-

- ployed in violation of law, or (2) with respect to any employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof;
- (e) under Coverage B, to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages because of such injury or death resulting therefrom;
- (f) under Coverage B, to any obligation for which the insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

CONDITIONS

[Unless otherwise noted, the conditions apply to all coverages]

- 1. **PREMIUM.**—This premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the Company. This policy is issued by the Company on the basis of the agreement that if any change in classifications, rates or rating plans is or becomes applicable to this policy under any law regulating this insurance or because of any amendments affecting the benefits provided by the workmen's compensation law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the Company, earned during the policy period by (a) all executive officers and other employees of the insured engaged in operations covered by this policy, and (b) any other person performing work which may render the Company liable under this policy for injury to or death of such person in accordance with the workmen's compensation law. "Remuneration" shall not include the remuneration of any person within division (b) foregoing if the insured maintains evidence satisfactory to the Company that the payment of compensation and other benefits under such law to such person is secured by other valid and

(CONTINUED ON CG-28-2 PAGES 2 & 3)

collectible insurance or by any other undertaking approved by the governmental agency having jurisdiction thereof.

If the declarations provide for adjustment of premium on other than an annual basis, the Insured shall pay the deposit premium to the Company upon the inception of this policy and thereafter interim premiums shall be computed in accordance with the manuals in use by the Company and paid by the Insured promptly after the end of each interval specified in the declarations. The deposit premium shall be retained by the Company until termination of this policy and credited to the final premium adjustment.

The Insured shall maintain records of the information necessary for premium computation on the bases stated in the declarations, and shall send copies of such records to the Company at the end of the policy period and at such times during the policy period as the Company may direct. If the Insured does not furnish records of the remuneration of persons within division (b) of the definition of remuneration foregoing, the remuneration of such persons shall be computed in accordance with the manuals in use by the Company.

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the rules, rates, rating plans, premiums and minimum premiums applicable to this insurance in accordance with the manuals in use by the Company. If the earned premium thus computed exceeds the premium previously paid, the Insured shall pay the excess to the Company; if less, the Company shall return to the Insured the unearned portion paid by the Insured. All premiums shall be fully earned whether any workmen's compensation law, or any part thereof, is or shall be declared invalid or unconstitutional.

2. PARTNERSHIP OR JOINT VENTURE AS INSURED—If the Insured is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an Insured only while he is acting within the scope of his duties as such partner or member.

3. INSPECTION AND AUDIT—The Company and any rating authority having jurisdiction by law shall each be permitted but not obligated to inspect at any reasonable time the workplaces, operations, machinery and equipment covered by this policy. Neither the right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the Insured or others, to determine or warrant that such workplaces, operations, machinery or equipment are safe.

The Company and any rating authority having jurisdiction by law shall each be permitted to examine and audit the Insured's payroll records, general ledger, disbursements, vouchers, contracts, tax reports and all other books, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof and within three years after termination of this policy, as far as they show or tend to show or verify the amount of remuneration or other premium basis, or relate to the subject matter of this insurance.

4. NOTICE OF INJURY—When an injury occurs written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the injury, the names and addresses of the injured and of available witnesses.

5. NOTICE OF CLAIM OR SUIT—If claim is made or suit or other proceeding is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

6. ASSISTANCE AND COOPERATION OF THE INSURED—The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits, or proceedings. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and other services at the time of injury as are required by the workmen's compensation law.

7. STATUTORY PROVISIONS—The Company shall be directly and primarily liable to any person entitled to the benefits of the workmen's compensation law under this policy. The obligations of the Company may be enforced by such person, or for his benefit by any agency authorized by law, whether against the Company alone or jointly with the Insured.

Bankruptcy or insolvency of the Insured or of the Insured's estate, or any default of the Insured, shall not relieve the Company of any of its obligations under Coverage A.

As between the employee and the Company, notice or knowledge of the injury on the part of the Insured shall be notice or knowledge, as the case may be, on the part of the Company; the jurisdiction of the Insured, for the purposes of the workmen's compensation law, shall be jurisdiction of the Company and the Company shall in all things be bound by and subject to the findings, judgments, awards, decrees, orders or decisions, rendered against the Insured in the form and manner provided by such law and within the terms, limitations and provisions of this policy not inconsistent with such law.

All of the provisions of the workmen's compensation law shall be and remain a part of this policy as fully and completely as if written herein, so far as they apply to compensation and other benefits provided by this policy and to special taxes, payments into security or other special funds, and assessments required of or levied against compensation insurance carriers under such law.

The Insured shall reimburse the Company for any payments required of the Company under the workmen's compensation law, in excess of the benefits regularly provided by such law, solely because of injury to (a) any employee by reason of the serious and wilful misconduct of the Insured, or (b) any employee, employed by the Insured in violation of law with the knowledge or acquiescence of the Insured or any executive officer thereof.

Nothing herein shall relieve the Insured of the obligations imposed upon the Insured by the other terms of this policy.

8. LIMITS OF LIABILITY—The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in Coverage B include damages for care and loss of services and damages for which the Insured is liable by reason of suits or claims brought against the Insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the Insured arising out of and in the course of their employment. The limit of liability stated in the declarations for Coverage B is the total limit of the Company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by one or more employees in any one accident. The limit of liability stated in the declarations for Coverage B is the total limit of the Company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by one or more employees of the Insured in operations in any one state designated in item 3 of the declarations or in operations necessary or incidental thereto.

The inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

9. ACTION AGAINST COMPANY—No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations under Coverage B.

10. OTHER INSURANCE—If the Insured has other insurance against a loss covered by this policy, the Company shall not be liable to the Insured hereunder for a greater proportion of such loss than the amount which would have been payable under this policy, had no such other insurance existed, bears to the sum of said amount and the amounts which would have been payable under each other policy applicable to such loss, had each such policy been the only policy so applicable.

11. SUBROGATION—In the event of any payment under this policy, the Company shall be subrogated to all rights of recovery thereof of the Insured and any person entitled to the benefits of this policy against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

12. CHANGES—Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

13. ASSIGNMENT—Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the Company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancellation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

14. CANCELLATION—This policy may be cancelled by the insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the Company shall be equivalent to mailing.

If the insured cancels, unless the manuals in use by the Company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

When the insurance under the workmen's compensation law may not be cancelled except in accordance with such law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

15. TERMS OF POLICY CONFORMED TO STATUTE—COVERAGE A—Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

16. LONG TERM POLICY—If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the Company with respect to classifications of operations for which this policy provides a per capita premium basis, to the following provisions:

(a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the Company;

(b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable for such period in accordance with the manuals in use by the Company.

17. DECLARATIONS—By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The Aetna Casualty And Surety Company has caused this policy to be signed by its President and a Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the Company.

Howard G. Moore
Secretary

John A. Rice
President

SHORT RATE TABLE

Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium
1	5%	37-40	21%	99-102	33%	210-213	53%	367-370	85%	214-217	54%
2	5	41-43	22	103-105	33	218-221	54	371-374	86	222-225	55
3	5	44-46	22	106-108	33	226-229	55	375-378	87	230-233	56
4	5	47-49	23	109-111	34	234-237	56	379-382	88	236-239	57
5	5	50-52	23	112-114	34	240-243	57	383-386	89	244-247	58
6	5	53-55	24	115-117	35	248-251	58	387-390	90	252-255	59
7	5	56-58	24	118-120	35	256-259	59	391-394	91	260-263	60
8	5	59-61	25	121-123	36	264-267	60	395-398	92	266-269	61
9	5	62-64	25	124-126	36	270-273	61	399-402	93	274-277	62
10	5	65-67	26	127-129	37	278-281	62	403-406	94	282-285	63
11	5	68-70	26	130-132	37	286-289	63	407-410	95	290-293	64
12	5	71-73	27	133-135	38	294-297	64	411-414	96	296-299	65
13	5	74-76	27	136-138	38	300-303	65	415-418	97	304-307	66
14	5	77-79	28	139-141	39	308-311	66	419-422	98	310-313	67
15	5	80-82	28	142-144	39	314-317	67	423-426	99	316-319	68
16	5	83-85	29	145-147	40	320-323	68	427-430	100	322-325	69
17	5	86-88	29	148-150	40	326-329	69				
18	5	89-91	30	151-153	41						
19	5	92-94	30								
20	5										

Schedule—Workmen's Compensation and Employers' Liability Insurance:

SOUTH CAROLINA

Location of Operations	Classification Symbol	Code No.	Estimated Remuneration	Rate per \$100 of Remuneration	Estimated Premium

STATE OF S.C.

TEXTILE FIBER MFG. - SYNTHETIC 2305

SALESMEN, COLLECTORS OR MESSENGERS -
OUTSIDE 8742

CLERICAL OFFICE EMPLOYEES - NOC 8810

ADDITIONAL MEDICAL

INCREASED LIMIT OF LIABILITY - COV. B
(3% OF TOTAL PREMIUM-EXCLUSIVE OF LOSS
& EXPENSE CONSTANTS) - (MP 100.)

EXPERIENCE MODIFICATION TENTATIVE
DIFFERENCE DUE TO EXPERIENCE MODIFICATION

ANNUAL

DEPOSIT

TABLE 1 - PREMIUM SUBJECT TO PLAN D, LIMITATIONS, LOSS CONVERSION FACTOR, STATE TAX MULTIPLIERS, EXCESS LOSS PREMIUM FACTORS

1. THE PREMIUM FOR THE FOLLOWING POLICIES IS TO BE COMPUTED IN ACCORDANCE WITH THE PROVISIONS OF RETROSPECTIVE RATING PLAN D IN ALL STATES WHERE SUCH PLAN IS OR BECOMES APPLICABLE ON AN INTERSTATE BASIS, SUBJECT TO THE LIMITATIONS SPECIFIED HEREIN:

LIST OF POLICIES: OIC 95527 CR

2. COMPENSATION LOSS LIMITATION IS

3. LOSS CONVERSION FACTOR IS

4. TAX MULTIPLIERS (STATE)

EXCESS LOSS PREMIUM FACTORS

NAME OF STATE	WORKMEN'S COMPENSATION & EMPLOYERS LIABILITY	WORKMEN'S COMPENSATION AND EMPLOYERS LIABILITY

S. CAR.

TABLE II - PERCENTAGES TO DETERMINE BASIC, MINIMUM AND MAXIMUM PREMIUMS.

THE BASIC PREMIUM, THE MINIMUM PREMIUM AND THE MAXIMUM PREMIUM FOR INSURANCE SUBJECT TO PLAN D ARE PERCENTAGES OF THE STANDARD PREMIUM FOR SUCH INSURANCE. SUCH PERCENTAGES ARE COMPUTED INITIALLY UPON AN ESTIMATE OF THE STANDARD PREMIUM AND FINALLY UPON THE EARNED STANDARD PREMIUM FOR SUCH INSURANCE. IF THE STANDARD PREMIUM LIES BETWEEN ANY TWO OF THE FIGURES ON THE "STANDARD PREMIUM" LINE, THE PERCENTAGE APPLICABLE SHALL BE OBTAINED BY LINEAR INTERPOLATION TO THE NEAREST ONE-TENTH OF 1%.

	PERCENTAGES OF STANDARD PREMIUM		
	50% OF LESS	100%	150% OR MORE
STANDARD PREMIUM			
MINIMUM PREMIUM			
MAXIMUM PREMIUM			
BASIC PREMIUM			
* (BASIC + (ELPF) (LCF)) X TAX MULT.			

RoA_2173

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

Alabama _____
 Alaska _____
 Arkansas _____
 California _____
 Colorado _____
 Connecticut _____
 Delaware _____
 District of Columbia _____
 Florida _____
 Georgia _____
 Hawaii _____
 Idaho _____
 Illinois _____
 Indiana _____
 Iowa _____
 Kansas _____
 Kentucky _____
 Louisiana _____
 Maine _____
 Maryland _____
 Massachusetts _____
 Michigan _____
 Minnesota _____
 Mississippi _____
 Missouri _____
 Montana _____
 Nebraska _____
 New Hampshire _____
 New Jersey _____
 New Mexico _____
 New York _____
 North Carolina _____
 Oklahoma _____
 Oregon _____
 Pennsylvania _____
 Rhode Island _____
 South Carolina CT1753C, CC395
 South Dakota _____
 Tennessee _____
 Texas _____
 Utah _____
 Vermont _____
 Virginia _____
 Washington _____
 Wisconsin _____

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy.

THE AETNA CASUALTY AND SURETY COMPANY
 THE STANDARD FIRE INSURANCE COMPANY
 Hartford, Connecticut

John A. Rice
 President

(C-2027-8) 1-66

RoA_2174

Appendix_02209

Workmen's Compensation and Employers' Liability Policy
UNITED STATES LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT ENDORSEMENT

It is agreed that:

1. With respect to operations in a state designated in item 3 of the declarations, the unqualified term "workmen's compensation law" includes the United States Longshoremen's and Harbor Workers' Compensation Act, U. S. Code (1946) Title 33, Sections 901 - 49, and definition (a) of Insuring Agreement III is amended accordingly.
2. With respect to operations subject to the said Longshoremen's and Harbor Workers' Compensation Act, the states, if any, named below, shall be deemed to be designated in Item 3 of the declarations.

ANY STATE NOT DESIGNATED IN ITEM 3

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement effective

Policy No.

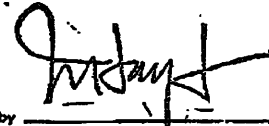
Endorsement No.

2

Named Insured

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by



(Authorized Representative)

BROKEN		COUNTERSINKING CODE		OFFICE CODE		C/S CODE		E		POLICY EXPIRY DATE		INITIALS	
STAT. PLAN	STATE	RATE	SH	PD	MED.	DR. REC.	FORM OR CLASS	DISC.	PREMIUM	EXPOSURE			
											EMPTY FORM NO.		

**VOLUNTARY COMPENSATION ENDORSEMENT
(FOREIGN COVERAGE)**

IT IS AGREED THAT WITH RESPECT TO THE HEREINAFTER DESIGNATED GROUP OF EMPLOYEES, ITEM 1 OF THE VOLUNTARY COMPENSATION ENDORSEMENT ATTACHED TO THIS POLICY IS AMENDED TO READ:

THE POLICY APPLIES UNDER COVERAGE C TO INJURY TO OR DEATH SUSTAINED OUTSIDE THE UNITED STATES OF AMERICA, ITS TERRITORIES OR POSSESSIONS OR CANADA, PROVIDED ANY CLAIM OR SUIT IS INSTITUTED WITHIN THE CONTINENTAL UNITED STATES OF AMERICA.

GROUP OF EMPLOYEES

STATE OF OPERATIONS

DESIGNATED WORKMEN'S
COMPENSATION LAW

EMPLOYEES WHOSE CONTRACT OF HIRE IS EXECUTED IN THE UNITED STATES WHILE OPERATING IN COUNTRIES OTHER THAN THE UNITED STATES OF AMERICA AS INCIDENT TO THEIR EMPLOYMENT IN THE BUSINESS OF THE INSURED.

NOT APPLICABLE

STATE OF HIRE

THE COMPANY HEREBY GIVES THE INSURED NOTICE THAT THE UNDERTAKING INCORPORATED IN THIS ENDORSEMENT DOES NOT AND WILL NOT CONSTITUTE LEGAL INSURANCE OF THE INSURED'S OBLIGATION UNDER THE WORKMEN'S COMPENSATION LAW OF ANY FOREIGN COMPANY OR POLITICAL SUBDIVISION THEREOF. NO PENALTY PROVIDED FOR FAILURE TO COMPLY WITH ANY SUCH COMPENSATION LAW IS ASSUMED BY THIS ENDORSEMENT.

REPATRIATION: THE COMPANY AGREES TO REIMBURSE THE EMPLOYER FOR SUCH ADDITIONAL EXPENSES AS REASONABLY MAY BE INCURRED OVER AND ABOVE NORMAL TRANSPORTATION COST FOR REPATRIATION OF EMPLOYEES SUFFERING FROM INJURIES OR DISEASES COVERED UNDER COVERAGE C (INCLUDING THE BODIES OF EMPLOYEES INJURED FATALLY) FROM THE DESIGNATED COUNTRY AND LOCATION OF OPERATIONS TO THE DESTINATION IN THE U.S.A. OR CANADA, IT BEING UNDERSTOOD THAT SUCH INJURIES MUST MAKE REPATRIATION NECESSARY IN THE OPINION OF COMPETENT MEDICAL AUTHORITIES. THE LIABILITY OF THE COMPANY HEREUNDER SHALL BE LIMITED TO THE SUM OF WITH RESPECT TO ANY ONE EMPLOYEE.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 5

Named Insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

(Authorized Representative)

(90455-1-5) 3-67

RoA 2176

Appendix_02211

BROKER		OFFICE CODE		C/S CODE		E		POLICY EXPIRY DATE		INITIALS	
COUNTERSIGNED CODES		LIMITS OF LIABILITY		DR. REC.		FORM OR CLASS		DISC.		PREMIUM	
STAT. PLAN	STATE	RATE	BI	PD	BYED.	FORM OR CLASS	DISC.	PREMIUM	EXPOSURE	EMPT FORM NO.	

CONDITION NO. 14 OF THE POLICY AMENDED
IN PART

IT IS AGREED THAT THE WORDS "TEN (10) DAYS" IN CONDITION 14 OF THE POLICY ARE
AMENDED TO READ "THIRTY (30) DAYS".

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No.

6

Named Insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

(Authorized Representative)

(90455-1-B) 3-67

RoA_2177

Workmen's Compensation and Employers' Liability Policy
ADDITIONAL MEDICAL COVERAGE ENDORSEMENT

SCHEDULE

1. LIMITS OF LIABILITY	2. APPLICATION OF ENDORSEMENT			3. PREMIUM
EACH PERSON	COLUMN 1	COLUMN 2	COLUMN 3	
	S.C.			b. The minimum premium for this endorsement is \$50.

It is agreed that:

1. In addition to any medical benefits provided in the applicable compensation law, the Company will also pay the reasonable cost of any additional medical, surgical, nursing or hospital services, medical or surgical apparatus or appliances, including prosthetic devices, and medicines which in the opinion of the Company are reasonably necessary for the treatment of bodily injury sustained by any person who is entitled, on account of such injury, to the compensation and other benefits required of the insured under such law and afforded by the policy under Coverage A, or who is entitled to such benefits under other terms of the policy.
2. The limit of liability stated in Item 1 of the schedule as applicable to "each person" is the total limit of the Company's liability under this endorsement for all expenses incurred on account of each person for whom benefits are payable under Paragraph 1 above.
3. As a condition precedent to any payment by the Company under Paragraph 1 the injured person or, in the event of his incapacity, his legal representative shall, if requested

by the Company, execute an agreement of indemnity which shall entitle the Company to reimbursement for the amount of such payment or payments out of such person's share of the proceeds of any recovery, whether by settlement or judgment, made against any person or organization, other than the insured, which is or may be liable on account of such injury.

4. This endorsement applies only to persons entitled under the policy to receive the benefits provided by the workmen's compensation laws of the states listed in Item 2 of the schedule.
5. The premium for the insurance afforded by this endorsement for operations subject to the workmen's compensation law of any state listed in Item 2 of the schedule shall be determined in accordance with the additional medical coverage rules shown in the Company's manuals, and, with respect to states listed in Column 1, shall be that percentage of the policy premium shown in Item 3 of the schedule, and, with respect to states listed in Column 2, shall be the percentage of the policy premium stated in Column 3.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 1

Named Insured

Additional Premium \$ INCL.

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

(Authorized Representative)

AGENCY/ BROKER	CODE	NAME	C/O - BROKER	PAY T	TAX DIST.	TRANS. TYPE	LINE OF BUSINESS	C A P	POLICY EFF. DATE	DATE TYPED AND INITIALS	
COUNTERSIGNING CODES	OFFICE CODE	C/S CODE				E			POLICY EXP. DATE		
STAT. PLAN	TERM. STATE								FILE DEPT.	UND. APP.	UND. PROC.

(CC-395) Ed. 7-67

RoA_2178

Appendix_02213

Workmen's Compensation and Employers' Liability Policy

VOLUNTARY COMPENSATION ENDORSEMENT

SCHEDULE

2. GROUP OF EMPLOYEES	STATE OF OPERATIONS	DESIGNATED WORKMEN'S COMPENSATION LAW
ALL EMPLOYEES	ANYWHERE IN U.S.A.	STATE OF HIRE

2. Limits of Liability	Bodily Injury by Accident	Bodily Injury by Disease
	each employee \$	each employee \$
	each accident \$	aggregate disease \$ (per state)

It is agreed that:

1. Insuring Agreement 1 of the policy is amended by adding thereto an additional coverage as follows:
Coverage C — Voluntary Compensation. To pay on behalf of the insured, if any employee within a group of employees described in the schedule shall sustain injury, including death resulting therefrom, while employed by the insured in operations in a state specified opposite the description of such group of employees, under circumstances which would have rendered the insured liable for compensation if the injured employee and the insured had been subject to the workmen's compensation law designated in the schedule with respect to such employment, an amount equal to the compensation and other benefits which would have been payable under such law had the injured employee and the insured been subject to such law with respect to such employment.
2. The policy does not apply under Coverage C to injury or death which gives rise to a valid claim under any workmen's compensation or occupational disease law.
3. The policy applies under Coverage C only to injury or death.
 - (a) sustained in the United States of America, its territories or possessions, or Canada, or
 - (b) sustained while temporarily outside the United States of America, its territories or possessions, or Canada if the injured employee is a citizen or resident of the United States or Canada; but Coverage C does not apply to any suit brought in or any judgment rendered by any court outside the United States of America, its territories or possessions, or Canada or to an action on such judgment wherever brought.
4. The benefits payable under Coverage C on account of such injury shall be paid to such person or persons as would have been entitled thereto under the designated workmen's compensation law, provided, however, that as a condition precedent to any such payment, the injured employee, or in the event of his incapacity, his legal representative, or, in the event of his death, his

legal representative or the person or persons entitled to sue therefor, shall (1) execute such full and binding release of all claims against the insured and the Company on account of such injury or death as may be required by the Company, and (2) assign to the Company all claims or judgments or the proceeds thereof which he or they may have or recover against any person who or organization which is or may be liable on account of such injury or death and execute such other documents as the Company may require to enable it to enforce such rights or collect such proceeds. The Company shall have full power to enforce such rights under any such assignment in its own name or in the name of the injured employee, or to make such negotiations and settlement as may be deemed expedient by the Company, but the Company shall not be obligated to enforce such rights. In the event of any recovery or settlement the Company shall pay the proceeds thereof, less payments hereunder and all expenses incident to such recovery or settlement, to the person or persons entitled thereto.

5. If any person entitled to payment under Coverage C shall refuse to accept such payment and to comply with the terms and conditions set forth above or if any person shall commence any proceedings at law, in equity or in admiralty, except for such payment, seeking damages from the insured or the Company on account of such injury, the Company's liability under Coverage C with respect to such injury is thereupon terminated.
6. With respect to injury or death to which Coverage C is applicable, or would have been applicable except for paragraph 5 foregoing, the limit of the Company's liability under Coverage B shall be determined in accordance with the following provision, and Condition 8 of the policy is amended accordingly:

Limits of Liability — Coverage B. The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom", in Coverage B, include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured

(Continued on reverse)

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective	Policy No.	Endorsement No. 4
Named Insured		
The Aetna Casualty and Surety Company The Standard Fire Insurance Company Hartford, Connecticut		
Countersigned by		 (Authorized Representative)

(CC-397-B) 5-63

CAT. 136951
Printed in U.S.A.

RoA_2179

Appendix_02214

Workmen's Compensation and Employers' Liability Policy

RETROSPECTIVE PREMIUM ENDORSEMENT — ONE YEAR — PLAN D

It is agreed that this endorsement applies to the policies designated in Table I below, subject to the following provisions:

1. Final Premium. The final premium for such policies is the sum of:

- (a) the premium for the insurance not subject to Plan D, as specified in Table I, computed in accordance with the provisions of such policies, other than this endorsement, and
- (b) the premium for the insurance subject to Plan D, as specified in Table I, hereinafter referred to as the retrospective premium.

2. Retrospective Premium. The retrospective premium shall be the sum of:

- (a) the basic premiums for each state,
- (b) the excess loss premiums for each state, and
- (c) the converted losses for each state,

each multiplied by the applicable state tax multiplier. The retrospective premium shall be subject to the minimum retrospective premium and to the maximum retrospective premium.

3. Definition of Terms Used in the Computation of the Retrospective Premium.

- (a) "Standard premium" means the premium for the insurance subject to Plan D computed in accordance with the provisions of the policies, other than this endorsement and exclusive of the application of any premium discount endorsement.
- (b) "Basic premiums" means the amounts obtained by applying to each portion of the standard premium the basic premium percentage stated in Table II as applicable thereto.
- (c) "Excess loss premiums" means the sum of:
 - (1) the amounts obtained by applying to that portion of the standard premium under workmen's compensation and employers' liability policies for each state for which a factor is entered in the Excess Loss Premium Factors (Workmen's Compensation) column of Table I, the applicable factor times the applicable loss conversion factor,
 - (2) the amounts obtained by applying to that portion of the standard premium for liability insurance under general liability and automobile liability policies, the factor stated in the Excess Loss Premium Factors (Liability) column of Table I, times the applicable loss conversion factor, and
 - (3) the amounts obtained by applying to that portion of the standard premium for automobile physical damage insurance, the factor stated in the Excess Loss Premium Factors (Physical Damage) column of Table I, times the applicable loss conversion factor.
- (d) "Incurred Losses" means the sum of:
 - (1) all losses, including medical, actually paid,
 - (2) reserves for unpaid losses as estimated by the Company,
 - (3) premiums on bonds paid for by the Company in accordance with the provisions of the policies,
 - (4) interest accruing after entry of a judgment against the insured,
 - (5) allocated loss adjustment expenses, and
 - (6) expenses incurred in seeking recovery against a third party

under the insurance subject to Plan D, provided:

- (i) as respects the insurance afforded under any workmen's compensation and employers' liability policy:
 - (a) item (3) above shall not apply,
 - (b) item (5) above shall apply as respects employers' liability coverage only,
 - (c) item (6) above shall apply only if recovery is obtained against the third party, and
- (ii) items (3), (4), and (5) above shall not apply as respects automobile physical damage insurance.
- (e) "Compensation loss limitation", if stated in Table I, means the limit of incurred losses to be included in computing the retrospective premium under the workmen's compensation and employers' liability policies designated in Table I as subject to Plan D, applicable to any state for which a factor is shown in the Excess Loss Premium Factors (Workmen's Compensation) column of Table I, arising out of bodily injury by accident or disease, including death at any time resulting therefrom, sustained by one or more employees in a single accident. For the purpose of this definition, incurred losses arising out of bodily injury by disease, including death at any time resulting therefrom, sustained by any one employee shall be deemed to arise out of a single accident. If, during the policy period,
 - (i) the insured engages in operations in any state for which this policy affords insurance but for which no factor is shown in the Excess Loss Premium Factors (Workmen's Compensation) column of Table I, and
 - (ii) on the date this endorsement becomes applicable with respect to any such additional state, there is a loss limitation with respect to all states specifically insured under the policy and subject to Plan D, and
 - (iii) the insured is eligible to elect such loss limitation in such additional state,

such loss limitation shall also apply to incurred losses pertaining to such additional state. The excess loss premium factor applicable to such additional state, determined in accordance with the manuals in use by the Company, shall be deemed to be entered in Table I.

- (f) "Combined liability loss limitation", if stated in Table I, means the over-all limit of incurred losses to be included in computing the retrospective premium for general liability and automobile liability insurance afforded under any policy designated in Table I as subject to Plan D, arising out of a single accident.
- (g) "Automobile physical damage loss limitation", if stated in Table I, means the limit of incurred losses to be included in computing the retrospective premium for the automobile physical damage insurance afforded under any policy designated in Table I as subject to Plan D, arising out of any one occurrence.
- (h) "Loss conversion factor" means the factor designated in Table I.
- (i) "Converted losses" means the incurred losses multiplied by the applicable loss conversion factor.
- (j) "State tax multiplier" means the applicable factor stated in the State Tax Multiplier Table in Table I.
- (k) "Minimum retrospective premium" is the amount obtained by the application of the minimum premium percentage stated in Table II to the standard premium.
- (l) "Maximum retrospective premium" is the amount obtained by the application of the maximum premium percentage stated in Table II to the standard premium.

Workmen's Compensation and Employers' Liability Policy

ALL STATES ENDORSEMENT

A. In the event the Insured undertakes operations in any state not designated in item 3 of the declarations, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming, the Company agrees as follows:

1. To reimburse the Insured for all compensation and other benefits required of the Insured under the workmen's compensation or occupational disease law of such state.
2. Such insurance as is afforded by the policy under Coverage B also applies to bodily injury by accident or disease, including death at any time resulting therefrom, sustained by any employee of the Insured arising out of and in the course of his employment in operations in such state or in operations necessary or incidental thereto.
3. Such insurance as is afforded by the policy by virtue of this endorsement does not apply to such operations if the Insured has, under any workmen's compensation or occupational disease law, other insurance for such operations or is a qualified self-insurer therefor, or has affirmatively rejected the workmen's compensation or occupational disease law applicable to such operations.

B. The agreements in Paragraph A foregoing are subject to the following conditions:

1. The Insured shall give notice to the Company before or within a reasonable time after the commencement of such operations, but failure to give such notice shall not invalidate the insurance afforded by this endorsement.
2. The Insured shall, if requested by the Company, take whatever action is necessary to bring himself within the workmen's compensation and occupational disease laws of such state with respect to such operations. The Company shall thereupon issue, in the form required by such laws, and the Insured shall accept workmen's compensation coverage under such laws, and such insurance as is afforded by this endorsement with respect to such operations shall thereupon terminate.
3. The premium bases and rates for the classifications of operations in such state or operations necessary or incidental thereto shall be those which would have been applicable under the manuals in use by the Company had Coverage A of the policy applied to such operations and the premium for the insurance afforded by this endorsement shall be computed accordingly, subject to the provisions of Condition 1 of the policy.
4. The word "State" as used in this endorsement means any State of the United States of America and the District of Columbia.

C. Such insurance as is afforded by the policy by virtue of this endorsement shall not apply:

1. To injury to or death of the master or a member of the crew of any vessel; or
2. To fines or penalties imposed on the Insured for failure to comply with the requirements of any workmen's compensation law.

D. The insurance afforded by the policy by virtue of this endorsement shall not constitute workmen's compensation insurance as required of an employer under the laws of any state.

E. All of the provisions of the policy, except Coverage A of Insuring Agreement I and Conditions 7 and 15, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective	Policy No.	Endorsement No.
Named Insured		

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned

Authorized Agent

President

(C-2083-C) 2-47

RoA_2181

Appendix_02216

ENDORSEMENT — POLICY CHANGES — COMPENSATION

It is agreed that: (Check one alternative below)

- () The name of the insured is changed to:
- () The address (location) has been changed to:
- (X) **PART OF THE DECLARATIONS AMENDED.** The part of the Declarations of this Policy dealing with the Classifications of Operations insured, Premium Rates and Estimated Annual Premium is amended to read as shown below:
- () **CHANGE IN REMUNERATION.** The Estimated Total Annual Remuneration and Estimated Annual Premium stated in the Declarations for the classifications identified by code numbers below are amended as indicated in the appropriate columns below:
- () **ADDITIONAL OPERATIONS.** Such insurance as is afforded by the Policy also applies to the operations described below:
- () **CHANGE IN PREMIUM RATES.** The premium rates for operations listed below and conducted in the State of shall be as follows: (See Declarations for more complete description of certain classifications)

Classification of Operations	Code No.	Estimated Total Annual Remuneration	Rate per \$100 of Re- muneration	Estimated Annual Premium
IT IS AGREED THAT THE ADJUSTMENT OF PREMIUM AS SHOWN IN DECLARATION 4 OF THE POLICY IS AMENDED TO READ: ANNUAL				
Minimum Premium for full period \$		Total Estimated Premium \$		

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective **8/12/69** Policy No. **01C 95527 CR** Endorsement No.
 Named Insured **HYSTROM FIBERS INC.**
 PREMIUM:
 Additional \$ Return \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
 Hartford, Connecticut

Countersigned
 (C-1939-D) 10-66

Authorized Agent

John A. Niece
 President

RoA 2182

Appendix_02217

AGENCY/ BROKER	CODE	NAME		C/O CODE	PAYMENT	TAX DISTRICT	TRANSACTION TYPE E	LINE OF BUSINESS	POLICY EFF. DATE	DATE TYPED AND INITIALS
COUNTERSIGNED CODES		OFFICE CODE	C/S CODE						POLICY EXPIRY DATE	
STATE PLAN	TERRITORY	LIMITS OF LIABILITY			OR REC.	FORM OR CLASS	DISC.	PREMIUM	- EXPOSURE	
STATE	DATE	B1	PD	NED.						
										ENDY FORM NO.

RETROSPECTIVE PREMIUM ENDORSEMENT

AMENDED IN PART

IT IS AGREED THAT THE RETROSPECTIVE PREMIUM ENDORSEMENT ATTACHED TO POLICY IS AMENDED AS FOLLOWS:

UNDER ITEM 4 PERCENTAGES OF STANDARD PREMIUM ARE AMENDED AS FOLLOWS:
50% OF LESS 100% 150% OR MORE

OTHER

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective **8/12/69** Policy No. **01C95527 CR** Endorsement No. **7**

Named Insured **HYSTRON FIBERS INC.**

Additional Premium \$ Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by

[Signature]
(Authorized Representative)

(00455-1-8) 3-67

RoA 2183

ENDORSEMENT — POLICY CHANGES — COMPENSATION

It is agreed that: (Check one alternative below)

- () The name of the insured is changed to:
- () The address (location) has been changed to:
- () **PART OF THE DECLARATIONS AMENDED.** The part of the Declarations of this Policy dealing with the Classifications of Operations insured, Premium Rates and Estimated Annual Premium is amended to read as shown below:
- () **CHANGE IN REMUNERATION.** The Estimated Total Annual Remuneration and Estimated Annual Premium stated in the Declarations for the classifications identified by code numbers below are amended as indicated in the appropriate columns below:
- (X) **ADDITIONAL OPERATIONS.** Such insurance as is afforded by the Policy also applies to the operations described below:
- () **CHANGE IN PREMIUM RATES.** The premium rates for operations listed below and conducted in the State of shall be as follows: (See Declarations for more complete description of certain classifications)

Classification of Operations	Code No.	Estimated Total Annual Remuneration	Rate per \$100 of Remuneration	Estimated Annual Premium
DMT PLANT, SPARTENBURG, S.C.		FOR TERM		FOR TERM
CLERICAL OFFICE EMPLOYEES N.O.C.	8810			
CHEMICAL MFG.	4809			
ADDITIONAL MEDICAL IF ABOVE PREM				
EXPERIENCE MODIFICATION (TENTATIVE)				
DIFFERENCE DUE TO EXPERIENCE MODIFICATION				

Minimum Premium for full period \$

Total Estimated Premium \$

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the date of the policy unless otherwise stated herein.

(The information is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 5-1-70 Policy No. 01C95527 CR Endorsement No. 9.
 Named Insured HYSTRON FIBERS INC.
 PREMIUM:
 Additional \$ Return \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
 Hartford, Connecticut

Countersigned

Authorized Agent

President

(CC-552) Ed. 6/69

RoA 2184

Appendix_02219

ENDORSEMENT — POLICY CHANGES — COMPENSATION

It is agreed that: (Check one alternative below)

- () The name of the insured is changed to:
- () The address (location) has been changed to:
- () PART OF THE DECLARATIONS AMENDED. The part of the Declarations of this Policy dealing with the Classifications of Operations insured, Premium Rates and Estimated Annual Premium is amended to read as shown below:
- () CHANGE IN REMUNERATION. The Estimated Total Annual Remuneration and Estimated Annual Premium stated in the Declarations for the classifications identified by code numbers below are amended as indicated in the appropriate columns below:
- (X) ADDITIONAL OPERATIONS. Such insurance as is afforded by the Policy also applies to the operations described below:
- () CHANGE IN PREMIUM RATES. The premium rates for operations listed below and conducted in the State of shall be as follows: (See Declarations for more complete description of certain classifications)

Classification of Operations	Code No.	Estimated Total Annual Remuneration	Rate per \$100 of Remuneration	Estimated Annual Premium
DMT PLANT, SPARTENBURG, S.C.		FOR TERM		FOR TERM
CLERICAL OFFICE EMPLOYEES N.C.C.	8810			
CHEMICAL MFG.	4809			
ADDITIONAL MEDICAL OF ABOVE PREM				
EXPERIENCE MODIFICATION (TENTATIVE)				
DIFFERENCE DUE TO EXPERIENCE MODIFICATION				
Minimum Premium for full period \$		Total Estimated Premium \$		

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the _____ date of the policy unless otherwise stated herein.

(The information is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 5-1-70 Policy No. 01C95527 CR Endorsement No. 9.
 Named Insured HYSTRON FIBERS INC.
 PREMIUM:
 Additional \$ Return \$

The Aetna Casualty and Surety Company
 The Standard Fire Insurance Company
 Hartford, Connecticut

Countersigned
 (CC-552) Ed. 6/69

Authorized Agent

John A. Nee
 President

RoA 2185

ENDORSEMENT — POLICY CHANGES — COMPENSATION

It is agreed that: (Check one alternative below)

- () The name of the insured is changed to:
- () The address (location) has been changed to:
- () PART OF THE DECLARATIONS AMENDED. The part of the Declarations of this Policy dealing with the Classifications of Operations insured, Premium Rates and Estimated Annual Premium is amended to read as shown below:
- () CHANGE IN REMUNERATION. The Estimated Total Annual Remuneration and Estimated Annual Premium stated in the Declarations for the classifications identified by code numbers below are amended as indicated in the appropriate columns below:
- (X) ADDITIONAL OPERATIONS. Such insurance as is afforded by the Policy also applies to the operations described below;
- () CHANGE IN PREMIUM RATES. The premium rates for operations listed below and conducted in the State of shall be as follows: (See Declarations for more complete description of certain classifications)

Classification of Operations	Code No.	Estimated Total Annual Remuneration	Rate per \$100 of Re- muneration	Estimated Annual Premium
DMT PLANT, SPARTENBURG, S.C.		FOR TERM		FOR TERM
CLERICAL OFFICE EMPLOYEES N.O.C.	8810			
CHEMICAL MFG.	4809			
ADDITIONAL MEDICAL OF ABOVE PREM				
EXPERIENCE MODIFICATION (TENTATIVE)				
DIFFERENCE DUE TO EXPERIENCE MODIFICATION				
Minimum Premium for full period \$	Total Estimated Premium \$			

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the issue date of the policy unless otherwise stated herein.

(The information is required only when this endorsement is issued subsequent to expiration of the policy.)

Endorsement Effective 5-1-70 Policy No. 01C95527 CRUP: Endorsement No. 9.
 Named Insured HYSTRON FIBERS INC.
 PREMIUM:
 Additional \$ Return \$

The Aetna Casualty and Surety Company
 The Standard Fire Insurance Company
 Hartford, Connecticut

Countersigned

(CC-552) Ed. 6/69

Authorized Agent

President

RoA_2186

AGENCY OR BROKER	CODE	NAME	PAYMENT	TAX DISTRICT	TRANS. TYPE	LINE OF BUSINESS	POLICY EFF. DATE	DATE TYPED AND INITIALS
	3713	JOHNSON & HIGGINS	052		E		8-12-69	
COUNTERSIGNING CODES	OFFICE CODE	C/E CODE					POLICY EXPIRY DATE	
							8-12-70 JCH8-12	
STAT. PLAN	TERRITORY STATE							

ENDORSEMENT — POLICY CHANGES — COMPENSATION

It is agreed that: (Check one alternative below).

- () The name of the insured is changed to:
- () The address (location) has been changed to:
- () PART OF THE DECLARATIONS AMENDED. The part of the Declarations of this Policy dealing with the Classifications of Operations Insured, Premium Rates and Estimated Annual Premium is amended to read as shown below:
- () CHANGE IN REMUNERATION. The Estimated Total Annual Remuneration and Estimated Annual Premium stated in the Declarations for the classifications identified by code numbers below are amended as indicated in the appropriate columns below:
- (X) ADDITIONAL OPERATIONS. Such insurance as is afforded by the Policy also applies to the operations described below:
- () CHANGE IN PREMIUM RATES. The premium rates for operations listed below and conducted in the State of shall be as follows: (See Declarations for more complete description of certain classifications).

Classification of Operations	Code No.	Estimated Total Annual Remuneration	Rate per \$100 of Remuneration	Estimated Annual Premium
DMT PLANT, SPARTENBURG, S.C.		FOR TERM		FOR TERM
CLERICAL OFFICE EMPLOYEES N.O.C.	8810			
CHEMICAL MFG.	4809			
ADDITIONAL MEDICAL OF ABOVE PREM				
EXPERIENCE MODIFICATION (TENTATIVE)				
DIFFERENCE DUE TO EXPERIENCE MODIFICATION				
Minimum Premium for full period \$	Total Estimated Premium \$			

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective
Named Insured
PREMIUM:
Additional \$

5-1-70

HYSTRON FIBERS INC.

Policy No. 01C95527 CR

Endorsement No. 9.

Return \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned

John A. Nee

RoA_2187

ENDORSEMENT — POLICY CHANGES — COMPENSATION

It is agreed that: (Check one alternative below)

- () The name of the insured is changed to:
- () The address (location) has been changed to:
- (X) **PART OF THE DECLARATIONS AMENDED.** The part of the Declarations of this Policy dealing with the Classifications of Operations insured, Premium Rates and Estimated Annual Premium is amended to read as shown below:
- () **CHANGE IN REMUNERATION.** The Estimated Total Annual Remuneration and Estimated Annual Premium stated in the Declarations for the classifications identified by code numbers below are amended as indicated in the appropriate columns below:
- () **ADDITIONAL OPERATIONS.** Such insurance as is afforded by the Policy also applies to the operations described below:
- () **CHANGE IN PREMIUM RATES.** The premium rates for operations listed below and conducted in the State of shall be as follows: (See Declarations for more complete description of certain classifications)

Classification of Operations	Code No.	Estimated Total Annual Remuneration	Rate per \$100 of Remuneration	Estimated Annual Premium
IT IS AGREED THE LIMIT OF LIABILITY COVERAGE B - EMPLOYEES LIABILITY IS AMENDED TO READ:				
Minimum Premium for full period \$		Total Estimated Premium \$		

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 5-1-70 Policy No. 01C95527 CR Endorsement No. 8.
 Named Insured NYSTRON FIBERS INC.
 PREMIUM:
 Additional \$ Return \$

**The Aetna Casualty and Surety Company
 The Standard Fire Insurance Company
 Hartford, Connecticut**

Counersigned

Authorized Agent

President

(CC-332) Ed. 6/69

RoA_2188

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE

EXCLUSION OF MARITIME LIABILITY

It is agreed that the policy does not apply to injury, including death resulting therefrom, sustained by a master or a member of the crew of any vessel.

C

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No.

3

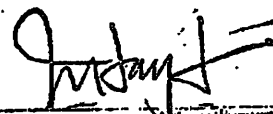
Named insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by



T-560B

RoA_2189

Appendix_02224

ADVICE OF INSURANCE
JOHNSON & HIGGINS
Established 1845

INSURANCE BROKERS - AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

CABLE ADDRESS "REOPEN"

68 WALL ST., NEW YORK, N. Y. 10006
TEL. 944-3160 - AREA CODE 212

To: Mr. Alexander D. Korwek, Assistant Treasurer
Hyston Fibers, Incorporated
485 Lexington Avenue
New York, N.Y.

October 7, 1969

Dear Sir:

In accordance with your instructions, coverage has been bound and endorsements have been ordered for the policies listed herein, making the following changes, effective: August 12, 1969

It is hereby agreed Aetna Life & Casualty Workmen's Compensation Policy 01C95527 is amended to an annual audit.

Name of Insured: Hyston Fibers, Incorporated

Policy Numbers: Workmen's Compensation Policy 01C95527

The endorsements are now being prepared by the Underwriters and will be sent to you in the near future.

Yours very truly,

JOHNSON & HIGGINS

Per:

V. L. Ventura
V. L. Ventura

IMPORTANT NOTICE
If there is any inaccuracy in the changes requested as described above, please advise immediately.

eh

ENDORSEMENTS

2840A-

RoA_2190

ADVICE OF INSURANCE JOHNSON & HIGGINS

Established 1845

INSURANCE BROKERS - AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

CABLE ADDRESS "KEROZER"

95 WALL ST., NEW YORK, N. Y. 10005
TEL. 944-2160 - AREA CODE 212

To: Mr. Hans Hoffmann, Treasurer
Hyston Fibers, Inc.
485 Lexington Avenue
New York, N. Y.

Dear Sir:

In accordance with your instructions, coverage has been bound and endorsements have been ordered for the policies listed herein, making the following changes, effective:

12:01 A.M. May 1, 1970

It is hereby agreed Employers Liability (Coverage B) limit is amended as follows:

Name of Insured: Hyston Fibers, Inc.

Policy Numbers: Workmen's Compensation Policy QIC95527

The endorsements are now being prepared by the Underwriters and will be sent to you in the near future.

Yours very truly,

JOHNSON & HIGGINS

Per:

IMPORTANT NOTICE
If there is any inaccuracy in the changes requested as described above, please advise immediately.

V. Ventura
V. Ventura

ENDORSEMENTS

2540A -

RoA_2191

ADVICE OF INSURANCE
JOHNSON & HIGGINS

771

Established 1845

INSURANCE BROKERS - AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

CABLE ADDRESS "KEROVEN"

95 WALL ST., NEW YORK, N. Y. 10005
TEL. 944-3160 - AREA CODE 212

To: Mr. A. D. Korwek
Assistant Secretary/Treasurer
Hyston Fibers Incorporated
485 Lexington Avenue
New York, New York 10017
Dear Sir:

August 7, 1970

In accordance with your instructions, coverage has been bound and endorsements have been ordered for the policies listed herein, making the following changes, effective:
August 12, 1970

It is hereby agreed the Workmen's Compensation Policy # 01C95527CR is extended to October 12, 1970.

Name of Insured: Hyston Fibers, Inc.

Policy Numbers: Workmen's Compensation Policy # 01C95527CR

The endorsements are now being prepared by the Underwriters and will be sent to you in the near future.

Yours very truly,

IMPORTANT NOTICE
If there is any inaccuracy in the changes requested as described above, please advise immediately.

JOHNSON & HIGGINS
Per: *V. L. Ventura*
V. L. Ventura

mg

2640A

ENDORSEMENTS

RoA_2192

ADVICE OF INSURANCE JOHNSON & HIGGINS

Established 1845

INSURANCE BROKERS-AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

CABLE ADDRESS

95 WALL ST., NEW YORK, N. Y. 10005
TEL. 944-3160-AREA CODE 212

TO: Mr. A. D. Korwek
Assistant Secretary/Assistant Treasurer
Hyston Fibers, Inc.
485 Lexington Avenue
New York, N. Y. 10017

June 23, 1970

Dear Sir:

In accordance with your instructions, we have arranged insurance
attaching from August 12, 1970 and expiring August 12, 1971

ON: Renewal of Aetna Casualty & Surety Company's Workmen's
Compensation Policy #01C95527CR.

Name of Insured: Hyston, Inc. Etal

Address of Insured: 485 Lexington Avenue

Interest of Insured:

Location of Risk: New York, N. Y.

Limits of Liability

Additional Coverages

Workmen's Compensation —
Employer's Liability —
Bodily Injury —
Property Damage —

The policy (or policies) are being prepared and will be forwarded to you in the near future.

IMPORTANT NOTICE
If there be any inaccuracy in the
above description of the insurance
required, please advise immediately.

Yours very truly,

JOHNSON & HIGGINS,

Per

V. Ventura

WORKMEN'S COMPENSATION AND GENERAL LIABILITY

363149-

RoA_2193

ADVICE OF INSURANCE
JOHNSON & HIGGINS
Established 1845

INSURANCE BROKERS-AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

CABLE ADDRESS

Mr. A. D. Korwek
 Assistant Treasurer/Secretary
 TO: Hyston Fibers, Incorporated
 485 Lexington Avenue
 New York, N. Y.

95 WALL ST., NEW YORK, N. Y. 10005
 TEL. 944-3160-AREA CODE 618
 September 16, 1970

Dear Sir:

In accordance with your instructions, we have arranged insurance
 attaching from October 12, 1970 and expiring November 1, 1971.

ON: Renewal of the Aetna Casualty & Surety Insurance Co.
 Workmen's Compensation Policy #01C95527CR.

Name of Insured: Hyston Fibers, Inc.

Address of Insured: 485 Lexington Ave. N.Y.N.Y. Interest of Insured:

Location of Risk:

Limits of Liability	Additional Coverages
Workmen's Compensation —	
Employer's Liability —	
Bodily Injury —	
Property Damage —	

The policy (or policies) are being prepared and will be forwarded to you in the near future.

IMPORTANT NOTICE.

If there be any inaccuracy in the
 above description of the insurance
 required, please advise immediately.

Yours very truly,

JOHNSON & HIGGINS,

Per

V. Ventura

WORKMEN'S COMPENSATION AND GENERAL LIABILITY

2534A2-

RoA_2194

RoA_2195

Appendix_02230



These DECLARATIONS and Endorsements, with the general provisions, complete this

THE AETNA-CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

WORKMEN'S COMPENSATION AND EMPLOYERS'
LIABILITY POLICY For

1. NAME OF INSURED AND ADDRESS

HYSTRON FIBERS, INC.
485 LEXINGTON AVE.,
N.Y.C., N.Y.

(Show Number and Street or RFD, City, State and Zip Code)

POLICY NUMBER

010 89636 CC

☐ Individual ☐ Partnership ☒ Corporation
☐ Other:

Locations--All usual workplaces of the insured at or from which operations covered by this policy are conducted are located at the above address unless otherwise stated herein:

SEE SCHEDULES

2. POLICY PERIOD

From 8-12-68 to 8-12-69 12:01 A.M.
Standard Time at the address of the insured as stated herein.

3. Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states:

SOUTH CAROLINA

4. Classification of Operations

Entries in this item, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy.

- * Clerical Office Employees N.O.C.
- * Salesmen, Collectors or Messengers—outside
- * Drivers, Chauffeurs and their Helpers N.O.C.—commercial
(* If not specifically included below)

Code Numbers	Premium Basis Estimated Total Annual Remuneration	Rates Per \$100 of Remuneration	Estimated Annual Premium
8810 8742 7380			

SEE SCHEDULES

If policy subject to three-year fixed rate manual rules type 'X' in this block ☐

If applicable, type ☐ Loss Constant
'X' in proper block ☐ Expense Constant ☐ Loss & Expense Constant

MINIMUM PREMIUM	\$	DEPOSIT PREMIUM	\$	TOTAL ESTIMATED ANNUAL PREMIUM	\$
If indicated herein, interim adjustments of premiums shall be made: ☐ Semi-Annually ☒ Quarterly ☐ Monthly Endorsements made part of the policy (designated by Endorsement number): SEE C2027-B				3 Year Policy Installments Payable:	
				In Advance	\$
				1st Anniversary	\$
				2nd Anniversary	\$

5. Limit of Liability for Coverage B—Employers' Liability: \$
subject to all the terms of this policy having reference thereto.

Countersigned by

Edward H. Ellison

(CC-28) ED. 10-67

Printed in U.S.A.

RoA 2196

Appendix_02231

THE AETNA CASUALTY AND SURETY COMPANY
(A stock insurance company, herein called the Company)

Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. COVERAGE A — WORKMEN'S COMPENSATION

To pay promptly when due all compensation and other benefits required of the Insured by the workmen's compensation law.

COVERAGE B — EMPLOYERS' LIABILITY

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained in the United States of America, its territories or possessions, or Canada by any employee of the Insured arising out of and in the course of his employment by the Insured either in operations in a state designated in item 3 of the declarations or in operations necessary or incidental thereto.

II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

As respects the insurance afforded by the other terms of this policy the Company shall:

- (a) defend any proceeding against the Insured seeking such benefits and any suit against the Insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended proceeding or suit, but without any obligation to apply for or furnish any such bonds;
- (c) pay all expenses incurred by the Company, all costs taxed against the Insured in any such proceeding or suit and all interest accruing after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

- (d) reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the amounts payable under Coverage A or the applicable limit of liability under Coverage B.

III. DEFINITIONS

- (a) Workmen's Compensation Law. The unqualified term "workmen's compensation law" means the workmen's compensation law and any occupational disease law of a state designated in item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.
- (b) State. The word "state" means any State or Territory of the United States of America and the District of Columbia.
- (c) Bodily Injury by Accident; Bodily Injury by Disease. The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."
- (d) Assault and Battery. Under Coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the Insured.

IV. APPLICATION OF POLICY

This policy applies only to injury: (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the Insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

- (a) to operations conducted at or from any workplace not described in item 1, 2 or 4 of the declarations if the Insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;
- (b) unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;
- (c) under Coverage B, to liability assumed by the Insured under any contract or agreement, but this exclusion does not apply to a warranty that work performed by or on behalf of the Insured will be done in a workmanlike manner;
- (d) under Coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee em-

ployed in violation of law, or (2) with respect to any employee employed in violation of law with the knowledge or acquiescence of the Insured or any executive officer thereof;

- (e) under Coverage B, to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the Insured for damages because of such injury or death resulting therefrom;
- (f) under Coverage B, to any obligation for which the Insured or any carrier or his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

CONDITIONS

[Unless otherwise noted, the conditions apply to all coverages]

1. **PREMIUM.**—The premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the Company. This policy is issued by the Company and accepted by the Insured with the agreement that if any change in classifications, rates or rating plans is or becomes applicable to this policy under any law requiring the insurance or because of any amendments affecting the benefits provided by the workmen's compensation law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the Company, earned during the policy period by (a) all executive officers and other employees of the Insured engaged in operations covered by this policy, and (b) any other person performing work which may render the Company liable under this policy for injury to or death of such person in accordance with the workmen's compensation law. "Remuneration" shall not include the remuneration of any person within division (b) foregoing if the Insured maintains evidence satisfactory to the Company that the payment of compensation and other benefits under such law to such person is secured by other valid and

(CONTINUED ON CG-28-2 PAGES 2 & 3)

12. CHANGES—Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

13. ASSIGNMENT—Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the Company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancellation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

14. CANCELLATION—This policy may be cancelled by the insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the Company shall be equivalent to mailing.

If the insured cancels, unless the manuals in use by the Company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

When the insurance under the workmen's compensation law may not be cancelled except in accordance with such law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

15. TERMS OF POLICY CONFORMED TO STATUTE—COVERAGE A—Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

16. LONG TERM POLICY—If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the Company with respect to classifications of operations for which this policy provides a per capita premium basis, to the following provisions:

(a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the Company;

(b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable for such period in accordance with the manuals in use by the Company.

17. DECLARATIONS—By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The Aetna Casualty And Surety Company has caused this policy to be signed by its President and a Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the Company.

Howard G. Moreen
Secretary

John A. Nee
President

SHORT RATE TABLE

Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium
1	25	37-40	21%	73-98	27%	154-159	54	219-223	70
2	26	41-43	22	99-102	28	160-164	55	224-228	71
3	27	44-47	23	103-106	29	165-169	56	229-233	72
4	28	48-51	24	107-110	30	170-174	57	234-238	73
5	29	52-55	25	111-114	31	175-179	58	239-243	74
6	30	56-59	26	115-118	32	180-184	59	244-248	75
7	31	60-63	27	119-122	33	185-189	60	249-253	76
8	32	64-67	28	123-126	34	190-194	61	254-258	77
9	33	68-71	29	127-130	35	195-199	62	259-263	78
10	34	72-75	30	131-134	36	200-204	63	264-268	79
11	35	76-79	31	135-138	37	205-209	64	269-273	80
12	36	80-83	32	139-142	38	210-214	65	274-278	81
13	37	84-87	33	143-146	39	215-219	66	279-283	82
14	38	88-91	34	147-150	40	220-224	67	284-288	83
15	39	92-95	35	151-154	41	225-229	68	289-293	84
16	40	96-99	36	155-158	42	230-234	69	294-298	85
17	41	100-103	37	159-162	43	235-239	70	299-303	86
18	42	104-107	38	163-166	44	240-244	71	304-308	87
19	43	108-111	39	167-170	45	245-249	72	309-313	88
20	44	112-115	40	171-174	46	250-254	73	314-318	89
21	45	116-119	41	175-178	47	255-259	74	319-323	90
22	46	120-123	42	179-182	48	260-264	75	324-328	91
23	47	124-127	43	183-186	49	265-269	76	329-333	92
24	48	128-131	44	187-190	50	270-274	77	334-338	93
25	49	132-135	45	191-194	51	275-279	78	339-343	94
26	50	136-139	46	195-198	52	280-284	79	344-348	95
27	51	140-143	47	199-202	53	285-289	80	349-353	96
28	52	144-147	48	203-206	54	290-294	81	354-358	97
29	53	148-151	49	207-210	55	295-299	82	359-363	98
30	54	152-155	50	211-214	56	300-304	83	364-368	99
31	55	156-159	51	215-218	57	305-309	84	369-373	100

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

Alabama _____
 Alaska _____
 Arkansas _____
 California _____
 Colorado _____
 Connecticut _____
 Delaware _____
 District of Columbia _____
 Florida _____
 Georgia _____
 Hawaii _____
 Idaho _____
 Illinois _____
 Indiana _____
 Iowa _____
 Kansas _____
 Kentucky _____
 Louisiana _____
 Maine _____
 Maryland _____
 Massachusetts _____
 Michigan _____
 Minnesota _____
 Mississippi _____
 Missouri _____
 Montana _____
 Nebraska _____
 New Hampshire _____
 New Jersey _____
 New Mexico _____
 New York _____
 North Carolina _____
 Oklahoma _____
 Oregon _____
 Pennsylvania _____
 Rhode Island _____
 South Carolina _____
 South Dakota _____
 Tennessee _____
 Texas _____
 Utah _____
 Vermont _____
 Virginia _____
 Washington _____
 Wisconsin _____

C1763C; C1600C

C2003C; T560B; COND.14 AMENDED; CC397A; C2005A; VOL.COMP.FOREIGN COVERAGE

Forming part of the policy to which attached from its date of issue.

THE ETNA CASUALTY AND SURETY COMPANY
 THE STANDARD FIRE INSURANCE COMPANY
 Hartford, Connecticut

John A. Nee
 President

10-2027-31 11-44

RoA_2199

Appendix_02234

12. CHANGES—Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or stop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

13. ASSIGNMENT—Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the Company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancellation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancellation of this policy.

14. CANCELLATION—This policy may be cancelled by the insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the Company shall be equivalent to mailing.

If the insured cancels, unless the manuals in use by the Company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the minimum premium stated in the declarations. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

When the insurance under the workmen's compensation law may not be cancelled except in accordance with such law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

15. TERMS OF POLICY CONFORMED TO STATUTE—COVERAGE A—Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

16. LONG TERM POLICY—If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the Company with respect to classifications of operations for which this policy provides a per capita premium basis, to the following provisions:

- (a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the Company;
- (b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable for such period in accordance with the manuals in use by the Company.

17. DECLARATIONS—By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The Aetna Casualty And Surety Company has caused this policy to be signed by its President and a Secretary at Hartford, Connecticut, and countersigned on the declarations page by a duly authorized agent of the Company.

Howard G. Moore
Secretary

John A. Rice
President

SHORT RATE TABLE

Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium	Days Policy In Force	Per Cent of One Year Premium
1	35.00	11	22.00	21	15.00	31	10.00	41	7.00
2	34.00	12	21.00	22	14.00	32	9.00	42	6.00
3	33.00	13	20.00	23	13.00	33	8.00	43	5.00
4	32.00	14	19.00	24	12.00	34	7.00	44	4.00
5	31.00	15	18.00	25	11.00	35	6.00	45	3.00
6	30.00	16	17.00	26	10.00	36	5.00	46	2.00
7	29.00	17	16.00	27	9.00	37	4.00	47	1.00
8	28.00	18	15.00	28	8.00	38	3.00	48	0.50
9	27.00	19	14.00	29	7.00	39	2.00	49	0.25
10	26.00	20	13.00	30	6.00	40	1.00	50	0.10
11	25.00								
12	24.00								
13	23.00								
14	22.00								
15	21.00								
16	20.00								
17	19.00								
18	18.00								
19	17.00								
20	16.00								
21	15.00								
22	14.00								
23	13.00								
24	12.00								
25	11.00								
26	10.00								
27	9.00								
28	8.00								
29	7.00								
30	6.00								
31	5.00								
32	4.00								
33	3.00								
34	2.00								
35	1.00								
36	0.50								
37	0.25								
38	0.10								
39	0.05								
40	0.02								
41	0.01								
42	0.00								
43	0.00								
44	0.00								
45	0.00								
46	0.00								
47	0.00								
48	0.00								
49	0.00								
50	0.00								

Schedule—Workmen's Compensation and Employers' Liability Insurance: SOUTH CAROLINA

Location of Operations	Classification X/S/106X	Code No.	Estimated Remuneration	Rate per \$100 of Remuneration	Estimated Premium

STATE OF S.C.:

TEXTILE FIBER MFG.
SYNTHETIC

2305

SALESMEN, COLLECTORS OR
MESSENGERS-OUTSIDE

8742

CLERICAL OFFICE EMPLOYEES
N.O.C.

8810

ADDITIONAL MEDICAL

INCREASED LIMIT OF LIABILITY-COV.B
(OF TOTAL PREMIUM-EXCLUSIVE OF LOSS
AND EXPENSE CONSTANTS)-(M.P.100.)

ANNUAL
DEP.

Workmen's Compensation and Employers' Liability Policy

VOLUNTARY COMPENSATION ENDORSEMENT

SCHEDULE

1. GROUP OF EMPLOYEES	STATE OF OPERATIONS	DESIGNATED WORKMEN'S COMPENSATION LAW
ALL EMPLOYEES	ANYWHERE IN U.S.A.	STATE OF HIRE
2. Limits of Liability		
	Bodily Injury by Accident	Bodily Injury by Disease
	each employee \$	each employee \$
	each accident \$	aggregate disease \$ (per state)

It is agreed that:

1. Insuring Agreement of the policy is amended by adding thereto an additional coverage as follows:

Coverage C — Voluntary Compensation — To pay on behalf of the Insured, if any employee within a group of employees described in the schedule shall sustain injury, including death resulting therefrom, while employed by the Insured in operations in a state specified opposite the description of such group of employees, under circumstances which would have rendered the Insured liable for compensation if the injured employee and the Insured had been subject to the workmen's compensation law designated in the schedule with respect to such employment, an amount equal to the compensation and other benefits which would have been payable under such law had the injured employee and the Insured been subject to such law with respect to such employment.

2. The policy does not apply under Coverage C to injury or death which gives rise to a valid claim under any workmen's compensation or occupational disease law.
3. The policy applies under Coverage C only to injury or death sustained in the United States of America, its territories or possessions, or Canada.
4. The benefits payable under Coverage C on account of such injury shall be paid to such person or persons as would have been entitled thereto under the designated workmen's compensation law, provided, however, that as a condition precedent to any such payment, the injured employee, or in the event of his incapacity, his legal representative, or, in the event of his death, his legal representative or the person or persons entitled to sue therefor, shall (1) execute such full and binding release of all claims against the Insured and the Company on account of such injury or death as may be required by the Company, and (2) assign to the Company all claims or judgments or the proceeds thereof which

he or they may have or recover against any person who or organization which is or may be liable on account of such injury or death and execute such other documents as the Company may require to enable it to enforce such rights or collect such proceeds. The Company shall have full power to enforce such rights under any such assignment in its own name or in the name of the injured employee, or to make such negotiations and settlement as may be deemed expedient by the Company, but the Company shall not be obligated to enforce such rights. In the event of any recovery or settlement the Company shall pay the proceeds thereof, less payments hereunder and all expenses incident to such recovery or settlement, to the person or persons entitled thereto.

5. If any person entitled to payment under Coverage C shall refuse to accept such payment and to comply with the terms and conditions set forth above or if any person shall commence any proceedings at law, in equity or in admiralty, except for such payment, seeking damages from the Insured or the Company on account of such injury, the Company's liability under Coverage C with respect to such injury is thereupon terminated.

6. With respect to injury or death to which Coverage C is applicable, or would have been applicable except for paragraph 5 foregoing, the limit of the Company's liability under Coverage B shall be determined in accordance with the following provision, and Condition 8 of the policy is amended accordingly:

Limits of Liability — Coverage B — The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom", in Coverage B, include damages for care and loss of services and damages for which the Insured is liable by reason of suits or claims brought against the Insured

(Continued on reverse)

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 5

Named Insured

The Aetna Casualty and Surety Company

The Standard Fire Insurance Company

Hartford, Connecticut

Countersigned by

(Authorized Representative)

(CO-357-A) 9-67

Printed in U.S.A.

RoA_2202

Appendix_02237

by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. The limit of liability stated in Item 2 of the schedule as applicable to "each employee" is the total limit of the Company's liability for all damages because of bodily injury by accident, including death resulting therefrom, sustained by one employee in any one accident; and, subject to the foregoing provision respecting "each employee", the limit of liability stated in Item 2 of the schedule as applicable to "each accident" is the total limit of the Company's liability for all damages because of bodily injury, including death resulting therefrom, sustained by two or more employees in any one accident. The limit of liability stated in Item 2 of the schedule as

applicable to "each employee" is the total limit of the Company's liability for all damages because of bodily injury by disease, including death resulting therefrom, sustained by one employee; and, subject to the foregoing provision respecting "each employee", the limit of liability stated in Item 2 of the schedule as applicable to "aggregate disease" is the total limit of the Company's liability for all damages because of bodily injury by disease, including death resulting therefrom, sustained by employees in operations in any one state. The limits of liability stated herein are in lieu of and shall not be cumulative with any limit of liability stated elsewhere in the policy. The inclusion of more than one insured shall not operate to increase the limits of the Company's liability.

Workmen's Compensation and Employers' Liability Policy

ALL STATES ENDORSEMENT

A. In the event the Insured undertakes operations in any state not designated in item 3 of the declarations, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming, the Company agrees as follows:

1. To reimburse the Insured for all compensation and other benefits required of the Insured under the workmen's compensation or occupational disease law of such state.
2. Such insurance as is afforded by the policy under Coverage B also applies to bodily injury by accident or disease, including death at any time resulting therefrom, sustained by any employee of the Insured arising out of and in the course of his employment in operations in such state or in operations necessary or incidental thereto.
3. Such insurance as is afforded by the policy by virtue of this endorsement does not apply to such operations if the Insured has, under any workmen's compensation or occupational disease law, other insurance for such operations or is a qualified self-insurer therefor, or has affirmatively rejected the workmen's compensation or occupational disease law applicable to such operations.

B. The agreements in Paragraph A foregoing are subject to the following conditions:

1. The Insured shall give notice to the Company before or within a reasonable time after the commencement of such operations, but failure to give such notice shall not invalidate the insurance afforded by this endorsement.
2. The Insured shall, if requested by the Company, take whatever action is necessary to bring himself within the workmen's compensation and occupational disease laws of such state with respect to such operations. The Company shall thereupon issue, in the form required by such laws, and the Insured shall accept workmen's compensation coverage under such laws, and such insurance as is afforded by this endorsement with respect to such operations shall thereupon terminate.
3. The premium bases and rates for the classifications of operations in such state or operations necessary or incidental thereto shall be those which would have been applicable under the manuals in use by the Company had Coverage A of the policy applied to such operations and the premium for the insurance afforded by this endorsement shall be computed accordingly, subject to the provisions of Condition 1 of the policy.
4. The word "State" as used in this endorsement means any State of the United States of America and the District of Columbia.

C. Such insurance as is afforded by the policy by virtue of this endorsement shall not apply:

1. To injury to or death of the master or a member of the crew of any vessel; or
2. To fines or penalties imposed on the Insured for failure to comply with the requirements of any workmen's compensation law.

D. The insurance afforded by the policy by virtue of this endorsement shall not constitute workmen's compensation insurance as required of an employer under the laws of any state.

E. All of the provisions of the policy, except Coverage A of Insuring Agreement I and Conditions 7 and 15, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective

Policy No.

Endorsement No.

Named Insured

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned

Authorized Agent

President

SCHEDULE

1. LIMITS OF LIABILITY	2. APPLICATION OF ENDORSEMENT			3. PREMIUM
EACH PERSON	COLUMN 1	COLUMN 2	COLUMN 3	
~~XXXXXX~~ ~~XXXXXX~~ 	S.C.			~~XXXX~~ b. The minimum premium for this endorsement in any

It is agreed that:

1. In addition to any medical benefits provided by the applicable compensation law and applicable state law, the reasonable cost of any additional medical, surgical, nursing or hospital services, medical or surgical apparatus or appliances, including prosthetic devices, and medicines which in the opinion of the Company are reasonably necessary for the treatment of bodily injury sustained by any person who is entitled, on account of such injury, to the compensation and other benefits required of the Insured under such law and afforded by the policy under Coverage A, or who is entitled to such benefits under other terms of the policy.
2. The limit of liability stated in Item 1 of the schedule as applicable to "each person" is the total limit of the Company's liability under this endorsement for all expenses incurred on account of each person for whom benefits are payable under Paragraph 1 above.
3. As a condition precedent to any payment by the Company under Paragraph 1 the injured person or, in the event of his incapacity, his legal representative shall, if requested

by the Company, execute an agreement of indemnity which shall entitle the Company to reimbursement for the amount of such payment or payments out of such person's share of the proceeds of any recovery, whether by settlement or judgment, made against any person or organization, other than the insured, which is or may be liable on account of such injury.

4. This endorsement applies only to persons entitled under the policy to receive the benefits provided by the workmen's compensation laws of the states listed in Item 2 of the schedule;
5. The premium for the insurance afforded by this endorsement for operations subject to the workmen's compensation law of any state listed in Item 2 of the schedule shall be determined in accordance with the additional medical coverage rules shown in the Company's manuals, and, with respect to states listed in Column 1, shall be that percentage of the policy premium shown in Item 3 of the schedule, and, with respect to states listed in Column 2, shall be the percentage of the policy premium stated in Column 3.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No

Endorsement No. 1

Named Insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company

The Standard Fire Insurance Company

Hartford, Connecticut

Countersigned

[Authorized Representative]

AGENCY/ BROKER	CODE	NAME	EC-INT-REP	PAY'T	TAX DIST	TRANS TYPE	LINE OF BUSINESS	CAL	POLICY EFF DATE	DATE TYPED AND INITIALS
COUNTERSIGNING CODES		OFFICE CODE	C/R CODE			E			POLICY EXP DATE	
STAT PLAN	TERM STATE							FILE DEPT	UND APP	UND PROG

(DC-395) Ed 7-57

RoA 2206

Appendix_02241

PREMIUM DISCOUNT ENDORSEMENT
(Workmen's Compensation and Employer's Liability Insurance)

It is agreed that:

1. **Standard Premium; Total Standard Premium.** The premium for each state in which the policies designated in Paragraph 3 hereof are effective, computed in accordance with the provisions of such policies, other than this or any other premium discount endorsement and exclusive of the application of any retrospective rating plan, any automatic premium adjustment endorsement, or any premium return plan endorsement shall be known as the Standard Premium for that state. The sum of such Standard Premiums for all states in which such policies are effective shall be known as the Total Standard Premium.

2. **Computation of Premium Discount.**

(a) If one of the Standard Premiums for the states named in the Table of States is subject to retrospective rating the Standard Premium for each such state shall be subject to the applicable discount stated in the Table of Premium Discount Percentages for that state.

(b) So much of the Total Standard Premium as is subject to retrospective rating shall not be subject to discount. If a portion of the Standard Premiums for such states is subject to a retrospective rating plan, the discount on that portion of such premiums not subject to retrospective rating shall be the difference between (i) the discount which would be obtained in (a) foregoing if none of the Total Standard Premium were subject to retrospective rating, and (ii) the discount which would be obtained in (a) if only premium subject to retrospective rating were included in the computations.

3. **Schedule.**

Policy Numbers

Estimated Standard Premium

01C89636 CC

Total:

Table of States	Table of Premium Discount Percentages	Table of States	Table of Premium Discount Percentages
S.C.	5		

The number entered in the column "Table of Premium Discount Percentages" refers to the Table of Premium Discount Percentages in use by the Company, applicable to the designated state and approved by the insurance authorities having jurisdiction.

This endorsement, issued by one of the below named Companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective

Policy No.

Endorsement No. 2

Named Insured

PREMIUM:

Additional \$

Return \$

THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
Hartford, Connecticut

Countersigned

Authorized Agent

President

(C-1600-C) 11-64

RoA 2207

Appendix_02242

Workmen's Compensation and Employers' Liability Policy
**UNITED STATES LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT ENDORSEMENT**

It is agreed that:

1. With respect to operations in a state designated in item 3 of the declarations, the unqualified term "workmen's compensation law" includes the United States Longshoremen's and Harbor Workers' Compensation Act, U. S. Code (1946) Title 33, Sections 901 - 49, and definition (a) of Insuring Agreement III is amended accordingly.
2. With respect to operations subject to the said Longshoremen's and Harbor Workers' Compensation Act, the states, if any, named below, shall be deemed to be designated in item 3 of the declarations.

ANY STATE NOT DESIGNATED IN DECLARATION 3

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.
[The information below is required only when this endorsement is issued subsequent to preparation of the policy.]

Endorsement Effective

Policy No.

Endorsement No. **3**

Named Insured

PREMIUM:

Additional \$

Return \$

**The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut**

Countersigned.....

Edward H. Ellison

Authorized Agent

John A. Rice
President

(C-2005-A) 11-64

RoA_2208

Appendix_02243

VOLUNTARY COMPENSATION ENDORSEMENT
(FOREIGN COVERAGE)

IT IS AGREED THAT WITH RESPECT TO THE HEREINAFTER DESIGNATED GROUP OF EMPLOYEES ITEM 1 OF THE VOLUNTARY COMPENSATION ENDORSEMENT ATTACHED TO THIS POLICY IS AMENDED TO READ:

THE POLICY APPLIES UNDER COVERAGE C TO INJURY TO OR DEATH SUSTAINED OUTSIDE OF THE UNITED STATES OF AMERICA, ITS TERRITORIES OR POSSESSIONS OR CANADA, PROVIDED ANY CLAIM OR SUIT IS INSTITUTED WITHIN THE CONTINENTAL UNITED STATES OF AMERICA.

GROUP OF EMPLOYEES

STATE OF OPERATIONS

DESIGNATED WORKMEN'S
COMPENSATION LAW

EMPLOYEES WHOSE CONTRACT
OF HIRE IS EXECUTED IN THE
UNITED STATES WHILE OPERATING
IN COUNTRIES OTHER THAN THE
UNITED STATES OF AMERICA AS
INCIDENT TO THEIR EMPLOYMENT
IN THE BUSINESS OF THE INSURED

NOT APPLICABLE

STATE OF HIRE

THE COMPANY HEREBY GIVES THE INSURED NOTICE THAT THE UNDERTAKING INCORPORATED IN THIS ENDORSEMENT DOES NOT AND WILL NOT CONSTITUTE LEGAL INSURANCE OF THE INSURED'S OBLIGATION UNDER THE WORKMEN'S COMPENSATION LAW OF ANY FOREIGN COMPANY OR POLITICAL SUBDIVISION THEREOF. NO PENALTY PROVIDED FOR FAILURE TO COMPLY WITH ANY SUCH COMPENSATION LAW IS ASSUMED BY THIS ENDORSEMENT.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 6

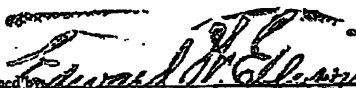
Named Insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by


(Authorized Representative)

(90455-8) 3-67

RoA 2209

CONDITION NO. 14 OF THE POLICY
AMENDED IN PART

IT IS AGREED THAT THE WORDS "TEN (10) DAYS" IN CONDITION 14 OF THE
POLICY ARE AMENDED TO READ "THIRTY (30) DAYS."

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 7

Named Insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by


(Authorized Representative)

(00455-B) 3-67

RoA_2210

Appendix_02245

AGENCY/BROKER	CODE 3713	NAME JOHNSON&HIGGINS	PAYMENT	TAX DISTRICT	TRANSACTION TYPE E	LINE OF BUSINESS	CAP 9	POLICY EFF. DATE 8/12/68	DATE TYPED AND INITIALS 1/13
COUNTERSIGNING CODES	OFFICE CODE	C/S CODE						POLICY EXPIRY DATE 8/12/69	MGL
STATE	TERRITORY STATE RATE	LIMITS OF LIABILITY BI PD MED.	DR. REC.	FORM OR CLASS	DISC.	PREMIUM	EXPOSURE		
								EMPTY FORM NO.	

POLICY PREMIUM AMENDED

IT IS AGREED THAT THE ESTIMATED DEPOSIT PREMIUM STATED
IN DECLARATION NO. 4 OF THE POLICY IS AMENDED TO READ:

PREM DISC.

DISC.PREM.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective 8/12/68 Policy NO IC 89636CC Endorsement No. 9
Named Insured HYSTRON FIBERS, INC.

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by Edward H. Ellison
(Authorized Representative)

RoA_2211

T560B

THIS ENDORSEMENT MODIFIES SUCH INSURANCE AS IS AFFORDED BY THE PROVISIONS OF THE POLICY RELATING TO THE FOLLOWING:

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE

EXCLUSION OF MARITIME LIABILITY

IT IS AGREED THAT THE POLICY DOES NOT APPLY TO INJURY, INCLUDING DEATH RESULTING THEREFROM, SUSTAINED BY A MASTER OR A MEMBER OF THE CREW OF ANY VESSEL.

This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No. 4

Named Insured

Additional Premium \$

Return Premium \$

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut

Countersigned by


(Authorized Representative)

(90455-B) 3-67

RoA_2212

Appendix_02247

ADVICE OF INSURANCE JOHNSON & HIGGINS

Established 1845

INSURANCE BROKERS-AVERAGE ADJUSTERS
EMPLOYEE BENEFIT PLAN CONSULTANTS

CABLE ADDRESS "JOHNSON"

63 WALL ST., NEW YORK, N. Y. 10005
TEL. 944-3160-AREA CODE 212

Mr. John F. Bullard, Treasurer
TO: Hystron Fibers, Inc.
485 Lexington Avenue
New York, N. Y.

May 28, 1969

Dear Sir:

In accordance with your instructions, we have arranged insurance
attaching from August 12, 1969 and expiring August 12, 1970

ON: Renewal of Aetna Casualty & Surety Company's Workmen's Compensation
Policy #01C89636CC, as expiring.

Name of Insured: Hystron Fibers, Inc.

Address of Insured: 485 Lexington Ave. N.Y., N.Y. Interest of Insured:

Location of Risk: Various Locations

Limits of Liability

Additional Coverages

Workmen's Compensation —
Employer's Liability —
~~Bodily Injury~~ —
~~Property Damage~~ —

The policy (or policies) are being prepared and will be forwarded to you in the near future.

IMPORTANT NOTICE

If there be any inaccuracy in the
above description of the insurance
required, please advise immediately.

Yours very truly,

JOHNSON & HIGGINS,

Per

V. Ventura

WORKMEN'S COMPENSATION AND GENERAL LIABILITY

2035A2-EM.

RoA_2213

EXHIBIT B

RoA_2214

Appendix_02249

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Angela D. Keene, Individually and as	)	C/A No. 2013-CP-42-03915
Personal Representative of the Estate of	)	
Dennis Seay, Deceased, and Linda Seay,	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
3M COMPANY., et al.,	)	
	)	
Defendants.	)	
	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Frankie Van Hamett and Shirley Hammett,	)	C/A No. 2014-CP-42-01896
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
AURORA PUMP COMPANY, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GARRY ALLEN

I, Garry Allen, do hereby depose and state as follows:

1. I am above the age of eighteen (18), suffer from no legal disabilities, and am competent to give this Affidavit.

11130858v1

RoA_2215

Appendix_02250

2. I am the Global Claims Manager of Celanese Corporation.

3. Counsel for Hoechst Celanese requested that I search Celanese's historical files for workers' compensation policies related to the plant previously known as Hoechst Celanese in Spartanburg, South Carolina.

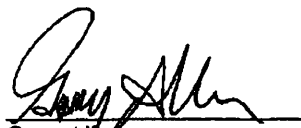
4. I conducted a diligent search of Hoechst Celanese's historical workers' compensation policies and have attached to this affidavit as Exhibit 1, a true and accurate copy of the policies that I located to date that pertain to the following periods: 8/12/67-8/12/68, 8/12/68-8/12/70, 8/12/69-11/01/71, and 10/12/70-11/11/72.

5. Hoechst Celanese maintained workers' compensation coverage during the entirety of Mr. Seay's and Mr. Hammett's employment but, due to the passage of time, it has been unable to locate the specific policies for each year.

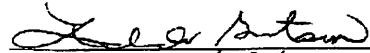
6. Hoechst Celanese always maintained the proper and adequate workers' compensation insurance required under South Carolina's Workers' Compensation Law.

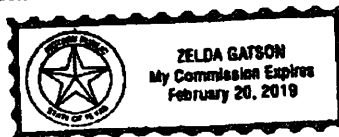
7. The policies were located in Hoechst Celanese's files and were created and maintained in the ordinary course of Hoechst Celanese's business activities.

Further, the affiant saith not.


Garry Allen

SWORN to and subscribed before me
This 30th day of June, 2015.


Notary Public Zaida Gatson



My Commission Expires: February 20, 2019

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PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CNA HOLDINGS, LLC'S SUPPLEMENTAL AND AMENDED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTORY EMPLOYEE DOCTRINE

Plaintiffs oppose the motion to dismiss, and alternative motion for summary judgment, filed by CNA Holdings, LLC (“Hoechst Celanese” or “Defendant”), and would respectfully show that the motion should be denied.

INTRODUCTION

Hoechst Celanese has failed to show that it has tort immunity under the exclusive remedy provision of the South Carolina Workers' Compensation Act ("the Act"). There are three reasons that Hoechst Celanese's motion fails. First, decedent Dennis Seay and his heirs do not have any right to compensation under the Act. Occupational diseases are only compensable under the Act if they arise within one year of workplace exposure, or, in the case of pulmonary diseases, within two years of exposure. S.C. Code Ann. § 42-11-70. Seay did not develop malignant mesothelioma until 2013, 35 years after his last exposure to asbestos at Hoechst Celanese.

Second, Hoechst Celanese has failed to prove that it complied with the Act's requirement

that it obtain workers' compensation insurance or provide proof that it was financially able to self-insure. S.C. Code Ann. §§ 42-5-10, 42-5-20. An employer who fails to secure the payment of compensation as required by the Act loses its immunity under the Act's exclusive remedy provision and may be sued in tort. S.C. Code Ann. § 42-5-40; *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999).

Finally, Hoechst Celanese has not demonstrated that Seay is a statutory employee. In order to establish statutory employer status, Hoechst Celanese must show that Seay's work was "part of [its] trade, business, or occupation." S.C. Code Ann. §42-1-400. This determination is always made on a case-specific basis, and here it cannot be concluded that Seay's work maintaining equipment for Hoechst Celanese was part of its business of manufacturing synthetic fibers and resins. Hoechst Celanese was not a maintenance company, did not have a maintenance division, and its own employees never did the type of maintenance work performed by Seay. Virtually all of the authority relied on by Hoechst Celanese involved workers performing the same type of maintenance work as the defendant's own employees, and there is no such evidence in this case. A proper application of South Carolina precedents shows that Seay's work was not part of the business of Hoechst Celanese, and that he was not a statutory employee. For all of these reasons, Hoechst Celanese's motion should be denied.

STATEMENT OF FACTS

Decedent Dennis Seay was employed by Daniel Construction Company ("Daniel") from about 1969 until about 1978. **Ex. 1**, Seay Depo., 11/20/2013, at 17:5-23.¹ Seay worked at the Hoechst Celanese plant in Spartanburg, South Carolina, during his entire employment with Daniel. *Id.* The Hoechst Celanese plant manufactured polyester fibers. Seay Depo., 11/20/13, at

¹ All exhibit references are to the Master Exhibits filed in support of all of Plaintiffs' summary judgment responses in this case.

18:16-21. Seay began as a millwright helper, and after six months he was promoted to millwright. Seay Depo., 11/20/13, at 17:16-18, 19:3-4. As a millwright, Seay's primary duties were repairing and maintaining equipment such as pumps and valves. Seay Depo., 11/20/2013, at 17:24-18:5, 19:9-14, 34:17-23. He had substantial exposure to asbestos while working at Hoechst Celanese. **Ex. 3**, Seay Depo., 1/17/14, at 23:17-25, 27:12-28:5.

Seay testified that all of the maintenance workers at Hoechst Celanese were employed by Daniel. Seay Depo., 11/20/13, at 20:23-21:10. Hoechst Celanese did not have its own maintenance division or its own construction division. Seay Depo., 1/17/14, at 67:2-7. No Hoechst Celanese employees ever did the type of maintenance work performed by Seay and other Daniel workers. Seay Depo., 1/17/14, at 67:8-11. The Hoechst Celanese employees were all production workers who were making the polyester fibers. Seay Depo., 11/20/13, at 21:1-5; Seay Depo., 1/17/14, at 67:12-15. The Daniel workers and the Hoechst Celanese employees performed "significantly different" work. Seay Depo., 1/17/14, at 67:22-68:11.

Bruce Bowyer is the corporate representative of CNA Holdings, the corporate successor to Hoechst Celanese. **Ex. 5**, Bowyer Depo., 12/18/14, at 311:7-10; Bowyer Aff., at ¶ 2 (Ex. G to Hoechst Celanese Motion). Bowyer confirmed that during the years of Seay's employment with Daniel, all maintenance work at the Spartanburg facility was accomplished by Daniel employees under a maintenance services contract. Bowyer Depo., 12/18/14, at 276:21-277:6, 284:23-285:9; Bowyer Aff., at ¶ 4. Bowyer explained that, "Daniel's did the maintenance, and Hoechst managed the plant." Bowyer Depo., 12/18/14, at 285:5-9. Daniel supervised its own workers. Bowyer Depo., 12/18/14, at 285:10-14.

Hoechst Celanese did not provide Daniel's millwrights with tools. A detailed list of employee-furnished tools was included in the Hoechst/Daniel maintenance services contract.

1972 Maintenance Services Contract, at Appendix D (Ex. I to Hoechst Celanese Motion). Daniel millwrights were required to furnish their own wrenches, screwdrivers, pliers, scales, levels, hammers, chisel and punch sets, packing removers, etc. *Id.*

According to Bowyer, the trade or business of the Hoechst Celanese facility in Spartanburg was the manufacture of synthetic fibers and resins. Bowyer Depo., 12/18/14, at 272:13-16, 21-24; Bowyer Aff., at ¶ 3. Dr. Frederick Toca, who was the Director of Occupational Health and Safety for Hoechst Celanese in the 1990s, has testified that Hoechst Celanese “considered itself the second largest chemical company in the world or in the Western world.” Ex. 6, Toca Depo., 11/20/14, at 16:10-17:1, 17:22-18:2. The purpose of the company was the production of fibers, chemicals, pharmaceuticals, plastics, and some agricultural products. Toca Depo., at 18:2-9, 18:22-19:1. Toca testified that maintenance “would not have been part of the overall mission of the company” and that “it was not a maintenance company when I was there.” *Id.* at 18:10-21. His job was to develop safety policies for the production workers at Hoechst Celanese. He explained that, “they were primarily manufacturing facilities, and so [the production] employees [] were the primary people that I focused on.” *Id.* at 20:25-21:21.

Hoechst Celanese has no records showing that it obtained workers’ compensation insurance for its employees between 1968 and 1978. Bowyer Depo., 12/18/14, at 274:9-13.

Seay developed asbestos-related malignant mesothelioma in August of 2013. Seay Depo., 1/17/14, at 11:21-12:8, 12:22-25; Ex. 7, Richard L. Kradin, M.D., Depo., 3/11/15, at 67:25-69:12. Because his last exposure to asbestos was at Hoechst Celanese in 1978, Seay’s latency period of 35 years falls within the normal 20-to-40 year latency period for the development of mesothelioma. Kradin Depo., at 34:21-35:4.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction presents a question of law for the court. *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct. App. 1998).² When a defendant invokes the exclusive remedy provision of the Workers' Compensation Act, that presents a jurisdictional question that should be resolved by reviewing the entire record. *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 50 (1997). The jurisdictional facts should be determined in accord with the preponderance of the evidence. *Id.*

"Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006); *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Under South Carolina Rule of Civil Procedure 56, summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCPP; *Cafe Assocs. Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The moving party has the burden of clearly establishing the absence of a genuine issue of material fact. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). If and when the party moving for summary judgment meets its initial burden of showing an absence of evidentiary support for the plaintiff's case, only then is the plaintiff required to come forward with specific facts showing there is a genuine issue for trial. *See Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582

² Hoechst Celanese called its motion a "Motion for Dismiss for Failure to State a Claim," but a motion seeking to determine the existence of an employer/employee relationship is a motion for lack of subject matter jurisdiction under SCRCPP 12(b)(1). *See Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004).

S.E.2d 432, 438 (Ct.App.2003).

In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Faile v. S. C. Dep't of Juvenile Justice*, 350 S.C. 315, 324, 566 S.E.2d 536, 540 (2002). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991). Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994). Summary judgment should be denied unless reasonable minds cannot differ on plain, palpable, and indisputable facts. *See Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

ARGUMENTS AND AUTHORITIES

I. Hoescht Celanese cannot invoke the exclusive remedy provision of the Act because Seay does not have any right to compensation under the Act.

The Workers' Compensation Act is not Seay's exclusive remedy against Hoescht Celanese because he has *no remedy* against Hoescht Celanese under the Act. The exclusive remedy provision, S.C. Code Ann. § 42-1-540, is of course contingent on the existence of an employee's right to compensation under the Act. This section provides in relevant part:

The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies of such employee**, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Code Ann. § 42-1-540 (emphasis added).

Occupational diseases are compensable as "accidents" under the Act only when certain

conditions are met. Section 42-11-40 provides that, “[w]hen employer and employee are subject to the provisions of this title, the disablement or death of an employee resulting from an occupational disease shall be treated as an injury by accident” This section further provides that, “the employee, or in case of death his dependents, shall be entitled to compensation as for an injury under this title, **except as otherwise provided in this chapter**” S.C. Code Ann. § 42-11-40 (emphasis added).

Occupational diseases are generally only compensable under the Act if they arise within one year of workplace exposure, or, in the case of pulmonary diseases, within two years of exposure. S.C. Code Ann. § 42-11-70. Specifically, the Act limits compensation for occupational diseases as follows:

Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

S.C. Code Ann. § 42-11-70. The Act thus provides a general rule that there can only be compensation for occupational diseases that arise within one year of workplace exposure, with two exceptions. The first exception is for diseases arising from exposure to ionizing radiation. The second exception is for pulmonary diseases arising out of inhalation of organic or inorganic dusts, but in those cases there is only a right to compensation if the disease was contracted within two years of the last exposure.

Under the terms of Section 42-11-70, Seay does not have a right to compensation under the Act. His occupational disease, mesothelioma, did not arise within one year and was not from exposure to ionizing radiation. Although Seay developed a “pulmonary disease arising out of the inhalation of organic or inorganic dusts,” he has no claim

for Workers' Compensation benefits because he did not contract the disease within two years of his last exposure. Seay's last exposure to asbestos was in 1978, and he developed mesothelioma in 2013.

Plaintiffs could not locate any South Carolina case law that has specifically addressed the issue of whether mesothelioma contracted more than two years after the last exposure is compensable under the Act. In *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432, 716 S.E.2d 443, 445 (2011), the employer made the argument that there is no right to benefits for asbestosis that did not develop within two years of asbestos exposure. The Supreme Court did not reach the question, however, because it decided the claimant's asbestosis was not compensable under the Act for a separate reason. *See id.* at 433, 716 S.E.2d at 446.

Based on the plain language of Section 42-11-70, workers' compensation benefits cannot be awarded for occupationally-related pulmonary diseases that develop more than two years after exposure. As Seay's mesothelioma developed 35 years after his exposure to asbestos from the Hoescht Celanese facility in Spartanburg, he does not have a compensable disease under the Act. Unless there is a right to compensation under the Act, the exclusive remedy provision is inapplicable and cannot bar Seay's tort action.

II. Hoescht Celanese cannot invoke the exclusive remedy provision of the Act because it has failed to show that it secured the payment of compensation under the Act.

An employer may only claim tort immunity if it has complied with the requirements of the Act. S.C. Code Ann. § 42-5-40; *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999). Under the exclusive remedy provision, immunity from suit is predicated on the employer "accept[ing] the provisions" of the Act. S.C. Code Ann. § 42-1-540. "Such immunity is part of the broader *quid pro quo* arrangement imposed upon the employer and employee by the Act. The employee 'receives the right to swift and sure compensation' in

exchange for giving up the right to sue in tort; the employer receives such tort immunity in exchange for complying with those provisions of the Act that insure swift and sure compensation for the employee.” *Harrell*, 337 S.C. at 326, 523 S.E.2d at 772 (quoting *Parker v. Williams and Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980)).

“The Act achieves such ‘swift and sure compensation’ by requiring the employer to secure the payment of compensation under S.C. Code Ann. § 42-5-10 (1985).” *Id.* at 326, 267 S.E.2d at 773. Section 42-5-10 provides that, “[e]very employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter.” S.C. Code Ann. § 42-5-10. The next section, 42-5-20, instructs employers that to accept the provisions of the title, the employer “shall insure and keep insured his liability” or provide proof of the ability to self-insure. S.C. Code Ann. § 42-5-20. Compliance with the insurance provisions shall be filed with the Workers’ Compensation Commission on an annual basis. S.C. Code Ann. § 42-5-30.

“An employer who refuses or neglects to secure such compensation becomes liable either under the Act or in an action at law.” *Harrell*, 337 S.C. at 327, 523 S.E.2d at 773. The Act provides that, “[a]ny employer required to secure the payment of compensation under this title who refuses or neglects to secure such compensation . . . shall be liable during continuance of such refusal or neglect to an employee either for compensation under this title or at law in an action for personal injury or death by accident” S.C. Code Ann. § 42-5-40. **“Thus, an employer who fails to secure the payment of compensation as prescribed in section 42-5-20 loses its immunity under the Act’s exclusive remedy provision.”** *Harrell*, 337 S.C. at 327, 523 S.E.2d at 773. “A common exception to the exclusiveness of the compensation remedy is the right of suit against an employer who fails to secure his compensation liability by taking out

insurance or qualifying as a self-insured.” *Id.* (quoting 6 Arthur Larson, Workers' Compensation Law, § 67.22 (1998)).

The Supreme Court has addressed this question specifically with regard to statutory employers, holding that statutory employers must be in compliance with Section 42-5-20 in order to claim immunity from suit. *Harrell*, 337 S.C. at 330-31, 523 S.E.2d at 775. In *Harrell*, the plaintiff had recovered workers' compensation benefits from his direct employer, and then brought suit against the owner of the premises where he worked. The owner contended that it should be able to invoke tort immunity even though it had failed to comply with the Act's requirement that it secure the payment of compensation. *Id.* at 328-29, 523 S.E.2d at 774. The Court rejected that argument as contrary to the purpose of the statutory employer provision, which is to provide double layers of protection for employees in case their direct employers do not comply with the Act. *Id.* It was inconsequential that in *Harrell* the employee was able to recover benefits from his direct employer. The Court noted that, “[i]t is true that in this situation *Harrell* may recover in both tort and in workers' compensation. However, *Harrell* is recovering from two separate entities, each that owed him a responsibility to secure compensation.” *Id.* at 329, 523 S.E.2d at 774. Therefore, “a statutory employer, in order to claim tort immunity, was required to secure the payment of compensation as prescribed in section 42-5-20.” *Id.* at 330, 523 S.E.2d at 775. Because the statutory employer had not complied with the Act, it was not immune from suit.

Here, Hoescht Celanese has completely failed to show that it had workers' compensation insurance, or received permission to be self-insured, during the years of Seay's employment. It acknowledges in its motion that it must provide such proof to invoke the protections of the Act, and yet it fails to do so. Bowyer acknowledged that Hoechst Celanese has no records of workers'

compensation insurance for its employees between 1968 and 1978. Bowyer Depo., 12/18/14, at 274:9-13. Bowyer's affidavit merely states that, "*upon information and belief*, Hoechst Celanese has always maintained the proper and adequate workers' compensation insurance required under South Carolina's Workers' Compensation Law." Bowyer Aff., at ¶ 9 (Ex. G to Hoechst Celanese Motion) (emphasis added). Bowyer does not cite the source or basis for his "belief," which is inadequate proof under the South Carolina Rules of Civil Procedure. Affidavits offered in support of summary judgment "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence." SCRCP 56(e). Bowyer's affidavit does not satisfy Rule 56(e).

Finally, Plaintiffs note that Hoechst Celanese makes much of the contract provisions that required it to reimburse Daniel for the cost of Daniel's workers' compensation insurance. But under *Harrell*, Hoechst Celanese had a separate duty to maintain its own workers' compensation insurance. Indeed, securing the payment of compensation is the predicate act on which its tort immunity as a statutory employer is based. It is completely irrelevant that Hoechst Celanese undertook the obligation to reimburse Daniel for the costs associated with the fulfillment of Daniel's statutory duty, when Hoechst Celanese cannot show that it fulfilled its own statutory duty to maintain workers' compensation insurance or provide proof that it was self-insured. Therefore, Hoechst Celanese cannot claim immunity from suit.

III. Hoescht Celanese cannot invoke the exclusive remedy provision of the Act because Seay was not a statutory employee of Hoechst Celanese.

Hoescht Celanese has failed to demonstrate that it was Seay's statutory employer. The statutory employer doctrine is based in Section 42-1-400 of the Act, which provides:

When any person, in this section ... referred to as 'owner,' undertakes to perform or execute any work which is part of his trade, business, or occupation and contracts with any person (in this section ... referred to as 'subcontractor') for the

execution or performance of the whole or any part of the work undertaken by the owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. §42-1-400.

The question of statutory employment status turns on whether the work performed by the subcontractor is “part of [the owner’s] trade, business, or occupation.” *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 484 (2003); *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997); *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946); *Raines v. Gould, Inc.*, 288 S.C. 541, 543, 343 S.E.2d 655, 657 (Ct. App. 1986). If the work was not part of the trade or business of the premises owner, then the plaintiff is not a statutory employee and may maintain a suit for damages. *Id.* A worker is only engaged in part of the owner’s trade or business if the activity is: (1) an important part of the owner’s business or trade, (2) a necessary, essential, and integral part of the owner’s business, or (3) has previously been performed by the owner’s employees. *Glass*, 325 S.C. at 201, 482 S.E.2d at 50. The Supreme Court has repeatedly held that there is no easy formula or bright-line rule for determining whether the work was part of the owner’s trade or business, and that each case must be decided on its own facts. *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000); *Glass*, 325 S.C. at 201, 482 S.E.2d at 51.

Determining whether Seay was a statutory employee is not the easy task that Hoechst Celanese suggests. There is *no general rule* that maintenance work is necessary or integral or that maintenance workers are statutory employees. Hoechst Celanese was in the business of manufacturing synthetic fibers. Hoechst Celanese was not in the maintenance business. It did not even have its own maintenance division, and not a single Hoechst Celanese employee was ever involved in maintenance during the years of Seay’s work. Generally, “where repairs are major,

specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business.” *Glass*, 325 S.C. at 202, 482 S.E.2d at 51.

This Court should conclude that Seay’s maintenance work on pumps and valves was not part of the synthetic fiber manufacturing business of Hoechst Celanese. The Supreme Court’s approach to the question of whether work was important, necessary, or integral has evolved over time. In 2000, the *Abbott* case shifted the focus back to whether the work was *part of the business* of the owner. 526 S.E.2d at 163-64, 526 S.E.2d at 514. There, the Court of Appeals had found that the plaintiff, who drove a delivery truck for a common carrier, was a statutory employee of the retailer to whom he made a delivery. *See id.* at 162, 526 S.E.2d at 514. The worker was injured when he slipped and fell while unloading boxes on the retailer’s premises. *See id.* The Court of Appeals reasoned that because the efficient delivery of goods was important to the business of the retailer, whose business depended on such deliveries to restock its stores, the driver was a statutory employee. *See id.* at 163, 526 S.E.2d at 514. The Supreme Court disagreed, holding that, “[t]he fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of the Retailer’s business.” *Id.* Simply because such deliveries were important to the conduct of the business, “that does not mean that the transportation of the goods is a *part or process* of the business.” *Id.* at 164, 526 S.E.2d at 514 (quoting *Caton v. Winslow Bros. & Smith Co.*, 309 Mass. 150, 154, 34 N.E.2d 638, 641 (1941)) (emphasis added).

In so holding, *Abbott* expressly overruled a line of prior Court of Appeals cases, including *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985). *See* 526 S.E.2d at 164 n.1, 526 S.E.2d at 514 n.1. In *Hairston*, the Court of Appeals held that the driver of a truck transporting cars intended for the defendant’s car-leasing business was a statutory

employee. 286 S.C. at 497, 334 S.E.2d at 827. Even though the transportation of vehicles was not part of the defendant's business, the court held that "if the nature of the work being done is such an integral part of the operations of the company for which it is done that the company cannot function without it, the company falls under the statutory employee situation." *Id.* This approach was overruled in *Abbott* because the work being done must be a *part of the defendant's business*.

In *Olmstead*, the Court recognized that *Abbott* had permanently altered the standards governing statutory employer status. 354 S.C. at 426-27, 581 S.E.2d at 486. The Court explained that, "*Abbott* represents a change in this state's jurisprudence on what activity constitutes 'part of [the owner's] trade, business or occupation' under section 42-1-400, and likely conflicts with cases other than the ones we explicitly overruled in footnote 1 of the *Abbott* opinion." *Id.* Further, the Court stated that, "we now overrule all prior cases to the extent they are in conflict with our holding in *Abbott* and now in this case." *Id.* Under *Abbott*, it is still necessary to conduct a case-specific analysis, but the focus must be on what type of business the defendant conducts. *See id.* at 426, 581 S.E.2d at 486. *Abbott* recognized "that transportation of goods is important to nearly all businesses," but that does not make such transportation "part" of the defendant's business. *Id.*

In *Olmstead*, the defendant was in the business of designing and manufacturing fiberglass products. *See id.* at 426, 581 S.E.2d at 486. The Court focused on the nature of the business in holding that a worker involved in transporting the company's fiberglass products was not a statutory employee:

Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare's products arrive

at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier **Although delivery by common carrier was certainly important to Shakespeare's operation, it does not follow that such delivery was "part or process" of its manufacturing business.**

Id. (emphasis added).

Abbott and *Olmstead* provide a framework for the Court's analysis of Hoechst Celanese's statutory employer status. The focus must be on the type of business that Hoechst Celanese conducted. Hoechst Celanese manufactures synthetic fibers. It is not in the maintenance business. It did not have a maintenance division and none of its employees ever conducted maintenance (until after Seay stopped working for Hoechst Celanese). Hoechst Celanese apparently did not even own any maintenance tools, as Seay and other Daniel workers were required to bring their own. Although maintenance of the equipment in the plant may have been important to Hoechst Celanese's operation, it does not follow that such maintenance was a "part or process" of its synthetic fiber manufacturing business.

Cases involving construction workers illustrate most starkly that an evaluation of the nature of the defendant's business is dispositive of the statutory employer question. Where construction is a part of a company's documented business purpose, or the company has a construction division or has handled its own construction in the past, then construction contractors have been found to be statutory employees. *See MacMullen v. South Carolina Elec. & Gas Co.*, 312 F.2d 662, 663 (4th Cir. 1963); *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980); *Fortner v. Thomas M. Evans Const. and Development. LLC*, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013); *Ewing v. A.W. Chesterton Co.*, No. 09-CP-40-8342, at p. 5 (Ct. Cmn. Pleas 2010). This Court's decision in *Ewing* falls into this category. In *Ewing*, the plaintiff was employed by a subcontractor to install new pipes and tie those new pipes into existing lines at two facilities owned and operated by DuPont. *Ewing*, at p. 2 (Exhibit K to

Defendant's Motion). The evidence showed that, "DuPont maintained its own Construction Division to build, repair, and expand new and existing plants." *Id.* Given the longstanding operation of DuPont's own construction division, this Court found Ewing to be a statutory employee:

DuPont maintained a Construction Division for at least fifty years to build, construct, repair, and renovate new and existing facilities around the world. Through its Construction Division, DuPont hired Mr. Ewing's direct employer, Daniel, to assist in the construction, maintenance, repair, and upgrade of a number of its facilities, including those in Camden and Florence. During the time period at issue in this case, DuPont's Construction Division employed numerous employees, including superintendents, engineers, and safety supervisors who worked on the construction of new and existing facilities. To complete its projects, the Construction Division also regularly employed a variety of craft workers, including pipefitters, through contractors like Daniel. During various time periods, DuPont's direct employees have performed the same type of craft work, including pipefitting work. In addition, during the time Mr. Ewing worked at DuPont's facilities in South Carolina, DuPont's corporate charter provided that the company's business objectives and purposes included construction of plants and factories.

Ewing at 5 (emphasis added). Thus, the determination of Ewing's statutory employee status was based on the fact that DuPont's stated business purpose included construction, it maintained its own construction division, and its own employees performed the same type of work as the plaintiff.³

Conversely, if the defendant is not in the business of construction, and the construction work cannot fairly be characterized as part of the defendant's business, courts will not find the construction worker to be a statutory employee. *See Glass*, 325 S.C. at 202; *Raines*, 288 S.C. at 547, 343 S.E.2d at 659. For example, in *Raines* the court noted that, "the nature of [the defendant's] business, according to its application to transact business in South Carolina, is the

³ Similar facts were presented to this Court in *Bumgardner v. ABB, Inc.*, also cited by Hoechst Celanese and attached as Exhibits L and M to its Motion. There, the defendant, Duke Energy, presented evidence that its Articles of Incorporation "provided that the company's business objectives and purposes included the construction of power plants." Def. Ex. L at 2.

‘manufacturing and selling [of] batteries of all kinds and related products.’” 288 S.C. at 547, 343 S.E.2d at 659. Further, “the record does not indicate that [the defendant] had a construction division or that any construction work was performed by its regular employees.” *Id.* Therefore, the plaintiff’s construction work was not part of the defendant’s trade or business and he was not a statutory employee. *Id.*

As a whole, the construction cases demonstrate that a determination that work is part of an owner’s trade or business depends heavily on the company’s stated business purpose. See *MacMullen*, 312 F.2d at 663; *Parker*, 275 S.C. at 73; *Fortner*, 402 S.C. at 431; *Raines*, 288 S.C. at 547; *Ewing*, at p. 5. Where the corporate documents, partnership agreements, state business filings, or plain language of the company name showed construction as a business activity, the business was found to be in the construction business. *MacMullen*, 312 F.2d at 663; *Parker*, 275 S.C. at 73; *Fortner*, 402 S.C. at 431; *Ewing*, at p. 5. Employees of construction contractors or subcontractors were therefore found to be statutory employees. *Parker*, 275 S.C. at 74; *Fortner*, 402 S.C. at 432; *MacMullen*, 312 F.2d at 671-72; and *Ewing* at 6. On the other hand, in *Raines* where the stated business purpose was to manufacture batteries, the court could not find that construction was part of the company’s business. *Raines*, 288 S.C. at 547.

Here, the stated purpose of Hoechst Celanese was to manufacture synthetic fibers. While Seay’s work as a maintenance millwright may have been important to that operation, that does not answer the question of whether maintenance was a part of Hoechst Celanese’s synthetic fiber manufacturing business. All of the record evidence shows that maintenance was not a part of Hoechst Celanese’s business: it had no maintenance division, its own employees did not conduct maintenance, and it had no maintenance tools. Hoechst Celanese has presented no evidence that its corporate purpose included equipment maintenance.

Nevertheless, Hoechst Celanese relies on five cases that it contends support its position that maintenance workers are statutory employees. None of the cited cases involve facts similar to those presented here. In at least three of them, the owner's workers also did the same type of work as the contractor found to be a statutory employee. For example, in *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939), the plaintiff conceded that his work painting power transmission poles was necessary to the defendant's electricity business and the trial court found that, "it is not disputed that such maintenance work was ordinarily performed by defendant's regular employees." *Id.* at 342, 2 S.E.2d at 831. Similarly, in *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992), the decedent's work installing scouring machinery at the defendant's textile mill was installation work that was also done by a large group of the mill owner's employees: "[t]he plant had from forty to fifty regular employees who installed, maintained, and removed equipment." *Id.* at 236, 414 S.E.2d at 181. Thus, it was not hard to conclude that the installation of the scouring machinery was an integral part of the defendant's business. *See id.* at 237, 414 S.E.2d at 181.

Particularly instructive is Hoechst Celanese's reliance on *Wheeler v. Morrison Machinery Co.*, 313 S.C. 440, 438 S.E.2d 264 (Ct. App. 1993). There, the plaintiff was injured while removing asbestos insulation from the defendant's plant. *See id.* at 441, 438 S.E.2d at 265. The removal of asbestos was performed by the defendant's own employees before and during the time that the plaintiff's employer was hired as an outside contractor for the removal: "Prior to asbestos removal being regulated because of its hazardous properties, Springs' employees routinely removed and disposed of the asbestos Even during this transition period [when Springs hired outside contractors specializing in asbestos removal], Springs had certain employees who were licensed to handle emergency asbestos removal." *Id.* at 443, 438 S.E.2d at

266. Given that the plaintiff was performing the same work as the owner's own employees, he was found to be a statutory employee.

The other cases relied on by Hoechst Celanese reflect an outdated approach that did not carefully examine the type of business the defendant was engaged in. *See Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991); *Bell v. South Carolina Electric & Gas Co.*, 234 S.C. 577, 109 S.E.2d 441 (1959). In these cases, the courts conducted no analysis of the owner's business or whether the plaintiff's work was part of that business. Not only has this approach been effectively overruled by *Abbott* and *Olmstead*, without any evaluation of the relevant facts surrounding the plaintiff's work, these cases are of little assistance to this Court.

Again, "[t]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." *Hopkins*, 208 S.C. at 311, 38 S.E.2d at 6. As held in *Abbott*, and reiterated in *Olmstead*, the importance of delivering a finished product does not make delivery a part of the manufacturing business for purposes of statutory employment. *Olmstead*, 354 S.C. at 425-26, 581 S.E.2d at 485-86. Similarly, the importance of maintenance does not make maintaining equipment part of the manufacturing business. This Court should therefore find that because Seay was not engaged in any work that was part of Hoechst Celanese's synthetic fiber manufacturing business, Hoechst Celanese was not his statutory employer.

CONCLUSION

For the foregoing reasons, the Court should find that Hoechst Celanese may not invoke the exclusive remedy provision of the Workers' Compensation Act. Its motion to dismiss, or in the alternative, motion for summary judgment, should be denied.