THE SILICOSIS STORY: MASS TORT SCREENING AND THE PUBLIC HEALTH

HEARINGS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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THE SILICOSIS STORY: MASS TORT SCREENING AND THE PUBLIC HEALTH

WEDNESDAY, MARCH 8, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in Room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield (Chairman) presiding.

Members present: Representatives Stearns, Bass, Walden, Burgess, Blackburn, Barton (ex officio), Stupak, DeGette, Schakowsky, Inslee, and Whitfield.

Staff present: Tony Cooke, Counsel; Mark Paoletta, Chief Counsel for Oversight and Investigations; Clayton Mattheson, Research Analyst; Jonathan Pettibon, Legislative Clerk; David Nelson, Minority Investigator and Economist; Jonathan Brater, Minority Staff Assistant; and Eric Gerhlach, Minority Staff Assistant.

MR. WHITFIELD. Okay, I want to call this hearing to order this afternoon. This is the Subcommittee on Oversight and Investigations for the Energy and Commerce Committee. And the subject of today's hearing is "The Silicosis Story: Mass Tort Screening and the Public Health."

Now today we are going to have three panels of witnesses. On the first panel there will be two witnesses and I would ask them to come forward at this time. First, we have Professor Edward Sherman who is a Professor of Law at Tulane University Law School. So we would ask him to take a seat. And then we have Dr. Laura Welch who is the Medical Director of the Center to Protect Workers Rights from Silver Spring, Maryland. I want to welcome you all to this first panel. We genuinely appreciate your taking the time to be with us today on what we consider to be a particularly important hearing and we look forward to your testimony.

Of course at this time the members of the subcommittee will be giving their opening statements and I will start off and simply say that we consider this to be a particularly important hearing because some of the events that happened in the Federal Court in Texas with those silicosis claims many of us consider to be really a mockery of our justice system.

This is going to be the first of several hearings on important public health issues raised by the practice of mass tort screening. We are examining the manner in which doctors, plaintiff lawyers, and medical screening companies identify large numbers of claimants for personal injury lawsuits. This matter first came to our attention through a June 2005 Federal Court opinion from the Southern District of Texas in a matter captioned "In re: Silica Product Liability Litigation." U.S. District Judge Janis Graham Jack, a former nurse appointed by President Clinton in 1994 presided over a multi-district case involving some 10,000 claimed diagnoses of silicosis, a largely incurable and often fatal pulmonary disease.

In managing this enormous personal injury matter, Judge Jack documented the fraudulent means by which plaintiff lawyers, doctors, and screening companies manufactured claims. She then made the determination that these diagnoses were about litigation rather than healthcare, and were driven neither by health nor justice, but were manufactured for money.

This is particularly troubling because it undermines our judicial system, but it also clearly shows the lack of attention or concern about the actual health and treatment of patients. This subcommittee, with the cooperation of our Democratic colleagues and staff and with the firm support of the Chairman of our full committee, Mr. Joe Barton, in an effort to understand the larger public health consequences of this alleged conduct, has sought to examine the relationships, the standards, and the practices that govern the manner in which the 10,000 plaintiffs of "In re: Silica" were identified, diagnosed, and joined in this massive tort lawsuit.

To that end, we have so far written to doctors, screening companies, and very recently law firms, State regulatory agencies, and State medical boards. While most parties have been cooperating with the subcommittee's inquiry, four doctors have required subpoenas for their documents and several individuals here today have also required a subpoena to secure their appearance. And I would like to emphasize that the subcommittee will use all means at its disposal in its pursuit of the information and records required for this investigation. The "In re: Silica" matter provides a case study through which we are examining public health issues and mass tort screening. To be sure, screening is an important tool of public health. It provides broad access to care and vital monitoring and surveillance for many occupational and environmental health concerns. However, the type of screening used in this class action lawsuit simply generated claimants to obtain settlements for the benefit of certain plaintiff law firms. Dollars were the priority; patient health and wellbeing were afterthoughts.

Now I would like to say to appreciate the practices, the standards, and the ethics of this process, we want to briefly look at some examples of one of the treating physicians, Dr. Ray Harron, for example. Now I would point out to you that the presence of both diseases, silicosis and asbestosis, in one individual is extremely rare. And Dr. Harron, for example, performed an examination of the X-rays of one patient in 1996 for the purpose of asbestos litigation and then later in 2002 again evaluated the same patient for the purposes of silicosis litigation. Now these two documents show the results of these examinations. The highlighted part of the form shows the lung damage observed by Dr. Harron. On the right, we can see that when he looked at a chest X-ray in the context of asbestos litigation, he found S and T type damage in the lungs which are classic for asbestos exposure. A few years later when Dr. Harron again looked at a chest X-ray of this same person, now in the context of silicosis litigation, he found P type damage in the lung classic of silicosis. So what happened to the S and T type damage caused by the asbestos? Dr. Harron, was this man's asbestos injury cured? Why wasn't it again seen in the second X-ray review?

And I would also point out that Judge Jack, in her decision, pointed out that when Dr. Harron first examined 1,807 plaintiff X-rays for asbestos litigation, he found them all to be consistent only with asbestos and not with silicosis. But upon reexamining those same 1,807 MDL plaintiff X-rays for silicosis litigation, Dr. Harron found evidence of silicosis in every case. Now this volume and high percentage of reversal, basically 100 percent, simply cannot be exampled as intra-reader variability which is often a reason given for a difference of opinion on these readings.

I would also point out that we will ask some of the same questions that I have just raised with Dr. Harron with Dr. Ballard. And here are his reports for a woman whom he diagnosed with asbestos in 2000, but later with silicosis in 2004 using the same October 1999 X-ray. Ray Harron's son, Dr. Andrew Harron, when he did his diagnosis work, had secretaries take his marks on an X-ray form, draft the diagnosing report, stamp his signature, and then send out the report. Dr. Andrew Harron says he never saw, never read any of his more than 400 silicosis reports. And we would ask Dr. Harron, is this how he continues to practice in Wisconsin today?

There are further stunning examples of apparent disregard for reasonable medical standards, practices, and ethics such as Dr. Martindale's purported diagnosis of 3,617 people with silicosis in 48 days, an average of 75 reports per day. Yet we cannot lose sight of the fact that these numbers represent real people learning that they have a largely incurable and sometimes fatal disease, a fact I hear was missed

by the doctors, lawyers, and screening companies here in their rush to bill what they call an inventory of clients.

This investigation has found little to date to demonstrate real regard or acceptance of responsibility in the mass tort screening process for the manner in which patients learn about the results of their screening, the way the significance and reliability of the tests performed are presented, or the way follow up and treatment options are discussed and pursued. The medical professions involved here have so far all disavowed any legal or ethical duty to the care of the patients that they have diagnosed.

At the end of the day, I suppose the ultimate question we are presented with here is are the diagnoses generated by this process real or are they simply to facilitate litigation? On that point, while we have found no direct information, although Justice Jack made some very strong conclusions, we will look at some circumstantial data. According to the work of Dr. Laura Welch, who joins us here today, in a sample of 9,605 metal workers with 20 years work experience, an ILO score of 1/0 was found, and that is basically very little found, for approximately 12 percent of the group. In the world of mass torts, this would be the positive diagnosis, the potential claimants. So 12 percent of the 9,605 would be found positive. Today, I would like to compare those findings with those of a for profit screening venture N&M, the company of our witness, Heath Mason. While we have not yet found hard numbers for the rate at which this company's overall generated positive diagnoses, I will ask Mr. Mason whether the screening N&M gave on February 15, 2002, was typical for his business. On that day in Columbus, Mississippi, they found all 111 people screened to be positive for silicosis, and yet the average rate of silicosis found in Mississippi is around eight. So they looked at 111 people, they found 111 people, a rate of 100 percent, which is very good for Mr. Mason, considering that we understand two of his larger clients, the law firms of Campbell, Cherry, Harrison, Davis, and Dove and O'Quinn, Lamonick and Purdle typically paid him only for positive diagnosis, as much as $750 for each person tagged with a diagnosis of silicosis. Whether the success rate of February 15 was the exception or the norm for N&M will be a telling fact.

I want to thank Chairman Barton for his continued support of this important investigation, as well as my colleagues from across the aisle who have backed our efforts to gather the information and records needed to understand this issue and we look forward to the testimony of our witnesses.

[The prepared statement of Hon. Ed Whitfield follows:]

PREPARED STATEMENT OF THE HON. ED WHITFIELD, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

This afternoon we convene what I believe will be just the first of several hearings on certain important public health issues raised by the practice of mass tort screening. We are examining the manner in which doctors, lawyers, and medical screening companies seek to identify large numbers of potential claimants for personal injury lawsuits. We have been troubled, however, by the processes we have reviewed to date. We are concerned by the apparent lack of attention to the actual health and treatment of patients as well as the financial incentives geared to rewarding positive findings of disease. Ultimately, I am most concerned by the suggestion that, with respect to mass torts, there exists some alternate field of medicine, or pseudo-medicine, containing its own standards, practices, and ethics.

This matter first came to our attention though a June 2005 federal court opinion from the Southern District of Texas. In a matter captioned In Re: Silica Product Liability Litigation, U.S. District Judge Janis Graham Jack, a former nurse appointed by President Clinton in 1994, presided over a multi district case involving some 10,000 claimed diagnoses of silicosis – a largely incurable and often fatal pulmonary disease. In managing this enormous personal injury matter, Judge Jack made the remarkable determination that, "these diagnoses were about litigation rather than health care" and "were driven by neither health nor justice [but] were manufactured for money." This stunning conclusion was backed up in a dense 249 page opinion in which Judge Jack laid out her support for this finding in compelling detail.

This Subcommittee, with the cooperation of our Democratic colleagues and staff, and with the firm support of the Chairman of our full Committee, Joe Barton, in an effort to understand the larger public health consequences of this alleged conduct, has sought to examine the relationships, standards, and practices that governed the manner in which the 10,000 plaintiffs in In Re: Silica were identified, diagnosed and joined in this massive tort lawsuit.

To that end, we have so far written to doctors, screening companies, and, very recently, to law firms, state regulatory agencies, and state medical boards. While most parties have been cooperating with the Subcommittee's inquiry, 4 doctors have required subpoenas for their documents and several individuals here today have also required a subpoena to secure their appearance. For the avoidance of doubt, this Subcommittee will use all reasonable means at its disposal in its pursuit of the information and records required for this investigation.

The In Re: Silica matter provides a case study through which we are examining public health issues in mass tort screening. To be sure, screening is an important tool of public health; it provides broad access to care and vital monitoring and surveillance for many occupational and environmental health concerns. Yet the type of screening at issue here appears to be a mechanism purely to generate grist for the mill of litigation. And what is more, the business practice of screening, seen here, seems to present almost insurmountable conflicts between profit and patient health.

To appreciate the practices, standards, and ethics of this process, it is instructive to look at examples from some of the doctors joining us today. Let's consider first the treatment of several patients by Dr. Ray Harron of Bridgeport, West Virginia. Dr. Harron performed an examination of the X-rays of one patient in 1996 for the purpose of asbestos litigation and then later, in 2002, again evaluated this same patient for the purpose of the silicosis litigation. [1] These two documents show the results of these examinations. The circled part of the form shows the lung damage observed by Dr. Harron. On the right we can see that when he looked at a chest X-ray in the context of asbestos litigation, he found "S and T" - type damage in the lungs - classic for asbestos exposure. A few years later when Dr. Harron again looked at a chest X-ray of this gentleman, now in the context of silicosis litigation, he found "P" – type damage in the

lung – classic of silicosis. What happened to "S and T" – type damage caused by the asbestos? Dr. Harron, was this man's asbestos injury cured? Why wasn't it again seen in the second X-ray review?

Let's look at another patient. Dr. Harron evaluated the case of a 71 year-old man in 2002 for asbestos based on a July 27, 2001 X-ray and concluded he had asbestosis, as the report reads. [2] When silicosis was the name of the game, again referring to the same July 27, 2001 X-ray, Dr. Harron determined that this 71 year-old man had silicosis. Are these anomalies? What about this 60 year-old man found to have first asbestos and then silicosis using the same July 27, 2001 X-ray? [3] Another 53 year-old man? [4] And another? [5] And another? [6] Dr. Harron, what are the medical standards and practices that account for such apparently miraculous cures? I hope to find out today.

We will ask the same question of Dr. Ballard – here are his reports for a woman whom he diagnosed with asbestosis in 2000 but later with silicosis in 2004, using the same October 1999 X-ray. [7]

Ray Harron's son, Dr. Andrew Harron, when he did his diagnosis work, had secretaries take his marks on an X-ray form, draft the diagnosing report, stamp his signature, and then send out the report. Dr. Andrew Harron says he never saw or read any of his more than 400 silicosis reports. I will ask Dr. Harron if this is how he continues to practice in Kenosha, Wisconsin.

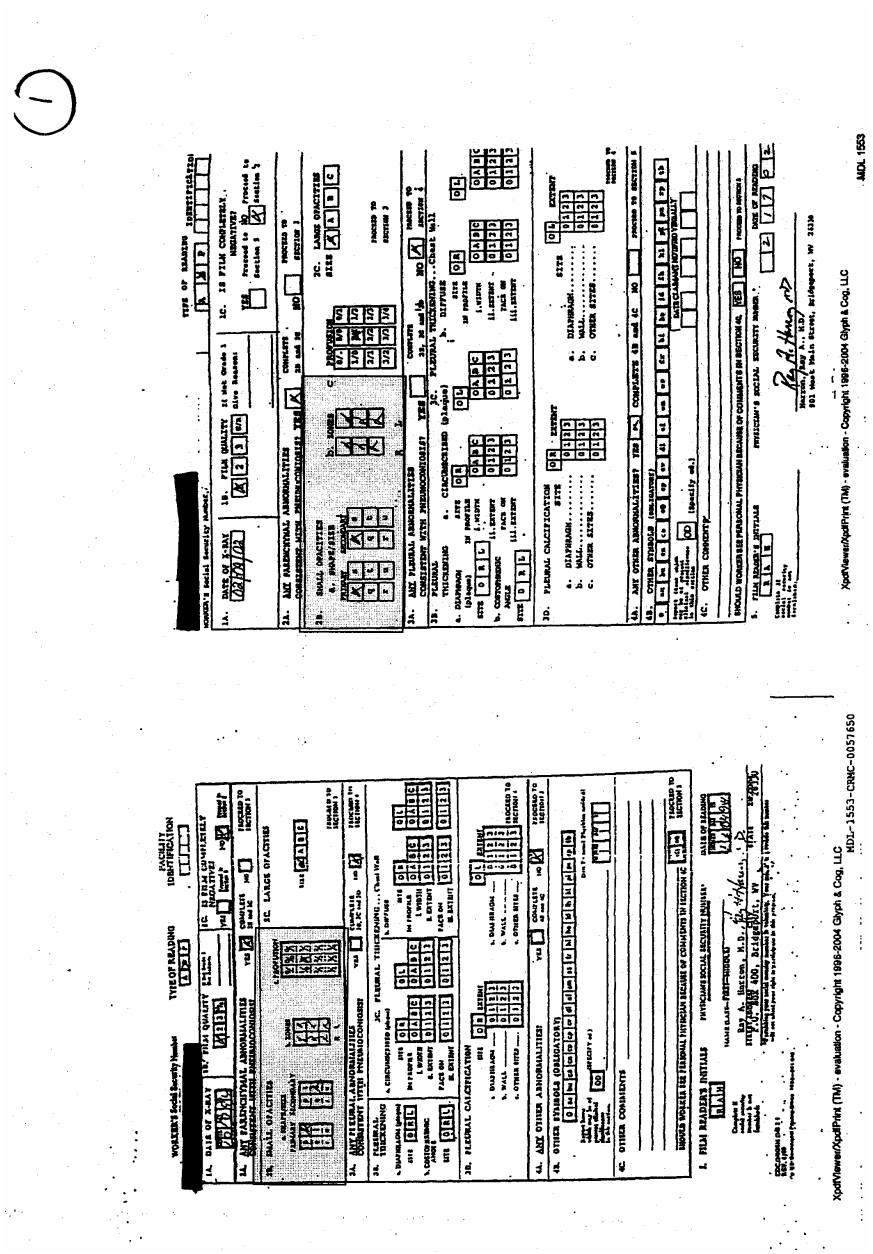
There are further stunning examples of apparent disregard for reasonable medical standards, practices, and ethics such as Dr. Martindale's purported diagnosis of 3,617 people with silicosis in 48 days – an average of 75 reports per day. Yet we cannot lose sight of the fact that these numbers represent real people learning they have a largely incurable and sometimes fatal disease – a fact I fear was missed by the doctors, lawyers, and screening companies, here, in their rush to build what they call an "inventory" of clients.

This investigation has found little, to date, to demonstrate real regard, or acceptance of responsibility, in the mass tort screening process for the manner in which patients learn about the results of their screening, the way the significance and reliability of the tests performed are presented, or the way follow-up and treatment options are discussed and pursued. The medical professionals involved here have, so far, all disavowed any legal or ethical duty to the care of the patients they have diagnosed.

At the end of the day, the ultimate question we are presented with is: Are the diagnoses generated by this process for real? On that point, while we have found no direct information, we might look at some circumstantial data. According to the work of Dr. Laura Welch, who joins us here today [8] in a sample of 9,605 Sheet Metal Workers with 20 years work experience, an ILO score of 1/0 was found for approximately 12% of the group. In the world of mass torts, this would be the positive diagnoses – the potential claimants. Today, I would like to compare those findings with those of a "for profit" screening venture, N&M, the company of our witness Heath Mason. While we have not yet found hard numbers for the rate at which this company overall generated positives diagnoses, I will ask Mr. Mason whether the screening N&M gave on February 15, 2002 was typical for his business – on that day in Columbus, Mississippi, they found all 111 people screened to be positive for silicosis. [9] That's a rate of 100%, which is very good for Mr. Mason considering that, we understand, two of his larger clients, the law firms of Campbell, Cherry, Harrison, Davis and Dove and O'Quinn, Laminack and Pirtle, typically paid him only for the positive diagnoses – as much as $750 for each person tagged with a diagnosis of silicosis. Whether the success rate of February 15 was the exception or the norm for N&M will be a telling fact.

I want to thank Chairman Barton for his continued support of this important investigation as well as my colleagues from across the aisle who have backed our efforts to gather the information and records needed to understand this issue. I also want to welcome today's witnesses, particularly Professor Edward Sherman from Tulane

University and Dr. Laura Welch from the Center to Protect Workers' Rights. I look forward to your testimony.



(2)

Ray A. Harron, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

(304) 623-3900

P.O. Box 400
Bridgeport, WV 26330

Wednesday, December 4, 2002

POC 7.20125

The Foster Law Firm
440 Louisiana Ave.
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

I certify that on 11/08/02 I examined the above client in Pascagoula. MS and reviewed a B-reading of the chest x-ray dated 07/17/01.

The work history provided to me indicates that the client had an occupational exposure to asbestos from 1963-1975, and one of his job sites was [redacted] in Pascagoula, MS and one of his job trades was laborer. The client's chest x-ray reveals the possibility of cancer low and anteriorly, for which the client was advised to see his doctor. The client complains of shortness of breath. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are no abnormal breath sounds. The client denies having cancer. The client denies having tuberculosis. The client denies having connective tissue disease. The B-reading of this client's chest x-ray reveals findings consistent with asbestosis.

On the basis of this client's history of occupational exposure to asbestos and my B-reading of the client's chest x-ray, within a reasonable degree of medical certainty, [redacted] has asbestosis.

Since asbestos exposure leads to increased incidences of lung cancer, upper respiratory tract cancer, stomach cancer, colon cancer, upper GI tract cancer, lymphoma, pleural and peritoneal mesothelioma, kidney cancer, pancreatic cancer as well as other types of cancer, this person should be examined frequently by his physician for possible early detection and treatment of these processes.

Pulmonary Function: See attached

Sincerely,

Ray A. Harron, M.D.

RAH/mah

MDL-1553-CR6C-000:

Ray A. Harron, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

(304) 623-3900

P.O. Box 400
Bridgeport, WV 26330

Wednesday, December 4, 2002

O'Quinn, Laminack & Pirtle
440 Louisiana Ave.
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

I certify that on 11/08/02 I examined the above client in Pascagoula, MS.

The work history provided to me indicates that the client had an occupational exposure to silica from 1972-1991, and two of his job sites were [redacted] and [redacted] and two of his job trades were sandblaster and rigger. The client's chest x-ray reveals the possibility of cancer low and anteriorly, for which the client was advised to see his doctor. The client complains of shortness of breath. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are no abnormal breath sounds. The client denies having cancer. The client denies having tuberculosis. The client denies having connective tissue disease.

On the basis of this client's history of occupational exposure to silica and my reading of the client's chest x-ray showing findings consistent with silicosis, within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incident of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue diseases such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by his physician for possible early detection and treatment of these processes.

Pulmonary Function: See attached

Sincerely,

Ray A. Harron, M.D.

RAH/mah

8

MDL 1553
SULLIVAN-000276

RAY A. HARRON, M.D.
Diplomate American Board of Radiology
Diplomate American Board of Nuclear Medicine

2437 Bay Area Blvd. #47
Houston, TX 77058
(409) 933-1264

7 North Flamingo
La Marque, TX 77568
(409) 769-1319

O'Quinn, Laminack & Pirtle
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

At your request, I have reviewed the occupational history, exposure and medical history as provided to me and a B-reading of a chest x-ray dated 07-27-01 on [redacted].

The work history reveals an occupational exposure to silica while [redacted] was working as a sandblaster and painter at [redacted], and other job sites from 1973-2002. My B-reading of the chest x-ray dated 07-27-02, reveals bilateral interstitial fibrosis consistent with silicosis.

On the basis of this individual's history of occupational exposure to silica and my reading of his chest x-ray, I feel within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incidence of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue diseases such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by a physician for possible early detection and treatment of these processes.

Sincerely,

Ray A. Harron, M.D.

RAH/ajg

MDL 1553
SHOWS-001340

(5)

Oct 15 02 10:44a The Foster Law Firm 713-238-0568 p.3

Ray A. Harron, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

P.O. Box 400
Bridgeport, WV 26330

Wednesday, June 26, 2002

Foster & Hausman
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

I certify that on 5/17/2002 I examined the above client in Pascagoula, MS and reviewed a B-reading of the chest x-ray dated 7/27/2001.

The client's work history reveals an occupational exposure to various asbestos containing products from 1974-1975, one of the job sites was [redacted] Avondale, LA and was at the trades was Laborer. This individual complains of shortness of breath. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are no abnormal breath sounds. The client denies having cancer. The client denies having tuberculosis. The client denies having connective tissue disease. The B-reading of this client's chest x-ray reveals findings consistent with asbestosis.

On the basis of this client's history of occupational exposure to asbestos and the B-reading of the client's chest x-ray, within a reasonable degree of medical certainty, [redacted] has asbestosis.

Since asbestos exposure leads to increased incidence of lung cancer, upper respiratory tract cancer, stomach cancer, colon cancer, upper GI tract cancer, lymphoma, pleural and peritoneal mesothelioma, kidney cancer, pancreatic cancer as well as other types of cancer, this person should be examined frequently for possible early detection and treatment of these cancers.

Sincerely,

Ray A. Harron, M.D.

MDL-1553-CRNC-0002104

6

(4)

RAY A. HARRON, M.D.
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7 North Flamingo
La Marque, TX 77568
(409) 765-1319

RE: [redacted] POC 719279

DOB: [redacted]

At your request, I have reviewed the occupational history, exposure and medical history as provided to me and a B-reading of a chest x-ray dated 07/21/01 on [redacted]

His work history reveals an occupational exposure to asbestos containing products while he was working as a seaman while serving in the [redacted] in Newport, VA from 1972-1976, and as a electrician while working for [redacted] at various residential sites in Jackson, MS in 1976. My B-reading of the chest x-ray dated 07/21/01 reveals bilateral interstitial fibrosis consistent with asbestosis.

On the basis of this individual's history of occupational exposure to asbestos and my reading of his chest x-ray, I feel within a reasonable degree of medical certainty, [redacted] has asbestosis.

Sincerely,

Ray A. Harron, M.D.

RAH/mdh

RAY A. HARRON, M.D.
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7 North Flamingo
La Marque, TX 77568
(409) 789-1319

O'Quinn, Laminack & Pirtle
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

At your request, I have reviewed the occupational history, exposure and medical history as provided to me and a B-reading of a chest x-ray dated 07-21-01 on [redacted].

The work history reveals an occupational exposure to silica while [redacted] was working as an electrician at [redacted] and while serving in the [redacted] from 1974-1991. My B-reading of the chest x-ray dated 07-21-01, reveals bilateral interstitial fibrosis consistent with silicosis.

On the basis of this individual's history of occupational exposure to silica and my reading of his chest x-ray, I feel within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incident of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue diseases such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by a physician for possible early detection and treatment of these processes.

Sincerely,

Ray A. Harron, M.D.

RAH/sjg

(5)

RAY A. HARRON, M.D.
Diplomate American Board of Radiology
Diplomate American Board of Nuclear Medicine

2437 Bay Area Blvd. #47
Houston, TX 77058
(409) 933-1264

7 North Flamingo
La Marque, TX 77568
(409) 789-1519

O'Quinn, Laminack & Pirtle
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]
SSN:
DOB: [redacted]

At your request, I have reviewed the occupational history, exposure and medical history as provided to me and a B-reading of a chest x-ray dated 08/07/01 on [redacted].

His work history reveals an occupational exposure to silica while he was working as a painter for [redacted] from 1965-1968. My B-reading of the chest x-ray dated 07/27/01, reveals bilateral interstitial fibrosis consistent with silicosis.

On the basis of this individual's history of occupational exposure to silica and my reading of his chest x-ray, I feel within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incident of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue diseases such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by a physician for possible early detection and treatment of these processes.

Sincerely,

Ray A. Harron, M.D.

RAH/sjg

MDL 15
NASH-00286_

Ray A. Harron, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

P.O. Box 400
Bridgeport, WV 26330

Wednesday, June 20, 2002

Foster & Sarzeena
440 Louisiana Ave.
Houston, TX 77002

POC 721726

RE: [redacted]
DOB: [redacted]

I certify that on 04/12/2002 I examined the above client in Hattiesburg, MS and reviewed a B-reading of the chest x-ray dated 08/07/2001.

The client's work history reveals an occupational exposure to various asbestos containing products from 1957-1994, while working for the [redacted] as a Laborer. This individual complains of shortness of breath. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are abnormal breath sounds, described as: expiratory wheezes in both bases. The client has cancer and the type is cnr. The client denies having tuberculosis. The client denies having connective tissue disease. The B-reading of this client's chest x-ray reveals findings consistent with asbestosis.

On the basis of this client's history of occupational exposure to asbestos and the B-reading of the client's chest x-ray, within a reasonable degree of medical certainty, [redacted] has asbestosis.

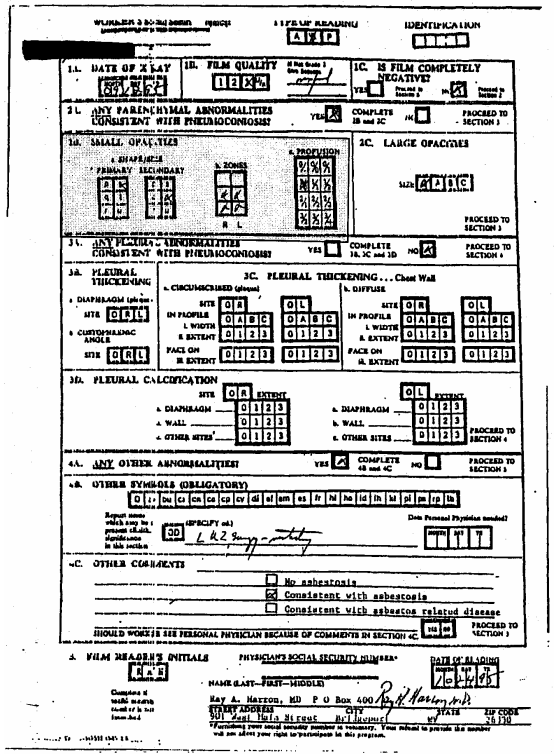
Since asbestos exposure leads to increased incidence of lung cancer, upper respiratory tract cancer, stomach cancer, colon cancer, upper GI tract cancer, lymphoma, pleural and peritoneal mesothelioma, kidney cancer, pancreatic cancer as well as other types of cancer, this person should be examined frequently for possible early detection and treatment of these cancers.

Sincerely,

Ray A. Harron, M.D.

MDL-1553-CRMC-0002380

11



TYPE OF READING: A B P

IDENTIFICATION

1A. DATE OF X-RAY: 07/26/02

1B. FILM QUALITY: 1 2 X R

1C. IS FILM COMPLETELY NEGATIVE? YES ☐ (Proceed to Section 2) NO ☒ (Proceed to Section 2)

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES ☒ (COMPLETE 2B and 2C) NO ☐ (PROCEED TO - SECTION 3)

2B. SMALL OPACITIES — a. SHAPE/SIZE (PRIMARY / SECONDARY): p/p; b. ZONES: R U / R M / R L; c. PROFUSION: 1/0, 1/1, 2/1, 2/2, 2/3, 3/2, 3/3, 3/+

2C. LARGE OPACITIES — SIZE: A B C

PROCEED TO SECTION 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES ☐ (COMPLETE 3B, 3C and 3D) NO ☒ (PROCEED TO SECTION 4)

3B. PLEURAL THICKENING — a. CIRCUMSCRIBED (plaque): a. DIAPHRAGM (plaque) SITE O R L; b. COSTOPHRENIC ANGLE SITE O R L; IN PROFILE O A B C; I. WIDTH 0 1 2 3; II. EXTENT 0 1 2 3; FACE ON III. EXTENT 0 1 2 3

3C. PLEURAL THICKENING ... Chest Wall — b. DIFFUSE: SITE O R / O L; IN PROFILE O A B C; I. WIDTH 0 1 2 3; II. EXTENT 0 1 2 3; FACE ON III. EXTENT 0 1 2 3

3D. PLEURAL CALCIFICATION — SITE O R / O L; EXTENT 0 1 2 3: a. DIAPHRAGM, b. WALL, c. OTHER SITES

PROCEED TO SECTION 4

4A. ANY OTHER ABNORMALITIES? YES ☒ (COMPLETE 4B and 4C) NO ☐ (PROCEED TO SECTION 5)

4B. OTHER SYMBOLS (OBLIGATORY): 0 1 Bn Ca Cn Ce Cp Cv di ef em es Ir hl ho id ih kl pl pn rp Ih

Does Personal Physician needed? YES ☐ NO ☒

Report items which may be present in addition to those listed in this section: OD (SPECIFY ed.) L&D

4C. OTHER COMMENTS: ☐ No asbestosis ☒ Consistent with asbestosis ☐ Consistent with asbestos related disease

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C: YES ☐ NO ☒ (PROCEED TO SECTION 5)

5. FILM READER'S INITIALS: R A B

PHYSICIAN'S SOCIAL SECURITY NUMBER*: [redacted]

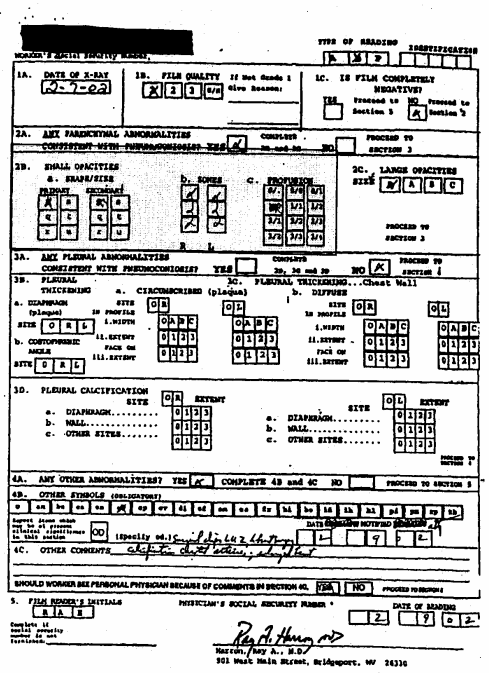
DATE OF READING: 12/9/02

NAME (LAST—FIRST—MIDDLE): Kay A. Harron, MD

STREET ADDRESS: P O Box 400 / 501 West Main Street

CITY: Bridgeport STATE: WV ZIP CODE: 26330

*Furnishing your social security number is voluntary. Your refusal to provide this number will not affect your right to participate in this program.



TYPE OF READING: A B P

1A. DATE OF X-RAY: 7-26-02

1B. FILM QUALITY: 1 2 3 R/U

1C. IS FILM COMPLETELY NEGATIVE? YES ☐ (Proceed to Section 2) NO ☒ (Proceed to Section 2)

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES ☒ (COMPLETE 2B and 2C) NO ☐ (PROCEED TO SECTION 3)

2B. SMALL OPACITIES — a. SHAPE/SIZE (PRIMARY / SECONDARY): p/p; b. ZONES: R U / R M / R L; c. PROFUSION: 1/0, 1/1, 2/1, 2/2, 2/3, 3/2, 3/3, 3/+

2C. LARGE OPACITIES — SIZE: A B C

PROCEED TO SECTION 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES ☐ (COMPLETE 3B, 3C and 3D) NO ☒ (PROCEED TO SECTION 4)

3B. PLEURAL THICKENING — a. CIRCUMSCRIBED (plaque): a. DIAPHRAGM (plaque) SITE O R; b. COSTOPHRENIC ANGLE SITE O R L; IN PROFILE O A B C; I. WIDTH 0 1 2 3; II. EXTENT 0 1 2 3; FACE ON III. EXTENT 0 1 2 3

3C. PLEURAL THICKENING ... Chest Wall — b. DIFFUSE: SITE O R / O L; IN PROFILE O A B C; I. WIDTH 0 1 2 3; II. EXTENT 0 1 2 3; FACE ON III. EXTENT 0 1 2 3

3D. PLEURAL CALCIFICATION — SITE O R / O L; EXTENT 0 1 2 3: a. DIAPHRAGM, b. WALL, c. OTHER SITES

PROCEED TO SECTION 4

4A. ANY OTHER ABNORMALITIES? YES ☒ (COMPLETE 4B and 4C) NO ☐ (PROCEED TO SECTION 5)

4B. OTHER SYMBOLS (OBLIGATORY): 0 1 Bn Ca Cn Ce Cp Cv di ef em es Ir hl ho id ih kl pl pn rp Ih

Report items which may be present in addition to those listed in this section: OD (Specify ed.) L&D

DATE EXPOSURE NOTIFIED [redacted]: 12/9/02

4C. OTHER COMMENTS: slight chronic changes, slight

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C: YES NO (PROCEED TO SECTION 5)

5. FILM READER'S INITIALS: R A B

PHYSICIAN'S SOCIAL SECURITY NUMBER*: [redacted]

DATE OF READING: 12/9/02

Harron, Kay A., M.D.

501 West Main Street, Bridgeport, WV 26330

MDL 1553
ROBINSON-004084

James W. Ballard, M.D. NIOSH Certified B-Reader
3832 Eastwood Drive ● Birmingham, AL 35243
Phone (205) 967-1688

X-RAY EVALUATION
February 14, 2000

[redacted] RTSLVM49

PA and lateral views of the chest dated 10/15/99 are reviewed for the presence of, and classification of pneumoconiosis according to the ILO (1980) classification.

Film quality is grade 2 due to slight underexposure. Inspection of the lung parenchyma demonstrates interstitial changes in the mid and lower lung zones bilaterally, consisting of small and irregular opacities of size and shape S/T, profusion 1/0.

Pleural plaques are seen face on bilaterally, extent of 3 bilaterally. No parenchymal infiltrates, nodules or masses are seen. The heart is of normal size and the mediastinal structures are unremarkable.

CONCLUSION: The above parenchymal and pleural changes are consistent with asbestosis provided the subject's exposure history and period of latency are appropriate.

James W. Ballard, M.D.

021400.ltr(jwb)

03-938-5

James W. Ballard, M.D. NIOSH Certified B-Reader
4012 Bryans Drive ● Birmingham, AL 35243 Licensed in Alabama and Florida

June 7, 2004

Asbestos Clerk
Law Offices of Alwyn H. Lackey
P. O. Box 724
2016 Biemville Blvd.
Ocean Springs, MS 39566-0724

Re: [redacted]

Chest radiograph(s) dated 10/15/99 is reviewed for the presence of and classification of pneumoconiosis (silicosis) according to the ILO 80 classification.

Film quality is grade 2 due to slight underexposure. Inspection of lung parenchyma demonstrates interstitial changes in all six lung zones, consisting of small rounded opacities of size and shape p/q, profusion 1/0.

There are no pleural plaques, pleural thickenings or pleural calcifications. No parenchymal infiltrates, nodules or masses are seen. The heart is of normal size and the mediastinal structures are unremarkable.

CONCLUSION: I have reviewed the occupational history and chest x-ray of the referenced individual. Based upon that history and the chest x-ray findings compatible with bilateral interstitial lung disease, it is my opinion, to a reasonable degree of medical certainty, that the x-ray changes are due to silicosis, acquired through occupational exposure to silica.

James W. Ballard, M.D.

60604.ltr(jwb)

(7)

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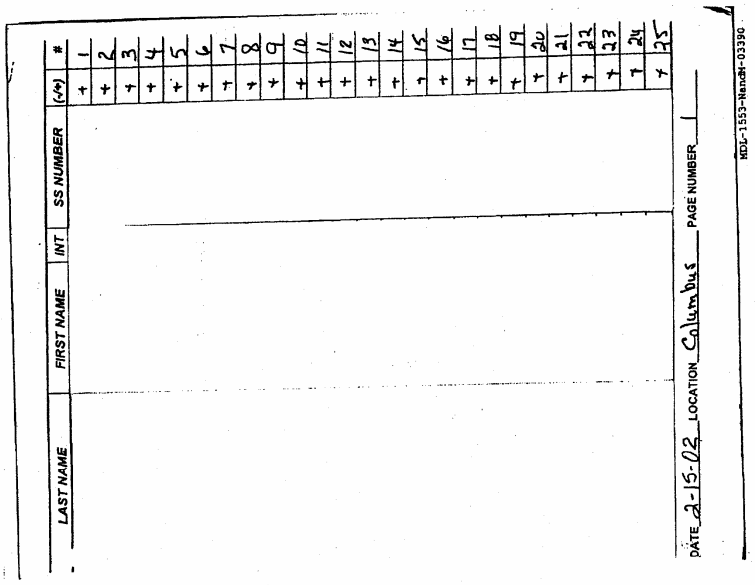
TABLE I. Distribution of ILO Scores in Survey of 9,605 Sheet Metal Workers With 20 or More Years Since Entering the Trade

ILO score	n	(%)
0/0	7317	76.2
0/1	1110	11.6
1/0	737	7.7
1/1	306	3.2
1/2	62	.6
2/1	25	.3
2/2	32	.3
2/3	13	.1
3/2	2	—
3/3	1	—
Total	9605	100.0

ILO, International Labour Office.

(9)



LAST NAME	FIRST NAME	INT	SS NUMBER	(44)	#
				+	1
				+	2
				+	3
				+	4
				+	5
				+	6
				+	7
				+	8
				+	9
				+	10
				+	11
				+	12
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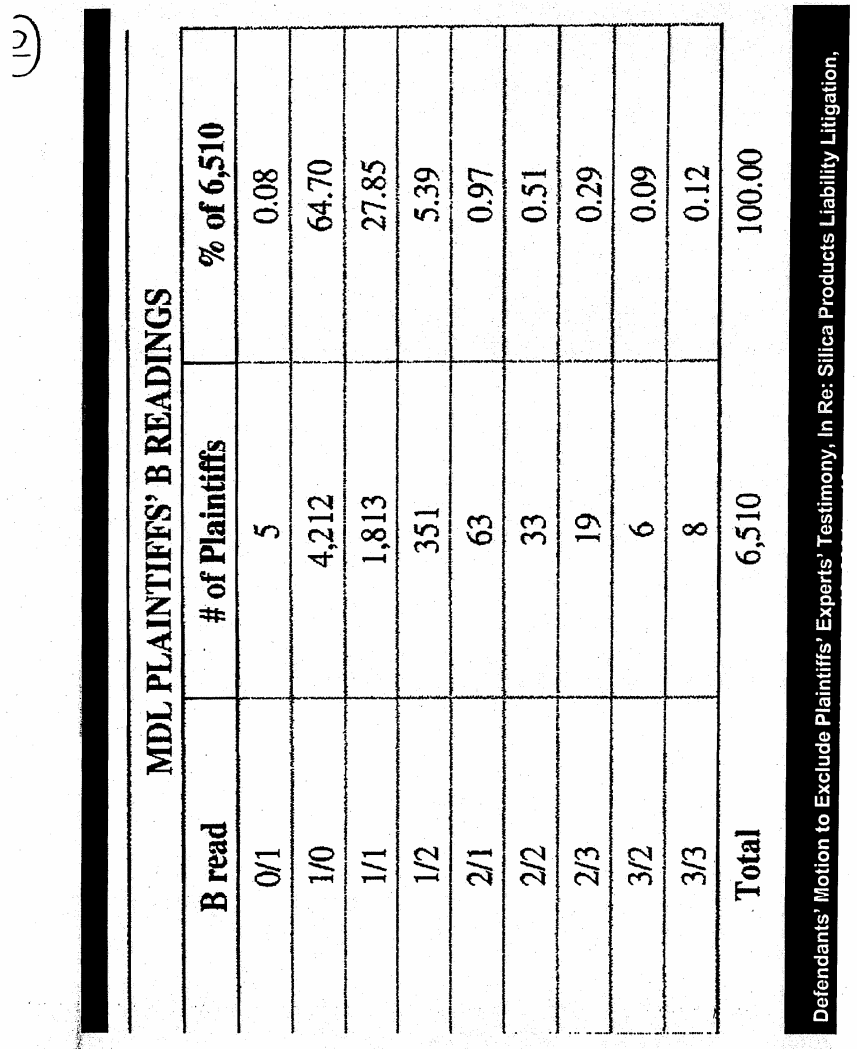
				+	25

DATE 2-19-02 LOCATION Columbus PAGE NUMBER 1

MDL-1553-Nunc-03390



MDL PLAINTIFFS' B READINGS

B read	# of Plaintiffs	% of 6,510
0/1	5	0.08
1/0	4,212	64.70
1/1	1,813	27.85
1/2	351	5.39
2/1	63	0.97
2/2	33	0.51
2/3	19	0.29
3/2	6	0.09
3/3	8	0.12
Total	6,510	100.00

Defendants' Motion to Exclude Plaintiffs' Experts' Testimony, In Re: Silica Products Liability Litigation,

MR. WHITFIELD. And at this time, I recognize the Ranking Member from Michigan, Mr. Stupak.

MR. STUPAK. Thank you, Mr. Chairman. I wish to acknowledge your fairness in conducting this investigation. I would also support the procedural steps you have taken to obtain documents and testimony relevant to this inquiry.

The witnesses you have assembled on the first panel are likely to provide an objective assessment of the situation from a legal and medical perspective. My Democratic colleagues and I remain, however, unconvinced that this investigation will contribute much to the public

health. As Dr. Welch will tell us, there are clearly better ways to screen for occupational diseases than the methods that were apparently employed at the direction of certain plaintiff attorneys in the silicosis litigation consolidated in the U.S. District Court for the Southern District of Texas as described in Judge Jack's opinion issued last year in the case referred to "In re: Silica."

It is truly disturbing that the individuals diagnosed as having silicosis were apparently not informed of their condition by the handful of physicians participating in the evaluations at the behest of the law firms seeking clients for lawsuits. It is also disturbing that there is some evidence that evaluations of chest X-rays, known as B reads, may not have been conducted up to the professional standards in that inaccurate diagnosis may, and I do say may, have led to the filing of some lawsuits that lacked merit.

Perhaps the single most disturbing event regarding public health issues uncovered in this inquiry is that the lawyers, rather than the physician, are provided reports of any acute condition such as TB or cancer identified in the screening. It is up to a person entirely lacking in medical training to convey a serious acute risk to the unfortunate individual. The problems, however, can and should be addressed outside of Congress. The courts have the power and it has been exercised in this case to remedy any misrepresentation made in the courtroom. Defense attorneys have the right to question evidence and experts to uncover any misrepresentations. There is no need for Congress to impose any additional burdens on the tort process that would only serve to discourage legitimate screening that uncovers occupational illness or deny workers their right to recover damages from companies that are responsible for their disease.

Finally, Mr. Chairman, I believe that there are many targets of this subcommittee's attention that would have a far more positive impact on public health. I have sought repeatedly to have this subcommittee examine the problems associated with the heating oil price increases that directly threaten the health of my constituents. Many of them must literally decide between heat or medicine. We still have an open investigation into the failures of the Food and Drug Administration to ensure the safety of our Nation's drug supply, including Accutane, which we have had approximately 100 deaths since the last hearing this subcommittee held in that issue.

Not a week goes by without some report in the press regarding yet another botched job by the FDA. Recently, members of the Advisory Committee on Drug Safety were told that the FDA has yet to get Pfizer to agree to studies that it believes are vital to determine a real risk of Celebrex to public health. It is well over a year since the subcommittee

launched an investigation of the approval of the COX-2 pain treatments, including how FDA officials approved a label for Vioxx that understated the cardiovascular risk of that drug. Apparently higher officials in the Center for Drug Evaluation and Research overruled medical officers responsible for reviewing Vioxx, yet there has been no hearing on the FDA drug safety process that led the prescribing community to underestimate the risk associated with Vioxx.

Recently, we learned of a public health disaster in the making because some FDA bureaucrat operating well outside the public view decided to permit the agribusiness conglomerates to increase their profits by approving the use of carbon monoxide to make dangerously old and improperly stored meat appear fresh and appetizing. You have to wonder whether the current administration at FDA even understands that its role is to protect the public health, not the profits of companies that play Russian roulette with America's health.

We also have not finished our work on the safety issues surrounding jockeys and exercise riders that you began so well in the fall. I am delighted that the National Institute of Occupational Safety and Health, NIOSH, has agreed to our joint request for a comprehensive assessment of safety conditions at race tracks around the country. However, there is still no legislation to give jockeys and exercise riders some input regarding the conditions under which they risk their lives daily. The National Labor Relations Board still refuses to extend legal protections to jockeys that seek to organize so that jockeys can have some control over their exceedingly hazardous working conditions.

I have supported you, Mr. Chairman, regarding the exercise of the committee's prerogatives to obtain necessary and truthful information every time it has been requested, yet I believe that we were deliberately misled by testimony given by the representative of one of the tracks at our last hearing and again in written response we received to our questions. Of course, we still have not received all the documents that were the subject of our subpoena to Matrix Capital Corporation, the Gertmanian company that was a source of funds diverted from the Jockeys Guild.

Mr. Chairman, I look forward to hearing from the witnesses today that you have assembled. I applaud the fair manner in which you have conducted this inquiry today. I look forward to working with you to address some of the more pressing health issues that I have outlined above. I will be moving in and out because I will be on the floor today on food safety, as we do have that bill that benefits the agribusiness but jeopardizes America's health, and I will be on the floor fighting that and Ms. DeGette will be here most of the day to take our functions so I will

be moving in and out, Mr. Chairman, but with that, I thank you for your time.

[The prepared statement of Hon. Bart Stupak follows:]

PREPARED STATEMENT OF THE HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, I join with Mr. Dingell in acknowledging the fairness with which you have conducted this investigation, and I also support the procedural steps you have taken to obtain documents and testimony relevant to this inquiry. The witnesses you have assembled on the first panel are likely to provide an objective assessment of the situation from a legal and medical prospective.

My Democratic colleagues and myself remain unconvinced that this investigation will contribute much to the public health. As Dr. Welch will tell us, there are clearly better ways to screen for occupational diseases than were the methods apparently employed at the direction of certain plaintiff's attorneys in the silicosis litigation consolidated in the US District Court for the Southern District of Texas, as described in Judge Jack's opinion issued last year in the case referred to as: IN RE: SILICA.

It is truly disturbing that the individuals diagnosed as having silicosis were apparently not informed of their condition by the handful of physicians participating in the evaluations at the behest of the law firms seeking clients for lawsuits. It is disturbing that there is some evidence that evaluations of chest X-rays known as "B reads" may not been conducted up to professional standards and that inaccurate diagnoses may, and I do say may, have led to the filing of some lawsuits that lacked merit.

Perhaps the single most disturbing event regarding public health issues uncovered in this inquiry is that the lawyers rather than a physician are provided reports of any acute condition, such as TB or cancer, identified in the screening. It is then up to a person entirely lacking in medical training to convey a serious acute risk to the unfortunate individual.

However, these problems can and should be addressed outside of Congress. The Courts have the power (and it has been exercised in this case) to remedy any misrepresentation made in the Courtroom. Defense attorneys have the right to question evidence and experts to uncover any misrepresentations.

There is no need for Congress to impose any additional burdens on the tort process that would only serve to discourage legitimate screening that uncovers occupational illness or deny workers their right to recover damages from companies that are responsible for their disease.

Finally Mr. Chairman, it seems to me that there are many targets of the Subcommittee's attention that would be far more likely make a positive impact on the public health. I have sought repeatedly to have this Subcommittee examine the problems associated with the heating oil price increases that directly threaten the health of my constituents. Many of them must literally decide: heat or medicine.

We still have an open investigation into the failures of the FDA to assure the safety of our nation's drug supply, including Accutane. Not a week goes by when some expose or another is reported in the public press regarding yet another botched job by the FDA. Recently, Members of the Advisory Committee on Drug Safety were told that the FDA has yet to get Pfizer to agree to studies that it believes are vital to determine the real risk of Celebrex to public health.

It is well over a year since the Subcommittee launched an investigation of the approval of the Cox-2 pain treatments including how FDA officials approved a label for Vioxx that understated the cardio-vascular risks of that drug. Apparently higher officials in CDER overruled medical officers charged with reviewing Vioxx. Yet there has been

no hearing on the FDA drug safety process that led the prescribing community to underestimate the risks associated with Vioxx.

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The NLRB still refuses to extend legal protections to jockeys that seek to organize so that jockeys can have some control over their working conditions that are exceedingly hazardous.

I have supported you regarding the exercise of the Committee's prerogatives to obtain necessary and truthful information every time it has been requested. Yet I believe that we were deliberately misled by testimony given by the representative of one of the tracks at our last hearing and again in a written response we received to our written questions. Of course, we still have not received all the documents that were the subject of our subpoena to Matrix Capital Corp., the Gertmanian company that was the source of funds diverted from the Jockey's Guild.

Mr. Chairman, I look forward to hearing the witnesses you have assembled for today's hearing. I applaud the fair manner in which you have conducted this inquiry to date.

I also look forward to working with you to address some of the more pressing public health issues that I have outlined above.

MR. WHITFIELD. Thank you, Mr. Stupak.

At this time, I recognize Mr. Bass for his opening statement.

MR. BASS. Thank you, Mr. Chairman for holding this hearing today.

And I also want to apologize for the fact that I have a 2:30 meeting and will try to get back after that. The reason I say so is that it is important that we all pay very close attention to what we are about to hear today. You can be in love with the mass tort system in this country. You can admire and respect billionaire trial lawyers who have collected money often at times at the expense of legitimate business activities in some cases, but you cannot defend doctors who provide analyses based on getting $750 a shot if they give a result that benefits the trial lawyer and nothing if they do not. That is not medicine. That is greed. You cannot come down on the side of these law firms that intentionally direct cases of asbestosis to silicosis because they see the potential for the issue being resolved to the benefit of their very clients in the asbestos side working its way through the Congress and the Senate and they need a new rainmaker for their business.

I would also commend to my friends who have any doubts about the perversion of the legal process in this case to take a few minutes to listen

to the story that was carried for 20 minutes on National Public Radio the other day in which this very issue was explored from beginning to end. Now, NPR is not known for being a bastion of conservatism. And the information that was provided to the American people by that story was absolutely devastating. It is sad that the needs and the rights of individuals who have been hurt by occupational accidents or occupational issues should be perverted for such total greed and avarice on the part of individuals who are not seeking any kind of relief for their clients, but relief for themselves and the continuation of a gravy train that is providing them with billions of dollars and not helping the system of justice in this country.

So I want to thank my chairman for bringing this issue to the attention of the Congress. And I hope that regardless of where you stand on the issue of tort law reform, or the trial bar, or any other issue, that you understand that this goes far beyond the issues of justice that are contemplated in real policy regarding tort law in America and I will yield back.

MR. WHITFIELD. Thank you, Mr. Bass.

At this time, we will recognize the gentlelady from Colorado, Ms. DeGette for her opening statement.

MS. DEGETTE. Thank you, Mr. Chairman.

I would like to add my thanks for having this important hearing. And to say that I am sure that all of us, every single one of us condemns any and all fraudulent or illegal activity by attorneys, doctors, or others, and we believe that they should be prosecuted to the fullest extent of the law and that they should be sanctioned by the appropriate sanctioning authorities.

One thing I think, though, that we need to talk about is the very serious issue about what do we do about physician sanctions? Because while I think the legal system is often dealing with the lawyers who wrongfully file claims in this matter, the same may not be said for professional misconduct of the physicians. Now I know that the investigations of misconduct are ongoing, but certain circumstances in this case amply demonstrate the larger point that State medical licensing authorities are failing in their responsibilities to protect the public from negligent doctors. The doctors who made the diagnoses in most of these cases were licensed to practice medicine in six States. Last September, the general counsel for the American Medical Association, apparently motivated by news reports of this case, sent the opinion in the "In re: Silica" case to the medical licensing authorities in those six States. The AMA's letter cites specific page number references to the judge's finding regarding the conduct of specific doctors whose practice was regulated by these agencies.

Not one, not a single licensing authority, Mr. Chairman, even bothered to acknowledge the communication, much less to investigate the professional conduct of these physicians. So in my opinion, if there is a public health problem, it is the ongoing failure of State medical licensing authorities to police licensed physicians, a problem that we encounter along with lawyer misconduct in medical malpractice cases all the time. Now clearly, the individual plaintiffs in "In re: Silica" would have been better served if the screenings were conducted by our expert witness, Dr. Laura Welch, or any other number of qualified and conscientious physicians. However, using this case as justification for preventing mass health screenings is inappropriate. In many cases, mass screenings are the only instances in which serious health problems are identified and some are worthy of compensation. The true public health issue is how to improve mass screenings so that patients are properly screened and diagnosis of any health problem is made known to them and that is not even to discuss the fact of fraudulent screenings which, of course, is probably illegal.

Mr. Chairman, to the extent that this case exposes holes in our system where unfairness can creep in, it is the failure of medical regulators. It would be a mistake and a real danger to the public health if Congress were to fashion a remedy that either made the screening uneconomic or otherwise limited the medical treatment and redress of harm due to preventable occupational or environmental exposure to poisons. And that is certainly an area I would like to explore with our witnesses today: how we can improve these screenings to make sure that they are ethical, accurate, and that they help the patients.

Mr. Chairman, just one other public health issue. NIOSH, which is the National Institute of Occupational Safety and Health, certifies radiologists and other medical doctors who pass a rigorous test as so-called B readers. These B readers are qualified to read chest X-rays for evidence of occupational disease. The editorial page of the Wall Street Journal has been campaigning for NIOSH to take the responsibility of disciplining B readers who allegedly misdiagnose occupational disease. I think there are two problems with that approach. First of all, Congress specifically separated NIOSH from OSHA and the Labor Department in the OSHA Act so that researchers would not be regulators. NIOSH is predominately a research entity whose main role is to develop standards for exposure of various workplace contaminants using data collected at the workplaces. NIOSH has no regulatory experience and it does not have anywhere near the resources to undertake nationwide B reader discipline. So I do not think that it would really be appropriate to essentially create a new regulatory agency within NIOSH.

Now Mr. Chairman, silicosis is a horrible disease. We need to make sure that people who do get the disease have legal protections and we also need to make sure that they are not taken advantage of. I think we can work together. I think we can make it happen but we need to be sensible and thoughtful about how we do it.

MS. DEGETTE. And finally, Mr. Chairman, I would ask unanimous consent to submit Mr. Dingell's statement for the record and also the statements of any other Members who wish to submit opening statements.

MR. WHITFIELD. Without objection, so ordered.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF THE HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

This investigation into the public health implications of the U.S. District Court findings in the silicosis litigation raises issues of both process and substance. With regard to process, Mr. Chairman, thus far you and your staff have conducted this investigation in a manner that has been quite fair. You have apprised us of each step taken, and we have supported the use of your authority to subpoena both documents and testimony. I see no reason why your fairness, and our procedural support, will not continue.

But the subject of this investigation requires going forward with great care. We will learn today that in this particular case, abuses have occurred that could have been avoided if the physicians, the screening companies, and the lawyers involved had insisted upon good medical practice in the identification of the health effects of occupational exposure to silica. Such exposures can and do result in the irreversible and fatal but preventable disease of silicosis.

These apparent abuses are unsettling and worrisome. The question before us is whether they are being addressed. In this case, the District Court in Texas has formulated remedies to any false claims that may have been filed. Further, I understand that a Federal grand jury has been impaneled to review possible criminal behavior surrounding false statements that may have been made in connection with this case. I am not aware of allegations that the judicial and executive branches are falling down on the job.

This Committee's concern is with the public health. I note that only the courts and the State medical societies and bar associations can insure that workers with silicosis and other diseases found during mass screenings receive a timely diagnosis from a physician bound by the ethics of a traditional doctor/patient relationship. Any action by Congress that has the effect of directly or indirectly limiting the access of workers to diagnostic medical exams or redress in the courts for damage done by workplace exposure to silica or any other toxic substances can only have an extremely negative effect on the public health. I ask that this concern for the public health remain the Committee's focus as the inquiry goes forward.

MR. WHITFIELD. I might say to the gentlelady that this subcommittee has sent letters to the regulating bodies of physicians in 20 States on this issue just yesterday, and I do appreciate your raising that issue, I might also just--

MS. DEGETTE. Mr. Chairman, I will look forward to hearing if they send us letters back.

MR. WHITFIELD. Okay. I would also just comment that in this particular case in Texas that of the over 9,000 plaintiffs who submitted the fact sheets, they were diagnosed by only 12 physicians.

MS. DEGETTE. Right.

MR. WHITFIELD. At this time, I recognize the Chairman of the Energy and Commerce Committee, Mr. Barton of Texas.

CHAIRMAN BARTON. Thank you, Mr. Chairman, for holding this hearing on the public health implications of mass tort screenings.

Today we are going to examine a troubling story that has emerged from a mass tort before the U.S. District Court for the Southern District of Texas related to the occupational disease of silicosis.

Federal health statistics suggest that silicosis, a largely incurable and often fatal lung disease, has been in decline, yet it is somewhat perplexing that in the great State of Mississippi, a State that epidemiology would suggest should experience perhaps eight new silicosis cases per year, the number of new silicosis lawsuits skyrocketed from 76 in 2001 to more than 10,500 in 2002. Why the enormous spike in the number of silicosis claims from one State? Was this as the District Court Judge from Texas, Janis Graham Jack noted an industrial disaster of unprecedented proportion or something entirely different? Like Judge Jack, I have some questions. This might be a story of medical heroes who identify and then treat and care for people with a deadly disease. More likely, it is a story of medical mercenaries who allege cases of disease for the sole purpose of legal action and great financial gain.

The processes that went into assembling these mass silica lawsuits are very troubling. The recruitment of potential clients by lawyers and the rush to judgment by doctors is remarkable. Particularly troubling is the prospect that thousands of people were handed bogus diagnoses of this horrible disease and in many instances made by medically unqualified lawyers, paralegals, or screening company employees. I also have a problem with doctors certified by the National Institute for Occupational Safety and Health alleging using their Government credentials to produce thousands of silicosis diagnoses for patients they never met and probably did not care about meeting.

Today we are joined by several individuals who can tell us what has really happened. I am told that some of these individuals refused to help and refused to testify because after they were confronted with the facts about what they have done, they have decided to assert their protection under the Fifth Amendment Right against self incrimination. Nevertheless, we have brought them here today to ask some questions that need asking and I hope that they choose to answer. I look forward to

hearing how anybody can justify being paid thousands of dollars, and indeed in at least one case, millions of dollars, to diagnose people for whom they claim no ethical or legal responsibility. I can tell you that I would be very unhappy if a doctor I didn't know, using standards and practices he would never use in his own medical office, took money to conclude that I had a disease that could kill me and then made no apparent effort to see that I was treated. We count on doctors to first do no harm, yet every callous slight diagnosis risk harms for the sake of money. It quickly became evident that some of you did very well financially, but apparently did very poorly in terms of actually helping people treat their medical diagnosis.

The questions that I have do not just involve the doctors. I am also looking for some answers from screening companies whose business model seems to be based solely on their ability to find large numbers of willing patients and then link them with doctors who had an uncanny ability to diagnose the very disease with the greatest potential for profit. Of course lawyers and law firms behind the silicosis litigation from the beginning also have some serious questions to answer. I look forward to hearing their testimony at a later hearing on this topic, but today we are going to focus on the medical professionals.

I want to emphasize it is not this committee's intent to question in any way a person's right to seek all legal compensation for a real injury. Indeed, I believe by calling out the bogus claims, we are preserving resources in assets for the truly injured men and women. I want to shine a bright light on questionable behavior and what it says about certain medical practices done in the name of law.

In closing, I want to acknowledge and give accolades to my fellow Texan, Judge Janis Graham Jack appointed by President Clinton, I might add, for her scrupulous inquiry into this matter that has help to eliminate the irrelevant issues for us, and I want to thank the subcommittee Chairman and the Ranking Member for their work to help keep us focused on this issue. I look forward to the testimony and yield back the balance of my time.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF THE HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Chairman Whitfield - and thank you for holding this hearing on the public health implications of mass tort screenings. Today, we'll examine a troubling story that has emerged from a mass tort before the U.S. District Court of the Southern District of Texas related to the occupational disease of silicosis.

Federal health statistics suggest silicosis, a largely incurable and often fatal lung disease, has been in decline. Yet all of a sudden, in the State of Mississippi, a state that epidemiology suggests would experience perhaps eight new silicosis cases a year, the number of new silicosis lawsuits skyrocketed from 76 in 2001 to more than 10,500 in

2002. Why the enormous spike in the number of silicosis claims? Was this, as the District Court Judge from Texas, Janis Graham Jack, noted, "an industrial disaster of unprecedented proportion – or something else entirely"?

Like Judge Jack, I have some questions. This might be a story of medical heroes who identify and then treat and care for people with a deadly disease. More likely, this is a story of medical mercenaries who allege cases of disease for the purpose of legal action and great financial gain.

The processes that went into assembling these mass silica lawsuits are very troubling. The recruitment of potential clients by lawyers and the rush to judgment by doctors are remarkable.

Particularly troubling is the prospect that thousands of people were handed bogus diagnoses of this horrible disease and, in many instances, by medically unqualified lawyers, paralegals, or screening company employees. I also have a problem with doctors certified by the National Institute for Occupational Safety and Health allegedly using their government credentials to produce thousands of silicosis diagnoses for patients they never met and maybe never even cared about.

Today we are joined by several individuals who can tell us what happened. I am told that some will refuse to help because after they were confronted with the facts about their work, they may have decided to assert the protection of their Fifth Amendment right against self-incrimination. Nevertheless, we have brought them here today to ask some questions that need asking, and I hope that they choose to answer. I look forward to hearing how anyone can justify being paid thousands of dollars, and indeed in one case millions of dollars, to diagnose people for whom they claim no ethical or legal responsibility.

I can tell you that I would be very unhappy if a doctor I didn't know, using standards and practices he would never use in his own medical office, took money to conclude that I had a disease that could kill me and then made no apparent effort to see that I was treated.

We count on doctors to first, do no harm, yet every callous, slide-show diagnosis risked harm for the sake of money. It quickly becomes evident that some of you did very well, but little good.

The questions I have do not just involve doctors. I am also looking for answers from screening companies, whose business model seemed to be based solely on their ability to find large numbers of willing patients and then link them with doctors who had an uncanny ability to diagnose the very disease with the greatest potential for profit.

Of course the lawyers and law firms behind the silicosis litigation from the beginning also have some serious questions to answer, and I look forward to hearing their testimony at a later hearing on this topic. But today, we hear from some of the medical professionals.

In closing, I should emphasize that it is not this Committee's intent to question, in any way, a person's right to seek all legal compensation for a real injury. Indeed, I believe by culling out bogus claims, we are preserving resources and assets for the truly injured men and women. I want to shine a bright light on questionable behavior and what it says about certain medical practices done in the name of the law.

Finally, I want to acknowledge my fellow Texan, Judge Janis Graham Jack, for her scrupulous inquiry into this matter that has helped illuminate the relevant issues for us, and I want to thank the Subcommittee Chairman once again for keeping focus on this issue.

I look forward to the testimony and yield back the remainder of my time.

MR. WHITFIELD. Thank you, Mr. Chairman.

At this time, I recognize Ms. Schakowsky of Illinois for her opening statement.

MS. SCHAKOWSKY. Thank you, Mr. Chairman.

I appreciate the opportunity to make this statement but I have to be frank in saying that I do not really understand the purpose of this hearing. If we truly are concerned about inquiring into the public health consequences of occupational exposure to silicosis, why are we not looking at the causes of this disease? Judge Jack's opinion and as the Chairman of this full committee said, she has scrupulously been looking into this issue. The document that stirred up this silicosis controversy states clearly, "Although OSHA currently has a permissible exposure limit for crystalline silica, more than 30 percent of OSHA collected samples from 1982 through 1991 exceeded this limit. Additional studies suggest"—this is still a quote—"additional studies suggest that the current OSHA standard is insufficient to protect against silicosis." Judge Jack drew that quote from a May 14, 2001 report by OSHA published in the Federal Register.

So what we have here is an already inadequate standard that is violated in 30 percent of the workplaces that OSHA inspects. These are work sites where silica dust threatens the worker with a disease that is incurable and fatal. Judge Jack has raised serious public health issues. Why are we not focusing on those issues where Congress has responsibility and no one else is acting? Why are we not looking into the adequacy of screening programs and standards? Why are we instead holding a hearing on the behavior of a small number of trial lawyers whose actions are already being investigated by the courts and who no one here is justifying? If we are concerned that some workers may have been falsely diagnosed as having silicosis, why are we not also concerned that other workers who have been exposed are not being screened for the disease and given access to medical care if they are ill? If we are really concerned with the public health dimension of this problem, we should be hearing from OSHA, and the company doctors, and lobbyists that fight adequate standards and meaningful enforcement. I just do not see any individuals on the witness list.

I am concerned that the publicity surrounding this case will have the effect of minimizing the need for action to reduce workplace injuries and disease caused by exposure to toxic substances while encouraging restrictions on the rights of the injured to get adequate medical care and appropriate compensation for their suffering. Any such restrictions would be very bad public health policy. It would give employers immunity to maintain whatever toxic workplace environment maximizes their profits no matter what the healthcare consequences for their workers. If we are going to investigate the public health problems

associated with the disease of silicosis, we ought to look at the whole problem, not just problems with specific cases that have already been identified and apparently are being dealt with by the courts. And I yield back the balance of my time.

Thank you, Mr. Chairman.

MR. WHITFIELD. Thank you.

At this time, I recognize Dr. Burgess of Texas for his opening.

MR. BURGESS. Thank you, Mr. Chairman.

In the interest of time, I will submit my statement for the record and we will go on to the witnesses.

[The prepared statement of Hon. Michael Burgess follows:]

PREPARED STATEMENT OF THE HON. MICHAEL BURGESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Mr. Chairman, and thank you for having this important hearing. While today we are focusing on the public health issues related to the mass screening and diagnosis of silicosis, I strongly believe that it is the role and responsibility of this entire committee to address the imminent health care needs of our nation. Mr. Chairman, thank you for bringing yet another specific health related issue to not only this committee's attention, but also to the public's attention.

As a physician for over twenty five years, I understand the importance and need for an efficient and effective medical screening process. Thousands upon thousands of lives have been saved due to medical screening processes that were able to detect illnesses and other serious maladies. This system relies upon trained physicians and other medical personnel to perform reliable diagnostic evaluations. Without this crucial element, the screening system falls apart, thus, jeopardizing the health and welfare of the public that was meant to be protected.

The situation before us today exemplifies the harm that can occur when corruption and greed overtakes the system. On June 30, 2005, a Federal judge in South Texas, Judge Janis Graham Jack, issued an opinion regarding the deplorable situation before us today. While the case was ultimately dismissed and remanded in part due to lack of subject-matter jurisdiction, Judge Jack noted in her opinion serious allegations of fraud resulting from a mere12 doctors diagnosing over 10,000 cases of silicosis in Texas, Mississippi, Georgia, and Alabama. While OSHA reported that there has been a steady decline of silicosis, due to these few doctors' diagnosis, Mississippi alone went from 40 cases reported in one year to 6000 cases in the next. This would have been considered an occupational outbreak, yet not one single person contacted the CDC. Judge Jack summed it up best by concluding that "these diagnoses were about litigation rather than health care" and "were driven by neither health nor justice but were manufactured for money."

Today, three of the twelve doctors will have the opportunity to present their side of the story to Congress. I sincerely hope that Dr. James Ballard, Dr. Andrew Harron, and Dr. Ray Harron will take this opportunity and explain to the nation how they were able to diagnosis so many patients with silicosis when 8,000 treating doctors involved in the actual treatment of the patients did not see this disease.

Again, Mr. Chairman, I thank you for this hearing, and I look forward to working with you and the rest of the committee to achieve real results for the public health and welfare of this country.

I yield back the remainder of my time.

MR. WHITFIELD. Thank you.

At this time, I recognize the gentleman from Washington, Mr. Inslee?

MR. INSLEE. Thank you, Mr. Chairman.

I just want to make two brief points. First, I am from Washington State and I have got my neighbors today working in the Puget Sound Naval Shipyard, the Washington State Ferry System about 300 yards from my house that are exposed to potential silicosis. And the projections are, I think I saw one estimate of 1,204 people projected to develop this disease in the next year. But instead of holding a hearing on how to protect my neighbors from silicosis, here we are talking about an issue that has been largely resolved by our judicial system. And I think the reason that we are holding this hearing is not because of silicosis, but because of lawyerosis, which is a disease that affects some people in the U.S. Congress to think that everything from the common cold to global warming is caused by trial lawyers. Now it sounds to me like in this particular case, there were some things that were not according to hoil. And apparently through this judge's intensity found out that was not the case. But the judicial system under existing rules dealt with it.

I would hope that at some point we could hold a hearing on how to protect my neighbors and my constituents from developing this life threatening disease rather than just relating it to this one case.

Second, I want to note that I hope that we explore the responsibility of the medical community to police their own. We have had a lot of debates about litigation in this Congress and other legislative bodies. What is very important, I think, for the medical community to be sufficiently aggressive in policing their own. I am told that of three of the doctors whose alleged diagnoses they said they diagnosed this, and in fact, they had not on this terribly non-comprehensive review that were obviously scandalous behavior at least obvious to me from what I have heard to date. I am told the AMA wrote the Texas Licensing Authorities and nothing has been done about or the licensing of the effective State legislators, nothing has been done about the licenses of these physicians. And we ought to be examining why the medical community has not policed its own in this particular circumstance.

So I will hope that we have a discussion from some of the witnesses of how the medical community can help us solve the problem of medical negligence in this country by policing bad doctors and that is something that we need to take a look at. And I am a great admirer of the profession, by the way, who have done incredible things, but why these doctors have been not disciplined to date, we ought to have a serious examination of that.

Thank you.

MR. WHITFIELD. Thank you.

At this time I recognize the gentlelady from Tennessee, Mrs. Blackburn, for her opening statement.

MRS. BLACKBURN. Thank you, Mr. Chairman. And I really want to thank you and the staff for putting the attention on the issue and for the hearing we are having today.

And I think it is so appropriate that we enter some time on the examination of the lawsuit. It is timely for us as the Senate is looking at the asbestos trust fund, and we need to ensure that the Federal cases will compensate true victims when it comes to asbestosis and silicosis. We cannot allow trial lawyers to engage in deceptive tactics that intimidate both our large and our small companies, and intimidate them into capitulating to their demands for enormous amounts of money. And we need to be certain that those who are harmed by the diseases are the ones who are compensated for those diseases. This hearing is a good first step as we are looking into the issue. And I am looking forward to the hearing. I am looking forward to hearing from our witnesses and also to a time to be able to question our witnesses and continue working on this in the future.

Thank you.

MR. WHITFIELD. Thank you.

At this time, recognize the gentleman from Florida, Mr. Stearns.

MR. STEARNS. Thank you, Mr. Chairman. And let me just compliment you like my colleagues have for having this hearing. For those on the other side that are complaining about this, let me just say that the staff had advised me that they have contacted 13 law firms and over there in the discussion inviting them to come and so there will probably be another hearing for them. They are welcome to come when we have all the trial lawyers come and they can ask their questions then. Perhaps they do not think it is appropriate today but we will have another hearing for them to do that.

You know, in many ways, to a person who is a small business person before I came to Congress, this represented another jackpot for some of these trial attorneys. They looked at this and they thought, "Well, maybe this is the next mother of all jackpots like asbestos was, and like tobacco was" and the next big thing for these folks. And so, you know, it is a tribute obviously as Chairman Barton has said, that Judge Janis Graham Jack smelled a rat in her courtroom and when the numbers did not add up, she alerted everybody and that is why we are here today.

So this hearing is not about a class action suit or the tort system. Men and women exposed to silica and suffering from silicosis have every right to seek compensation and deserve their day in court. That is true. This is about exploitation of an occupational health system that

otherwise serves to help workers injured on the job. And we have a structure, a chain of events and entities and public officials that all participate in identifying a pattern, collecting reporting data, locating diagnosis, and treating patients who are truly harmed. But it works well only if the integrity of the system is in place. Today we will hear from some of the individuals who unfortunately lack this integrity and put financial gain way ahead of everything else, subjecting about ten thousand workers in fields to these claims.

What is remarkable about the current system is that a Federal case involving some 9,000 plaintiffs could unravel when just a judge asks a few simple questions about the medical evidence and practices underlying the claim. I think for all of us on the committee it is just appalling that this would actually occur. So we need to understand how thousands of people could have perhaps been misdiagnosed with this terrible disease, and what is more, how insurance coverage or other such resources perhaps owed to sick and suffering men and women could have been potentially misappropriated by allegedly trumped up claims. Now those are the facts, and that is why we are here and I think it is important that we take the time to look at this, Mr. Chairman. And I think in the end, it would not hurt to have some of these lawyers from these other 13 law firms come in here and explain.

And lastly, I would indicate that for people who think this is not an important hearing, we are going to hear from witnesses who are going to take the Fifth Amendment, and so that means they do not want to testify, and they have every right to take the Fifth Amendment. But I would say the fact that people will not talk honestly about something is something that we should all be concerned about and ask the question of why won't they testify, why won't they tell us some of this information and I think it is a hard job to extricate this information out and bring it to the public's attention.

So Mr. Chairman, I look forward to the hearing.

MR. WHITFIELD. Thank you, Mr. Stearns.

That concludes the opening statements and I want to welcome the witnesses on Panel I. I have already introduced you, but once again I would say Professor Edward Sherman of Tulane University Law School in New Orleans and Dr. Laura Welch who is the Medical Director at Center to Protect Workers Rights in Silver Spring, Maryland. So we welcome you. And as you are aware, this committee is holding an investigative hearing and when doing so we have had the practice of taking testimony under oath. The Chair would advise you that under the rules of the House and the rules of the Committee, you are entitled to be advised by legal counsel. Do you desire to be advised by legal counsel today?

MR. SHERMAN. No.

[Witnesses sworn.]

MR. WHITFIELD. Well you are now under oath and Professor Sherman, if you would give us your five minute opening statement.

TESTIMONY OF EDWARD F. SHERMAN, THE MOISE F. STEEG, JR., PROFESSOR OF LAW, TULANE LAW SCHOOL; AND LAURA WELCH, M.D., MEDICAL DIRECTOR, CENTER TO PROTECT WORKERS RIGHTS

MR. SHERMAN. Mr. Chairman.

MR. WHITFIELD. Turn your microphone on.

MR. SHERMAN. Okay, yes, thank you.

Mr. Chairman, I have been asked to address the problems with silicosis screening and evaluation that came to light in the Texas case; and similar problems were also addressed by the AVA Task Force on asbestos of which I was the reporter. And so I will refer also during my remarks to some of the recommendations that were made by the task force since very similar issues arise as to both asbestosis and silicosis.

Judge Jack was in an unusual position of being able to see the big picture that many judges don't have because 10,000 cases were transferred to her. And during the course of determining a jurisdictional question, she took evidence and had discovery made and came to the conclusion that this was a phantom epidemic. The fact that huge numbers of cases were being reported out of Mississippi over a relatively short period of time of silicosis was really the result of manufacturing of cases done by screening companies, lawyers, and doctors. And most important, she pointed out the deficiencies and the manner in which the screening and diagnosis was done, and she said that the X-rays by a small number of doctors who did not personally examine the patients. She said medical histories, physical examinations, and other tests were non-existent or cursory. And this is very similar to what the ABA Task Force found about some asbestos screening as well, also done by screening vans and certain screening companies, that the screenings are done by non-medical personnel, that the doctors who actually do the diagnosis often do it on the basis of a single X-ray without having taken medical testimony and other tests. And so I think what we do know is that there are some very serious problems about the methodology and the standards that are being followed in screening and that is in asbestosis, as well as silicosis.

It does not mean that silicosis is not a serious problem. Judge Jack pointed out that more than a million American workers continue to be exposed to respirable silica most prevalent in occupations such as

sandblasting, mining, quarrying, and rock drilling. But since the 1970's when OSHA standards were adopted, the rate of silicosis has gone down considerably, not that, in fact, those standards might not be improved but in fact they have gone down and as she said, the phantom epidemic that we saw from Mississippi and those cases was really the result of a screening and diagnostic cabal as opposed to a real epidemic.

I think that the evidence and findings deduced by Judge Jack have an importance beyond the particular cases that were before her because those practices have to be examined in reference to systemic problems relating to silicosis cases, to asbestos cases, and indeed very possibly to other delayed manifestation of disease cases. And I want to mention three proposals that the AVA Task Force presented, and these have been given to the committee in writing, Mr. Chairman.

First, regarding standards, the task force proposed that screening should only be done by a qualified medical professional licensed to perform such tests in the State in which the test is performed and in compliance with local, State, and Federal laws and with professional standards for physicians and other qualified medical professions for the conduct of medical examinations. And then second, relating to diagnosis, propose that a physician or other qualified medical professional rendering a diagnosis based on screening should have personally examined the patient and should have considered all appropriate diagnostic tests and not merely X-rays, as well as the patient's full medical history which that individual should have taken and any other available medical evidence. So what we are talking about are some much, much stricter standards in an area that has been essentially standardless up until this time.

I want to point out that the task force did point out that this does not mean that mass screening programs are necessarily bad. The task force said these standards would clearly not prevent the operation of screening programs by unions or community, health, or other non-profit organizations in order to monitor the health and conditions of the persons whom they serve. No interest legitimately served by medical screenings will be hindered by these measures. These standards will, however, substantially reduce the prospects of litigation abuse. So what we are talking about is reducing probably the number of cases that would be filed by the standards but also ensuring that as a public health matter mass screenings can be conducted if they are conducted according to these standards.

The second proposal of the AVA Task Force, Mr. Chairman, was that courts, both State and Federal courts that have asbestos cases before them, adopt a model case management order and that that case management order would require the provision at a relatively early stage

in the litigation of setting out with particularity the facts and legal grounds for the claims and the medical condition and medical history. In fact, similar court case management orders have been used in California courts for several years, and have reduced the number of claims filed. And we believe that the courts would be well to do this, and we have attached to that report a lengthy case management order and appendices that would indicate that.

The third proposal of the AVA Task Force, Mr. Chairman, has to do with statute of limitations. I think we have to realize that sometimes lawsuits are filed because of fear of the running of the statute of limitations and fear and uncertainty, excuse me, of people who have been exposed to conditions that may result in asbestos or silicosis conditions. And one can imagine that a lawyer who is concerned about this might feel that if there has been a screening and there has been a diagnosis that the statute of limitations will now begin to run and they have to file the suit even though there is no present injury or no disability. The trouble is that in our States, the standards for when a statute of limitations begins to run are quite diverse. They vary from a discovery rule to an actual injury rule and the proposal of the task force is that a model statute of limitations rule be set in clear and bright line rules so that individuals would not have to file suits which may turn out to be meritless and clog the courts in order to keep the statute of limitations from running.

So those are three proposals that we feel would be relevant in both the silicosis, as well as the asbestos area and very possibly in the area of other delayed manifestation torts.

[The prepared statement of Edward F. Sherman follows:]

PREPARED STATEMENT OF EDWARD F. SHERMAN, THE MOISE F. STEEG, JR., PROFESSOR OF LAW, TULANE LAW SCHOOL

Written Statement of Summary of Testimony to be Given by Professor Edward F. Sherman at the Hearing of the Oversight and Investigations Subcommittee, House Energy and Commerce Committee on "The Silicosis Story: Mass Tort Screening and the Public Health," on March 8, 2006

Good Morning, Chairman Whitfield, Congressman Stupak, Members of the Subcommittee. I am pleased to be here this morning. I am Edward F. Sherman a professor of law at Tulane University Law School in New Orleans, Louisiana. I was also the Dean of Tulane University Law School from 1996 to 2001. I previously taught at the University of Texas School of Law where I was the Edward A. Clark Centennial Professor of Law (1977-1996), at the University of Indiana School of Law (l969-l977) and as a Teaching Fellow at Harvard Law School (l967-l969). Upon graduation from Harvard Law School in l962, I clerked for a federal district judge in the Western District of Texas and practiced with a Texas law firm. My areas of teaching and research are Complex Litigation, Civil Procedure, and Alternative Dispute Resolution, and I have published casebooks on these subjects that are used in law schools around the country. I have been on the Members Consultative Group of the American Law Institute's Complex

Litigation and Transnational Civil Procedure Projects. I served as Chair and Reporter for the 2001-2003 American Bar Association's Task Force on Class Action Litigation. I was the Reporter for the ABA's Tort Trial and Insurance Practice Section's Task Force on Asbestos Litigation 2003-2005, which submitted eight proposals that were adopted as ABA policy by the ABA House of Delegates. I appear in my capacity as a law professor, and not as a representative of the ABA, but will pass on to you three of the proposals made by the Task Force as they relate to the silicosis topic that were adopted by the ABA House of Delegates.

I will discuss *In re Silica Products Liability Litigation*[1] and the significance of the opinion of Judge Janis Graham Jack.[2] Cases involving some 10,000 plaintiffs against some 250 corporate defendants alleging injuries from silica exposure (most having been removed to federal court from Mississippi courts) were transferred by the Judicial Panel on Multidistrict Litigation to Judge Jack's federal district court in Texas for pretrial disposition. Judge Jack ordered discovery so that factual issues relating to whether there was subject matter jurisdiction could be determined. Defendants deposed Dr. George Martindale, a radiologist, who testified that he had not intended to diagnosis silicosis in the 3,617 plaintiffs that he had previously so diagnosed based solely on reading their X-rays. Hearings were held in February, 2005 concerning the nine doctors and two screening firms that accounted for 99% of diagnoses of silicosis.

Judge Jack entered a lengthy opinion and order on June 30, 2005. She found that most of the silicosis claims "were essentially manufactured on an assembly line" through screening companies, doctors, and plaintiffs' lawyers. She criticized the diagnoses based on readings of X-rays by a small number of doctors who did not personally examine the patients. "Medical histories, physical examinations and other tests were nonexistent or cursory." The doctors "repeatedly testified that they were told to look for silicosis" and "did as they were told." In thousands of the cases, individuals who had previously been diagnosed only with asbestosis were now diagnosed with silicosis, although the presence of both diseases in an individual is rare. Thus a "small cadre of non-treating physicians, finally beholden to lawyers and screening companies rather than to patients, managed to notice a disease missed by approximately 8,000 other physicians – most of whom had the significant advantage of speaking to, examining, and treating the Plaintiffs."

Judge Jack noted that "more than a million U.S. workers continue to be exposed to respirable silica … most prevalent in occupations such as abrasive blasting (i.e., "sandblasting"), mining, quarrying, and rock drilling. This continued exposure is tragic, because while silicosis is incurable, it is also 100% preventable." Beginning in the 1970's, OSHA implemented regulations requiring the use of respirators and other measures to reduce exposure, and additional measures adopted by employers and individuals have also been effective. The Centers for Disease Control has found that the number of U.S. workers exposed to silica dust declined steadily since 1970, and deaths from silicosis declined from 1157 in 1968 to 187 in 1999. Nevertheless statistical probability suggests that there might be 1204 new silicosis cases per year in the U.S. "However, in 2002, the number of new Mississippi silicosis claims skyrocketed to approximately 10,642," with 7,228 in 2003 and 2,609 in 2004. Public health officials and medical experts "were unaware of any increase in silicosis cases in Mississippi." Judge Jack attributed this "phantom epidemic" to screening and diagnosis practices. She proceeded to grant a motion for sanctions against a plaintiff law firm and to remand most of the cases to state court for further proceedings.

Judge Jack was able to make the connection between the dramatic rise in silicosis claims and screening/diagnosis practices because such a large number of cases had been transferred to her. Silicosis cases are usually filed in state courts, where a single judge

[1] No. MDL 1553, U.S. Dist. Ct. for S.D. Texas, Corpus Christi Div.
[2] 398 F.Supp.2d 563 (S.D. Tex. 2005).

does not have a large enough sample to make such a connection. Also such cases would not normally be consolidated before a federal MDL judge because plaintiff's lawyers typically structure them avoid removal to federal court. Because she possessed "jurisdiction to determine jurisdiction" as to the propriety of removal, she had the rare opportunity to see the big picture.

The evidence and findings adduced by Judge Jack have an importance beyond the particular cases before her. The practices she identified reflect systemic problems which can exist in other silicosis cases, and indeed in the closely related asbestos cases and cases involving delayed manifestation of disease due to exposure to conditions or products.

I would also like to comment on policies of the American Bar Association that I have attached to my statement. The ABA's Tort Trial and Insurance Practice Section's Task Force on Asbestos Litigation identified many of the same defects in the screening and diagnosing of asbestos claims by "screening vans" operated by for-profit companies. Composed of both plaintiff and defendants' lawyers and representatives of businesses, insurers, and unions, the Task Force found the practices "of concern to reputable attorneys on both sides of the docket." As indicated in its report, it concluded that the screening and diagnosis practices were generating cases where there is no clinical finding other than an X-ray said to be "consistent with an asbestos-related disease." The result can be the filing of claims by persons based on questionable medical diagnoses and the settlement of such cases, deflecting funds from persons with serious conditions.

ABA Proposal for Screening and Diagnosis Standards

The ABA House of Delegates adopted as policy the proposal of the TIPS Task Force that "as authorized by an appropriate court rule, statute, or regulation, standards be established by the states and territories for the operation of screening vans or other forms of mass screening for asbestos-related conditions. These standards should be enforced, as appropriate, by federal, state and territorial governmental agencies; by the investigation and enforcement of bar professional ethics; by the investigation and enforcement of medical societies' ethical standards; and by courts through evidentiary ruling, rulings on motions for summary judgment, and the issuance of other appropriate orders."

The standards recommended by the proposal include:

- Screenings should only be done by a qualified medical professional licensed to perform such tests in the state in which the test is performed and in compliance with local, state and federal laws and with the professional standards for physicians and other qualified medical professions for the conduct of medical examinations.

- A physician or other qualified medical professional rendering a diagnosis based on screening should have personally examined the patient and considered all appropriate diagnostic tests, as well as the patient's full medical history and any other available medical evidence.

- Medical diagnoses based on screening tests should conform to the applicable standard of diagnostic care that is regularly exercised in a doctor-patient relationship.

The TIPS Task Force report noted that screening programs are not suspect if proper standards are followed. The Task Force's proposal stated: "These standards would clearly not prevent the operation of screening programs by unions or community, health, or other non-profit organizations in order to monitor the health and conditions of the persons whom they serve. No interest legitimately served by medical screenings will be hindered by these measures. The standards will, however, substantially reduce the prospects for litigation abuse." The standards, if adopted and applied, would also assist the state and federal courts by sharply reducing the number of claims filed, substantially easing congested court dockets.

ABA Proposal for Model Case Management Orders

A second important deterrent to the filing and prosecution of unmeritorious cases must be found in court procedures. This can be accomplished through a Case Management Order requiring early in the litigation a detailed written submission stating with great particularity the facts and legal grounds for each claim.[3] The ABA adopted as policy the TIPS Task Force proposal of a Model Case Management Order to be adopted by state and federal courts for asbestos cases.[4] The approximately 175 pages of standardized discovery required by the Order would require extensive information about the medical condition of the plaintiff and evidentiary support for the claim and injury. I think this is an appropriate order. It was based on California practice, which has reduced the number of unmeritorious asbestos claims clogging the courts. Requiring a lawyer to investigate a case thoroughly in order to provide specific information serves to screen out meritless cases and deter the filing and bundling of multiple cases based on questionable screening diagnoses in hopes of a quick settlement.

ABA Proposal for Model Statute of Limitations

Finally, the ABA adopted as policy the TIPS Task Force proposal that addressed the problem that law suits as to diseases that have a long latency period between exposure and manifestation (as from asbestos or silica exposure) may be filed on the basis of fear and uncertainty of mere exposure or a weak diagnosis in order to prevent the statute of limitations from running. Uncertainty in certain states as to when the statute of limitations begins to run, and, in states having a discovery standard, as to what information will be deemed to constitute notice of discovery, can warrant a prudent attorney to recommend filing suit even though there is no present disability. When some 17,000 asbestos cases were filed en mass in the multidistrict litigation transferred to the U.S. District Court for the Eastern District of Pennsylvania, Judge Charles R. Weiner commented:

> [T]hat the screening cases have been filed without a doctor-patient medical report setting forth an asbestos related disease has not been refuted. The basis for each filing, according to the evidence of the moving parties, is a report to the attorney from the screening company which states that the potential plaintiff has an X-ray reading "consistent with" an asbestos related disease. Because this report may set in motion the running of any applicable statutes of limitations, a suit is then commenced without further verification. Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.[5]

The overload of asbestos cases in the courts often resulting in serious cases not being reached, or not being subjected to serious settlement consideration, in a timely fashion has led a number of courts to create "pleural registries." In the early 1990's,

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[3] See Feliciano v. DuBois, 846 F. Supp. 1033 (D. Mass. 1994). Judge Jack derived important information concerning these cases by requiring the parties to submit "Fact Sheets" providing, for example, as to plaintiffs, specific information about when, where and how he or she was exposed to silica dust and detailed medical information concerning the alleged silica-related injury, and, as to defendants, information (including photographs) of each-silica-related product that defendant designed, manufactured, marketed, sold, or distributed.

[4] See Appendices to the ABA Task Force Proposal for a Model Case Management Order, adopted by the ABA House of Delegates in January, 2006.

[5] In re: Asbestos Products Liability Litigation (No. VI)(Civ. Ac. No. MDFL 875, E.D. Pa.), Administrative Order No. 8m o, 2 (Jan. 15, 2002).

various courts issued orders giving priority to cancer claims or other serious conditions, deferring other cases for trial settings or dismissing them without prejudice. Some registries were voluntary, like the order of Judge Moss, of the Pa. Ct. of Com. Pis., in a 1993 order creating a voluntary pleural registry under which claims of asympotomatic plaintiffs "are dismissed without prejudice, to be reopened on an expedited basis if the plaintiff develops asbestos-related cancers."[6] Others were mandatory, moving such claims to an inactive list for a trial setting, or dismissing them without prejudice, with provisions that they could be moved onto a trial or active docket upon a motion meeting certain criteria as to actual manifestation of disease or injury and, in some courts, satisfying certain medical standards.

Constitutional questions based on separation of powers, due process, equal protection, and access to courts have been raised regarding mandatory registries,[7] but there are no definitive precedents. The ABA adopted as policy the TIPS Task Force proposal for a Model Statute of Limitations for states that provides bright line tests for determining when the statute of limitations begins to run based on manifestation of disability or discovery of disability, whichever later occurs. It provides that the time for the commencement of an action shall be within two years after the later of "the date the plaintiff first suffered disability" or "the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure." This proposal is based on the belief that, with greater certainty as to when the statute of limitations will commence, based on actual disability or discovery of it, there will not be an incentive for attorneys to undertake the costs and obligations of filing cases based solely on X-ray readings indicating only consistency with disease without manifestation of disability.

Like the ABA, I believe that the asbestos crisis requires multiple approaches directed at systemic conditions that have resulted in the too-loose screening and filing of cases, the clogging of courts by unmeritorious cases and cases filed to prevent the statute of limitations from running, and the pressures (and attractiveness) for defendants to settle questionable bundled cases cheaply, which can disadvantage a plaintiff who subsequently develops a serious disease. These principles should apply equally to silicosis.

I again want to thank you Mr. Chairman and members of the Subcommittee for inviting me here today and for your time. I would be happy to answer any questions you may have.

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[6] Judge Sandra Mazer Moss, "State-Federal and Interstate Cooperation, Case Management Techniques Move Complex Litigation, Hasten Disposition of Asbestos, Other Cases," State-Federal Judicial Observer (Federal Judicial Center & National Center for Stare Courts), April 1993, at 3.

[7] See Professor Erwin Chemerinsky, "Statement of Opposition to Petition to Establish a Court Rule or Administrative Order Creating Statewide Inactive Asbestos Docketing System," id.

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Born: July 5, 1937, El Paso, Texas
Family: Married, two children

EDUCATION:

High School: El Paso High School, El Paso, Texas

College: Georgetown University, Washington, D.C.
A.B., Philosophy, 1959

Graduate: University of Texas at El Paso
M.A., History, 1962
M.A., English, 1967

Law School: Harvard Law School, Cambridge, Mass.
LL.B., 1962
S.J.D., 1981

LEGAL AND ACADEMIC EXPERIENCE:

Legal Aide to Governor of Nevada, 1962 (Ford Foundation Fellowship in State & Local Government)

Law Clerk to U.S. District Judge for the Western District of Texas, Honorable R.E. Thomason, 1963

Law Practice: Mayfield, Broaddus, MacAyeal & Perrenot, El Paso, Texas, 1963-1965

U.S. Army, Captain, Military Police Corps, 1965-1967; U.S. Army Reserve, Judge Advocate General's Corps, 1968-l990 (to Lt. Colonel)

Harvard Law School, Teaching Fellow, 1967-1969

Indiana University School of Law, Bloomington, Indiana, Professor, 1969-1977

Fulbright Lectureship (in International and Constitutional Law), Trinity College, Dublin, Ireland, 1973-1974

American Bar Foundation Fellowship in Legal History, 1975

University of Texas School of Law, Austin, Texas
Edward Clark Centennial Professor of Law, 1977-1996

University of London, Visiting Professor, l989

Krajowa Szkola Administracji Publicznej (School of Public Administration), Warsaw, Poland, Visiting Professor, January-February 1995.

Institute of Comparative Law, Chuo University School of Law, Tokyo, Japan, Visiting Professor, spring, 1995.

Tulane Law School, Dean and Professor of Law, 1996-2001; Professor of Law, 2001-present.

University of New South Wales, Sydney, Australia, Visiting Professor, 2002.

University of Maine School of Law, Godfrey Distinguished Visiting Professor of Law, fall, 2003.

SUBJECTS TAUGHT:

Civil Procedure
Complex Litigation
Alternative Dispute Resolution
International Law, International Arbitration
Constitutional Law, Civil Rights, Government Liability
Law of War, Military Law, National Security Law
Jurisprudence, Law and Literature

SELECTED ACTIVITIES:

American Association of University Professors, General Counsel, 1986-1988

American Bar Association

ABA Tort Trial & Insurance Practice Section 2004 Robert B. McKay Award

Reporter, Task Force on Asbestos Reform (2003-2005)

Chair & Reporter, Task Force on Class Action Legislation (2001-2003)

Reporter, Task Force on Offer of Judgment Rule (1995)(TIPS).

Reporter, Summit on Civil Justice System Improvements (l993).

Section of Litigation, Co-chair, Task Force on Federal Rules (1996-99); Task Force on the Public Perception of the Litigation System (1999-2001); Task Force on State of Justice System & Federal Initiatives (l993-1996); Standing Committee on Pro

Bono & Public Service (1998-2001); Subcommittee on Computerization, Committee on Discovery (l982-1983).

Section of Dispute Resolution, Co-chair & member, Arbitration Committee, 1999-present

American Law Institute, l988-present

Complex Litigation Project, Members Consultative Group, l989-1995
Transnational Civil Procedure, Members Consultative Group, 2001-present

Arbitrator

Expedited Arbitration Panel, Aluminum Co. of America and United Steel Workers of America, 1984-1996

American Arbitration Association, Labor Law Panel, l989-1996

International Centers for Arbitration, International Arbitrator Panel, l993-1996; director of training, 1993-1996.

Association of American Law Schools

Chair, Section on Litigation, 1999-2000
Chair, Section on Dispute Resolution, 1995-96
Board, Section on Civil Procedure, 1994-95
Committee on Clinical Education, 1999-present

Expert Witness on Class Action Certification and Management (cases in state and federal courts)

Law & Economics Center, summer program for law professors, 1981, advanced course, 1991

Louisiana Bar Foundation, Judicial Liason Committee, 1999-present

Louisiana State Law Institute, 1996-2002

Louisiana State Bar Association

Board of Governors, 1997-99
Board, ADR Section, 1997-present
Committee on Codes of Lawyer and Judicial Conduct, 1999-present

Mediator

Basic Mediation Training Course, 1985; volunteer mediator, Travis County Dispute Resolution Center, 1985-1996; court-appointed mediator, Texas state & federal court cases, 1985-1996

Professor, courses in mediation and arbitration, U. of Texas School of Law, 1986-1996; Tulane Law School, 1996-present; Hamline Law School Summer Mediation

Program, 1994; Tulane-Humboldt Universities Intercultural Negotiation/Mediation Summer Program, Berlin, Germany, 1999-2001.

National Institute for Military Justice, Board of Directors (2000-present)

Texas Bar Association

Chair, Committee on Pattern Jury Instructions (Vol. I), 1982-1994

Board & Member, Alternative Dispute Resolution Section, 1984-96

Texas Center for Public Policy Dispute Resolution, Chair of Board, l993-1996.

Texas Civil Liberties Union, General Counsel, 1992-1996

Travis County Jail Litigation, Court-Appointed Attorney, U.S. District Court for the Western District of Texas, 1981-1990

Travis County Dispute Resolution Center, Board and Vice-President, 1986-1988

Texas Resource Center (for Post-Conviction Capital Representation), Board, 1988-1993, Chair of Board, 1993-1994.

U.S. AID "Stars Project – Vietnam" on drafting new Vietnamese Code of Civil Procedure, 2003

Who's Who in:
America
American Education
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SELECTED PUBLICATIONS:

BOOKS:

Processes of Dispute Resolution: The Role of Lawyers (with Rau & Peppet)(Foundation Press 2002).

Civil Procedure: A Modern Approach (with Marcus & Redish)(West Pub. Co. 1989, 4th ed. 2005).

Rau, Sherman, and Shannon's Texas ADR and Arbitration: Statutes and Commentary (with Rau & Shannon))(Shepard's McGraw-Hill l994, West Group 3d ed. 2000).

Complex Litigation: Cases and Materials on Advanced Civil Procedure (with Marcus)(West Pub. Co. l985, 4th ed. 2004)

Processes of Dispute Resolution: The Role of Lawyers (with Murray & Rau)(Foundation Press 1989, 2d ed. 1996).

Dispute Resolution: Materials for Continuing Legal Education (with Murray and Rau)(National Institute for Dispute Resolution l99l).

Cases and Materials on Military Law: The Scope of Military Authority in a Democracy (with Zillman & Blaustein)(Matthew Bender l978).

Civil Procedure (Federal and Indiana) (Josephson's Bar Review Center of America l977).

CHAPTERS IN BOOKS:

"Mediation Training: Career Opportunities and Skill Formation for Other Occupations," 20 ADR & The Law 69 (20th ed. 2006).

"Sources and Bibliography for Alternative Dispute Resolution, in "Alternative Dispute Resolution Handbook 499 (State Bar of Texas 2003).

"Class Actions," in Oxford Companion to American Law 118 (2002).

Volume 3 (Federal Rules 13 & 15), Moore's Federal Practice (1997).

"Applications of Dispute Resolution Processes in the Israeli-Palestinian Conflict," in The Struggle for Peace: Israelis and Palestinians (ed. E. Fernea & M. Hocking l992)

"Local Court Rules on ADR" and "ADR References," in Handbook of Alternative Dispute Resolution, Chap 23, Appendix B (State Bar of Texas, A. Greenberg, ed.)(2d ed. l990).

"In-Service Conscientious Objection," in Selective Conscientious Objection: Accommodating Conscience and Security 117 (M. Noone, ed.)(Westview Press l989).

"Texas Tort Claims Act" (Chap. 60), in Texas Torts and Remedies (H. Edgar & J. Sales, ed.)(Matthew Bender l987).

"Military Law," in Encyclopedia of the American Judicial System, Vol. l (McMillan Pub. Co. l987).

"Contemporary Challenges to Traditional Limits on the Role of the Military in American Society," in Rowe & Whelan, Military Intervention in Democratic Societies 216 (Croom Helm l985).

"Responsiveness and Accountability in the Military," in People Versus Government Power 226 (L. Rieselbach, ed.)(U. of Indiana Press l975).

"Domestic Law and the Military Establishment," in Modules in Security Studies (A. Williams & D. Tarr. ed.)(U. Press of Kansas l974).

"Bertrand Russell and the Peace Movement: Liberal Consistency or Radical Change," in Bertrand Russell's Philosophy 253 (G. Nakhnikian, ed.)(Indiana U. Press l974).

"Amnesty and the Military Offender," in When Can I Come Home? A Debate on Amnesty for Exiles, Anti-War Prisoners and Others 92 (M. Polner, ed.)(Doubleday & Co. l972).

"The Civilianization of Military Law," in With Justice for Some 65 (B. Wasserstein & M. Green, ed.)(Beacon Press l97l).

"Justice in the Military," in Conscience and Command 21 (J. Finn, ed.)(Random House l97l).

"Rights of Servicemen," in The Rights of Americans 621 (N. Dorsen, ed.)(Random House Pantheon l97l).

"Military Justice and Individual Liberty," in A. Yarmolinsky, The Military Establishment: Its Impacts on American Society (A Twentieth Century Fund Study)(Harper & Row l97l).

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"Complex Litigation: Plagued by Concerns over Federalism, Jurisdiction, and Fairness" (Introduction to Symposium on Complex Litigation), 37 Akron Law Review 589 (2004).

"American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems," 215 Federal Rules Decisions 130 (2003).

"Evolving Military Justice," 67 Journal of Military History 999 (July 2003).

"Courting Controversy: Class Action Practice in the United States," 2 Legal Week Global (UK) 22 (April 2003).

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"Standards of Professional Conduct in Alternative Dispute Resolution," Symposium from AALS, 1995 Journal of Dispute Resolution 95.

"Policy Issues for State Court ADR Reform," Alternatives 142 (Nov. 1995).

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"Restructuring the Trial Process in the Age of Complex Litigation," 63 Texas Law Review 72l (l984).

"The Role of the Judge in Discovery," 3 Review of Litigation 89 (l982).

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"Exit Black: New Chance for Nixon to Push the Court to the Right," Sept. l9, l97l, E.4.

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"My Lai: Army Blow the Lid on Its Own Cover-Up," March 22, l970, E.l.

"Pretrial Jousting Over My Lai Massacre," Feb. l, l970, E.3.

"My Lai: Some Knotty Legal Questions," Dec. 7, l969, E.3.

"The Civilianization of Military Law," 22 Maine Law Review 3 (l970).

"Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement," 55 Virginia Law Review 483 (l969), reprinted in 48 Military Law Review 9l (l970).

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"The Right to Competent Counsel in Special Courts Martial," 54 American Bar Assoc. Journal 866 (Sept. l968).

"Nevada Faces the End of the Casino Era," Atlantic ll2 (Oct. l966).

"The Use of Public Opinion Polls in Continuance and Venue Hearings," 50 American Bar Association Journal 357 (April l964).

RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

FEBRUARY 2005

RESOLVED, That the American Bar Association recommends that states and territories establish by statute or regulation, standards for the operation of screening vans or other forms of mass screening for asbestos-related conditions. These standards should be enforced, as appropriate, by federal, state and territorial governmental agencies and judicial bodies; by the investigation and enforcement of bar professional ethics; and by the investigation and enforcement of medical societies' ethical standards. The objective of screening standards should be to prevent medical screenings from being conducted inaccurately and being misused, but not to prevent legitimate monitoring of health.

1. Such standards should require compliance with:

a. Federal Food and Drug Administration and other local, territorial, state, and federal governmental laws and regulations governing the use of medical equipment and testing devices.

b. Local, territorial, state, and federal laws and regulations.

c. Professional standards for physicians and other qualified medical professionals concerning the conduct of medical examinations, screening tests (including X-rays and pulmonary function tests) and medical diagnoses such as those promulgated by the American Medical Association and the American Thoracic Society.

d. Such standards should be technology-neutral and based on current medical technological advancements.

2. The reading, evaluation and reporting of such tests should be performed by a physician or other medical professional qualified under professional and state licensing standards, recognizing that there may be multiple medical professionals carrying out certain functions in the chain from screening through diagnosis.

3. The physician or other qualified and legally authorized medical professional rendering the diagnosis shall have examined the screened individual, either in person or through medically accepted telemedicine or electronic practices, following a complete history of all occupational exposures that might be relevant; and has considered the results of all diagnostic tests performed during the medical examination or screening, including but not limited to pulmonary function tests and X-rays; and has considered all other medical information concerning the patient relevant to the diagnosis that is available to such physician or qualified and legally authorized medical professional.

4. All pulmonary function test reports shall conform with any guidelines or standards adopted by such state or territory pursuant to paragraph 1.c above, and shall be accompanied by the original tracings, and all X-ray reports shall be accompanied by the

original X-ray or X-rays, either in original form or as transmitted digitally or in a manner judged to be reliable by qualified medical technology experts.

5. All medical diagnoses shall be made in accordance with the applicable standard of diagnostic care, and such diagnoses must be communicated to the screened individual within a reasonable period of time by the physician or other qualified and legally authorized medical professional rendering the diagnosis.

RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

AUGUST 2005

RESOLVED, That the American Bar Association recommends that federal, state, and territorial courts without any existing Case Management Order governing asbestos litigation, or with an existing Case Management Order that has proven unworkable, utilize the Model Case Management Order, with referenced exhibits, dated August 2005.

AMERICAN BAR ASSOCIATION

TORT TRIAL & INSURANCE PRACTICE SECTION

MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER

AUGUST 2005

MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER

This Asbestos Pre-Trial Case Management Order is entered in conjunction with this Court's Asbestos Inactive Docket Order dated _____. This Order sets forth the procedures to be followed when a plaintiff files an asbestos-related Complaint, whether or not said plaintiff previously has been registered on the Registry. This Order also governs certain aspects of discovery and pre-trial motions.

This Order applies to all pending asbestos Complaints and to all asbestos Complaints filed after the date of this Order.

As used herein, the term "plaintiff" also refers to plaintiff's decedent, if applicable.

IT IS HEREBY ORDERED as follows:

1. Any Complaint alleging an asbestos-related injury must attach the following:
   - A. A Preliminary Fact Sheet in the form attached hereto as Exhibit A, http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf completed in full.
   - B. A Physician's Report signed by a pulmonologist, internist, occupational health physician, or pathologist which diagnoses one or more asbestos-related disease(s). Said physician must be actively licensed to practice medicine and certified by the appropriate subspecialty board in his or her applicable subspecialty. The Physician's Report must:
     - i. Verify that the diagnosing doctor, or a medical professional employed by and under the direct supervision and control of the diagnosing doctor, has performed all examinations or tests referenced in the Report and conducted any referenced interviews of plaintiff or plaintiff's representative.
     - ii. Set forth a reliable history of exposure, as described in the "Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos" by the American Thoracic Society, Am. J. Respir. Crit. Care Med., Vol. 170, pp. 691-715, 2004.
     - iii. Set forth a medical and smoking history that includes a review of the plaintiff's relevant past and present medical problems.
     - iv. Set forth all findings revealed by any hands-on physical examination of the plaintiff.

v. Verify that an adequate latency has elapsed between plaintiff's first exposure to asbestos and the time of diagnosis.

vi. Verify that the doctor has diagnosed an asbestos-related disease to a reasonable degree of medical probability. A diagnosis of findings "consistent with" an asbestos-related disease is not sufficient under this Order.

vii. Verify that any X-rays, CTs and/or Pulmonary Function Tests were administered in accordance with all applicable state health regulations and that any Pulmonary Function Tests were performed using equipment, methods of calibration and techniques that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5th Ed.) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A), §3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am. Rev. Resp. Dis. 1991:144:1202-1218.

viii. Attach copies of all reports interpreting Pulmonary Function Tests that have been administered (including flow volume loops), and all reports of X-ray and CT Scan reports, including B-reading forms when available.

C. Authorizations in the form attached hereto as Exhibit B, http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf executed by plaintiff or plaintiff's representative, authorizing release of plaintiff's social security, military, veterans, employment and medical records.

D. Be accompanied by the current regular filing fee for each named plaintiff (after crediting any fee previously paid with plaintiff's application to the Inactive Docket).

2. Within thirty (30) days of the service of any Complaint hereunder, any Defendant may file an Objection to Complaint, which states any objections Defendant has as to whether the above requirements for filing an asbestos-related complaint have been met. Plaintiff shall have the right to file a written response to the Objection within twenty (20) days after the date of the Objection. The Court may decide the issue on the papers so submitted, or schedule a hearing, in its discretion, and/or impose sanctions in accordance with applicable law if either side has filed a document under this paragraph without substantial justification.

3. The Clerk shall create and maintain a public file, which shall contain Master Complaints and Master Answers ("Master Pleadings"). Attorneys representing parties in asbestos litigation may file a Master Complaint or Master Answer, and copies of such pleadings shall be served on all counsel who previously filed a Master Pleading. Thereafter, any party represented by counsel who has filed a Master Complaint or Master Answer may file and serve on any adverse party a Summary Pleading, and such Summary Pleading shall have the same force and effect as if the Master Pleading had been filed and served on the adverse party. A Summary Pleading filed pursuant to this General Order shall contain the following:

i. The case caption, which shall include the names of the parties to the action, the case number, and the name(s) of the party(ies) on whose behalf the Summary Pleading is filed and against whom the Summary Pleading is asserted;

ii. Notice that the Master Pleading is on file with the Clerk of the Superior Court and the date on which it was filed, that a copy of the

Master Pleading and of this General Order may be obtained upon request from counsel filing the Summary Pleading, and that designated portions of the Master Pleading are incorporated by reference in the Summary Pleading. The Summary Pleading shall specify those claims or affirmative defenses contained in the Master Pleading, which are being asserted against the party being served.

iii. Such case-specific information as may be necessary to satisfy applicable statutes, pleading requirements, and this Order.

An amended Master Pleading shall not be deemed incorporated by reference into any previously filed Summary Pleading without further order of the court. This provision shall not limit the substantive rights of any party, nor limit the right of any party to challenge the sufficiency of any Master Pleading or Summary Pleading.

4. Within sixty (60) days after filing a Complaint hereunder, plaintiff(s) shall
   A. Answer the Standard Interrogatories and Request for Documents attached to Exhibit C http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf (sub-parts A (1-5) and B) hereto. Said answers shall be full and complete, and must be verified under penalty of perjury.
   B. Using the form attached hereto as Exhibit D, http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf agree to deliver pathology in the parties' possession (including attorneys and consultants) to Defendants' Representative (defined below) within ten (10) days after said Representative is designated pursuant to paragraph 6, below, and noting whether plaintiff objects to destructive testing of said pathology. Any dispute over destructive testing of pathology will be resolved by the Court upon noticed motion. In the event there is no dispute, Defendants' Representative shall return the pathology to plaintiff's counsel within sixty (60) days of receipt.
   C. Using the form attached hereto as Exhibit E, http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf offer plaintiff(s) for discovery depositions indicating each deponent's availability on no less than three (3) dates (at least 30 and no more than ninety (90) days after the date of the offer).
5. The court hereby adopts standard plaintiff interrogatories to defendants, attached to Exhibit C http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf(subparts C (1-4)), to be answered by defendant under oath without objection except for the assertion of a claim of privilege or as provided below.
   A. Upon motion by any defendant made within seventy-five (75) days of the effective date of this order, the Court shall determine on a one-time basis the propriety of an objection by such defendant that providing answers to specific question(s) in the standard plaintiff interrogatories to defendants would impose on such defendant a particular burden which is not justified by the likelihood that such answers will provide or lead to the discovery of relevant and material evidence. When a new defendant is served in the litigation in this jurisdiction for the first time after the effective date of this order, that defendant shall have ninety (90) days following service of the complaint to move the court to review any claim of burden it may have on the same basis.
   B. Within one-hundred twenty (120) days of the effective date of this order, each defendant in any pending action served with a copy of this order shall serve upon all counsel who previously filed a Master Pleading its answers to the standard plaintiff interrogatories to defendants. These answers shall be deemed served in all pending cases, and thereafter it shall be deemed that the defendant has served the same answers in all other subsequently

served cases. If at any time a defendant amends or provides further answers, in whole or in part, to the standard plaintiff interrogatories to defendants, it shall serve said amended and/or further answers on all counsel and said amended and/or further answers shall apply to all cases.

C. The court hereby adopts plaintiffs' standard case-specific interrogatories to defendants (attached to Exhibit C http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf) and a notice of service of plaintiffs' standard case-specific interrogatories to defendants (also attached to Exhibit C http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf). Plaintiffs' counsel may serve such Notice at any time after commencement of the action. Thereupon, unless excused from the obligation to answer by order of the Court, the defendant designated in the Notice shall be required to answer such interrogatories within sixty (60) days after service of the Notice, but no sooner than one-hundred twenty (120) days after service of the complaint upon that defendant.

D. Nothing herein shall preclude any party from propounding additional non-duplicative discovery.

E. On the annual anniversary of the date upon which it served its initial answers to Standard Plaintiff Interrogatories to Defendants, each defendant shall either (1) supplement its answers with information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory responses, or (2) serve a verified statement from defendant's most knowledgeable agent(s), officer(s) or employee(s) stating that such individual(s) has reviewed defendant's answers to such interrogatories and that the answers are still true and complete."

6. Defendants are required to cooperate with each other and with plaintiff's counsel in order to coordinate the scheduling of depositions, testing of pathology materials, and scheduling of Defense Medical Examinations. Within fifteen (15) days after service of the materials specified in subpart 4, above, defendants shall notify plaintiffs' counsel of the defense firm which shall act as Defendants' Representative in said case, and plaintiffs' counsel shall work with said Defendants' Representative firm thereafter in connection with discovery, scheduling and pathology issues. If Defendants' Representative's firm subsequently ceases to represent any defendants in said case, the remaining defendants shall notify plaintiffs' counsel within fifteen (15) days of a replacement firm as the Defendants' Representative. The Court hereby recognizes the applicability of the joint defense privilege to work performed by Defendants' Representative in this regard, and to communications among defendants concerning matters, which are the subject of this Order.

7. Plaintiff's depositions shall proceed as follows:

A. The plaintiff's deposition may be noticed only by the Defendants' Representative or by the plaintiff.

B. If the deposition is noticed by the Defendants' Representative, defendants shall have 7 hours to depose the witness on the record, absent agreement of the parties or court order.

C. If the plaintiff notices the deposition, the plaintiff may complete his or her direct testimony before cross-examination is conducted by defendants. If this procedure is used, the time for defendants' cross-examination shall be either 7 hours on the record or three times the amount of time used by plaintiff to complete the direct examination, whichever is longer. Defendants are expected to allocate the available time among themselves and, in the event of inability to agree, shall make a timely motion for protective order before expiration of the time limit.

D. In the event any defendant is served after completion of plaintiff's deposition, such late-served defendant(s) may request that the Defendants' Representative schedule and notice a further deposition of the plaintiff. Said deposition shall be limited to those matters not adequately covered in the initial deposition including liability issues pertaining to the newly served defendant.

8. Cases governed by this Order may be challenged by expedited summary judgment motions, as follows:

A. A motion for summary judgment on the ground that there is no evidence tending to show that the plaintiff was exposed to asbestos for which the defendant is responsible shall be deemed filed if a defendant timely files and serves a Notice of Intent to Request Expedited Summary Judgment. This procedure may be used solely with respect to product, site and contractor identification issues. The Notice of Intent to Request Expedited Summary Judgment need not be accompanied by any supporting papers except as required herein.

B. A Notice of Intent to Request Expedited Summary Judgment may be served at any time after a trial date is set, or six months have elapsed since the commencement of the action, whichever occurs first, and no later than forty-five (45) days before the date set for Expedited Summary Judgment Hearing. Such Notice of Intent shall contain a certification by defendant's counsel that:

i. Such attorney has reviewed, or caused to be reviewed by another attorney or legal assistant working under the supervision of such attorney, all of the discovery, which has been exchanged between the plaintiff and the moving defendant in the action;

ii. The moving defendant has provided plaintiff with all information in its possession, custody or control (other than expert discovery), which it is required to produce to plaintiff pursuant to proper discovery demand or court order in the action; and

iii. Plaintiff's responses to discovery in the action have not identified any competent evidence tending to show exposure to asbestos for which the defendant is responsible.

C. Not later than fifteen (15) days before the hearing date, plaintiff shall file and serve a Response establishing that there is a triable issue of fact as to whether the plaintiff was exposed to asbestos for which the defendant is responsible. In the event that plaintiff fails timely to file a Response to a defendant's Notice of Intent to Request Expedited Summary Judgment, the action shall be dismissed without prejudice.

D. Not less than five (5) days before the hearing date, the moving defendant may file and serve a Reply to the plaintiff's Response to Notice of Intent to Request Expedited Summary Judgment.

E. The Court shall have the discretion to make a ruling based upon the submitted papers and without the need of a hearing, and in its discretion, impose sanctions in accordance with applicable law if either side has filed a document under this section without substantial justification.

F. Nothing herein shall preclude any party from bringing a motion for summary judgment on any ground, in full compliance with the procedures and time limitations generally applicable to civil actions.

EXHIBIT E
TO PROTOTYPE ASBESTOR PRE-TRIAL
CASE MANAGEMENT ORDER
(See order dated _____)

REPORT

It is hard to see or hear the word "Asbestos" without the word "Crisis". In this context, numbers abound. $145 Billion proposed for a federal trust fund, 600,000 lawsuits filed, 10 to 20 million people exposed in industrial settings, 30,000 to 50,000 new lawsuits filed a year and scores of bankruptcies. A single case may have thousands of plaintiffs and hundreds of defendants with a settlement value of $600,000,000.00.

As a result, the media has been focused on the efforts of the asbestos stakeholders to resolve their differences and secure a federal solution to a problem besetting many state and territorial courts. A sample of that media attention has been included in this report so you may understand why the stakeholders represented on the TIPS Asbestos Task Force are not optimistic about a federal solution emerging, especially as long as the federal solution does not address stakeholder uncertainties with federal guarantees.

Recognizing that there was little that the TIPS Asbestos Task Force could add to the negotiations over the amount and allocation of contributions, the TIPS Asbestos Task Force has spent the last twenty-four months developing a trilogy of recommendations to control the flood of claims that have and are inundating our courts. These recommendations provide a Model Case Management Order and extensive standard discovery to address claims already filed and a pair of recommendations approved by the HOD at the 2005 MYM to stem the filing of new claims with the courts. The first approved Recommendation addressed the use and "abuse" of screening vans, a critical factor in producing thousands of non-malignant and non-disabled plaintiffs for a single case filing.

The second approved Recommendation offered a Model Statute of Limitations governing the accrual of actions for injury, illness or wrongful death based upon exposure to asbestos, to address the fear and uncertainty surrounding the running of a statute of limitations that may or may not have been triggered by the information communicated to a person, typically after an examination in a screening van, where there is no clinical finding other than an X-ray "consistent with" an asbestos related disease.

Case Management Orders

In an effort to address the large number of asbestos cases filed in their respective jurisdictions, many courts have issued case management orders ("CMO") setting out detailed schedules and procedures for handling such matters as docketing, discovery, motions, case priorities, trial settings, settlement negotiations, and trial or disposition of asbestos cases. Many of these CMOs have led to the efficient and fair handling of asbestos litigation. On the other hand, there exist jurisdictions in which there are no CMOs, competing CMOs within a jurisdiction, outdated CMOs, or simply CMOs that for one reason or another no longer function as originally intended. The Asbestos Task Force of the Tort Trial & Insurance Practice Section ("TIPS") believes that the existing litigation system can be made more efficient and fairer by the promulgation of and adherence to a comprehensive model CMO.

The TIPS Asbestos Task Force examined a large number of pre-trial orders and CMOs, from both federal and state courts and has attempted to distill the best features of these orders into a model CMO. The TIPS Asbestos Task Force does not intend this to be a replacement for existing CMOs that have been developed in various jurisdictions through the input of the courts and counsel, and which have proven effective. Rather, the goal is to adopt a model CMO that can be used to more effectively and fairly administer

asbestos litigation in those jurisdictions that have not developed a CMO or in those jurisdictions in which an existing CMO no longer appears to be effective. TIPS submits this model CMO as suggested guidance in such jurisdictions. It is a resource designed by representatives of the plaintiff and defense bar and company defendants and their insurers to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

Furthermore, the TIPS Asbestos Task Force also encourages the use of standard discovery requests by both plaintiffs and defendants, as envisioned in the model CMO, to expedite the timely discovery of the basic and necessary information for the assessment and handling of the asbestos case. Proposed standard discovery requests are referenced in the model CMO (see http://www.abanet.org/tips/atf/cmo/cmo_home.htm). While the TIPS Asbestos Task Force believes that these discovery requests will be effective, it is anticipated that individual jurisdictions may modify the requests based upon the jurisdiction's statutes, rules, procedures, and practices. The Exhibits to the CMO and the standard discovery requests are voluminous (almost 200 pages):

Case Specific Interrogatories to All Defendants - http://www.abanet.org/tips/atf/cmo/Case Specific Interrogatories to All Defendants.pdf

Case Specific Interrogatories to Friction Defendants - http://www.abanet.org/tips/atf/cmo/Case Specific Interrogatories to Friction Defendants.pdf

Friction Interrogatories - http://www.abanet.org/tips/atf/cmo/Friction Interrogatories.pdf

Heir, Legal Rep Interrogatories - http://www.abanet.org/tips/atf/cmo/Heir, Legal Rep Interrogatories.pdf

Loss of Consortium Interrogatories - http://www.abanet.org/tips/atf/cmo/Loss of Consortium Interrogatories.pdf

Notice of Service - http://www.abanet.org/tips/atf/cmo/Notice of Service.pdf

Personal Injury Interrogatory - http://www.abanet.org/tips/atf/cmo/Personal Injury Interrogatory.pdf

Request for Production of Documents - http://www.abanet.org/tips/atf/cmo/Request for Production of Documents.pdf

Standard Interrogatories to All Defendants - http://www.abanet.org/tips/atf/cmo/Standard Interrogatories to All Defendants.pdf

Standard Interrogatories to Friction Defendants - http://www.abanet.org/tips/atf/cmo/Standard Interrogatories to Friction Defendants.pdf

Wrongful Death Interrogatories - http://www.abanet.org/tips/atf/cmo/Wrongful Death Interrogatories.pdf

Exhibit A to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf
Exhibit B to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf
Exhibit C to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf
Exhibit D to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf
Exhibit E to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf

and can be reviewed on the ABA website at:

http://www.abanet.org/tips/atf/cmo/cmo_home.htm

After a review of the case management orders and standard discovery requests adopted by various jurisdictions and a determination that there are jurisdictions without case management orders to control asbestos litigation or effective case management orders, it is clear that there remains an unmet need. The model CMO is intended to address this need. Adoption of the model CMO by the ABA will go far in accomplishing the goal of providing the courts with the best practices of various jurisdictions used to effectively manage asbestos litigation.

Respectfully submitted

James K. Carroll, Chair
Tort Trial and Insurance Practice Section
August 2005

GENERAL INFORMATION FORM

Submitting Entity: Tort Trial & Insurance Practice Section

Submitted By: James K. Carroll, Chair

1. Summary of Recommendation(s).

   The Association recommends that federal, state, and territorial courts without any existing Case Management Order governing asbestos litigation, or with an existing Case Management Order that has proven unworkable, adopt the Model Case Management Order dated August 2005, designed by representatives of the plaintiff and defense bar and company defendants and their insurers to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

2. Approval by Submitting Entity.

   Approved by the Council of the Tort Trial & Insurance Practice Section on December 17, 2004.

3. Has this or a similar recommendation been submitted to the House or Board previously?

   No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   The medical criteria for asbestos claims adopted by the Association at the 2003 MYM as predicates for filing asbestos related claims would be complimented by the case management orders in those jurisdictions adopting both.

5. What urgency exists which requires action at this meeting of the House?

The 600,000 asbestos claim filings have significantly burdened, delayed and disrupted the operations of State, Federal and Territorial courts throughout the country. The resolution proposes a means for courts to gain control of their dockets and address the claims of the disabled claimants or their families on a priority basis, allowing the claims of the non-disabled or non-malignant cases to wait until disability or malignancy emerges. The case management orders ("CMO") set out detailed schedules and procedures for handling such matters as docketing, discovery, motions, case priorities, trial settings, settlement negotiations, and trial or disposition of asbestos cases. These lead to the efficient and fair handling of asbestos litigation and make additional judicial resources available for other cases.

The stakeholders are in accord that these changes are needed as soon as possible for the benefit of both the asbestos related claims of the disabled or those with malignancies and all other non-asbestos related claims.

6. Status of Legislation. (If applicable.)

None

7. Cost to the Association. (Both direct and indirect costs.)

None, except the indirect cost of any lobbying efforts by the Association

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8. Disclosure of Interest. (If applicable.)

The TIPS Asbestos Task Force is composed of members representing the various stakeholders in the discussion and negotiation of the federal solution to the asbestos crisis, including members who have participated directly and indirectly in the drafting of bills and testified before Congress. They represent diverse interests in the claims settlement crisis including general counsel and staff of insurance trade associations, attorneys for claimants, representative of the AFL-CIO, attorneys for defendants, and staff counsel. The members of the TIPS Council and leadership also represent diverse interests in the asbestos claims crisis as general counsel and staff attorneys of insurance companies and trade associations, attorneys for claimants, attorneys for defendants, and staff counsel.

9. Referrals.

Simultaneously with this submission, referral is being made to: All Sections and Divisions

10. Contact Person. (Prior to the meeting.)

Hervey P. Levin
6918 Blue Mesa Drive, Suite 115
Dallas, Texas 75252
(972) 733-3242
(972) 733-3269 (Fax)
hervey@airmail.net

11. Contact Person. (Who will present the report to the House.)

Hervey P. Levin
6918 Blue Mesa Drive, Suite 115
Dallas, Texas 75252
(972) 733-3242
(972) 733-3269 (Fax)
hervey@airmail.net

12. Links to Case Management Order exhibits;

Exhibit A to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf
Exhibit B to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf
Exhibit C to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf
Exhibit D to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf
Exhibit E to CMO - http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf

13. Exhibit C Discovery Request;

http://www.abanet.org/tips/atf/cmo/cmo_home.htm

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RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

FEBRUARY 2005

RESOLVED, That the American Bar Association recommends that the states and territories adopt the Model Statute of Limitations for Asbestos dated February 2005, governing the accrual of actions for injury, illness or wrongful death based upon exposure to asbestos.

FURTHER RESOLVED, That the Model Statute of Limitations for Asbestos is a resource designed by representatives of the plaintiff and defense bar and company defendants to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

EXHIBIT E
TO PROTOTYPE ASBESTOR PRE-TRIAL
CASE MANAGEMENT ORDER
(See order dated _____)

AMERICAN BAR ASSOCIATION

TORT TRIAL & INSURANCE PRACTICE SECTION

MODEL STATUTE OF LIMITATIONS FOR ASBESTOS

(FEBRUARY 2005)

Exposure to Asbestos; Actions for injury, illness or wrongful death

(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following:

(1) Within two years after the date the plaintiff first suffered disability.

(2) Within two years after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure.

(b) "Disability" as used in subdivision (a) means the loss of time from work, as a result of such exposure, which precludes the performance of the employee's regular occupation, or if the plaintiff is not working, meeting the medical standards in the "ABA Standards for Non-Malignant Asbestos-Related Disease Claims" (dated February 2003).

(c) In an action for the wrongful death of any plaintiff's decedent, based upon exposure to asbestos, the time for commencement of an action shall be the later of the following:

(1) Within two years from the date of the death of the plaintiff's decedent.

(2) Within two years from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by such exposure.

MR. WHITFIELD. Thank you, Professor Sherman.

And at this time, Dr. Welch, we will recognize you for five minutes for your opening statement.

DR. WELCH. Thank you, Mr. Chairman and members of the committee, for inviting me to be here today.

I have heard a lot. People have mentioned a lot of the things I am going to touch on and I will try to be brief. I am a physician, as you know, and I have been in occupational medicine practice for over 25 years, a lot of seeing people with asbestos related disease and some with silica. I have run a nationwide medical screening program for sheet

metal workers for 20 years. We have examined over 18,000 people and I want to describe to you the basis for such a screening program and some of the parameters that really should exist for such screening programs.

Before I do, I want to reinforce what other people have said here though. There is excess exposure to silica going on. In the construction industry, where I have the most experience, more than 50 percent of the standards in 1999 exceeded the OSHA standard for example. And we do not really know how many cases of silicosis there are, but Dr. Rosenman at Michigan State did a really elegant analysis and estimated as many as 7,000 new cases of silicosis each year in the United States. So we do need to focus attention on ongoing exposures and existing cases finding those people through appropriate screening and not, in a way, throw the baby out with the bath water. It may be that these 10,000 cases do not have silicosis, but there are probably 10,000 other people who do someplace else. So we need to not mix them up. So in terms of medical screening, the principal medical screening is to find previously unrecognized disease so that you can do something about it. Mammography is a perfect example to find breast cancer early, save lives, colon cancer screening. So there is a lot of screening that goes on in the medical arena for which there are standards and guidelines, criteria that the test has to be of a benefit that finding the disease early is a benefit. This is written in a lot of medical textbooks so I will not repeat it all for you, although some of it is outlined in my testimony.

And then occupational screening programs use those same principles, but also look at the whole population of people. So you can do a screening program if by identifying cases you are going to be able to identify occupations that have excess exposures, and identify workplaces where you need remediation. And then so let us apply those to silicosis in particular; why screen for silicosis? I want to point out that people who have silicosis are at risk for several other diseases. They are very high risk for getting tuberculosis and someone with silicosis and unrecognized tuberculosis could be a community source for tuberculosis, so finding those cases is very important. They need medical treatment and you can help by identifying the cases. You can help the treating doctors separate silicosis from congestive heart failure, or what might be the other diseases that the person has, plus identifying people that really need attention for smoking cessation.

So there are a lot of benefits that occur to the individual if you screen and diagnose that. So let me talk a little about these guiding principles. I wanted to point out that there is a national organization called the Association of Occupational Environmental Clinics that includes at least 50 academic occupational health clinics around the country. And in 2000, they set forth a set of criteria to address the question of asbestos

screening and as Professor Sherman pointed out, the issues that are raised here and by Judge Jack's opinion have been issues that people have been aware of through asbestos screening as well. These questions are not new questions to me and I do not think they are new to Professor Sherman either.

So what are the principles? That screening on the basis of chest X-ray and work history alone identifies possible cases. It is a screening but does not provide enough information to make a firm diagnosis. And that is the principle in general to do a mammogram, you find something, then you are going to end up doing a biopsy. The mammogram does not make the diagnosis, so a screening is not a diagnostic test and there has been some mixing up of that in this discussion I think, so screening programs have to be followed with more detailed evaluation and then referral for appropriate medical care.

An appropriate screening program for lung disease is X-ray, exposure history, symptom review, spirometry, and physical examination. The screening programs have to include actions like smoking cessation programs, evaluation for cancers, and things in this case like tuberculosis. And very importantly, there has to be timely physician disclosure of the results to the patient, appropriate medical follow up, and patient education. There is no point in diagnosing or finding early signs of silicosis if you do not do anything about it. And that is, I mean, that is so basic, I do not really need to say it and I think you probably all agree with that. But so emission of those factors that look at what you do after you find that early diagnosis, that is why we do screening and so that is really important. And screening programs that do not include the notification, timely notification, follow up and investigation of how the exposures are occurring really do not meet the standards of care and ethical practice and occupational health.

There is a lot more in my testimony and I would be happy to answer any other questions that you have.

[The prepared statement of Laura Welch, M.D., follows:]

PREPARED STATEMENT OF LAURA WELCH, M.D., MEDICAL DIRECTOR, CENTER TO PROTECT WORKERS RIGHTS

Summary of testimony by Laura S. Welch, MD, FACP, FACOEM on March 8, 2006

Medical screening is the search for previously unrecognized disease, when finding the disease can lead to a benefit. Screening for silicosis or asbestosis has clear benefits, including (1) identification of occupations/industries where excess exposure occurs, so that exposure reduction can occur; (2) implementation of targeted smoking cessation programs; and (3) identification of individuals at heightened risk from other occupational exposures.

In 2000, the Association of Occupational and Environmental Clinics (AOEC) developed criteria for medical screening programs for asbestos; these principles apply

equally as well to screening for silicosis. Omission of these important preventive aspects in the clinical assessment of asbestos-related lung disease falls short of the standard of care and ethical practice in occupational health.

(1) Screening on the basis of chest X-ray and work history alone identifies possible cases but does not by itself provide sufficient information to make a firm diagnosis, to assess impairment or to guide patient management.

(2) An appropriate screening program for asbestos-related lung disease includes properly chosen and interpreted chest films, reviewed within one week of screening; a complete exposure history; symptom review; standardized spirometry; and physical examination.

(3) Programs should also include smoking cessation interventions, evaluation for other malignancies and evaluation for immunization against pneumococcal pneumonia.

(4)Timely physician disclosure of results to the patient, appropriate medical follow-up and patient education are essential.

Qualifications: I am a physician with board certification in both Occupational and Environmental Medicine and Internal Medicine. I received my medical degree from the State University of New York at Stony Brook, and have held faculty positions at the Schools of Medicine at Albert Einstein, Yale and George Washington Universities. Details of my education and training are set for in my curriculum vitae

I have extensive experience in diagnosis and treatment of asbestos-related diseases and other occupational lung diseases. I have been in occupational medicine practice for over 20 years, and a substantial part of my practice has always been devoted to examination of workers exposed to respiratory hazards.

In addition, I have many years of experience in medical surveillance programs for asbestos. Since 1987 I have been the medical advisor to the Sheet Metal Occupational Health Institute Trust, a joint labor-management organization within the sheet metal industry established to provide medical examinations for sheet metal workers exposed to asbestos and other respiratory hazards. To date, SMOHIT has provided medical examinations to over 30,000 sheet metal workers, and is now the largest epidemiological database of asbestos-exposed workers in the country. I also developed similar medical screening programs for the Laborers National Health and Safety Fund and other construction trades, in conjunction with the Occupational Health Foundation. I currently serve as medical director for a Department of Energy-funded medical screening program to provide medical examinations for former construction workers at a number of former atomic weapons production facilities. In each of these programs I have designed programs to detect asbestos-related disease, and designed algorithms for the examining physicians to use in interpretation of the results. I have been active in efforts to improve validity and reliability of X-ray reading to detect asbestos related disease in the United States; this work included publication of a paper on variability between readers' classification of X-rays using the International Labour Organization Guide to Classification of Pneumoconiosis, based on an analysis of results from these screening programs.

I currently am medical director at The Center to Protect Workers Rights, a research institute devoted to improving health and safety in the construction industry. Because of my expertise in medical programs for asbestos-exposed workers, I participated in a working group with representatives from labor, industry, and insurance companies to develop medical criteria for a bill to establish a national trust fund for compensation of asbestos related disease in the United States. I have also testified at hearings held by the Senate Judiciary Committee, at the committee's request, on various aspects of asbestos-related disease.

Attached is copy of my current curriculum vitae, which sets forth my education, training, professional affiliations, research activities and publications. I am testifying here today as an individual, and not on behalf of any group or organization.

Purpose of medical screening

Medical screening is the search for previously unrecognized disease, when finding the disease can lead to a benefit. Mammography is a well-accepted screening test, for example, since it has been shown to improve life expectancy for breast cancer in those for whom a cancer is found early with screening; the same is true for colon cancer screening, skin cancer screening, and others. Occupational screening programs are designed to detect work-related disease at an early stage, when treatment or removal from exposure can improve the outcome of that disease.

Screening is only one of the important steps in prevention of occupational disease. The first step, the primary prevention, is reduction or elimination of hazardous exposures. The second step, when hazardous exposures have not been eliminated, is screening; this is called secondary prevention. Tertiary prevention is essentially medical care and rehabilitation of disease, when it cannot be reversed after diagnosis.

Some key principles should underlie all medical screening programs:

- The tests used should be selective, and chosen to identify a specific disease.
- There must be some effective action that can be taken if the screening test is positive, such as removal from exposure or medical treatment. In the occupational setting, screening may benefit a group of workers by detection of health effects of hazardous exposures, the benefit need not accrue only the worker being screened in this context.
- Adequate follow-up is critical, and further diagnostic tests must be available, accessible, and acceptable to the individual screened. In the occupational setting, follow-up also entails action to reduce or eliminate the hazard
- Individuals who have been screened should receive test reports and interpretation of those results.
- The screening tests used should have good reliability and validity. Reliability is a measure of the consistency of the test in repeated use. Validity is the ability of the test to identify correctly which individuals have the disease and which do not.
- The benefits of the screening program should outweigh the costs

Asbestos and silica related disease

Silicosis is still an important occupational lung disease. Rosenman recently estimated that there are between 3600 and 7300 newly recognized cases a year of silicosis in the United States [1]. At least 1.7 million U.S. workers are potentially exposed to respirable crystalline silica [2]. Hazardous exposures to silica, at levels likely to result in disease, continue to occur in a range of industries and occupations in the United States.

It is also important to remember that thousands of workers have had, and will still develop, asbestos-related disease. In this country, from 1940 to 1979, at least 27.5 million workers were occupationally exposed to asbestos in shipyards, manufacturing operations, construction work and a wide range of other industries and occupations; 18.8

[1] Rosenman K, Reilly MJ, and Henneberger PK. 2003 Estimating The Total Number Of Newly-Recognized Silicosis Cases In The United States. Am J Ind Med 44:141-147

[2] DHHS/CDC/NIOSH. Health Effects of Occupational Exposure to Respirable Silica. DHHS(NIOSH) publication # 2002-129 Cincinnati, OH

million of these had high levels of exposure[3]. In 1982 William Nicholson at Mt. Sinai projected that the occupational exposures that occurred between 1940 and 1979 would result in 8,200 – 9,700 asbestos related cancer deaths annually, peaking in 2000, and then declining but remaining substantial for another 3 decades. Overall, the Nicholson study projected that nearly 500,000 workers would die from asbestos related cancers between 1967 and 2030; deaths from asbestosis are above and beyond this number. Because of the long lag between exposure to asbestos and the development of an asbestos related cancer or another asbestos disease, the asbestos disease epidemic is only now reaching a peak, and will be with us for decades to come.

Role of screening in asbestos-related and silica-related disease

Screening for asbestosis or silicosis has several clear public health and medical benefits:

- Identification of occupations and industries where excess exposure still occurs, so that exposure reduction can occur
- Implementation of smoking cessation programs. Evidence shows that smoking cessation programs that are integrated with assessment of toxic exposures at work are more effective than smoking cessation programs alone [4]
- Identification of individuals at heightened risk from other occupational exposures. For example, workers with significant lung impairment from asbestosis or silicosis should not be exposed to other occupational agents that will add injury to that lung disease.

Elements of a good occupational lung disease screening program

In 2000, the Association of Occupational and Environmental Clinics (AOEC) developed a set of criteria for medical screening programs for asbestos; the policy in reproduced here in its entirety. These principles apply as well to screening for silicosis. AOEC is a leading organization in the field of occupational medicine.

The Association of Occupational and Environmental Clinics
Policy Statement on Asbestos Screening

The Association of Occupational and Environmental Clinics is concerned that medically inadequate screening tests are being conducted to identify cases of asbestos-related disease for legal action. These tests do not conform to the necessary standards for screening programs conducted for patient care and protection. Screening is only conducted as a preliminary step in determining the presence of asbestos-related disease. AOEC therefore supports the following statement:

Screening on the basis of chest X-ray and work history alone identifies possible cases but does not by itself provide sufficient information to make a firm diagnosis, to assess impairment or to guide patient management.

An appropriate screening program for asbestos-related lung disease includes properly chosen and interpreted chest films, reviewed within one week of screening; a

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[3] Nicholson WJ, Perkel G, Selikoff IJ. 1982. *Occupational exposure to asbestos: population at risk and projected mortality -- 1980-2003*. Am J Ind Med 3:259-311. Mr. Nicholson worked with Irving Selikoff, MD at the Mt. Sinai School of Medicine

[4] Sorensen G. 2001 Worksite tobacco control programs: the role of occupational health. Respir Physiol. 2001 Oct;128(1):89-102; Sorensen G, Barbeau E, Hunt MK, Emmons K. 2004 Reducing social disparities in tobacco use: a social-contextual model for reducing tobacco use among blue-collar workers, Am J Public Health. Feb;94(2):230-9.

complete exposure history; symptom review; standardized spirometry; and physical examination.

Programs should also include smoking cessation interventions, evaluation for other malignancies and evaluation for immunization against pneumococcal pneumonia.

Timely physician disclosure of results to the patient, appropriate medical follow-up and patient education are essential.

Omission of these important preventive aspects in the clinical assessment of asbestos-related lung disease falls short of the standard of care and ethical practice in occupational health.

Who provides asbestos screening for exposed workers?

Given the clear benefits of screening exposed workers for asbestos and silica-related disease, such programs should be available. Regular monitoring of workers with significant exposure to asbestos was recommended by the American Thoracic Society (ATS) in its recent statement on diagnosis and initial management of diseases related to asbestos. [5] However, there has been no public health infrastructure, and no employer-mandated programs, to provide such screening. The Occupational Safety and Health Administration does require medical monitoring of workers who are exposed to asbestos, but this rule does not require monitoring after the worker leaves the place of employment where exposure occurred. Since asbestosis takes at least 20 years after first exposure to develop, screening programs should be also be directed at former employees. (The U.S. Navy does include formerly exposed workers in its medical surveillance program for asbestos, based on a recommendation from the examining doctor.)

Some construction unions, in conjunction with employers, have developed programs for their members; these programs reach a very small proportion of the workers at risk. The largest such program in run by the Sheet Metal Occupational Health Institute Trust, which has provided medical examinations to over 20,000 sheet metal workers since 1998. This program follows the guidelines for screening programs outlined here, and can serve as a model for future programs [6]. In addition to finding cases of asbestos-related disease, this program has been effective in reducing exposures to sheet metal workers, and in reducing smoking in the group screened.

In recognition of the lack of medical screening services for former workers, the U.S. Department of Energy initiated a medical screening program for former workers from the atomic weapons complex [7]. Universities and other public health organizations provide medical examinations to detect health effects of remote exposure, again following the guidelines for screening programs described above.

As noted above, Nicholson estimated there were 18.8 million U.S. workers with high exposures to asbestos before 1982; many of these workers are still alive and could benefit from screening. These workers have seen co-workers and even family members die of asbestos-related diseases, and so they have taken opportunities afforded them to be screened for disease; anyone would. The challenge for those of us in public health is to assure that these programs meet the standards set by AOEC, ATS and other organizations.

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[5] American Thoracic Society Statement on Diagnosis and initial management of nonmalignant diseases related to asbestos. 2004. Am J Respir Crit Care Med 170:691-715

[6] Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers. American Journal of Industrial Medicine 25:635-48, 1994

[7] Dement J, Welch, L, Bingham E, Cameron B, Rice C, Quinn P, Ringen K. Surveillance Of Respiratory Diseases Among Construction And Trade Workers At Department Of Energy Nuclear Sites. Am J Ind Med. 2003 Jun;43(6):559-73

American Journal of Industrial Medicine 25:635–648 (1994)

The National Sheet Metal Worker Asbestos Disease Screening Program: Radiologic Findings

Laura S. Welch, MD, David Michaels, PhD, MPH, Stephen R. Zoloth, PhD, MPH, and The National Sheet Metal Examination Group

This report presents data gathered from a series of asbestos disease screening examinations of 9,605 United States sheet metal workers who were first employed in the trade at least 20 years before the examination. The overall prevalence of asbestos-related radiographic changes was 31.1%: 18.8% had pleural abnormalities alone, 6.6% had parenchymal abnormalities (International Labour Office (ILO) score of 1/0 or higher)

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alone, and 5.7% had both. Among those with 40 years or more since entering the trade, 41.5% had radiographic signs of asbestos-related disease, 24.2% pleural alone, 7.7% parenchymal alone, and 9.6% both pleural and parenchymal abnormalities. After controlling for several surrogates for asbestos exposure level, cigarette smoking was found to increase risk of parenchymal, and more modestly, pleural abnormalities. Each pack-year was associated with a 1% increased prevalence odds ratios for parenchymal abnormalities (ILO category 1 compared to category 0), and 0.4% increased prevalence odds ratios for pleural abnormalities. A history of shipyard employment also produced significantly increased prevalence odds ratios for each radiographic category. More that 90% of chest radiographs were classified by A or B readers; after adjustment for other risk factors, A readers were more likely to report parenchymal abnormalities of category 1, but not more likely to report category 2 or pleural abnormalities, than B readers.

Key words: asbestosis, pleural abnormalities, parenchymal abnormalities, shipyard worker, cigarette smoking, B reader, sheet metal workers

INTRODUCTION

The harmful effects of exposure to asbestos have been identified in numerous studies of asbestos miners, textile workers, paper workers, railroad workers, and construction workers [Selikoff et al., 1979; Hedenstierna et al., 1981; Sprince et al., 1985]. Nicholson et al. [1982] estimated that there will be 125,000 cancer deaths due to asbestos-related diseases from 1985 to 2009; Lilienfeld et al. [1988] project 130,000 deaths in the same period. Asbestosis is also a significant cause of morbidity among highly exposed workers [Becklake, 1982, 1992].

Sheet metal workers are members of a profession with well-documented exposure to asbestos. Sheet metal work involves fabrication or installation of metal products, such as sheet metal ventilation systems, metal roofing, and metal facades, as well as large-scale production of metal products, such as refrigerators and air conditioners. Sheet metal workers work in the construction industry, railroad industry, and shipyards, as well as in specialized sheet metal production shops.

Although the craft of sheet metal work does not itself use asbestos, sheet metal workers in construction were, for many years, exposed to asbestos while working in close proximity to insulation workers, while working in areas that were being sprayed with asbestos for fireproofing, by working on beams fireproofed with asbestos, and by retrofitting (renovating) asbestos-insulated metal ventilation systems. During spray application of asbestos, much of the asbestos did not adhere to the building surfaces and instead filled the air. Before 1973, when this application was banned, over half of the high rise buildings constructed in the United States used asbestos as fireproofing [Paik et al., 1973]. Levels as high as 100 f/cc were measured in the spray zone during application of asbestos, and as high as 4 f/cc 30 minutes after spraying stopped [Paik et al., 1973]. Currently, because of stringent regulations on its use, asbestos exposure in the sheet metal trade occurs only during retrofit work in existing buildings.

In addition to asbestos, respiratory hazards associated with sheet metal work include exposure to welding fumes and manmade mineral fibers, primarily fiberglass. Other exposures include glues, solvents, noise, and vibration.

Several studies have examined asbestos-related disease among sheet metal

workers employed in construction. Two analyses of mortality among New York City sheet metal workers found significantly elevated mortality ratios for all malignant neoplasms and for lung cancer [Zoloth and Michaels, 1983; Michaels and Zoloth, 1988]. Notably, mesothelioma was recorded on the death certificate of 9 of the 716 deaths (1.3%) in the two studies combined, providing strong evidence that sheet metal workers are at increased risk of mortality from asbestos-related disease. Further support for this finding is provided by the results of two screening programs among sheet metal workers. Baker et al. [1985] reported that 70% of Boston sheet metal workers with greater than 30 years in the trade had pleural abnormalities, and 4% had parenchymal abnormalities. Among New York City sheet metal workers who belonged to the union for 20 or more years, 29% had radiologic abnormalities consistent with parenchymal and/or pleural asbestosis [Michaels et al., 1987].

Following these reports, the Sheet Metal Workers International Association (SMWIA) and the Sheet Metal and Air Conditioning Contractors National Association (SMACNA) formed the Sheet Metal Occupational Health Institute (SMOHI) to study the health hazards of the sheet metal industry. One of SMOHI's objectives is to increase the scientific understanding of the health effects of asbestos exposure; the size of this screening program enabled SMOHI and collaborating scientists to explore questions that might be difficult to address in studies of smaller populations.

The institute invited sheet metal workers and sheet metal contractors to participate in one of two national asbestos disease medical screening programs, offered without charge and at a convenient time and place. In 1986 and 1987, 1,330 workers in seven cities in the United States and Canada were examined under the direction of Dr. Irving Selikoff; radiologic changes consistent with asbestos exposure were found in 60% of the workers examined [Selikoff and Lilis, 1991; Lilis et al., 1992]. Radiograph-related findings from the screening program in the remainder of the United States are presented in this paper.

METHODS

Starting in 1986, SMOHI contracted with 61 different clinical facilities in the United States (56) and Canada (5) to offer a standardized asbestos disease screening program for sheet metal workers who were first employed in the industry at least 20 years earlier. The program was offered to every SMWIA local; the program continues to offer examinations on a periodic basis. In this first round of screenings, 12,454 individuals were examined (out of 26,329 eligible), representing a participation rate of 47%. Participation varied among the screened locals, with a range of 24–93% in the United States and 14–83% in Canada.

Examination results were forwarded by participating United States clinics for 10,395 sheet metal workers. Of these, 234 (2.3%) had illogical or incomplete age or employment information, and 333 (3.2%) were missing clinical or radiographic results. These were eliminated from the analysis, as were the 207 (2%) screened at one clinic with a malfunctioning radiographic machine and the 16 female sheet metal workers seen, resulting in a study sample of 9,605 U.S. male sheet metal workers reported here. The results from the Canadian screening program will be reported separately.

Participating facilities were selected by one of the authors (LSW) in consultation with the staff of the SMOHI, based on the clinic's experience in conducting

similar screening programs in the past. The physicians agreed to provide each screened sheet metal worker with a standardized examination that consisted of:

- completion of an occupational and medical questionnaire
- a limited physical examination (blood pressure determination, examination of the heart and lungs, and examination for digit clubbing)
- spirometry, performed according to American Thoracic Society (ATS) guidelines [American Thoracic Society, 1987]
- PA and lateral chest radiograph, interpreted using the International Labour Office (ILO) classification for pneumoconiosis [International Labour Office, 1980]
- stool guaiac for occult blood.

The questionnaires were self-administered and subsequently reviewed by the clinic staff. The questionnaire included several questions used to describe the history of exposure to asbestos and manmade mineral fibers, including data on the industries in which the sheet metal worker was employed (new building construction, renovation, shipyard, or railroad), and on asbestos exposure before entering the sheet metal trade and while in the military. Years since first exposure were used as surrogate for time since first exposure. The medical history included sections of the ATS respiratory disease questionnaire.

Questionnaire data were checked for consistency for age, years since first exposure, years worked, and pack-years of smoking; those with illogical or missing data were corrected or discarded. Incomplete or illogical cigarette smoking histories were provided by 189 participants whose work histories appeared to be correct. Data from these individuals were not included in any smoking-related analyses. In addition, one clinic, at which 1,211 sheet metal workers were screened (of whom 1,094 provided accurate data on years worked and smoking history), used a modified questionnaire that provided only partial exposure histories.

Each chest radiograph was read by one reader. The reader was either an A reader, a B reader, or a physician with proficiency in the use of the ILO classification but who had not received a NIOSH rating. Parenchymal abnormalities were defined as the presence of profusion of 1/0 or greater on chest radiograph reading. A participant was considered to have pleural abnormalities if there were any notations of pleural abnormalities on the NIOSH/ILO coding form (sections 3A–D). Overall, the quality of 96.1% of the chest X-rays was rated as good or acceptable, 3.5% were scored as poor, and .3% unacceptable. Only three clinics, contributing approximately 1% of the population screened, had a combined proportion of greater than 15% of poor or unacceptable films.

Results of the examinations were conveyed to the individuals screened using a standardized notification letter and discussed in a meeting held with all participants subsequent to the examinations.

After the examinations, copies of the questionnaire, the NIOSH-ILO coding form, and a form summarizing the results of the pulmonary function tests and physical examinations were sent to the Center for Occupational and Environmental Health at the City University of New York for keypunching and analysis. The clinical centers were asked to do a minimum of abstraction from clinical records, limited to recording on the coding form the results of the two best spirometric results. All original data

were retained by the clinical centers. No independent assessment of the validity of questionnaire data, nor of radiographic technique or quality, was undertaken.

Descriptive analyses of the data were conducted using t-tests to explore differences between means and chi-square tests for examining relationships between categorical data. Logistic regression models were constructed and prevalence odds ratios and 95% confidence intervals were calculated in order to identify and examine risk factors for radiological signs of asbestos-related disease [SPSS, 1990]. Cigarette pack-year history was examined as a continuous variable. Prevalence odds ratios for the effects of smoking and aspects of sheet metal employment were calculated after adjusting for age, years since entering the sheet metal trade, and years employed in the trade.

RESULTS

The mean age of the sheet metal workers who participated in the screening was 57.2, with a median age of 57. Participants had worked an average of 32.8 years in the industry, and an average of 35 years had passed since they first became sheet metal workers. Age at time of examination and years since entering the trade were correlated ($r = .68$). More than half (55.6%) of the participants were working at the time of the examination, and 32% were retired. A small proportion, 3.2%, reported they were disabled, and the remainder were unemployed. The vast majority of the workers screened were employed in the building trades; only 7.9% (640 of those answering this question) reported a history of shipyard sheet metal employment, with an additional 1% with any employment history in the railroad industry. Asbestos exposure in the military was reported by 8.4% of the participants, and 7.4% reported asbestos exposure before entering the sheet metal trade.

At the time of the exam, 2,687 (28%) of the sheet metal workers examined were self-reported current smokers, with an additional 4,637 (48.3%) being former smokers and 2,282 (23.8%) never-smokers. Among those who reported a history of smoking, the mean number of pack-years smoked was 34.2; current smokers averaged 42.6 pack-years.

Overall, asbestos-related radiographic changes were found in 2,984 individuals (31.1%): 1,806 (18.8%) had pleural abnormalities alone, 634 (6.6%) had parenchymal abnormalities alone, and 544 (5.7%) had both. Among the 2,552 participants with 40 years or more since entering the trade, 41.5% had radiographic signs of asbestos-related abnormalities, 24.2% pleural alone, 7.7% parenchymal alone, and 9.6% signs of both pleural and parenchymal abnormalities. The radiographic changes consistent with pneumoconiosis were primarily in major category 1 of the ILO classification system (Table I); less than 1% were classified as 2/1 or higher.

Figure 1 displays the prevalence of asbestos-related parenchymal changes on radiograph by years since entering the sheet metal trade. The proportion of participants with chest radiographs scored as 1/0 or higher increased in each increment of five years since first exposure, with the exception of the group with the second shortest latency. This group (25–29 years) has a lower proportion of films rated 1/0 or greater than the group with 20–24 years in the trade, although the longer latency group has a larger percent of 0/1 chest radiographs.

Much of the parenchymal abnormalities in the shortest latency group were seen

TABLE I. Distribution of ILO Scores in Survey of 9,605 Sheet Metal Workers With 20 or More Years Since Entering the Trade

ILO score	n	(%)
0/0	7317	76.2
0/1	1110	11.6
1/0	737	7.7
1/1	306	3.2
1/2	62	.6
2/1	25	.3
2/2	32	.3
2/3	13	.1
3/2	2	—
3/3	1	—
Total	9605	100.0

ILO, International Labour Office.

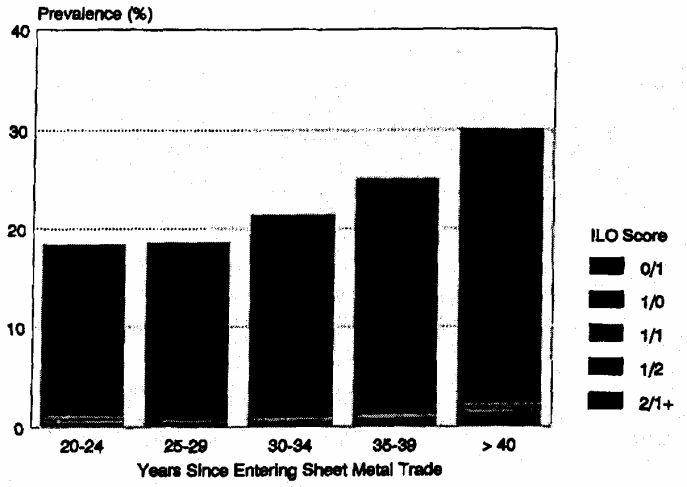

Fig. 1. Prevalence of parenchymal abnormalities among 9,605 sheet metal workers by ILO score and years since entering the trade (International Labour Office Classification of Radiographs of Pneumoconiosis; ILO, 1980).

in older than average workers (Table II); thus the increased prevalence of parenchymal abnormalities in this group may be explained by the presence of a larger percent of older workers, who may have had asbestos exposure before joining the sheet metal trade. However, in the logistic regression model reported exposure before entering sheet metal trade was not significantly associated with increased prevalence of parenchymal abnormalities among the 20–24 year group. Figure 2 illustrates the increasing prevalence of pleural abnormalities with years since first exposure.

TABLE II. Mean Age of 9,605 Screened Sheet Metal Workers by Latency and ILO Score

Years since entering trade	ILO score				
	0/0	0/1	1/0	1/1–1/2	2/1+
20–24 yrs	49.6	50.6	52.0	53.4	62.5
25–29 yrs	49.6	49.9	50.2	49.4	55.0
30–34 yrs	54.2	54.3	55.4	60.0	57.7
35–39 yrs	58.7	58.6	60.0	60.1	62.2
40+ yrs	65.3	65.0	66.6	67.5	68.3
Total	56.6	57.6	59.5	61.0	63.7

ILO, International Labour Office.

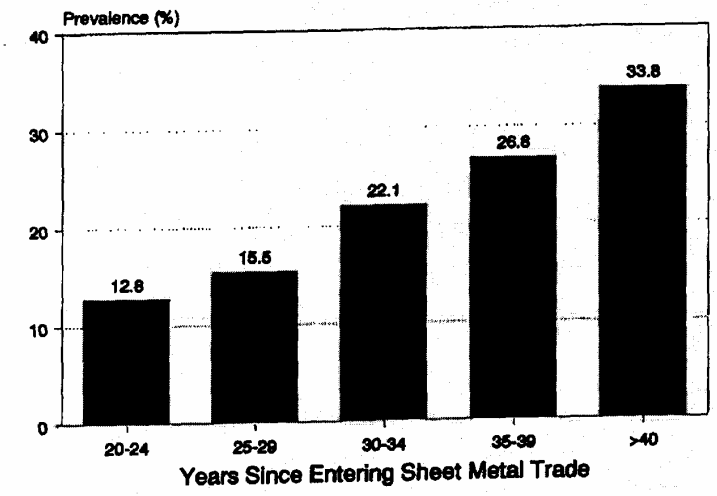

Fig. 2. Prevalence of pleural abnormalities among 9,605 sheet metal workers by years since entering the trade.

At each category of latency, sheet metal workers who had never smoked had a lower prevalence of parenchymal abnormalities than current smokers or those who had quit smoking; and those who quit generally had a lower prevalence that current smokers (Fig. 3). For the group as a whole, a significant trend of increasing risk was seen, comparing smokers with ex-smokers, and ex-smokers with never smokers, adjusting for latency ($p = .003$). This significant trend was also seen at each latency category.

While proportionally fewer never-smokers than ever-smokers had signs of pleural abnormalities as well (Fig. 4), the magnitude of the difference was much smaller than that seen for parenchymal abnormalities and the overall trend was not statistically significant.

Radiographs were classified by 62 readers, of whom 34 were B readers, 20 were A readers, and 10 were neither A nor B readers. Films of 7,075 (73.7%) participants

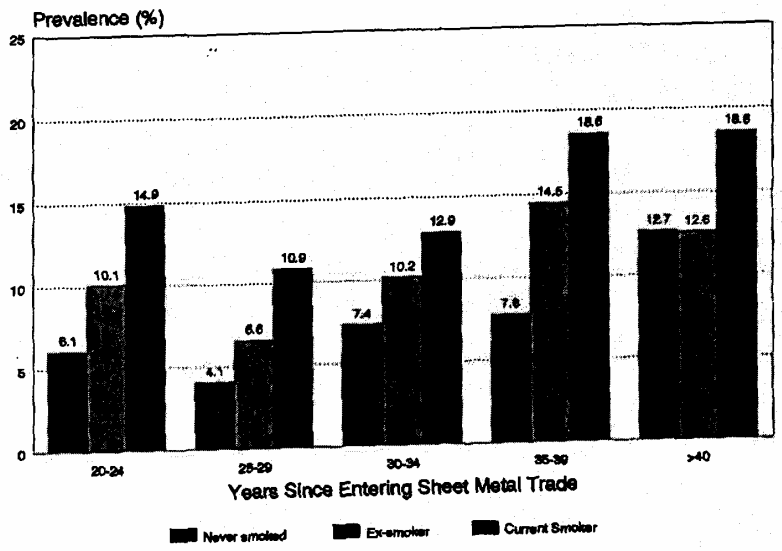

Fig. 3. Prevalence of parenchymal abnormalities (ILO score of 1/0 or higher) among 9,605 sheet metal workers by years since entering the trade and smoking status. See Figure 1 for definition of ILO score.

were read by B readers, 2,066 (21.5%) by A readers, and the remaining 464 (4.8%) by readers with no rating. The total prevalence of parenchymal abnormalities reported by all readers was 12.3%; among B readers the prevalence was 11.2%, among A readers 17.5%, and among other readers 4.9%. Pleural abnormalities were seen in 24.5% of the participants; among B readers, the prevalence was 25.3%, A readers 24.9%, and other readers 10.1%.

Table III presents the logistic regression model for parenchymal abnormalities scores 1/0–1/2, and for score 2/1 and higher, both compared with those with a score of 0/0 or 0/1. After controlling for age, years since entering the trade, and years worked, reported history of shipyard employment more than doubled the prevalence odds ratios for parenchymal abnormalities. Neither railroad employment nor asbestos exposure in the military or before entering the sheet metal trade was associated with increased risk of parenchymal changes. Cigarette smoking appears to increase the prevalence odds ratios of parenchymal abnormalities by approximately 1% for each pack-year smoked. Cigarette pack-years and shipyard employment history were both significantly associated with having a chest radiograph interpreted as 1/0 vs. 0/1, and 0/1 vs. 0/0 (not shown).

Table IV presents results of a similar logistic model for pleural abnormalities, again controlling for age and exposure history. Shipyard employment history increases risk of pleural abnormalities by approximately 30%; the effect of other exposure history-related variables (railroad, military, pre-sheet metal) are not statistically significant. Cigarette smoking is associated with increased risk, although the

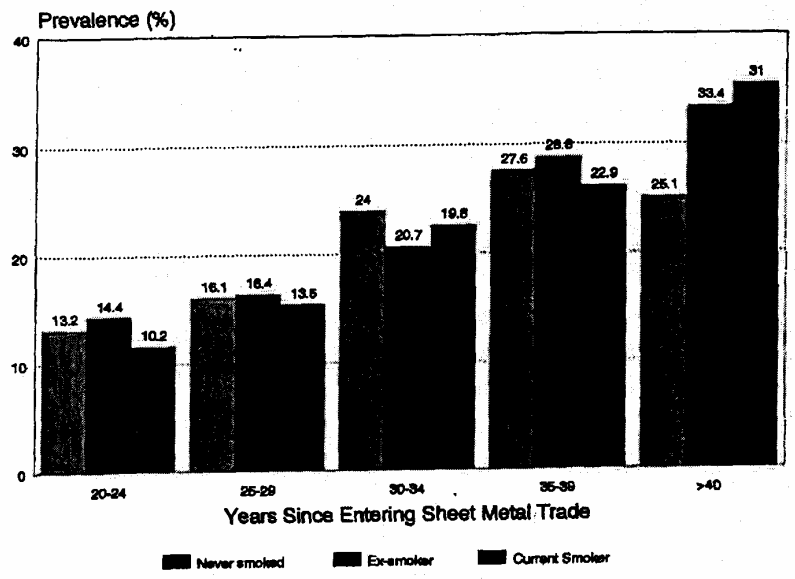

Fig. 4. Prevalence of pleural abnormalities among 9,605 sheet metal workers by years since entering the trade and smoking status.

TABLE III. Risk Factors for Parenchymal Abnormalities on Chest Radiographs in Survey of 9,605 Sheet Metal Workers

	ILO score: 1/0–1/2		2/1 or higher	
Risk factor	OR[a]	95% CI[b]	OR	95% CI
Cigarette pack-year	1.011[e]	1.009–1.014	1.012[d]	1.004–1.021
Shipyard employment history	2.28[e]	1.84–2.83	2.42[c]	1.23–4.77

[a]Prevalence odds ratios for pack-year history adjusted for age, years since entering the sheet metal trade, and years employed in the trade. Prevalence odds ratios for shipyard employment adjusted for age, years since entering the sheet metal trade, years employed in the trade, and pack-year history.
[b]95% confidence interval.
[c]$p < .05$.
[d]$p < .01$.
[e]$p < .001$.

effect of smoking on pleural changes is less than half of that on parenchymal abnormalities.

To investigate whether the effect of shipyard exposure detected here was an artifact associated with the higher prevalence rates reported by clinics in coastal areas, separate regression models were constructed for the six sites (1,173 participants) at which 20% or more of the workers screened reported a history of shipyard employment and the 14 sites (1,668 participants) at which 10% or more had worked in shipyards. In both these analyses, the prevalence odds ratios for the association of

TABLE IV. Risk Factors for Pleural Abnormalities on Chest Radiographs in Survey of 9,605 Sheet Metal Workers

Risk factor	OR[a]	95% CI[b]
Cigarette pack-year	1.004[c]	1.002–1.006
Shipyard employment history	1.33[d]	1.11–1.59

[a]Prevalence odds ratios for pack-year history adjusted for age, years since entering the sheet metal trade, and years employed in the trade. Prevalence odds ratios for shipyard employment adjusted for age, years since entering the sheet metal trade, years employed in the trade, and pack-year history.
[b]95% confidence interval.
[c]$p < .001$.
[d]$p < .01$.

shipyard employment and pleural and parenchymal abnormalities were not different from those detected in the general model.

In order to determine if readers with different degrees of proficiency (as determined by the B reader examination) classified radiographs differently, we constructed a series of regression models that compared reader types (Table V). Controlling for other risk factors, we found that A readers reported more parenchymal abnormalities of ILO category 1 than B readers, and readers who were neither A nor B readers reported significantly fewer abnormalities in category 1 than either group. There were no differences among the three groups in reporting category 2 on the ILO scale. A readers and B readers reported the same adjusted prevalence of pleural abnormalities, while non-A, non-B readers reported significantly fewer pleural abnormalities than either of the other groups. Inclusion of reader type in a logistic regression model did not change the association of both pack-year history and shipyard exposure with parenchymal and pleural radiographic abnormalities (not shown).

DISCUSSION

In this study 31% of sheet metal workers with more than 20 years in the trade had chest radiographic abnormalities consistent with asbestos exposure; the prevalence of abnormalities increased with years of exposure and years since first exposure; and abnormalities were seen more frequently in those participants who reported a history of working in a shipyard at any point in their career. In addition, a higher prevalence of radiographic abnormalities, both pleural and parenchymal, was seen among participants who smoked.

Sheet metal workers ordinarily do not use asbestos directly, but a high prevalence of asbestos-related abnormalities is evident in this population. This is consistent with the finding of numerous surveys of members of the building trades who are exposed to asbestos during the course of construction and renovation activities. In these studies the prevalence of asbestos abnormalities varies widely among different trades and occupations surveyed [Hedenstierna et al., 1981; Lilienfeld et al., 1988; Rosenstock et al., 1988; Schwartz et al., 1990; Selikoff and Lilis, 1991; Oksa et al., 1992]. In this study history of employment in shipyards increased the prevalence odds ratio of radiographic abnormalities, particularly of the parenchymal variety, suggest-

TABLE V. Relationship Between Reader Type and Radiographic Abnormalities

	ILO 1 vs. 0		ILO 2 vs. 0		Pleural changes	
Compared with B reader	OR[a]	95% CI[b]	OR	95% CI	OR	95% CI
A reader vs. B reader	1.83[c]	1.57–2.14	.82	0.44–1.53	0.92	0.81–1.04
Non-AB vs. B reader	0.75[d]	0.64–0.88	.92	0.62–1.37	0.68[d]	0.61–0.75
Non-AB vs. A reader	0.48[d]	0.37–0.61	.88	0.45–1.69	0.57[c]	0.48–0.67

[a]Prevalence odds ratios adjusted for age, years since entering the sheet metal trade, years employed in the trade, and shipyard employment and pack-year history.
[b]95% confidence interval.
[c]$p < .01$.
[d]$p < .001$.

ing that sheet metal worker exposure levels in the shipyards were higher than in construction.

The interaction between asbestos exposure and cigarette smoking in the development of parenchymal disease has been previously reported [Samet et al., 1979; Lilis et al., 1986; Blanc et al., 1988; Kilburn and Warshaw, 1992], and this study again demonstrates that smokers have a higher prevalence of radiographic parenchymal changes. In this population the risk of mild and severe parenchymal abnormalities increases with pack-year history.

The finding that cigarette smoking has an independent, albeit weak, association with pleural disease has been reported in another study of sheet metal workers [Baker et al., 1985], but has not been seen in most other analyses of asbestos disease prevalence [Rosenstock and Hudson, 1987]. It is possible that an effect as small as that suggested here, an increase in risk of pleural abnormalities by 0.3% with each pack-year smoked, might not have been detected in smaller studies. For example, Blanc et al.'s study of 294 shipyard workers reported an asbestos-smoking interactive effect for pleural disease that approached but did not reach statistical significance. Alternatively, since smoking has been associated with pleural disease in two studies of sheet metal workers but rarely in other occupational cohorts, pleural disease may be related to an interaction between asbestos, tobacco smoke, and some third toxic substance to which sheet metal workers are exposed. This question deserves further study.

It is important to note that the presence of either pleural or parenchymal abnormalities cannot be attributed to cigarette smoking alone. While several authors have suggested that smoking is independently associated with small opacities on chest radiograph, [Thériault et al., 1974; Amandus et al., 1976; Cockcroft et al., 1983], these studies did not include subjects without dust exposure, precluding the possibility of accurately identifying an independent effect of smoking. In one important investigation of this issue, NIOSH-certified B readers found a prevalence of parenchymal abnormalities (ILO score of 1/0 or greater) of less than 1% in a large population of blue collar workers with minimal exposure to occupational respiratory hazards [Castellan et al., 1985]. In that study, age, pack-years, and gender were significantly associated with small opacities, but the prevalence of small opacities was so low in the group without asbestos or other dust exposure that an independent effect of smoking, in the absence of dust exposure, can be considered insignificant. Thus, while history of tobacco consumption appears to increase risk of asbestos-

related pulmonary abnormalities among asbestos-exposed workers, these abnormalities would not have occurred in the absence of asbestos exposure.

Cross-sectional studies have several inherent sources of bias, and they are particularly susceptible to bias associated with selective participation [Checkoway et al., 1989]. Many of the abnormalities detected in this screening program, especially pleural and mild parenchymal abnormalities, may not be associated with overt symptoms. As a result, this study's finding of increased risk of both parenchymal and pleural disease among smokers is unlikely to be the result of selective participation among smokers with abnormalities. However, it remains possible that the overall rates of radiographic abnormalities in this population were affected by selective participation and inter-reader variability in radiographic classification.

The large number of radiograph readers may have resulted in a lack of uniformity in diagnostic criteria. This is likely to occur even among B readers, whose readings are considered to be the non-invasive gold standard for identifying asbestos-related pulmonary abnormalities [Jacobsen et al., 1983; Ducatman, 1988]. We did find an association between reader type and chest radiograph findings for parenchymal abnormalities, limited to category 1 films. When the analysis is restricted to B readers only, the other findings of this study do not change. Overall, the reported prevalence represents a rate of parenchymal abnormalities far above any background rate in the general population, and one consistent with studies of other asbestos-exposed populations. Importantly, the dose-effect relationship between smoking and signs of pleural and parenchymal abnormalities, and the finding that shipyard employment is associated with more radiographic abnormalities, do not change with the inclusion of B readers only.

We found that readers who were not designated as A readers or B readers reported fewer parenchymal and pleural abnormalities than either A or B readers. By and large, this set of readers were at clinical centers that examined small locals in more rural areas of the country; they averaged 46 films each, as compared to an average of 200 films per B reader. The difference in reported prevalence of abnormalities may be due to a difference in experience with the ILO system or due to different characteristics of the workers and their exposures in rural areas.

Four recent studies of the classification of profusion abnormalities in asbestos-exposed workers demonstrate that there is significant variation in ILO classification of the same radiographs among experts and B readers [Jacobsen et al., 1983; Musch et al., 1984; Ducatman, 1988]. Jacobsen et al. [1983] reported a range of 2.4–76.5% of readings of 6,100 equivalent films as 0/1 or higher by 18 readers; Ducatman (1988) reported a range of 0.22–7.55% of 100,000 films read as 1/1 or more by 23 readers. Musch et al. (1984) reported a range of 26–47% films classified as 1/0 or higher among three readers. These data remind us that limiting a program to B readers does not eliminate variability. In this report, with 34 B readers and 20 A readers participating, we present aggregate data, examining a mean prevalence across a range of clinical centers. Given that each film was classified by only one reader, and that variability exists between readers, our ability to compare results between participating centers is limited.

The examination program described here is continuing under the sponsorship of the Sheet Metal Occupational Health Institute. As examinations proceed, we will have the opportunity to study rates of disease in younger members who began work in the early 1970s. Examination of this group will allow us to determine if exposure after 1973, when the spray application of asbestos for fireproofing was discontinued,

results in significant disease. Sheet metal workers continue to be exposed to asbestos in repair and renovation work, and recent studies of workers exposed to asbestos only through building maintenance suggest that this type of work can result in significant disease [Oliver et al., 1991; Anderson et al., 1992].

The findings of this study confirm the value of large-scale screening programs for workers with historical exposure to asbestos. This survey shows a substantial prevalence of radiographic abnormalities in a group without direct occupational use of asbestos, a group that had been considered as having "light" exposure to asbestos. The results of this survey have been used to educate sheet metal workers and sheet metal contractors about the health effects of asbestos and possible sources of current exposure, so as to limit disease in the future.

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ORIGINAL ARTICLE

Radiographic abnormalities among construction workers exposed to quartz containing dust

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Background: Construction workers are exposed to quartz containing respirable dust, at levels that may cause fibrosis in the lungs. Studies so far have not established a dose-response relation for radiographic abnormalities for this occupational group.
Aims: To measure the extent of radiographic abnormalities among construction workers primarily exposed to quartz containing respirable dust.
Methods: A cross sectional study on radiographic abnormalities indicative of pneumoconiosis was conducted among 1339 construction workers mainly involved in grinding, (jack)-hammering, drilling, cutting, sawing, and polishing. Radiological abnormalities were determined by median results of the 1980 International Labour Organisation system of three certified "B" readers. Questionnaires were used for assessment of occupational history, presence of respiratory diseases, and symptoms and smoking habits.
Results: An abnormality of ILO profusion category 1/0 and greater was observed on 10.2% of the chest radiographs, and profusion category of 1/1 or greater on 2.9% of the radiographs. The average duration of exposure of this group was 19 years and the average age was 42. The predominant type of small opacities (irregularly shaped) is presumably indicative of mixed dust pneumoconiosis. The prevalence of early signs of nodular silicosis (small rounded opacities of category 1/0 or greater) was low (0.8%).
Conclusions: The study suggests an elevated risk of radiographic abnormalities among these workers with expected high exposure. An association between radiographic abnormalities and cumulative exposure to quartz containing dust from construction sites was observed, after correction for potentially confounding variables.

Construction industry workers are known to experience high exposure to quartz containing dust, indicating the potential for silicosis development.[1 2] Confirmation of this is provided by registry based studies, which suggest that silicosis could be an important cause of morbidity and subsequent mortality in the construction industry.[3 4] However, reliable prevalence and incidence data for silicosis among construction workers are not available; there are also no dose-response relations from studies in the construction industry. One Swedish study and one study from Hong Kong suggested that construction workers might suffer from quartz dust related radiographic abnormalities.[5 6] The observed prevalence of pneumoconiosis category 1/1 and greater was 4.4% in the Swedish study. However, this study was not primarily designed to assess the magnitude of the quartz dust related health effects, and exposure and population characteristics were not documented in the paper. Some other studies among construction workers[7 8] focused only on asbestos exposure as a cause of pneumoconiosis.

Construction workers are potentially exposed to a variety of components. Dutch construction work mainly involves working with quartz containing materials, such as bricks, stones, cement, and concrete, for the construction of houses, buildings, utilities, and roads. Other potential exposures include gypsum, asbestos, plaster, wood, and paint dust. In particular, the use of high energy equipment by construction workers for (jack)-hammering, drilling, sawing, cutting, grinding, and polishing, is likely to cause exposure to high levels of respirable dust. This dust can impose a risk of silicosis to the workers, for its quartz content. Because of the variability in composition, dust at construction sites can best be characterised as quartz containing mixed dust.

Silicosis has been traditionally measured in terms of presence of rounded opacities, but after the incorporation of the less discrete (irregular) opacities (associated with asbestosis originally) into the International Labour Organisation (ILO) classification system in 1980,[9] it was found that the presence of irregular opacities was also associated with dust exposures traditionally associated with rounded opacities, such as coal workers pneumoconiosis and silicosis.[10–14] Irregular opacities seem to be more prevalent when there is a high variability in quartz content of the dust and consequently more "mixed dust" exposure.[15] Irregular opacities can incorrectly be interpreted as effects of asbestos exposure, but apart from information on work history, the presence of diffuse pleural thickening, which is commonly present when irregular opacities are a result of asbestos exposure, should be decisive on the nature of the opacities. In the Netherlands, the use of asbestos has decreased since 1978 and has been prohibited since 1993. The removal of asbestos is subject to very strict control measures.

Although many construction workers are exposed to quartz containing dust, hardly any research has been performed on the quartz related respiratory health effects in this occupational group. The nature of the radiographic abnormalities and the magnitude of the quartz related risks are poorly described in construction workers. Deduction of risk estimates from studies with other sources of exposure is complicated, because of differences in exposure characteristics. Exposure data[16] suggest that construction workers are at risk of developing pneumoconiosis and stress the need for further epidemiological studies. This study was conducted to evaluate the magnitude of the risk of early signs of quartz dust related pneumoconiosis among construction workers with expected high exposure to quartz containing dust.

MATERIALS AND METHODS

Population

The study population was based on working Dutch construction workers, 30 years and older, and of occupational groups with expected high cumulative exposure to quartz containing dust. In 1998, 4173 natural stone and construction workers were identified from registries of the natural stone association and a nationwide construction workers database held by an organisation responsible for insurance for workers in the construction industry. Only data for construction workers with a contract with their employer at the time of invitation were available. No information was available on the job history, except a general description of the present occupation. This general description of current job title was used for selecting subjects. Some construction workers (n = 34) were invited either by their colleagues or other contacts. The invited construction workers had the following registered occupations: tuck pointer (including workers involved with removing mortar between bricks; n = 1270), demolition worker (including workers who clear up demolition rubbish; n = 1130), concrete worker (involved with drilling, repairing, or blasting concrete and cutting, grinding, and sawing grooves in walls; n = 816), natural stone worker (involved with sawing, engraving, and polishing of natural stone; n = 640), terrazzo worker (n = 291), and pile-top crusher (involved with drilling to break up tops of concrete piles; n = 26). Invited through different contacts (n = 34) were 15 road construction workers (involved with cutting and grinding), and some (n = 19) with unknown job category at the time of invitation.

The construction sector is organised around projects, and comprises many specialised construction companies employing one to about 50 employees, with most having less than 10 employees. A letter of invitation was sent to the worker's home address. A positive response came from 1690 workers, who were subsequently invited for examination. Eventually 1339 (32%) individuals participated in the survey, which took place between 29 January 1998 and 10 March 1998. The response rates ranged between 24% for demolition workers and 38% for natural stone workers. A mobile *x* ray unit went to five locations distributed over the country to facilitate all of the invited construction workers.

For the non-response analysis, a randomly selected group of 711 non-responders was approached by telephone. Of the 426 that could be contacted, 344 (48%) were willing to participate in the non-response survey.

Participants signed an informed consent document for use of the results for scientific research. The medical ethical committee of the university approved the study. All procedures were in agreement with European legal requirements with regard to privacy, data storage, and use of *x* ray equipment.

Questionnaires

A questionnaire with items on occupational history, smoking habits, and a validated questionnaire on respiratory symptoms, was sent to the participants to fill in before they came for the examination. The questions on respiratory symptoms were derived from the British Medical Council questionnaire.[17] Where necessary, trained assistants went through the questionnaire with the responders. Participants were asked if they ever had or have been told whether they ever had certain respiratory diseases, such as bronchitis, emphysema, and tuberculosis. Chronic cough or chronic cough with sputum were defined as having these symptoms for more than three months during the past two years. Frequent wheezing was defined as wheezing for more than one week during the past two years. For both smokers and ex-smokers, pack-years were calculated by multiplying the number of cigarettes smoked daily by the number of years smoked. Smoking intensity was considered constant over time.

The questionnaire for the non-responders contained questions on the reason for not participating, age, smoking habits, repeated dust exposure at work, respiratory diseases, and respiratory symptoms.

Radiographs of the chest

Posterior-anterior chest radiographs were taken in a mobile *x* ray unit from the Institute of Occupational Medicine (IOM) in Scotland. Large size (40×40 cm) radiographs were made at 125 kV. All films were read independently in the USA by three National Institute for Occupational Safety and Health (NIOSH) certified "B" readers, according to the protocols of the International Labour Organisation.[9] The readers knew only that the radiographs were from construction workers in the Netherlands. The median readings of profusion of small opacities were used as the outcome measure. If at least one reader recorded rounded opacities as the predominant type of opacities and at least one other reader recorded rounded opacities either as the predominant or secondary type of opacities the subject was classified as having rounded opacities. All other small opacities classified as category 1/0 and greater were classified as irregularly shaped small opacities.

Exposure assessment

A limited number of personal respirable dust measurements were performed among construction workers whose jobs mainly involved concrete drilling, tuck point grinding, cleaning of construction sites, and demolition and clearing of rubble. Respirable dust sampling was conducted during full workdays (6–8 hours), using Dewell-Higgins cyclones from The Casella Group Ltd (Bedford, UK), connected with Gilian Gilair5 portable pumps. The flow rate was 1.9 litres per minute. After gravimetric determination of dust on the filters, α-quartz was determined by infrared spectroscopy (NIOSH method 7602).[18] Occupational group based exposure levels were calculated.

Because measurements were available for only a few job categories, an expert judgement was used in addition to available measurements, to rank the different past and present occupations of the construction workers under study. Three industrial hygienists, with experience in exposure assessment among construction workers, classified 36 different jobs on a 10 point scale for quartz exposure. The median score of the three experts, weighted for all consecutive and multiple jobs, was used as a multiplier to calculate a proxy for the cumulative quartz exposure, relative to the highest exposure category, consisting of demolition workers and comparably exposed workers.

Data analysis

All data were analysed with SAS statistical software (version 6.12, SAS Institute, Inc. Cary, NC). Differences in dichotomous outcomes between groups were tested using the χ^2 test (SAS FREQ procedure).[19] For obtaining relative risk estimates corrected for confounders, prevalence ratios were calculated using proportional hazard analysis (Cox's regression model), modified by Breslow (SAS PHREG procedure). A semiquantitative measure of cumulative exposure was calculated by multiplying duration of exposure by the expert's quartz exposure index. This measure of cumulative exposure will be referred to as the cumulative exposure index. The Kruskal-Wallis test was used for comparing the exposure index with the quartz exposure measurement data (SAS NPAR1WAY procedure). Duration of exposure was calculated by summing up the years worked in jobs with potential mineral dust exposure in the construction industry. For calculating relative risk estimates, exposure groups were divided into four groups of about equal size. Smoking categories and age categories were also divided in four groups of about equal size and were considered as

Table 1 Population characteristics, respiratory disease history, and self reported respiratory symptoms of construction workers study population and non-responders

	Study population (n=1335)		Non-responders (n=344)	
	Mean (SD)*	n (%)	Mean (SD)	n (%)
Age (years)	42.0 (7.8)		42.9 (8.8)	
Height (cm)	179 (7.2)		n.a.†	
Employment in the construction industry (years)	19.1 (9.5)		n.a.	
Gender, % females		2 (0.15%)		0 (0%)
Individuals with reported exposure to mineral dust		1268 (95%)		268 (78%)‡
Current smokers		667 (50%)		187 (54%)
Ex-smokers		397 (30%)		90 (27%)
Pack-years	13.3 (13.0)		n.a.	
Did you ever have the following diseases or have you been told that you had them?				
Bronchitis		161 (12%)		20 (6%)‡
Emphysema		5 (0.4%)	–	
Tuberculoses or pleurisy		25 (1.9%)		2 (0.6%)
Selected respiratory symptoms				
Chronic cough (longer than three months in the past two years)		174 (13%)		64 (19%)‡
Chronic cough with sputum (longer than three months in the past two years)		134 (10%)		30 (9%)
Shortness of breath during normal activity		124 (9%)		30 (9%)
Ever wheezing		337 (25%)	n.a.	
Frequent wheezing (longer than one week in the past two years)		134 (10%)	n.a.	
Shortness of breath during wheezing		100 (7%)	n.a.	
Ever attacks of asthma?		117(9%)	n.a.	

*Results expressed as mean (SD).
†n.a., not asked.
‡Significantly different (χ^2; p<0.05).

potential confounders for the relation between respirable quartz dust exposure and radiographic abnormalities. Pneumoconiosis cannot result from smoking or from ageing, but there are suggestions that shadows on the radiographs can be misinterpreted as pneumoconiosis in heavy smokers, especially in the presence of emphysema.[20] On the other hand, smoking might confer an added risk for the development of irregular opacities, as is the case in workers exposed to high concentrations of asbestos.[21]

Ageing can influence the outcome of the analysis, because of the increased risk of obtaining respiratory illness with age. Age is also associated with cumulative exposure. To explore the relation between cumulative quartz exposure and radiographic abnormalities in greater detail, general additive models using quasi likelihood estimation,[22] and a log link function available in S-plus (version 2000, Mathsoft Inc. Cambridge, MA) were used. These additive models extend a linear (parametric) model by allowing some or all linear functions of the predictor variables (X_1, X_2, ... X_i) to be replaced by arbitrary smooth functions ($f_1(X_1)$, $f_2(X_2)$, ... $f_i(X_i)$). The f is usually unknown and can be estimated by a scatter plot smoother. The advantage over simple linear modelling is that the shape of an exposure response relation can be evaluated in greater detail, without applying a priori assumptions regarding shape, at the expense of loss of degrees of freedom. Plots were produced with LOESS smoothers using fractions of 0.7 of the data. Plots made according to above mentioned specifications yielded prevalence ratios for each exposure value over the plotted range. Results from this approach were combined and compared with results from conventional categorical epidemiological analyses. In all analyses, statistical significance was reached at the $p < 0.05$ level (two sided). The results were plotted using Sigma Plot 2000 (SPSS Science Inc.).

For quality control of the B-readings, a measure of agreement (Cohen's kappa)[23] between readers was calculated and multiple regression models were fitted for each reader.

RESULTS

Population characteristics

Valid questionnaires were obtained from 1335 individuals and chest radiographs were taken from 1331 individuals. Some participants preferred not to have a radiograph taken (n = 8) and a few (n = 3) submitted incomplete questionnaires. The average age of the participants was 42 (7.8) years. Although the cohort was initially restricted to workers older than 30 years of age, a few younger people who came to the medical survey with an invited colleague were also examined. Fifty per cent of the workers were current smokers, and 30% were ex-smokers. All were male, except for two female construction workers, and most (97.2%) were white. Most of the workers (95%) reported current exposure to mineral dust and the average duration of work in the construction industry was 19 years (range 1–52 years). Table 1 gives the population characteristics and prevalence of pulmonary abnormalities and respiratory symptoms of the study population and the non-responders. Bronchitis was reported by 12% of the responders and chronic cough by 13%. The prevalence of chronic cough was lower among responders reporting no dust exposure (n = 67) compared to responders with dust exposure (n = 1268) (5% versus 13%, χ^2; p = 0.05). The non-response survey (n = 344) did not reveal systematic differences with regard to age and smoking habits. The prevalence of bronchitis was lower among non-responders (6% versus 12%, χ^2; $p < 0.05$), but the prevalence of chronic cough was higher (19% versus 13%, χ^2; $p < 0.05$). Less non-responders than responders reported being exposed to dust (78% versus 95%, χ^2; $p < 0.05$).

Radiographs of the thorax

All radiographs were reviewed independently by three B-readers (table 2). Median readings were calculated of films classified as of acceptable quality (ILO technical quality grade 1, 2, or 3) by all three readers (n = 1294). Results of reader 1 indicate a prevalence of 17% for category 1/1 and greater; reader 2 classified 3.4% as category 1/1 and greater, and reader 3 classified 2.2% as category 1/1 and greater. Several films (n = 37) were considered of unacceptable quality by at least one reader. The median readings resulted in a prevalence of 10.2% of profusion category 1/0 and greater and 2.9% of profusion category 1/1 and greater, irrespective of the shape of the opacities. Reader 1 observed most small opacities in the middle and lower lung fields or in the lower lung fields alone. Readers 2 and 3 observed most of the opacities either in the whole lung or in the middle and lower part and they classified

Table 2 Radiographic abnormalities consistent with pneumoconiosis (n [%]) by B-reader and the median of the readings of radiographs of construction workers

	n*	Profusion category							
		0/0	0/1	1/0	1/1	1/2	2/1	2/2	2/3
Reader 1	1330	580 (43.61%)	234 (17.59%)	293 (22.03%)	186 (13.98%)	29 (2.18%)	3 (0.23%)	5 (0.38%)	–
Reader 2	1327	863 (65.03%)	337 (25.40%)	82 (6.18%)	31 (2.34%)	10 (0.75%)	2 (0.15%)	1 (0.08%)	1 (0.08%)
Reader 3	1297	1023 (78.87%)	183 (14.11%)	63 (4.86%)	25 (1.93%)	1 (0.08%)	2 (0.15 %)	–	–
Median	1294	868 (67.08%)	295 (22.80%)	94 (7.26%)	33 (2.55%)	1 (0.08%)	2 (0.15%)	1 (0.08%)	–

*Excluded were radiographs of unacceptable quality.

most of the predominant small opacities as irregularly shaped and between 1.5 and 3 mm in width (type t). Reader 1 classified most predominant small opacities as irregular and smaller than 1.5 mm (type s). On 10 films (0.8%) small rounded opacities were observed by at least two readers. The small rounded opacities were classified as profusion category 1/0 (n = 4), 1/1 (n = 3), 1/2 (n = 1) and 2/1 (n = 2).

Readers 1 and 2 recorded some large opacities, but none by consensus. Pleural abnormalities (pleural thickening or pleural calcification) were observed by at least two of the three readers on 22 radiographs (1.7%). Eleven of the 22 individuals with pleural abnormalities reported having had pneumonia or pleurisy, or having undergone an operation on the chest in the past.

Exposure to α-quartz

Mean eight hour time weighted average dust levels were calculated from full shift measurements for tuck pointers, concrete workers (partly involved with recess milling), demolition workers, inner wall constructors, construction site cleaners, and a group only experiencing dust exposure from activities of other workers (background exposed group) (table 3). The large task related variability in exposure within this group is shown for concrete workers where the exposure to respirable quartz ranged from a mean of 0.13 mg/m³ (0.02–0.25) when drilling holes in concrete with wet dust suppression to 2.22 mg/m³ (1.20–3.77) when cutting and grinding in material with high quartz content. The average quartz content of the dust was 12% (range 0.4–40%). Table 4 presents results of the expert evaluation. The Kruskal-Wallis test showed significant differences in quartz exposure between exposure indices ($\chi^2 = 40.7$, df = 4, $p < 0.0001$).

Radiographic abnormalities and exposure

Some job titles appeared to be at higher risk for radiographic abnormalities than others, although numbers were low for some job titles. Only 1291 films were used for this division by job title, because data on occupational history and age was missing for three participants. The prevalence of small irregular opacities of profusion category 1/0 and greater was highest among construction workers who had ever been a pile-top crusher (17% (6/36)), a natural stone worker (13% (13/246)), a demolition worker (11% (33/298)), a tuck pointer involved with chasing out of cement between bricks (11% (7/64)), or a concrete worker involved in drilling holes (9.5% (17/179)). The prevalence of small rounded opacities was high among those who had ever been a pile-top crusher (17% (6/36)), a recess miller (11% (3/28)), a person who clears up the rubble (9.4% (3/32)), a cutter and grinder (5.1% (2/39)), or a demolition worker (2.0% (6/298)). These results should be interpreted with great care, as most of these workers had a complex work history. Further analysis revealed that individuals with rounded opacities had on average a higher cumulative exposure index than individuals without radiographic

Table 3 Respirable dust and α-quartz levels of personal full shift measurements among several groups of construction workers

	n	Respirable dust AM* (min–max)	Respirable quartz AM (min–max)
Tuck pointers, chasing out mortar between bricks	10	3.5 mg/m³ (0.6–8.0)	0.56 mg/m³ (0.09–1.7)
Concrete drillers and grinders, including recess milling	14	2.8 mg/m³ (0.2–11.5)	0.84 mg/m³ (0.03–3.8)
Demolition workers	21	2.4 mg/m³ (0.2–9.4)	0.25 mg/m³ (0.04–1.26)
Inner wall constructor	4	2.1 mg/m³ (0.6–4.0)	0.043 mg/m³ (0.016–0.084)
Construction site cleaners	12	0.99 mg/m³ (0.1–2.5)	0.032 mg/m³ (0.002–0.1)
Background exposed group	6	0.3 mg/m³ (0.1–0.4)	0.005 mg/m³ (0.002–0.015)

*Arithmetic mean.

Table 4 Median scores of relative quartz exposure level for 36 jobs as mentioned by construction workers in the study

Job	Index
No construction work, driver, production worker, welder, miner	0
Mechanic, painter, crane driver, foundation worker, asbestos worker	0.1
Gypsum brick layers, finishing mechanic, tuck pointer, carpenter, insulator, tiler	0.2
Floorer, bricklayer, unskilled personnel, plasterer, work site personnel	0.3
Concrete worker, grinder—road construction, railway and road construction workers	0.4
Concrete repairman, worker blasting concrete	0.5
Concrete drillers and grinders, terrazzo worker	0.6
Pile-top crusher, natural stone worker, recess millers, tuck pointer chasing out mortar between bricks	0.8
Workers who clear up demolition rubbish, recess grinder, demolition worker	1

Table 5 Crude prevalence of irregular and rounded opacities (median scores) among construction workers by duration of exposure, age, and smoking category

	n	Irregular opacities: Profusion category ≥1/0, n=121 (9.4%)	Irregular opacities: Profusion category ≥1/1, n=31 (2.4%)	Rounded opacities: Profusion category ≥1/0, n=10 (0.77%)
Cumulative exposure index*				
0–3.99	258	19 (7.4%)	2 (0.8%)	1 (0.39%)
4–7.99	417	29 (7.0%)	5 (1.2%)	2 (0.48%)
8–14.99	335	31 (9.3%)	9 (2.7%)	1 (0.30%)
≥15	281	42 (15%)	15 (5.3%)	6 (2.1%)
Age at survey				
27–35	330	16 (5%)	3 (0.9%)	1 (0.29%)
36–41	350	28 (8%)	6 (1.7%)	3 (0.86%)
42–48	315	34 (11%)	10 (3.2%)	3 (0.95%)
≥49	296	43 (15%)	12 (4.1%)	3 (1.0%)
Pack-years smoked				
0–1.9	355	15 (4.2%)	3 (0.85%)	4 (1.1 %)
2–11.9	436	35 (2.7%)	8 (1.8%)	3 (0.69 %)
12–19.9	248	28 (11%)	9 (3.6%)	2 (0.81%)
≥20	252	43 (17%)	11 (4.4%)	1 (0.40 %)

*Exposure index x duration of exposure.

abnormalities (15.6 versus 9.8, *t* test, p = 0.09) or with radiographic abnormalities of category 1/0 (15.6 versus 9.9, *t* test, p = 0.09). The pile-top crushers with radiological abnormalities (either irregular opacities of profusion category ≥1/1 (n = 2) or round opacities of profusion category ≥1/0 (n = 6)) had worked longer in the construction trade (26.4 years) than pile-top crushers (n = 27) without these abnormalities (19.8 years) (*t* test, p < 0.05). Pile-top crushers with radiographic abnormalities had smoked significantly less pack-years (p = 0.05). There was no statistically significant age difference between groups with and without opacities.

Table 5 presents a breakdown of the prevalence of irregular and rounded opacities, by the cumulative exposure index, age at survey, and smoking habits. These illustrate the increase in crude prevalence of small irregular opacities (either category ≥1/0 or ≥1/1) with both the cumulative exposure index, and age. The prevalence of irregular opacities of category 1/1 and greater rose from 0.8% for a cumulative exposure index of less than 4 to 5.3% for the cumulative exposure index of 15 and higher.

To unravel the influence of exposure and potential confounding factors (age and smoking) on the outcome of the *x* ray readings (opacities of profusion category ≥1/0), these effects were studied simultaneously by multiple regression analysis (table 6). The −2 log likelihood statistic improved from 1877 without covariates to 1838 with the cumulative exposure index, age, and smoking included in the model (χ^2, p < 0.05), indicating improved fit of the model. The association with increasing cumulative exposure index was not significant though. Heavy smokers had an almost threefold increased risk for small opacities of category 1/0 and greater and construction workers over the age of 49 had a relative risk of 1.8, after correction for smoking.

A similar model was used to describe the relation between the prevalence of opacities of category 1/1 and greater, age, and cumulative exposure index (table 6). Subjects classified in category 1/0 consequently fell in the control group. A positive trend (p < 0.05) for the prevalence ratio with increasing cumulative exposure index was observed and the prevalence for a cumulative exposure index of more than 15 was clearly

Table 6 Results of multiple regression analysis for profusion category 1/0 and greater and profusion category 1/1 and greater (median scores) on age and the cumulative exposure index, for all opacities and corrected for smoking habits

	n	PR (95% CI*) for profusion category 1/0 and greater	PR (95% CI*) for profusion category 1/1 and greater
Reference†		1	1
Exposure			
4–7.99	417	0.83 (0.47 to 1.47)	0.89 (0.21 to 3.80)
8–14.99	335	1.05 (0.59 to 1.84)	2.05 (0.55 to 7.70)
≥15	281	1.60 (0.91 to 2.81)	4.69 (1.30 to 16.9)
Age			
36–41	350	1.46 (0.80 to 2.68)	1.25 (0.36 to 4.41)
42–48	315	1.62 (0.87 to 2.99)	1.81 (0.54 to 6.05)
≥49	296	1.80 (0.95 to 3.38)	1.64 (0.47 to 5.66)
Pack years			
2–11.9	436	1.61 (0.93 to 2.80)	1.45 (0.54 to 3.94)
12–19.9	248	2.15 (1.20 to 3.84)	2.06 (0.72 to 5.85)
≥20	252	2.56 (1.46 to 4.48)	1.80 (0.65 to 5.03)
−2 log likelihood		1838.2‡	507.9§

*Confidence interval.
†Reference: men who smoked less than two pack-years, younger than 35 years, and with a cumulative exposure index of less than 4.
‡−2 log likelihood without covariates: 1876.8.
§−2 log likelihood without covariates: 530.1.

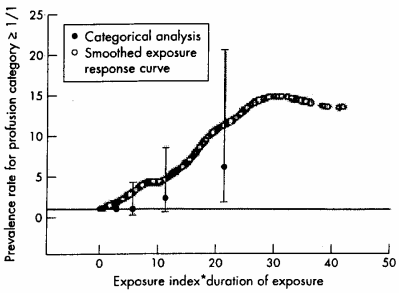

Figure 1 Risk of the presence of opacities of category 1/1 or greater with the cumulative exposure index. The reference group in the categorical analysis consists of individuals with a cumulative exposure index of less than 4.

increased. For age, the trend was less clear. The risk for smokers increased with increasing pack-years, but this was not statistically significant. The −2 log likelihood statistic improved from 530 without covariates to 508 when the cumulative exposure index, age, and smoking were included in the model. Data analysed per reader, also corrected for age or smoking, resulted in a relative risk of 1.8 ($p = 0.01$) for category 1/1 or higher for the highest exposure category for reader 1, and a relative risk of 3.2 ($p = 0.056$) for reader 2. For reader 3 the relative risk for the highest exposure category (PR = 1.8) was not statistically significant ($p = 0.3$).

Figure 1 presents the result of the regression with the cumulative quartz exposure index. The results in the graph are not corrected for smoking, but the categorical analysis resulted in almost similar regression estimates as the corrected regression estimates. The smoothed out curve from the non-parametric analysis suggests a higher risk with increasing cumulative quartz exposure index.

Some of the positive outcomes in this study may have been due to non-occupational causes, as three of the 31 individuals with positive radiographic outcomes of irregular opacities of category 1/1 or greater and one of the 10 individuals with small rounded opacities reported tuberculosis or pleurisy. One of 10 with small rounded opacities reported sarcoidosis. No abnormalities of category 1/1 or greater were observed among non-whites. Body weight and stature are also thought to influence the appearance of small irregular opacities. However, correction for these potential confounders in the multiple regressions did not influence the observed association between the presence of small opacities and exposure years. The overall agreement on profusion score was poor ($\kappa = 0.14$). Associations between radiographic abnormalities and smoking, age, and duration of exposure were similar when analysed per reader, although not always statistically significant.

DISCUSSION

The present study shows an increased risk of radiographic abnormalities among relatively young construction workers involved in grinding, (jack)-hammering, drilling, cutting, sawing, and polishing, which was associated with a proxy for cumulative exposure to quartz containing dust. Pneumoconiosis profusion category 1/0 and greater (median for three readers) was observed on 10.2% of the chest radiographs of the participants, and profusion category 1/1 and greater on 2.9% of the radiographs. Early signs of nodular silicosis (small rounded opacities) were read on only 0.8% of the films, while on the rest of the chest radiographs with abnormalities, irregular opacities were found. The abnormalities are, therefore, presumably indicative of a mixed dust type of pneumoconiosis. The increase in risk with increasing cumulative exposure index was noteworthy, even after correction for age and smoking habits. The reference group consisted of individuals who had smoked less than two pack-years and with a cumulative exposure index of less than 4, so the point estimates have to be interpreted with caution since they do not represent increased risks compared to an occupationally non-exposed population.

Little is known about the prognosis of individuals with radiographic abnormalities caused by dust generated at construction sites. The health implications of the presence of small irregular opacities, unrelated to asbestos exposure, are unknown. Only in coal workers is reduced lung function described among individuals with irregular opacities.[11 24] To better characterise the nature of the radiographic abnormalities, we intend to perform a follow up study among part of the population. High resolution computed tomography will be combined with normal *x* rays and lung function tests, including determination of the transfer factor.

Several forms of bias might be involved in this study, affecting the association between duration of exposure and the presence of opacities. Selection bias most certainly played a role, as the participation rate was only 32%. The nature of the database used, and the selection procedure might indeed have resulted in the invitation of unexposed workers and consequently in a relatively high refusal rate. The exact magnitude of the bias cannot be evaluated since even for the non-responder study, 20% of those who were contacted were not even willing to answer a few questions by telephone. The study revealed some excess respiratory disease (bronchitis) in the studied participants compared to the non-responders, but on the other hand, the participants had fewer reports of cough symptoms than non-responders. More generally, a healthy worker effect is likely to exist in the construction industry, as individuals with weaker health or with respiratory disease will tend to leave or not enter this industry where labour is heavy.

The measure of agreement (κ) of the classification of profusion of opacities by the readers was relatively poor, which indicates misclassification in the outcome of the readings, especially for the lower profusion scores. Making films in a mobile *x* ray unit might have resulted in films, which were more complicated to interpret, because the readers were more accustomed to interpreting films made in hospitals. Readers are known to disagree considerably over reported shape of opacities,[25] which will have added to the low measure of agreement. However, at least for two of the readers, the outcome of the analysis showed similar trends and significantly increased prevalence for the highest exposure category, when data were analysed per reader.

The cumulative exposure index is also subject to misclassification because working years had to be reconstructed from various answers in the questionnaires, which have undoubtedly been subject to some measurement error. The expert judgement might also contain some error; however, the fit of the model improved with the cumulative exposure index compared with duration of exposure as the measure of exposure. These scarce data, however, cannot be considered sufficient for validating a job exposure matrix. Despite the fact that the measurement series available are already considerable for the construction industry, new and larger exposure surveys are needed.

In the statistical analysis, correction for ageing and smoking were made, because the true association between exposure and outcome might have been confounded by these factors. Among populations not exposed to harmful dust the presence of mild profusions of irregular opacities (profusion category 0/1 and 1/0) are in some individuals effects of ageing and smoking.[20 26 27] As expected, the presence of small rounded opacities was not associated with smoking or age.

Fibrogenic reactions to the lung (pneumoconioses) in relation with quartz dust exposure can vary by source of exposure,

basically ranging from classical silicosis when exposure concerns relatively small amounts of dust with a high quartz content, to coal worker's pneumoconiosis when exposure concerns high dust levels and the role of quartz seems only minor.[28] The presence of irregular opacities of category 1/0 and greater are clearly related to cumulative exposure in populations exposed to quartz containing dust with an average quartz concentration below 20%[12 13 35] or coal dust.[10 11]

The presence of small irregular opacities in the lower lung fields is also a typical manifestation of asbestos exposure. Several studies of construction workers have reported evidence of radiological signs consistent with asbestosis, such as pleural and parenchymal changes.[7 8 29] It is unlikely that our study participants had sufficient asbestos exposure to cause these effects. In the Netherlands, use of asbestos has decreased since 1978 and its use has been prohibited since 1993. Only a few participants gave a positive response to items that asked for exposure to asbestos; in addition, should there have been substantial asbestos exposure, a higher prevalence of pleural abnormalities would have been observed, and some clustering of radiographic abnormalities among groups with a higher probability of asbestos exposure would have been observed.

Results from this study were compared to other studies, although our estimates of cumulative exposure for this study are unreliable and subject to error. The comparison was made with populations exposed to airborne dust with comparable quartz content.[12 15 36] The average quartz content in the dust samples of this study was 12%. The group based cumulative quartz exposure is 5.7 mg/m³.y over a period of 19 years when assuming an average eight hour quartz dust exposure level of 0.3 mg/m³ for the whole studied group. This was the average exposure level measured for the pointers, concrete workers, construction site cleaners, and demolition workers. Several other studies with exposures with comparable average quartz content,[15 25 36] average age, and a lower average cumulative exposure for quartz (<1 mg/m³.y to 2.6 mg/m³.y) showed lower prevalence of profusion category 1/1 and greater (between 0% and 1.5%) than among our construction workers (2.9%). In the diatomaceous earth industry the prevalence of profusion category 1/1 and greater was 3.0% where the group based calculated exposure to silica dust was 3.5 mg/m³.y, which comes closer to our results.[12] Hardrock miners had a high prevalence of opacities of profusion category 1/1 and greater (18%), but due to longer exposure times, their cumulative quartz dust exposure was very high (17.4 mg/m³.y).[13]

In summary, the prevalence of early signs of quartz dust related pneumoconiosis is increased in our study compared with most other recent studies in Western countries among quartz dust exposed populations. There are indications that the risks for rounded as well as irregular small opacities of profusion category 1/1 and greater are exposure related. Confounding and selection bias are present, but it is not likely that these explain the observed results. Although the large variability in composition of construction site dust makes it complicated to assess the nature of pneumoconiosis among construction workers,[31] the predominant type of abnormality found in this study most likely points to a mixed dust type of pneumoconiosis. Our findings, in combination with results from other studies, clearly indicate the need for implementation of exposure reduction strategies, among construction workers subgroups with expected high exposure to quartz containing dust.

Main messages

- Among construction workers, the presence of radiographic abnormalities, indicative of a mixed dust type of pneumoconiosis, is associated with exposure to quartz containing dust.
- The risk of early signs of quartz dust related pneumoconiosis is increased among construction workers compared to most other recent studies in Western countries among quartz dust exposed populations.
- Exposure to quartz in the construction industry regularly exceeds occupational exposure limits for this component.

Policy implications

- There is a clear need for exposure control to lower airborne dust levels in the construction industry.
- Respiratory health effects and exposures among construction workers should be studied to establish the nature of the effects, the progression, and the magnitude of dose-response relations.

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Previously Undetected Silicosis in New Jersey Decedents

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Background *Despite a reported decline in mortality and hospitalizations associated with silicosis [U.S. Department of Health and Human Services, 1999], this decline may be artifactual, stemming in part from underdiagnosis by physicians.*
Methods *This study estimates, through radiological confirmation, the prevalence of unrecognized silicosis in a group of silica-exposed New Jersey decedents whose cause of death was chronic obstructive pulmonary disease (COPD), tuberculosis, or cor pulmonale. Two expert readers re-evaluated the chest X-rays of this group to determine the presence or absence of silicosis. The study population was considered to be presumptively exposed to silica dust by virtue of their usual industry of employment as listed on the death certificate.*
Results *Radiographic evidence of silicosis was found in 8.5% of this population, and evidence of asbestosis was found in another 10.7%, for a total of 19.2%.*
Conclusions *The existence of previously unrecognized silicosis and asbestosis in 19.2% of this study group suggests that occupational lung disease is under-recognized and, hence, undercounted.* Am. J. Ind. Med. 44:304–311, 2003. © *2003 Wiley-Liss, Inc.*

KEY WORDS: silicosis; New Jersey; surveillance; occupational disease/diagnosis; asbestosis; pneumoconiosis/radiography

INTRODUCTION

Silicosis is an irreversible lung disease caused by work-related exposures to dust containing crystalline silica. Because the body cannot clear or metabolize the respirable portion of the inhaled mineral dust particles, fibrosis develops in the upper regions of the lungs, which interferes with their normal expansion. The immune system scavenger cells known as alveolar macrophages are destroyed, with fibrotic nodules forming around them [Balaan and Banks, 1998]. Although there is no cure for this disease and treatment is only palliative at best, silicosis is entirely preventable with dust control measures at the workplace. Each case usually signifies the existence of other cases at the same work site, and therefore a missed case implies other missed cases. The under-counting of silicosis—and other occupational disease—is a paramount public health issue in that it undermines the justification of resources for preventive programs to curb if not eliminate such disease.

Silica exposure brings about changes to the immune system [Hnizdo and Murray, 1998; Haustein et al., 1990; Rosenman et al., 1999], and the World Health Organization's International Agency for Research on Cancer [IARC] in 1996 designated crystalline silica as a human carcinogen, group 1 [International Agency for Research on Cancer, 1997], although this finding is still debated [Checkoway and Franzblau, 2000].

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Silicosis is strongly associated with chronic obstructive pulmonary disease (COPD) [Chia et al., 1992; Rosenman and Zhu, 1995], which appears frequently as a cause of death among workers in silica-exposed occupations [U.S. Department of Health and Human Services, 1994]. Cor pulmonale, or right heart failure, is an end-stage complication of silicosis. Studies in Ontario [Kusiak et al., 1993] and South Africa [Murray et al., 1993] have shown silicosis to be a significant risk factor for cor pulmonale.

Although reports to the Centers for Disease Control (CDC) show a sharp decline in silicosis from 1,100 deaths in 1968 to 255 deaths in 1992 [U.S. Department of Health and Human Services, 1999], large number of workers in many industries continue to be exposed to silica dust in the course of their work, frequently at levels exceeding the current OSHA permissible limit. Deaths from severe silicosis continue to be reported in workers under the age of 45 [Roberts and Castellan, 1997]; these are likely to be index cases, signifying the presence of other cases of varying severity in co-workers. This study was initiated to estimate the extent of previously undetected silicosis.

METHODS

Uncovering Cases Through Co-Morbidities

A diagnosis of silicosis is confirmed by chest radiography together with documented occupational exposure to crystalline silica dust. To test the hypothesis that silicosis has been overlooked by physicians, we identified potential cases of silicosis by selecting decedents who had worked in silica-exposed industries but whose cause of death was other than silicosis. Expert readers re-evaluated the chest X-rays of these potential silicotics for evidence of the rounded opacities characteristic of silicosis.

The New Jersey State Department of Health and Senior Services (NJDOHSS) has been conducting case-based silicosis surveillance since 1987 through SENSOR, a federally funded program [Baker, 1989]. Under SENSOR, New Jersey requires reports of new cases from hospitals and physicians. Each reported case is entered into a statewide silicosis registry for confirmation of the diagnosis through review of the chest X-ray and verification of appropriate work-related exposures. For each confirmed case, NJDOHSS identifies the industry where exposure occurred and assigns the relevant U.S. Department of Labor standard industrial classification (SIC) code.

Industrial codes found in the New Jersey silicosis registry were selected for use in this study. COPD, tuberculosis, and cor pulmonale were selected as diagnoses of interest, which met the criteria of being associated with silicosis and the likelihood of having chest radiographs available in the hospital files.

Death Certificates

Death certificates provide a convenient cross-match of diagnosis and usual industry. As of 1990, New Jersey was one of 25 states to code occupation and usual industry on death certificates and report to the National Center for Health Statistics (NCHS). When a death occurs in a hospital, the death certificate includes the name of the hospital, which is a potential source of chest X-rays plus admission and discharge diagnoses.

Study Population

Any individual who died as an inpatient in a New Jersey hospital during the 3-year period 1991–1993 was eligible for inclusion in the study if three additional criteria were met: (a) an underlying cause of death of either tuberculosis, cor pulmonale, chronic bronchitis, emphysema, or chronic airways obstruction; (b) a readable chest X-ray; and (c) usual industry on the death certificate in an SIC found in the NJ silicosis registry: mining, not coal SIC (14) construction (15,16,17) plastics, soaps (28), glass, cement, structural clay, pottery, miscellaneous mineral/stone (32), blast furnaces, foundries, primary metals (33), or shipbuilding and repair (37).

Preliminary List of Eligible Deaths

New Jersey state regulations (26:8–4) require that hospitals maintain records for a minimum of 10 years, and X-rays for 5 years. We utilized records for the entire 3-year period 1991–1993, during which time there were a total of 732 New Jersey deaths meeting these criteria. The NJDOHSS generated a list of these death certificates by death certificate number, year of death, cause of death, and usual (longest) industry. Because of the need to limit the size of the study to 300 observations, the maximum number of chest X-rays that could be processed by expert readers, it was necessary to use a sample of the data.

Sampling Strategy

Of the 732 deaths, 455 (62%) occurred in the construction industry, but the proportion of construction workers in the New Jersey registry between 1979 and 1990 was only 7%. Therefore, in order to keep the construction industry more in balance with the other industries, to address the lower potential for exposure, and to keep the number of cases under 300 for X-ray reading purposes, a random sample of 100 construction cases was drawn, bringing the new total to 377 cases. The proportion of construction workers was lowered from 62 to 27%.

Sending for and Processing Records

After sending for and reviewing the death certificates, 107 were found to be unusable in that death did not occur in a New Jersey hospital: 56 died at home, 11 died out of state, 11 were dead on arrival, and 29 died in nursing homes. This resulted in a total of 270 cases where data was potentially available from New Jersey hospitals. These death certificates were abstracted for age at death, name of hospital, underlying cause of death, usual industry, race, gender, and whether there was any mention of silicosis on the death certificate as a contributing cause of death.

After abstracting the death certificates, letters were sent to each hospital requesting admission sheets, discharge summaries, chest radiographs, and posterio-anterior and lateral view radiology reports. A log was maintained of each X-ray received from the hospitals. Upon receipt, X-rays were examined to confirm the identity of the patient and to eliminate micro-films, films, other than chest X-rays, or blank or severely over-exposed or under-exposed films. At the request of the readers, multiple X-rays were sorted and placed in chronological order. Chest X-rays were batched at the NJDOHSS and then forwarded to the Division of Respiratory Disease Studies (DRDS) at NIOSH in Morgantown WV for evaluation by the reading team. For each case, X-rays were affixed with three blank copies of the NIOSH roentgenographic interpretation sheet (B-reader sheet) labeled with the death certificate number.

Hospital records were abstracted at NJDOSS for name of attending physician, smoking status of patient (current, former, never, and unknown), any mention of silicosis or fibrosis on the discharge summary, or the X-ray report. All information, including that from the death certificates, was entered onto a coding sheet and later onto a SAS data set for analysis.

Although the protocol called for each X-ray to be read independently by two "B" readers, the readers opted to read side-by-side concurrently, using a consensus approach. The X-ray readers each filled out a separate (B-reader) sheet with the results of their classification. Although readers were blinded to all descriptors about the subjects, including other diagnoses, usual occupation, age, race, and sex, they were told that 25% of subjects had been in the construction industry, where exposures to silica dust do not always exist. Both readers have extensive experience in interpreting films, and previously passed a NIOSH-administered proficiency examination in radiologic classification of films, which qualified them as "B" (expert) readers [Wagner et al., 1992]. Both the coding sheet for each subject and the B-reader sheets contained the unique death certificate number to allow linkage of the two.

Statistical Analysis

Any decedent found to have evidence of silicosis with a profusion category of at least 1/0 was considered to be a missed diagnosis. Proportions with 95% confidence intervals (CIs) were calculated for subjects found to have a missed diagnosis.

RESULTS

Characteristics of the Study Population

Of the 270 subjects for whom hospital records and chest X-rays were requested, 93 were lacking either chest X-rays and/or hospital records. This left a total of 177 files with records adequate for interpretation. Table I shows the distribution of the study subjects by underlying cause of death and usual industry as shown on the death certificate. Table II shows distribution by cause of death, gender, age, race, and smoking status. This is primarily an older, white, male population. Smoking status was unknown for 122 (68.9%) cases. Of the 55 cases whose smoking status was known, 76.3% were documented as being either current or former smokers.

Construction workers excluded from the sample did not differ from the entire construction group with respect to original cause of death; similarly, those excluded because they died outside the hospital or had unusable records did not differ with respect to industry. The 93 lacking chest X-rays or hospital records did not differ in cause of death or industry from the 270 subjects for whom hospital records and chest X-rays were requested. (Data not shown.)

TABLE I. Distribution of Silicosis Cases by Industry and Underlying Cause of Death (n = 177), New Jersey

	Underlying cause of death				
Industry	**TB/CP[a]**	**CB[a]**	**ES[a]**	**CAO[a]**	**Total (%)**
Mining, not coal	0	0	2	3	5 (2.8)
Construction	9	2	6	32	49 (27.7)
Plastics/synthetics	2	0	2	7	11 (6.2)
Soaps/cosmetics	2	1	4	14	21 (11.9)
Glass	6	0	4	11	21 (11.9)
Cement, concrete, etc[a]	1	2	2	6	11 (6.2)
Blast furnaces	2	0	3	19	24 (13.6)
Foundries/primary metal	2	0	8	12	16 (9.0)
Shipbuilding	1	0	0	12	13 (7.3)
Total (%)	25 (14.1)	5 (2.8)	31 (17.5)	116 (65.5)	177 (100.0)

CP, cor pulmonale; CB, bronchitis; ES, emphysema; CAO, chronic airways obstruction.
[a]Includes structural clay, pottery, miscellaneous mineral and stone.

TABLE II. Distribution of Silicosis Cases (n = 177) by Cause of Death, Gender, Age, Race, and Smoking Status: New Jersey

	Frequency	Percent
Cause of death		
Tuberculosis	4	2.3
Cor pulmonale	21	11.9
Chronic bronchitis	4	2.3
Emphysema	32	18.1
Chronic airways obstruction	116	65.5
Gender		
Male	154	87.0
Female	23	13.0
Age		
50–64	21	11.9
65–74	57	32.2
75–84	67	37.8
85+	32	18.1
Race		
Black	10	5.6
White	167	94.4
Smoking status		
Current	22	12.4
Never	13	7.3
Former	20	11.3
Unknown	122	68.9

Previously Unrecognized Silicosis and Asbestosis

As shown in Table III, 15 previously unrecognized cases of silicosis and 19 previously unrecognized cases of asbestosis were identified by the readers. Table IV shows the distribution of these cases by cause of death, gender, age, race, and cause of death, and Table V shows the distribution by industry. Among the ten African-American workers, no missed cases of silicosis were observed, although three (30%) showed evidence of asbestosis.

The severity of undetected silicosis is shown in Table VI, which classifies the stage of disease by profusion category, industry, and age group. Profusion category 2 denotes denser concentrations of opacities than in category 1, signifying a more advanced stage of silicosis. Six of the fifteen silicosis cases fell into category 2. Progressive massive fibrosis (PMF), the most severe form of chronic silicosis, was detected in two construction workers and one shipbuilder: all three were white workers over the age of 65.

TABLE III. Prevalence of Previously Unrecognized Cases of Silicosis and Asbestosis With 95% Confidence Intervals (CIs)

Missed cases	Frequency	Percent	95% CI
Silicosis	15	8.5	4.8–13.6
Asbestosis	19	10.7	6.6–16.3
Total	34	19.2	13.7–25.8

TABLE IV. Distribution of Cases With Evidence of Silicosis and Asbestosis by Gender, Age, Race, and Cause of Death

	Re-evaluation results		
Category	N	Silicosis (%)	Asbestosis (%)
Gender			
Male	154	14 (9.1)	18 (11.7)
Female	23	1 (4.3)	1 (4.3)
Age			
50–64	21	2 (9.5)	1 (4.8)
65–74	57	4 (7.0)	8 (14.0)
75–84	67	5 (7.5)	9 (13.4)
85+	32	4 (12.5)	1 (3.1)
Race			
White	165	15	16
Black	10	0	3
Cause of death			
TB	4	1 (25.0)	2 (50.0)
Cor pulmonale	21	1 (4.8)	1 (4.8)
Chronic bronchitis	4	0	1 (25.0)
Emphysema	32	1 (3.1)	3 (9.4)
Chronic air obstruction	116	12 (10.3)	12 (10.3)

Of the fifteen cases of silicosis that were detected, the original radiology reports were available for thirteen. A comparison of the findings in the radiology reports with the B-reader findings are presented in Table VII. The B-readers

TABLE V. Distribution of Cases With Evidence of Silicosis and Asbestosis by Industry

Category	N	Silicosis n (%)	Asbestosis n (%)
Industry[a]			
Mines, not coal	5	2 (40.0)	0
Construction	49	3 (6.1)	6 (12.2)
Plastics/synthetics	11	1 (9.1)	1 (9.1)
Soaps/cosmetics	21	1 (4.8)	4 (19.0)
Glass	21	2 (9.5)	1 (4.8)
Cement	2	1 (50.0)	0
Non-metalic mineral	4	0	1 (25.0)
Blast furnaces	24	3 (12.5)	2 (8.3)
Iron & steel foundry	6	0	2 (33.3)
Primary metals	16	0	2 (12.5)
Shipbuilding	13	2 (15.4)	0

[a]No evidence of silicosis or asbestosis was found among the five workers in the structural clay and pottery industries.

TABLE VI. Distribution of Missed Silicosis Diagnoses Among Industry Groups and Age Groups by Disease Profusion Categories (n = 15)

	Profusion category	
	Category 1	Category 2
Industry group		
Mining, not coal	2	0
Construction	1	2 (both are PMF[a])
Manufacturing		
Plastics/soaps	2	0
Glass/cement/stone	2	1
Metal industries	3	0
Shipbuilding	1	1 (PMF[a])
Total	11	4
Age group		
50–64	2	0
65–74	1	3 (includes 2 PMF[a])
75 and over	8	1 (PMF[a])
Total	11	4

[a]PMF is the most advanced stage of chronic silicosis.

read these reports after completing the classifications, and found that in six cases the radiology report should have alerted the attending physician of the possibility of occupational exposures.

DISCUSSION

The principal finding of this study was that undetected silicosis and asbestosis exist despite a case-based surveillance system. This study has been a first attempt to systematically uncover previously unrecognized cases of silicosis in the U.S. Only one previous study was specifically designed to detect unrecognized silicosis. Seeking to identify silicosis in a population whose cause of death was other than silicosis [Murray et al., 1996] utilized autopsy data and work histories in their investigation of black South African gold miners whose cause of death was trauma; they found that the prevalence of silicosis among these decedents increased from 9.3% in 1975 to 12.8% in 1991.

Previous studies with other primary objectives have noted that silicosis has been overlooked by clinicians who sign death certificates. For example, in a mortality study of Vermont granite workers, investigators suggested that misdiagnosis may have occurred in 10 of 25 decedents who had evidence of silicosis in their chest X-ray records but had no mention of silicosis on the death certificate [Davis et al., 1983]. In a study of sandblasters in New Orleans, the death certificates were reviewed for eight of the eleven confirmed silicotics who died after entering the study; only three of eight decedents had any mention of silicosis on the death certificate [Hughes, 1982].

Since there is considerable overlap in the industries where exposures to asbestos and crystalline silica occur, it is reasonable that undetected asbestosis would be observed as well as undetected silicosis.

It has been estimated that almost 500,000 workers in New Jersey were exposed to asbestos in the 45 years since the start of World War II [Stanbury and Rosenman, 1987]. New Jersey ranked third in the nation in number of deaths from asbestosis between 1987 and 1996, and is one of the five leading states in crude mortality rates from asbestosis in this same time period [U.S. Department of Health and Human Services, 1999]. Surveillance of work-related

TABLE VII. Comparison of B-Reader X-Ray Reports With the Original Radiology Reports for 13 of 15 Cases With Evidence of Silicosis

Case[a]	Original radiology report comments	B-reader report[a]
1	No infiltrate; single frontal projection; evidence of COPD	1/1; QT; 123456
2	Tiny persistent left pleural effusion; minimal hazy density in right mid-lung; may be residual pulmonary edema	1/0; QQ 1245
3	Left lower lobe pneumonitis	1/0; QT; 123456
4[b]	Pulmonary interstitial lung disease	1/0; QT; 123456
5[b]	Left lower lobe infiltrate; faint increase in upper lobes density may be early infiltrates	1/2; RT; 123456"B"
6[b]	Interstitial fibrosis and infiltrative change in both upper lobes	2/1; QT; 123456 "A"
7	Small rounded calcific density at right base; a calcified granuloma; probable fibrosis in left lower lobes	1/1; QT; 123456
8[b]	Minimal infiltrate in right perihilar region and left lingula	1/0; QQ; 1245
9	Interstitial infiltrate in central lung zones; may be inflammatory or vascular etiology	1/1; QT; 123456
10	Infiltrates at right lung base	1/1; PS; 123456
11	Moderate cardiomegaly	1/0; QQ; 123456
12[b]	Underlying interstitial thickening or fibrosis	1/0; QT; 123456
13[b]	Diffuse bilateral infiltrates; atelectasis & consolidation in right upper lobe	2/2; RQ; 123456 "B"

[a]Radiology reports for two cases were missing.
[b]Starred cases denote radiology report comments that should have alerted the attending physician to consider occupational exposures.
[c]n/n is profusion; letters refer to size and shape of opacities, final numbers refer to lung zones where opacities appeared; "A", "B" refer to large opacities.

asbestos disease in New Jersey began in 1985 with mandatory reporting by hospitals; physicians have been required to report asbestosis since 1990. Smoking is considered to be the prime risk factor for both COPD and lung cancer, and smoking prevalence is high among silica-exposed populations. Smoking is rarely mentioned in exposure-response studies where the outcome is fibrosis; one investigator observed that smoking is not a contributory cause of silicosis but often aggravates symptoms [Landrigan, 1986]. Rice et al. [1986] found that smoking did not affect the results of their study of North Carolina dusty trades workers, but Finkelstein [1994] found that cigarette smoking was a risk factor for the diagnosis of silicosis in Ontario [Finkelstein, 1994]. A study of Michigan foundry workers found that among highly exposed workers the rate of silicosis was 12.2% in smokers, as compared with 4.4% in never smokers [Rosenman et al., 1996].

It is unfortunate that smoking status was unavailable in the hospital records of nearly 70% of decedents whose cause of death was a respiratory disease. Narratives frequently lacked smoking data, and admission sheet smoking boxes were seldom filled in. This is not surprising because hospital data is primarily recorded for billing purposes and not for research.

There were methodological limitations in this study. The purpose of the "B" reader program is to classify X-rays under the ILO scheme for the presence or absence of parenchymal or pleural lesions characteristic of pneumoconiosis. Classification of X-rays is an epidemiological exercise rather than a clinical one, and diagnosis can be made only in combination of the classification with confirmed exposure to airborne silica dust.

Although the X-rays in this study were classified according to the [International Labour Office, 1980] classification scheme, some requirements were relaxed. For instance, the protocol for the ILO scheme specifies the exact exposure view required. The required view is the postero-anterio (PA-lateral) meaning the X-ray is taken from the back and the side while the subject is standing with full inspiration. Because these patients were end-stage, in many cases the X-rays were administered from the front (anter-postero) with the subject either standing or sitting. The X-rays of this population are subject to the "noise" of end-stage disease. To assure that a sufficient number of cases were available for analysis, the film quality standard was also relaxed, in that only unreadable (category 4) were excluded from the survey. Film quality can be a factor in the classification of radiographs for asbestosis, but this is less of a problem with experienced readers [Parker, 1997].

The consensus approach in reading was adopted because the majority of case files included multiple X-rays, which required identification of the one highest quality film. Readers sat side by side and evaluated each X-ray using the standard reference set of X-rays called for in the ILO guidelines. A limitation of the consensus approach is that the stronger personality may dominate the discussion and the decision process. Both readers in this study, however, have extensive experience and expertise in interpreting films and it is not likely that any bias occurred from the consensus approach.

Many factors contribute to the interpretation of X-rays, including the size of the patient, the film quality, the experience of the reader, and observer bias of the ILO reader knowing that dust exposure is involved [Epler et al., 1978]. An early study found that physicians differ from each other one third of the time in reading X-ray films [Yerushalmy et al., 1951].

It is possible that these readers have underestimated the extent of silicosis because X-ray classification is limited in sensitivity. Examples appear in the literature of pulmonary impairment and pathological conformation of silicosis in the absence of radiological evidence. In an autopsy-based study comparing pathology to radiological findings for silicosis, the sensitivity values of the three X-ray readers were 0.393, 0.371, and 0.236, respectively; each reader found less than 40% of the cases confirmed by pathology [Hnizdo et al., 1993]. Similarly, an autopsy study of Vermont granite workers found pathological evidence of silicosis in the absence of radiological evidence [Craighead and Vallyathan, 1980]. A review of the literature on asbestos diagnoses found that autopsy series indicated a 40% sensitivity and 80% specificity rate for chest X-rays [Gefter and Conant, 1988].

On the other hand, there is the potential for "over-reading" of X-rays. Gefter and Conant [1988] reviewed chest X-rays on hospitalized patients without known industrial exposure; evidence of small opacities at a profusion level of 1/0, or greater in 18% of subjects [Gefter et al., 1984]. Of the positive cases, 60% had no previous dust exposure or medical etiology to explain the opacities. [Epstein et al., 1984] evaluated the chest radiographs of 200 patients entering a large urban hospital according to the 1980 ILO scheme and found that 22 (11%) without known industrial exposure had small opacities consistent with pneumoconiosis.

Although death certificates have been shown to be useful in occupational health surveillance, they can be potential sources of error. Errors in the identification of cause of death [Carter, 1985; Mancuso, 1993] as well as errors in the coding of occupation and industry [Steenland and Beaumont, 1984; McLaughlin and Mehl, 1991] are potential limitations. There was, however, 100% agreement in this study between underlying cause of death and discharge diagnosis on the hospital record. The lack of quantitative exposure data for the subjects in this study is another limitation.

This is a small study conducted in one state during the early 1990s and it would benefit from updating. It bears repeating that silica exposure occurs in a myriad of occupational settings, and that there is great variability among states in their industrial bases. New Jersey's range of industry

is not necessarily representative of that of the U.S. as a whole. Mining, for instance, with the exception of sand mining, is non-existent in New Jersey but is a great source of potential exposure for silicosis. Other diagnoses at death such as trauma might have captured a younger population but the probability of a chest X-ray in the hospital record would have been considerably lower. It is possible that rates of missed diagnoses found in New Jersey may understate the national rates because of the fact that all New Jersey physicians received a fact sheet in 1985 from the Health Department about the recognition and diagnosis of silicosis [Valiante and Rosenman, 1989]. Physicians from other states without the benefit of this notice may have missed even a higher proportion of cases.

Physicians play the pre-eminent role in case-based disease surveillance by virtue of their unique role in recognizing and diagnosing cases but most primary care physicians do not take occupational histories [Goldman and Peters, 1981]. Although 85% of primary care physicians treat patients in the workforce [Campbell and Nicolle, 1981], most receive minimal formal training in the recognition of occupational disease in medical school [Institute of Medicine, 1988].

The under-recognition of occupational disease by physicians may be attributable in part to factors beyond the scope of this study. It must be remembered that many of these cases of pneumoconiosis developed years or even decades ago, prior to the development of co-morbidities. The presence of silicosis in younger patients without complications would have been easier to recognize by the physicians who previously cared for them but are unknown to this study. It would be inappropriate; therefore, to attribute all responsibility for these missed diagnoses in patients with end-stage respiratory disease to the current physicians. It is not possible to tell what proportion of the cases retained the same provider for decades, but is it likely that providers changed for many subjects.

While the prevalence of silicosis has lowered, especially in the granite industry [Graham et al., 1991], this disease is by no means disappearing or becoming a historical curiosity [Markowitz and Rosner, 1998]. Large number of workers continue to be exposed to silica, at levels frequently exceeding the permissible exposure limit. Among active and retired Colorado hard-rock miners, investigators found a 50% risk for silicosis in miners working 45 years at an average exposure level of half the current OSHA standard [Kreiss and Zhen, 1996]. In a study of South Dakota gold miners, the adjusted lifetime risk for silicosis was estimated to be 35% [Steenland and Brown, 1995].

In conclusion, this study suggests that occupational lung disease may be undercounted in high-risk occupations. The promulgation by OSHA of a comprehensive standard for crystalline silica would include ongoing exposure monitoring and medical surveillance, which would significantly improve the recognition of cases and justify more stringent preventive measures to reduce exposure. Current practitioners as well as medical students need skills in taking an occupational exposure history.

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MR. WHITFIELD. Thank you very much for your testimony. We appreciate, as I said earlier, your being with us today.

And Dr. Welch, you are a physician, you are an expert on mass screenings, and I am assuming you are familiar with the decision rendered by Judge Jack in Texas in the case we are discussing today. What is it that bothers you the most about this screening process used in that particular case?

DR. WELCH. You know, when I give an opinion certainly under oath on anything, I actually like to have real information, and mostly what I know about that case is, in my mind, almost hearsay. It is somebody else's opinion on something else so I--

MR. WHITFIELD. Have you read her decision?

DR. WELCH. I have read her decision. And I actually think that she makes a very good case, her decision.

MR. WHITFIELD. But based on the decision that you read, assuming that the information in there is correct as she said, what is it about the screening process that would cause you the most concern?

DR. WELCH. It is my understanding that that timely notification to the individuals screened and assuring that there is the opportunity for ongoing medical care that just was not part of these screenings. Now if someone demonstrated to me that it was, I would certainly feel more

comfortable, but the discussion and what came through in her opinion was that the information went back to the attorney. And so if there was silicosis even if there was a cancer, the screening program or the B reader or whomever would notify the attorney. We have not heard any testimony--I was not aware of any of what the attorney did with that, how long it took for the worker to find out, and what discussion went on with the worker about what to do.

MR. WHITFIELD. So the purpose of screening is to give you advance warning so that you can take the steps to receive the medical procedures that you need to address that and in this case they were determining that this is a person who may have silicosis but nothing was done about it?

DR. WELCH. That is my opinion. We may hear different testimony here today or from the--

MR. WHITFIELD. Now if that is the case, that would be a real violation of medical ethics, would you not say?

DR. WELCH. Right, it is a screening program, but I would not put the word medical screening program in there.

MR. WHITFIELD. Right.

DR. WELCH. Because it is not providing any medical evaluation and treatment after the screening.

MR. WHITFIELD. Mr. Sherman, why couldn't someone look at the Judge Jack opinion and call it an example as some people have today that the system is working, bad claims being tossed out. Why can't we assume that this is only one example of bad behavior instead of an indicator of a systemic problem with our judicial system on class action lawsuits?

MR. SHERMAN. Well, what Judge Jack's opinion pointed out is the lack of standards over screening and diagnosis in this area, and without standards, we could anticipate that these kinds of situations might arise in other places and at other times. It points up quickly it seems to me that systemic changes need to be made in establishing ground rules and standards for screening and diagnosis.

MR. WHITFIELD. Now, you know, prior to this silicosis litigation there was a lot of asbestos litigation and some of these same doctors were involved in that. So even during the asbestos litigation there was a total lack of any standards in making the proper determinations. Is that correct?

MR. SHERMAN. I think in asbestos litigation there were certainly many incidents in which screening and diagnosis was made without adequate standards. And what happened in the litigation system of course is the cases were bundled by lawyers and law firms, and then were taken to settlement negotiations with defendants. And defendants also shared a little bit of the blame because defendants were complicit in

settling these bundled mass cases often at lower rates because they felt that they could strike a favorable settlement. The lower in that situation may be the individual whose case is settled at a relatively low settlement fee and then who develops later on a serious condition, and because of res judicata, would no longer be able to do this. So the system has taken on a life of its own. It involves lawyers on both sides.

MR. WHITFIELD. Now, you talked about some of the proposals of the American Bar Association. When did the American Bar Association become concerned enough about this issue to create a task force to try to develop some proposals?

MR. SHERMAN. The task force was created in 2003, but the American Bar Association in earlier times has focused on other aspects, particularly of the asbestos problem. But this particular one was 2003.

MR. WHITFIELD. And what precipitated that?

MR. SHERMAN. The task force was especially supposed to look at the pending legislation, the medical criteria versus the trust fund legislation.

MR. WHITFIELD. Okay.

MR. SHERMAN. But in the process of looking at that legislation, very interestingly, the task force became very concerned about a number of these conditions in the present litigation system.

MR. WHITFIELD. Well, could you compare the recommendations made by the American Bar Association in their February 2005 recommendation with the observations of Judge Jack and her opinion as far as what should be done? Were they similar? I mean is she recommending the same thing they were recommending or do they have differences of opinion or--

MR. SHERMAN. No, I think they track very closely. She was concerned about the fact that screening was being done without standards, very often by individuals who had minimal--

MR. WHITFIELD. That is okay.

MR. SHERMAN. --if any, medical training. She was also worried about the fact that very possibly in these vans the X-ray equipment was not up to standards. But her key objections had to deal with the diagnosis part, that diagnoses were being made on the basis of a single X-ray, sometimes by a doctor who had not seen the patient, who did not take the medical history, did not determine whether additional tests should be made and did not make determinations as to whether there were alternative explanations for what was read on the X-ray.

MR. WHITFIELD. Now Judge Jack in this case allowed discovery of the diagnosing doctors, and I am sure there are many cases like this where the judge does not allow that at that particular time. Now had she

not have permitted this discovery, how would this litigation have proceeded?

MR. SHERMAN. Well, in this case, it is an unusual case because, in fact, she ultimately found that most of these cases were improperly removed from state court to Federal court and she remanded them back to state court. But in making that remand and jurisdictional determination, she properly, I believe, felt that there had to be a factual inquiry, and it was that factual inquiry that led her to make that determination. One could imagine many judges, Federal judges, for example, looking at the jurisdictional issue and not being confronted with 10,000 cases as she was and a pattern that she identified of abuse and therefore simply remanding the case without going into the factual determination.

MR. WHITFIELD. Mr. Stupak, you are recognized for your 10 minutes.

MR. STUPAK. Thanks.

Professor Sherman, this was an MDL, multi-district litigation, right? Did it ever evolve to a class action suit?

MR. SHERMAN. Yes, it was.

MR. STUPAK. There was a class action suit?

MR. SHERMAN. No, it was not a class action suit.

MR. STUPAK. Right.

MR. SHERMAN. These were individual cases transferred, consolidated for transfer under MDL.

MR. STUPAK. So that is, I guess, sort of the first thing I wanted to clear up, this was not a class action suit.

Secondly, the Chairman asked you about discovery and in an MDL, both sides get to discuss, or I should say discover, what the experts of the other side knows so they certainly would have had time to in the MDL, multi-district litigation, do the depositions of each other's experts. Correct?

MR. SHERMAN. Yes, or had this case gone forward and not been remanded on the jurisdictional issue, there would have been opportunity for full discovery.

MR. STUPAK. Sure. And when we deal with MDLs, you look at MDLs because of the complexity of the issues involved, the sheer volume of the evidence and things like that when you do an MDL. Correct?

MR. SHERMAN. Yes.

MR. STUPAK. Okay. One of the points you made in your testimony and exhibit--in fact, both of you made this, both Dr. Welch and you. Professor, your testimony, in exhibits you have submitted, is that although many safety standards have been put in place to safeguard

against worker's exposure to asbestos and silica, many new cases of asbestos and silicosis are still rising, and those who have worked in manufacturing and construction for some time and we are just now seeing the peak of the epidemic. Could you expand a little bit on that for me?

MR. SHERMAN. Well, in the case of silicosis, it was first addressed in the '70s by OSHA regulations. There have since been various regulations and standards adopted, including industry standards and so forth, and there is no doubt that it has brought down the incidents of silicosis. But as Dr. Welch has indicated, there are many occupations in which the individuals are exposed to silica that may result in those injuries. And I am certainly not in a position to judge the adequacy of the present OSHA regulations or other regulations. That is another matter.

MR. STUPAK. And on the asbestos cases now that are pending yet, I just want to make sure the record is clear. There are some meritorious claims out there. These are not all bogus cases or cases where you have inadequate screening and plaintiffs' lawyers just filing lawsuits. There are legitimate claims on asbestos. Is there not?

MR. SHERMAN. Oh, absolutely. Asbestosis, as we know, asbestosis is a condition in which a single asbestos fiber in the lungs will stay there. It can result in pleural thickening. The plural thickening may never result in serious disability, but the exposure period is 40 years, and therefore, the period from exposure to the disability may be very long and plenty of those are very serious.

MR. STUPAK. And the exposure in silicosis, is it the same, about 40 years?

MR. SHERMAN. I am not sure about the length of time.

MR. STUPAK. Dr. Welch, could you answer?

DR. WELCH. It can be that long. I mean, the acute silicosis, which is the easiest thing to identify, and that is sometimes what the deaths are due to, occurs very quickly but the exposures are very high. But what we are dealing here with more would be a chronic silicosis, and take 20 or 30 years, probably take 10 years of exposure, and then 20 or 30 years from first exposure.

In terms of the asbestosis cases, could I comment on that?

MR. STUPAK. Sure.

DR. WELCH. I mean, you are aware of SA 52 in the Senate.

MR. STUPAK. Right, because I was going to ask why are we trying to get Congress through a bailout of the asbestos industry, if you will, or this trust fund if there are no claims?

DR. WELCH. Right, and there were $100 billion worth--

MR. STUPAK. Hundreds of them, right.

DR. WELCH. --of claims. Even when you have eliminated everybody with asbestosis that does not have severe impairment--and mostly the cancers are what is that cost and many people think it is not enough money. So there are certainly a lot of asbestos claims, not as many silica claims, the exposures were not as widespread, but it is still a medical problem we have to deal with. And OSHA is currently looking at reducing its permissible exposure limit. They are reevaluating that.

MR. STUPAK. I think you said we should not call this a medical screening that occurred in this case in the silica case, right?

DR. WELCH. It did not seem like there was a lot of medicine. It did not seem like, from my opinion it is legal case finding and so the diagnosis is a legal report rather than a medical diagnosis, was what it looks like to me.

MR. STUPAK. With screening and screening programs can be beneficial, can they not?

DR. WELCH. Absolutely.

MR. STUPAK. And could you explain some of the ways in which some medical benefit could be derived from screenings if properly conducted and reviewed?

DR. WELCH. Well, I could use the example of our sheet metal workers screening.

MR. STUPAK. Sure.

DR. WELCH. It started in 1986 and it is run by labor management trust. And people associated with it will say it has really changed the way sheet metal workers work because they are in buildings where there is asbestos in place, and by raising awareness through the program, identifying people who have disease and training those people about their hazards, it has changed the way they work. We also have really high rate of smoking cessation for people who go through the problem and are identified as having scarring. We get a 50 percent quit rate among those people in addition to the sort of more subtle benefits about diagnosis of treatment, but those are two pretty obvious ones.

MR. STUPAK. So cessation of smoking, maybe change of work environment, maybe change or alter the medical treatment you are currently receiving.

DR. WELCH. Right.

MR. STUPAK. Whether this would be for silicosis or asbestos, right?

DR. WELCH. Right. In addition to which identifying groups of people who are at risk and may need medical screening that we have not thought about before, because looking at groups in a screening setting allows you to better understand the pattern of disease and patterns of exposure.

MR. STUPAK. Okay. Doctor, you also set forth in your testimony goals of extensive screenings in occupational medicine. Are there any significant risks or dangers to a person undergoing untargeted mass screenings other than inconvenience?

DR. WELCH. Well, it is an issue of screening in general. If you make a diagnosis in somebody and they don't have it, there are some downsides to that. The person is worried, they may get medical treatment that they do not need, they may change their job. If you give them an occupational diagnosis, they may retire early. I mean, there are a lot of implications of inappropriate diagnoses. It applies with, you know, even mammography, where screening has to be sensitive enough to find cases. So not all the positives are going to be really positive, that is why it is appropriate to have the right follow up and good testing that follows it. If you leave those potential cases out there without doing that second level of follow up, you can create a lot of worry and concern.

MR. STUPAK. Let me ask the question this way. It is not necessarily the screening itself may not be a health risk to the individual, but what happens with that screening when it is being read, if you will, that is when the harms that you spoke of occurs.

DR. WELCH. That is correct.

MR. STUPAK. Okay. Would an inexperienced screener performing basic spirometric pulmonary function tests pose a significant risk for those being screened?

DR. WELCH. The risk would be getting the answer wrong, you know, if--

MR. STUPAK. Not the test, but again, it is reading these screens.

DR. WELCH. Right.

MR. STUPAK. Or the results.

DR. WELCH. Doing the test wrong is not going to hurt the person during the test, but if they are given a diagnosis that they do not have, or told they are normal when they are impaired, that could have an impact on them.

MR. STUPAK. One of the things I mentioned in my opening statement and I would ask you to elaborate on it. One of the things I found sort of appalling was it appeared that after these screenings the individuals, if they had something wrong with them that could be of a more serious nature, they usually received the news, the way I understood it, from the legal people, lawyers or paralegals, and not from medical personnel. And that was my reading of testimony in the case in Judge Jack's opinion. Could you explain that a little bit more? What would be the downside of this from a medical point of view?

DR. WELCH. Well, one sort of apparent downside is that is going to take a long time by the time there is a screening that occurs and the X-

ray goes to somebody else and gets read, they do a report, they get it back to the lawyer, you could be talking about weeks and months. And if there was something that needed immediate treatment, there would definitely be a downside in that. Also my impression, and again, I have not done a lot of investigation, is what the worker would get would be just a, you know, your X-rays showed this--but no true, you are not meeting with a doctor that is going to tell them what it means for them and what they need to do. And so, you know, finding out that you have silicosis without any advice about what to do about that is not really any use to anybody in my opinion.

MR. STUPAK. Okay. Professor Sherman, if you could--and it may not be fair to ask this question, but let me ask it this way. I am sure that people are--was this case rather an exception to the normal tort claims being filed in this country under an MDL or was this sort of standard? This deceptive fraud that we sort of see that went on here.

MR. SHERMAN. I think the level of the fraudulent practices here was pretty extreme. I am not aware of anything as poignant as that in one area of asbestos. I think there have been abuses in asbestos screening, I think, and diagnosis. I think that cases have been, over the years, asbestos cases have been settled, bundled cases in which large numbers of people are not ill, and probably will never become ill, and therefore are getting a windfall. But I do not think we have quite the kind of totality of lawyers, doctors, and screening companies in fairly small numbers working together as we have in this case.

MR. STUPAK. And in those other cases, I think you said--and even in this case--that both the plaintiffs' attorneys and the defense attorneys both bear some responsibility here for this outcome.

MR. SHERMAN. Yes, they do. That is part of the way that the system is worked.

MR. STUPAK. Thank you both for your time.

MR. BURGESS. [Presiding] We have a series of four votes on and we are going to take a brief recess to allow that to happen. In fact, we have got less than two minutes to make it over to the Capitol so the committee is going to stand in recess until after votes.

[Recess.]

MR. WHITFIELD. [Presiding] The subcommittee will come to order. I know that some of the Members had some additional questions for Professor Sherman and Dr. Welch and then we will move onto the second panel. And I certainly appreciate your patience.

At this time, I will recognize Dr. Burgess for his 10 minutes of questioning.

MR. BURGESS. Mr. Chairman.

Professor Sherman, let me just ask you a question, if I could. We heard comments on the other side during opening statements how the Texas State Board of Medical Examiners had not properly chastised, punished, investigated the doctors in question in Corpus Christi, but it is my understanding, at least the individuals who are on the witness list today, none of those individuals are licensed in the State of Texas. So it would be virtually impossible then for the Texas State Board of Medical Examiners to issue any type of sanction against those individuals since they are not licensees of the State. Is that correct?

MR. SHERMAN. That seems correct to me, yes.

MR. BURGESS. And even the comments to the extent that the American Medical Association should be involved, that is actually a professional advocacy organization and really not one that is charged with oversight and punishment of doctors. I mean, there are a lot of us who perhaps in the field of expert witnesses feel that maybe that would be a good idea if the AMA could do that, but to the best of my understanding that is not one of their core functions. Is that correct?

MR. SHERMAN. I think that is correct.

MR. BURGESS. Dr. Welch, do you agree with that?

DR. WELCH. Well, they do set standards for professional practice, so I think that there are some AMA guidelines that can be used to say is this appropriate practice and some of them are quite useful. So they do not necessarily enforce the practice, but it does provide a measure of the standard.

MR. BURGESS. The--and I do not remember which one of you, one of you did testify to the fact that one of the problems was lack of standards between the screening and the diagnostics of this particular issue. And I think it is important to point out that individuals who have an abnormal chest X-ray with a history of occupational exposure of so-called industrial or occupational pneumoconiosis may be suspected, but the actual definitive diagnosis of asbestosis or silicosis really is going to require further investigation. Is that not correct?

DR. WELCH. The American Thoracic Society actually recently published a guideline to the diagnosis of asbestosis, and the same would apply for silicosis. You need evidence of structural change, you need appropriate history, and you need to rule out more likely causes of the findings. So you certainly need more than an X-ray and pulmonary function tests, because you need all the detailed medical history, medical testing, if necessary.

MR. BURGESS. How common would it be for someone to have both diagnoses simultaneously?

DR. WELCH. Actually, we had hearings about that particular question with SA 52, and most of the people that testified, including

myself, said it is uncommon for people to have both asbestosis and silicosis. If you do have heavy exposures to both things you usually end up with something called a mixed dust pneumoconiosis, which looks like a mixed picture.

MR. BURGESS. How many have you encountered during your professional career?

DR. WELCH. I have not seen anybody that I would say had both asbestosis and silicosis. I have seen a mixed dust disease--

MR. BURGESS. Okay.

DR. WELCH. --but not sort of classic silicosis plus classic asbestosis, no.

MR. BURGESS. And just for our general knowledge, what would be required if you had someone with the abnormal chest X-ray and the history of exposure to both? What would be required to make the diagnosis of concomitant asbestosis and silicosis or the mixed dust phenomenon?

DR. WELCH. Well, the mixed dust what you would have then is you would have a diagnosis of a pneumoconiosis based on chest X-ray findings, you know, that there is some abnormal scarring and what the zones are and what the size and shape are can in mixed dust can be mixed. Then you need an occupational history to tell you what the dusts were and then you can end up--sufficient, you know, you still have to evaluate that to see if that kind of exposure, the work the person did, the job they did, the kind of exposures they had sufficient to cause this injury that I am seeing when I look at his X-ray. So it is really--

MR. BURGESS. So you would not require a pleural biopsy to make--for that type of diagnosis?

DR. WELCH. No. Actually, you know, for occupational lung disease biopsies are almost unheard of. You can use CAT scans, and those are helpful, but you never really need a biopsy.

MR. BURGESS. On the issue of what, I think, Mr. Stupak was asking, what harm can come to someone from the screening tests themselves and you testified as to a number of things. And one of the other issues of damage would be the inability to become insured in the future. I would imagine that a prior diagnosis of silicosis as a preexisting condition is going to make it terribly difficult for someone to obtain health insurance in the future, is it not?

DR. WELCH. Well, maybe life insurance more than health.

MR. BURGESS. Or life insurance or employment.

DR. WELCH. I have heard, you know, stories of that. It has never been really documented but it is reasonable to presume that would occur.

MR. BURGESS. But it certainly could be one of the unintended consequences of a misdiagnosis of silicosis or asbestosis?

DR. WELCH. Certainly.

MR. BURGESS. And certainly that information should be disclosed to the individual who was either diagnosed or misdiagnosed.

DR. WELCH. That they have it, yes.

MR. BURGESS. Yes.

DR. WELCH. What the findings were, yes, absolutely.

MR. BURGESS. And I guess that is one of the things that bothers me throughout this is the lack of disclosure to the patient. Now in your work, Dr. Welch, with the sheet metal screenings, I mean, would that ever happen that you would screen someone for sheet metal disease and not tell them of the findings, either positively or negatively?

DR. WELCH. No, because there is a standard protocol that everybody follows. We identify a local doctor to do the screenings, so it is usually at a local hospital or a clinic and they tell the person when they are there. They send them a letter and then they have a meeting a few weeks later to go over results again, so there are three opportunities to give the results to the individuals.

MR. BURGESS. So in general, your standard practice in your industrial medicine practice would differ from what you have seen described as standard practice in these cases?

DR. WELCH. Yes, but I think I tried to kind of qualify my answer to that because I do not know. I don't really know exactly what went on in these cases. I mean, I do not know who ordered the X-rays or where the results went or, you know, if the attorneys got results, what they did with them. It is not the same focus as our sheet metal program but there is--I do not know all the details.

MR. BURGESS. Yes, apparently we do not know, either, who ordered the tests and where the results went. Maybe we can get that information with one of the subsequent panels. Do you have the evidence books with you? Let me ask you to go to, do I have Tab 14?

DR. WELCH. Yes.

MR. BURGESS. The section of the AMA's guidelines E10.03, Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations, "when a physician is responsible for performing an isolated assessment of an individual's health or disability for an employer, business, or insurer, if limited patient-physician relationship should be considered to exist:" can you comment on what patient-physician relationship is created in the context of the screenings that you administer?

DR. WELCH. Yes, I do not know if I would even call it limited, but the screenings that we run through the sheet-metal program, we expect the doctors to tell the individuals what is wrong with them, arrange for follow-up medical care, provide urgent medical care, if it is necessary--

say if somebody has really high blood pressure or if they have something that looks like a lung cancer that needs urgent action--and provide appropriate education. So they may not be the person treating the lung cancer, but they have a responsibility to the patient, the individual, to act when they get any medical information that needs urgent action.

MR. BURGESS. Then, do you have a feeling as to the claims made by the doctors associated with the multidistrict litigation that they were acting as consultants for the screening companies, and they were not bound by any ethical obligations or relationships with the plaintiffs?

DR. WELCH. Well, I had read this statement before; I think it is pretty good. And I think it really should apply to screening programs that even if it is a limited physician-patient relationship, there is a responsibility for doctors acquiring medical information to make sure that the individual knows what that is and has the responsibility to act on it. In addition, this outlines how sometimes there is a potential conflict of interest if a doctor is working for a company; it can be perceived conflict of interest when the worker comes for an exam. We would like to have hoped that that would not be the case, and the doctor would be acting as a doctor; but this one also outlines the responsibilities of the doctors to state if there is a conflict of interest and how they are handling it.

MR. BURGESS. Thank you, Dr. Welch, and Professor Sherman, thank you for your time.

Mr. Chairman, I will yield back 38 seconds to do with as you wish.

MR. WHITFIELD. Thank you, Dr. Burgess. And at this time, I recognize Ms. DeGette for ten minutes.

MS. DEGETTE. Thank you very much, Mr. Chairman.

Dr. Welch, you testified as to the appropriate standards of care and ethical practice in cases like this. I wanted to talk about that for a minute. I think we are pretty clear--and Professor Sherman also talked about this--that a diagnosis should never be made by a physician without personally examining the patient. Is that correct?

DR. WELCH. Well, there are always variations of it. I mean certainly a pathologist makes a diagnosis of a disease.

MS. DEGETTE. Right.

DR. WELCH. But it is part of the context of the treatment and the treating doctor--

MS. DEGETTE. Right.

DR. WELCH. --so that certainly, if they are part of a team, one of the team has a personal relationship with the doctor if you are making a medical diagnosis.

MS. DEGETTE. But then part of that, too, is their needs to be some kind of physician-patient relationship so that the physician can work with the patient to determine treatment and all of that. Correct?

DR. WELCH. Right.

MS. DEGETTE. What would the purpose be for having the doctors or the people who are screening these individuals for silicosis then working with the doctors and the doctors meeting with the patient in terms of early detection?

DR. WELCH. Well, if they are screening for it, and you find a disease, then, when you start a screening program, you need to know what you are going to do when you find something.

MS. DEGETTE. Right.

DR. WELCH. And what the actions are going to be, and what recommendations you would make to the individual, their employer, or--

MS. DEGETTE. I mean that is reason you would have that relationship so that they could get treatment. Correct?

DR. WELCH. Right, absolutely.

MS. DEGETTE. In this case, without particularly commenting on the facts of the case which you do not know, but assuming that what Judge Jack said is correct, that these kinds of screenings were going on without that essential physician-client relationship, do you think that some of the issues the judge related could have been cured by adequate medical screening and treatment?

DR. WELCH. Yes.

MS. DEGETTE. Now should physicians who order and supervise these screenings also, then, assume a doctor-patient relationship with the individuals who are the subjects in the screening?

DR. WELCH. Yes, I think the physician that is ordering the X-rays or pulmonary function tests has a responsibility to the patient, the individual, to give them the results and tell them what to do about it.

MS. DEGETTE. Is any physician who discovers an acute, dangerous condition during a screening procedure ethically obligated to notify the individual or that person's individual physician?

DR. WELCH. Yes, in my opinion, yes.

MS. DEGETTE. That would be under medical ethics?

DR. WELCH. Yes.

MS. DEGETTE. And my next question, because you have had years of experience in this area: if a physician did not follow those standards, wouldn't you think that that would be appropriate for a complaint to whatever governing medical board was there?

DR. WELCH. It could be. I mean I think that in these screenings you have physicians at different levels interacting with the individual. I think

the person who is running the screening program and doing the X-rays, if X-rays are being taken, they should be looked at right away--

MS. DEGETTE. Right.

DR. WELCH. --because there could be an acute event. I would not necessarily apply the same standard to a B reader who is reading it two weeks later in a different context, but that there has to be a physician there--

MS. DEGETTE. Right.

DR. WELCH. --to accept responsibility. And that person, if they are not doing that, then they are not following standards.

MS. DEGETTE. And that is because then they are not following through on their physician responsibilities to their patient. Correct?

DR. WELCH. Correct.

MS. DEGETTE. I mean I think about if I went in for some kind of cancer screening, and the radiologist did their work, and the physician just never bothered to follow up with me, and then I died of cancer--

DR. WELCH. That is malpractice.

MS. DEGETTE. That would be correct. And not only would that be subject for a lawsuit, but it would also be subject to sanction by the appropriate medical governing board. Correct?

DR. WELCH. Correct.

MS. DEGETTE. And I wanted to ask you, Professor Sherman, because I am a reformed lawyer myself, and I was looking at this ABA resolution of February 2005 on asbestos standards, which you were talking about vis-à-vis this situation, and what it says is that the standards should be enforced by Federal, State, and territorial government agencies and judicial bodies. So my question is do you think that we should have a Federal statute that codifies these standards? I guess I am still trying to figure out why we are having this hearing, frankly.

MR. SHERMAN. Well, traditionally the regulation of medicine and the professions has been a matter for the States.

MS. DEGETTE. That is correct.

MR. SHERMAN. And I think that probably one starts with the presumption that that is where it ought to be. This gets into an interesting constitutional question, I guess, and a political question as to whether the Federal government, in certain situations, should step in. The proposed asbestos litigation over recent years, having to do with a medical criteria bill and now a trust fund, is a suggestion that that litigation is so mammoth and so affecting interstate commerce that Federal legislation is needed.

MS. DEGETTE. Right. I understand that, but I am specifically talking about these standards for screening that the ABA was talking about in this resolution, and I would assume this would be in silicosis

cases. I really am with you. I think that if the Federal government made a statute on this particular issue, it would be a fish out of water in a way because the States, really, are the entities that govern tort litigation. Correct?

MR. SHERMAN. And I think the ABA proposal you speak of, it mentioned all three local, State, and Federal.

MS. DEGETTE. Right.

MR. SHERMAN. But I think the recognition was that currently we are talking primarily about State regulation.

MS. DEGETTE. Now, have any States actually passed laws that would require these kinds of standards? The States also regulate medical boards, too. Right?

MR. SHERMAN. Yes.

MS. DEGETTE. So have any States adopted this particular regulation that you know of?

MR. SHERMAN. Not that I am aware of. We have not done a comprehensive survey to find what, if any, State regulation of mobile screening events, for example, or mass screening is done, but I am not aware of any.

MS. DEGETTE. Do you think that from what you know, that it would be possible to have oversight over the legal malpractice and the medical malpractice under existing laws? I mean if a lawyer is fraudulently filing a lawsuit, it would seem to be not only would they be subject to criminal prosecution, but also by enforcement by State Bar Associations and essentially the same with the parallel medical oversight groups.

MR. SHERMAN. Well, certainly, both professions are primarily regulated by the States.

MS. DEGETTE. But under current law of the States--

MR. SHERMAN. Under current law--

MS. DEGETTE. --if people filed lawsuits like this, they could be again regulated by their State entities as well as potentially criminally prosecuted.

MR. SHERMAN. Yes.

MS. DEGETTE. Now, Dr. Welch, I wanted to ask you what you thought about the idea of Congress making standards for workers being screened for exposure to silica or other kinds of toxins on the job. Do you think it is Congress's job to legislate medical screening criteria that must be met before a toxic tort claim can be made in court? It is sort of a variation of the same question.

DR. WELCH. Right, I mean I actually think that there are standards for medical practice that exist that would guide screenings in particular. And that I do not see a need to write more legislation. As you said in the beginning, I think the appropriate thing is to enforce existing standards.

And in some cases, by just bringing light to certain practices, the practices will stop. I am not an expert on Federal legislation, but I don't see how it would really add much. If what we do is we have existing standards that are not being enforced, adding additional legislation is not going to help that problem.

MS. DEGETTE. Right, and I mean what struck me in reading the summaries of the silicosis opinion and then seeing some of the media, is exactly the light that is being shown on this issue by the media and by this Congressional hearing. I will guarantee you there is not a defense lawyer in this country that is going to settle a silicosis case now without doing due diligence because the light has been shined on this issue, and I think that, combined with tough enforcement, is really the way to go.

Thank you both.

MR. WHITFIELD. Mr. Inslee, you are recognized for ten minutes.

MR. INSLEE. Thank you.

I have a series of letters from the American Medical Association of September 2005 that are directed to the medical examining boards of several States: West Virginia, Wisconsin, Massachusetts, Alabama, and Mississippi. And these letters basically alert the medical licensing boards of the participation in the case that brings us here today, which basically recite the judge's findings that several physicians had submitted certifications without examining the plaintiffs, that they simply had not complied with normally expected medical practice in this case. That involved, I believe, nine physicians. Do you know whether the medical licensing authorities of any of these States have taken actions to sanction any of the physicians involved in this situation?

DR. WELCH. I do not know.

MR. SHERMAN. I am not aware of any.

MR. INSLEE. Would it be fair to say that you think it would be healthy, if physicians did not act in accordance with their own professional standards, that the licensing authorities get off the dime and sanction these physicians if in fact they have not acted in accordance with their own professional expectations?

DR. WELCH. I think that is appropriate if people have violated professional standards. I agree.

MR. INSLEE. The reason I bring this up is that there is a lot of talk about litigation and medical negligence contacts in this country, and one of the problems that some foresee is there has not been vigorous aggressive pursuit of that thankfully small number of physicians who do not comply with their professional obligations. Now, in this instance as far as I can tell, there is at least nine of them that a Federal judge was quite directly critical of and from my little knowledge of this situation would indicate they violated their license. And for those who have

convened this hearing that want this issue to be investigated, I think we need to investigate whether or not there has been a compliance with the physician disciplinary system here. And if anyone else has knowledge at this hearing to provide this information, I would be particularly interested.

Dr. Welch, I wanted to ask you. I am concerned. I look at this situation is it looks to me like a lawsuit was initiated; it was thrown out of court by a judge. The judicial system dealt with this issue. It found that the medical evidence was not up to the standards that exist today in our judicial system, and that is why the lawsuit was by and large tossed out of court. The judicial system worked. What has not worked is reducing that 30 to 50 percent working environments that Dr. Welch told us about that still violate existing standards for being exposed to silicates that can cause silicosis. And what I am interested in today is how do I protect my constituents from silicosis from--I have seen estimates of 30 to 50 percent--of workplaces that violate existing health standards. Dr. Welch, do you have some suggestions of what we could do to try to protect our constituents in that regard?

DR. WELCH. Well, we could make OSHA an effective organization, instead of requiring that everything that OSHA do be voluntary. I thought they were a legislative agency. But making OHSA effective would go a long way toward that. I mean if OSHA could go and sample workplaces where there is silica exposure occurring, and then require effective action, it would reduce the exposures. And there are many ways to reduce hazardous exposures, but OSHA enforcement is a very important part of that.

MR. INSLEE. And why is that not happening now in your estimation? That is something to me would be a no brainer that OSHA would be doing today on behalf of the Federal government. I do not understand that.

DR. WELCH. Well OSHA does not have enough staff. It just simply has never had enough staff to enforce the laws that it is authorized to enforce. In addition, new standards setting under OSHA is almost impossible. There has not been a new health standard--well, there was actually the chromium standard just this last week, but that was because they were sued by public citizens. And without a lawsuit from an outside agency, OSHA has not issued a new health standard in 20 years. There is a lot to say about OSHA and how it is hampered from doing its legislative job. But a lot of it has to do with staffing and generally the bureaucratic nature, and I think that in some ways the rest of the Government does not support OSHA completely in its mission.

MR. INSLEE. This case, which certainly has an odor about it from what little I know about it, is there anything in this case that should

reduce our concern with these findings that 30 or 50 percent of these workplace environments expose our citizens to excess silicate that should remove our concern about that?

DR. WELCH. No. I mean what my concern was, and I think I said it in the beginning, was in some ways it is a distraction because there are people who are overexposed and there may be thousands of new cases of silicosis each year that are appearing without even active screening, and this is a distraction in that it can lead some people to believe that there is not silicosis. And the more we focus on the fact that if you believe that the lawyers and doctors were manufacturing cases that do not exist, the implication that follows is there are not any cases, But that is not true; there are cases. There are overexposures. There are cases occurring from prior exposures that were much higher, but for silica, there might be a possibility that current exposures are going to cause future silicosis. And so it is really two different questions, but if you put all your effort on one, then you are not spending much time on the other. I mean I think the fact that there are current cases of silicosis does not excuse any bad legal/medical practices at all. You kind of need to address both of them. But my concern is that somehow the implication is that anybody who files a claim is a fraudulent case.

MR. INSLEE. Professor Sherman, I wanted to ask you about these affidavits or certifications filed by the doctors in this case. I used to practice trial law and did a lot of cases involving people who had been injured, and I have to tell you from what little I know about this particular case, it is not something that I would have ever felt comfortable with because going into court with such scanty medical evidence in the courts that I participated in, frankly, would get tossed right away because they were superficial at best. Under existing standards of law, under existing standards of evidence, under existing rules of summary judgment, under existing rules of directed verdicts, under this whole existing regime, this case, from what I know about it, would have been thrown out in any court I ever practiced in based on superficial evidence under existing rules. And I guess the question I ask is, under every court situation I am involved in, a case like this would have been thrown out, why do we need new rules? This did get thrown out under existing rules. The court acted and largely dismissed these cases brought this to our attention. Why aren't the existing rules sufficient? We have judges to apply them.

MR. SHERMAN. Well, I think you are absolutely right that this evidence should not stand up under scrutiny in a court. I think some of the expectation of the parties involved in this was that if you can get a whole inventory of a large number of cases, and you can join them and file them amass, that there will be an impetus to settle those as a group

without individual scrutiny of each one and this is what I was talking about earlier, the settlement process in which both plaintiffs' and defendants' lawyers at times have been complicit. The reason these cases were not really thrown out, what happened, I think, is that a number of them were dismissed after Judge Jack brought this to light, and there were voluntary dismissals on the recognition that they would not stand up, and that was a courageous judge who, on a jurisdictional issue, was able really to bring about the demise of those cases. I think that is possible again, and one of the problems I do see, though, is the large inventory of a large number of cases, asbestos cases, are typical of that, in which the huge number of cases are pending. Our courts are incapable of trying those cases individually. It would take a hundred years to try all those cases individually, and so there is an impetus to settle them for one reason or another. And there is the hope, I think, of certain plaintiffs' lawyers in those situations, that they won't have to do any more than that.

One of the grounds that was given for the ABA proposal for an early fact sheet, or in the case management order in which lawyers have to come forward with detailed evidence as to both exposure and as to medical condition, is, I think that lawyers can't get an inventory of cases simply by paying a screening company to take an X-ray and then getting a bogus diagnosis and never have to do anything more, and then it is almost a green mail, take those cases, and settle them en masse without having to do anything more. And that seems to be one value of appropriate case management order in which you have got to present detailed individualized evidence early on is telling the lawyer that the lawyer is going to have to invest some time and some money. The lawyer will not do that if it is a case that is so questionable if it is a one slat case, many lawyers recognize that they are not prepared to do that. They are prepared to do it if they can just bundle those cases and settle 10,000 of them at a time, but if they know that there is going to be this kind of individual requirement, even if they are joined cases, there is going to be that requirement early on, and they are going to have to spend some time and effort, that, seems to me, is a weeding process. Good lawyers will not pursue those cases in recognition that it is good money passed down the drain.

MR. INSLEE. And some day we will have a hearing about the defense lawyers that somewhere in this great land have filed a defense that was not entirely appropriate as well.

Thank you very much.

MR. WHITFIELD. Dr. Welch, I would say that I respectfully disagree with your assertion that this hearing is a distraction. And I think, when you take the facts of this case, and when you have fraudulent practices

and diagnoses being made without examining witness, examining patients, or interviewing patients, and you have these kinds of class-action lawsuits with this number of people, it has a direct impact on public health, and this committee does have jurisdiction over public health, and so I think it is important that we shine the light on it. Unfortunately, our Oversight and Investigation Subcommittee does not have the authority to legislate, but we do have the authority to recommend legislation we think that is necessary.

So with that, I would recognize the gentlelady from Tennessee, Mrs. Blackburn.

MRS. BLACKBURN. Thank you, Mr. Chairman.

And thank you all for being here and allowing us to talk with you and work through this.

Dr. Welch, I want to go back to your testimony. As we left for our series of votes, you were talking about basically the provisions on page 4 of your testimony which is screening and the difference in screening and medical screening. And your comment basically was that a physician has to conduct a diagnosis that would include a medical screening in order to ID possible cases of silicosis. And then you went on to state that that was step number one. Is that correct?

DR. WELCH. The screening really is the first step in--

MRS. BLACKBURN. Right.

DR. WELCH. --reaching a diagnosis, right.

MRS. BLACKBURN. Okay. And then, if you will, you very quickly listed two or three things that would be additional tests, and then on page five of your testimony, you said the test used should be selective and chosen to identify a specific disease, so what I would like for you to do is let us go back to that part of your testimony if you will and give me what you would consider to be the other tests that would be necessary to supplement a screening, a medical screening, an X-ray which would be a screening, a first screening, a first identification and give me what those other exams and tests would be.

DR. WELCH. It does vary by an individual, but generally, if you are looking for an occupational lung disease, you need an occupational history. Now sometimes the screening it takes a general occupational history. How many years have you been in this trade? How and what kind of tasks did you do? But a more detailed evaluation would get more detail on that--

MRS. BLACKBURN. Okay.

DR. WELCH. --because determining that a disease is related to exposure, you need some detail on it.

MRS. BLACKBURN. You would have to have the history and the length of that exposure.

DR. WELCH. Right, I mean depending on the exposure and depending on the work someone did, you need more or less detail. If you know someone was an asbestos installer for 30 years, that is about all you need to know.

MRS. BLACKBURN. Sure.

DR. WELCH. But other jobs you would have to get a lot more information--

MRS. BLACKBURN. Okay.

DR. WELCH. --so depending on what you see on the X-ray, the X-ray may stand alone or you may want some additional tests, other views, or a CAT scan. That very much depends on what is on the X-ray. Generally a more additional evaluation will include pulmonary function tests. You do not absolutely need those for a diagnosis, but you need them to determine how much impairment there is and what kind of treatment is needed. And you need a detailed medical history to see if there are other likely explanations of the findings. Let us say somebody has an abnormal X-ray and they have asbestos exposure, but they also have a bad heart. Well, maybe the findings on the X-ray are caused by heart failure rather than asbestos exposure. You cannot get that level of detail on an individual on a screening, but you can get it when there is a further diagnostic evaluation.

So that is how I see the purpose of the screenings. A lot of the people who have gone to our sheet metal screening do not have other serious medical conditions. And the additional evaluation is pretty straightforward, but you get down to the individual level.

MRS. BLACKBURN. Okay.

DR. WELCH. You find out all you need to know about the individual.

MRS. BLACKBURN. So in other words what you are saying--and this is I think tying back into what you were speaking of as we left--was that it would be very difficult to determine whether someone had asbestosis or silicosis simply from an X-ray without doing the additional tests. And part of your concern was that the X-ray results went to the attorney, but then there did not seem to be a trail of medical information that was given from the attorney back to the individual.

DR. WELCH. Right. Now to be fair, we have not asked the attorney what they did with that. And I would prefer not to have an attorney in the middle if I am running the program because it is medical information, give it to the person's doctor and assure that they act on it.

MRS. BLACKBURN. Okay. Would there be any other factors that you would add to that list that would determine if a person had silicosis?

DR. WELCH. Well that is really the basics you would use.

MRS. BLACKBURN. That is the basics. So you can do pretty well with those?

DR. WELCH. Yes.

MRS. BLACKBURN. That you have listed.

DR. WELCH. Sometimes you can get that information from the screening evaluation, but usually you will get more information, particularly about the other medical histories and other medical conditions with a detailed evaluation.

MRS. BLACKBURN. All right, great.

Professor Sherman I have got a question that I want to ask you. And I am trying to be considerate of the time here because you all have been incredibly patient with us. In your testimony, somewhere, you mentioned inter-reader variability and a concept known as inter-reader variability, and if you would, could you talk with me for just a moment about how that applies to trying to prove fraud in X-ray readings.

MR. SHERMAN. Well, the concept of inter-reader variability is that if the X-rays are read by different individuals or at different times, sometimes in good faith, the readings could come out slightly different. Is that what you were referring to?

MRS. BLACKBURN. Yes. So in essence, then, in your mind it would take additional tests and supporting information such as Dr. Welch has articulated in order to give certainty to the validity or the dependability of a group of readings.

MR. SHERMAN. Yes. Dr. Welch can answer this better than I can, but it seems to me that if you had a reading of no asbestosis, and then six months later a reading of consistence with asbestosis, you would not necessarily want to take the second one as most recent in time. It seems to me it would raise a question of what is at work with those two readings of variance and require further inquiry.

MRS. BLACKBURN. Okay. You mentioned the ABA's recommendations on asbestosis and their discovery in management procedures and orders. Of the recommendations that are codified in the ABA standards and conduct for lawyers, is there anything there that you would recommend? Are they what they should be? Is there anything you would recommend for use as we look at the silicosis situation?

MR. SHERMAN. Well, I think all of the three proposals that I have mentioned today are transferable to the silicosis situation, and that is standards for screening and diagnosis, a case management order that requires an early revelation as to specific facts as to medical history, exposure, and so forth, and finally, a provision that would provide for a clear line as to the statute of limitations so that lawyers would not feel that they had, the diligent lawyers would not feel--

MRS. BLACKBURN. You mentioned that in your testimony.

MR. SHERMAN. --that they had to file suit to clog the courts with cases that may not go.

MRS. BLACKBURN. Okay, thank you. I yield back.

MR. WHITFIELD. Thank you, Mrs. Blackburn. At this point, if there are no additional questions then--

MR. STUPAK. Mr. Chairman, if I might, could we have Dr. Welch--you asked her a question about distraction, and I think she should be given an opportunity to explain to the committee and to the Chairman what she was talking about.

MR. WHITFIELD. Okay.

MR. STUPAK. I thought she was talking more about the questionable lawsuits and not necessarily this hearing; although, I would agree. I do not see a lot of public health in this aspect of the hearing to date.

DR. WELCH. I appreciate the opportunity. I was not trying to say that the hearing is necessarily a distraction. I was concerned about the broader public image of whether people really are sick from occupational lung diseases. And if there is a lot of attention on this case, but no attention on the fact that there are people who are sick and dying, it leaves the impression that there is no one sick from silicosis. That is not something you can do anything about. It is maybe something I can do something about by talking about the people who are sick, but that is my concern about the distraction.

MR. WHITFIELD. Well thank you for clarifying.

Professor Sherman, Dr. Welch, thank you very much for taking your time today. We are sorry you were here all afternoon but you are dismissed now and we will call the second panel.

On the second panel, we have Dr. James Ballard of Birmingham, Alabama. We have Dr. Andrew Harron of Kenosha, Wisconsin. And we have Dr. Ray Harron of Bridgeport, West Virginia, and we want to thank you gentlemen for being here today. Okay, would someone get these name plates in the right place?

Okay, you gentlemen are aware that the committee is holding an investigative hearing, and when doing so we have the practice of taking testimony under oath. Do you have any objection to testifying under oath?

DR. BALLARD. No.

DR. RAY HARRON. No.

DR. ANDREW HARRON. No.

MR. WHITFIELD. The Chair advises you that under the rules of the House and the rules of the committee you are entitled to be advised by legal counsel. Do you desire to be advised by counsel during your testimony today?

DR. BALLARD. Yes.

DR. RAY HARRON. Yes.

DR. ANDREW HARRON. Yes.

MR. WHITFIELD. Okay. I would ask that at this time you please identify your counsel for the record so that Dr. R. Harron, who would be your legal counsel?

DR. RAY HARRON. Larry Goldman of New York City.

MR. WHITFIELD. Mr. Goldman of New York City, okay. You may move forward and sit at the table with your client, Mr. Goldman. And Mr. Goldman, will you be giving testimony today?

MR. GOLDMAN. Dr. Harron will assert his privilege.

MR. WHITFIELD. Okay. Dr. A. Harron who is your legal counsel today?

DR. ANDREW HARRON. Mr. Judd Stone.

MR. STONE. Good afternoon, Chairman. Judd Stone on behalf of Andy Harron.

MR. WHITFIELD. Okay, thank you. You may move forward and sit there as well.

MR. STONE. Thank you.

MR. WHITFIELD. And Dr. Ballard, who is your legal counsel?

MR. HAFETZ. Frederick P. Hafetz, H-a-f-e-t-z.

MR. WHITFIELD. Okay.

MR. HAFETZ. And I am going to sit right next to Dr. Ballard.

MR. WHITFIELD. Thank you. Now, I would like to swear the three of you in. Do you have any objections to being sworn in at this time?

[Witnesses sworn.]

MR. WHITFIELD. Thank you. All right, each of you is now under oath, and you may give your five-minute opening statement, and we will begin with you, Dr. Harron, for your opening statement.

TESTIMONY OF DR. JAMES BALLARD, M.D.; DR. ANDREW W. HARRON, D.O.; AND DR RAY A. HARRON, M.D.

DR. RAY HARRON. I do not have anything to say, sir.

MR. WHITFIELD. You do not have an opening statement, okay. Dr. A. Harron?

DR. ANDREW HARRON. Respectfully, on the advice of my counsel, I decline to answer questions on the basis of constitutional privilege.

MR. WHITFIELD. And Dr. Ballard?

DR. BALLARD. I do not have an opening statement.

MR. WHITFIELD. Okay. Now, this is for Dr. Ray Harron. Dr. Harron, in my opening statement, I made some references to diagnoses that you made in the silica multidistrict litigation for people that you had previously diagnosed with asbestosis and those diagnoses are in the binder in front of you at tabs three through seven. And I would ask you today will you certify that each of these diagnoses and all others that you

made in this litigation are accurate and made pursuant to all medical practices, standards, and ethics?

DR. RAY HARRON. Mr. Chairman, with all due respect on the advice of counsel, I invoke my constitutional privilege under the Fifth Amendment and decline to answer the questions, sir.

MR. WHITFIELD. Now are you refusing to answer all of your questions based on the right against self-incrimination afforded to you under the Fifth Amendment of the U.S. Constitution?

DR. RAY HARRON. Yes, sir.

MR. WHITFIELD. And is it your intention to assert this right in response to all questions that may be asked you today?

DR. RAY HARRON. Yes, Mr. Chairman.

MR. WHITFIELD. Given that if there are no further questions from the members, I will dismiss you at this time subject to the right of the subcommittee to recall you if necessary and at this time you are excused.

DR. RAY HARRON. Thank you, sir.

MR. WHITFIELD. Now Dr. Andrew Harron, you have heard the opening statements today, and you have heard me specifically describe your practice in making diagnoses for some of the silica matters in which you essentially handed X-ray interpretation notes to a secretary to prepare the report, stamp your signature, and send it out. Dr. Harron, will you certify that each of these diagnoses are accurate and made pursuant to all medical practices, standards, and ethics?

DR. ANDREW HARRON. Sir, respectfully, on the advice of my counsel, I decline to answer questions on the basis of constitutional privilege.

MR. WHITFIELD. Okay. So you are refusing to answer all of the questions based on the right against self-incrimination afforded to you under the Fifth Amendment of the U.S. Constitution?

DR. ANDREW HARRON. Yes, sir.

MR. WHITFIELD. And it is your intention to assert that right in response to all questions that may be asked today?

DR. ANDREW HARRON. Yes, sir.

MR. WHITFIELD. If there are no other questions from the members, then I will dismiss you at this time subject to the right of the subcommittee to recall you if necessary and at this time you are excused.

DR. ANDREW HARRON. Thank you, sir.

MR. STONE. Thank you, Mr. Chairman.

MR. WHITFIELD. Dr. Ballard, in my opening statement, I made references to one diagnosis that you made in the silica multidistrict litigation for a person that you had previously diagnosed with asbestosis. This diagnosis is in the binder in front of you in Tab 8. And Dr. Ballard, will you certify that this and each of the diagnosis that you made in this

litigation are accurate and made pursuant to all medical practices, standards, and ethics?

DR. BALLARD. On the advice of my attorney, I refuse to answer on the grounds of my constitutional privilege against self-incrimination.

MR. WHITFIELD. So you are refusing to answer all of our questions based on the right against self-incrimination afforded to you under the Fifth Amendment of the U.S. Constitution?

DR. BALLARD. Yes.

MR. WHITFIELD. And it is your intention to assert that right on any and all questions that we might ask you today?

DR. BALLARD. Yes.

MR. WHITFIELD. If there are no further questions from the members, then, I would dismiss you at this time subject to the right of the subcommittee to recall you if necessary and at this time you are excused.

At this time, I would like to call the third panel of witnesses and we have two members on that panel. First of all, we have Dr. George Martindale of Mobile, Alabama, and we have Mr. Heath Mason who is the co-owner and operator of N&M, Inc. of Moss Point, Mississippi. I want to thank you gentlemen for being with us today and as you are aware that the committee is holding an investigative hearing and when doing so we have the practice of taking testimony under oath. Do you have any objection testifying under oath today?

DR. MARTINDALE. No, sir.

MR. MASON. No, sir.

MR. WHITFIELD. Okay. The chair would advise you that under the rules of the House and the rules of the Committee, you are entitled to be advised by legal counsel. Do you desire to be advised by legal counsel during your testimony today?

MR. MASON. Yes, sir. I am represented by Mr. Luke Dove from Jackson, Mississippi.

MR. WHITFIELD. Mr. Luke Dove, okay, thank you, Mr. Dove. And Dr. Martindale?

DR. MARTINDALE. My legal counsel is with me, Mr. Doug Jones from Birmingham.

MR. WHITFIELD. Mr. Doug Jones of Birmingham. And do any of the, do any of the legal counsels intend to testify today--

MR. DOVE. No, sir.

MR. WHITFIELD. --other than give advice. Okay. Well in that case, Mr. Mason if you and Dr. Martindale would stand up I would like to swear you in.

[Witnesses sworn.]

MR. WHITFIELD. Thank you. At this time, both of you are sworn in and I would ask you do you have an opening statement that you would like to give?

TESTIMONY OF DR. GEORGE MARTINDALE, M.D.; AND HEATH MASON, CO-OWNER AND OPERATOR, N&M, INC.

MR. MASON. No, sir, I will waive my opening statement.

MR. WHITFIELD. Dr. Martindale?

DR. MARTINDALE. I have no formal opening statement. I would just like to say before any questions that during my experience with this whole process beginning to end, I have maintained that I was involved only as a B reader. I was never involved as a diagnosing physician. I wanted to make that quite clear. I am a practicing diagnostic radiologist who received certification from NIOSH to be a B reader, and I considered my activities in that very narrow spectrum. I have attempted at every turn to cooperate throughout this whole process, and I have never invoked Fifth Amendment rights and have been voluntary in my appearance whenever needed.

I would just like to note that in Dr. Welch's testimony, I think she did draw a distinction between B readers and diagnosing physicians in that she did not hold B readers to the same standard as far as--let me consult my notes. I believe she said that the physician that ordered the chest X-rays, and the pulmonary function tests, and did the history, and physical, should be responsible for communicating the results of those tests, any additional follow-up exams, and the overall care of the individual examined, she specifically stated, I do not believe I would hold a B reader who has seen the X-ray say two or three weeks later to the same standard.

MR. WHITFIELD. Okay. Well, Dr. Martindale, thank you very much and for stating your position and I would like to ask you a question. On October 29, 2004, you were deposed by attorneys representing the defendants in the "In Re: Silica" matter, and in the deposition an attorney read to you the impression section of your report that I believe you have which is Tab 12, if you have it there. In the impression section of that report which states on the basis of the medical history review which is inclusive of a significant exposure to silica dust, physical exam, and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty. After that, he asks, now, doctor that is simply inaccurate, isn't it? And at this time, I would like to listen to your response in that deposition, if you would play that.

[Video].

MR. WHITFIELD. That is sufficient, thank you.

Well I think you reiterated in that deposition what you have said today that it was never your intent to make a diagnosis. Is that correct?

DR. MARTINDALE. Yes, sir.

MR. WHITFIELD. And actually when you did that, you in effect tossed out one third of the 10,000 claims in the multidistrict litigation. Now, tell me how did that happen?

DR. MARTINDALE. Well, you have to go back to when I approved the wording in that specific paragraph, and I had been a B reader with a verbal contract with N&M Testing for--I do not remember precisely when this happened--but some two to three months. Mr. Mason called me, and I had been dictating reports with an impression, in my own words that I typically used on my reports in private practice, typically saying that this would be consistent with a clinical diagnosis of asbestosis or silicosis. He proposed this change and wanted to fax it to me for my viewing and to see if I would be willing to accept it. So he did, and he called later. I said I had read it, and that I did not really believe that it changed basically what I was doing and the essence of what I was trying to say. You have to understand that for the four years of my residency and the, at that time, about 12 years of private practice, I had never filled the role of a diagnosing physician on any X-rays that I undertook to interpret. I was a radiographic consultant. I would dictate a report; that report would then be sent to the physician who did the history and physical, the whole clinical work up, maybe the hospital kept a copy. I did not keep a copy, and the physician who was in charge of the clinical workup related the findings and also correlated with any clinical history and physical findings. And so I had never been put into this position; I never represented myself as having been trained in, nor having any, clinical expertise in the diagnosis of pulmonary diseases outside of their radiographic manifestations, ever. I want to make that very clear. I had never represented myself in that fashion.

MR. WHITFIELD. No, I am sorry. Go ahead.

DR. MARTINDALE. Add to that, that I knew, and I had been told by Mr. Mason, Dr. Ray Harron traveled with his screening company, and had for some time, years. He was conducting histories and physicals on all of these patients. He was overseeing the pulmonary function studies. He was interpreting the chest X-ray, and I was to be the second reading on the chest X-ray. Maybe I had tunnel vision, but I never had any reason to believe that I could possibly be the diagnosing physician. I was basically a consultant on films as a second reading even so that when I read this paragraph.

MR. WHITFIELD. So Mr. Mason had led you to believe that there was another doctor that was really examining the patient, taking the medical--

DR. MARTINDALE. Well, he had told me that, yes.

MR. WHITFIELD. Okay. And Dr. Mason, I mean, Mr. Mason what do you have to say about that?

MR. MASON. I agree with Dr. Martindale on the portion that we had a doctor that saw the client before it got to him.

MR. WHITFIELD. And who was that doctor?

MR. MASON. In most instances I would say it was Dr. Harron. Over all the instances, I probably could not say; but I would say in the majority of the cases that Dr. Martindale saw, Dr. Harron had performed some type of physical on those people.

MR. WHITFIELD. So why did you need Dr. Martindale?

MR. MASON. I particularly did not need him at all, sir. From our standpoint, the lawyers contacted us and said that they needed another doctor to diagnose these clients for them. So that--

MR. WHITFIELD. Why could they not use Dr. Harron?

MR. MASON. They just told me they had to have another doctor. No reason as to why it was. They just said they had to have another doctor to have, to diagnose these clients.

MR. WHITFIELD. Let me ask you some other questions, Mr. Mason. Over the past several years, if I am correct, you have supplied screening services in the following States: Ohio, Texas, Louisiana, West Virginia, Alabama, California, Mississippi, Florida, Missouri, Wisconsin, Kentucky, Hawaii, Virgin Islands, Arkansas, Illinois, and Pennsylvania. How do you ensure that you are conducting your operations, including the administration of chest X-rays, on perhaps dozens of people per day in accordance with the State medical and radiological laws?

MR. MASON. I guess I would have to go back, number one, to all the States that you just rendered off. I do not know that, honestly, I did work in all of those places. I would have to see that. But from a standpoint of what did we do to ensure that we were able to do chest X-rays in a State, you always had to contact the State and let them know that you were coming, where you were coming to. You had to provide them who was doing those chest X-rays for you, and you had to provide a license that they had in that State, and those are the things that we did.

MR. WHITFIELD. Who in your company was responsible for ensuring compliance with those rules?

MR. MASON. You know, when you are the owner, you are as responsible as anybody I would say, so I guess I would not say there was one responsible or the other; but Molly Nolan did do a good portion of

our X-ray stuff for us, but overall when you are an owner you are as responsible as the other party.

MR. WHITFIELD. And you were retained by these law firms, certain law firms to do these mass screenings. Is that correct?

MR. MASON. Yes, sir. We were contacted by different law firms to do a screen in different areas, yes, sir.

MR. WHITFIELD. Could you give us the name of a couple of those law firms or--

MR. MASON. Oh, Lord, sir, it was a lot.

MR. WHITFIELD. Okay. One other question, and then my time has expired. But who was prescribing the X-rays in each of your screenings?

MR. MASON. It was different. It is according to the State that you are in. Did the State have a priority, have a--

MR. WHITFIELD. For the ones that Dr. Martindale looked at.

MR. MASON. There, again, I do not know. I do not remember exactly the ones that Dr. Martindale has read and from where we did them. But as far as a prescription for a chest X-ray goes, if a State did not have the procedure set up for what they called a healing arch screen, then, if we were there for the lawyers, they would provide us with an X-ray prescription from whatever doctor it is that they had agreed would prescribe the X-rays, for us to take the X-rays for them and provide them with those X-rays.

MR. WHITFIELD. So the lawyers would provide that to you?

MR. MASON. Yes, sir.

MR. WHITFIELD. Okay. My time has expired. I will recognize the gentleman from Michigan.

MR. STUPAK. Thank you.

Mr. Mason so it is your testimony that the patients would come with a prescription then from a doctor?

MR. MASON. Sir, I am sorry. I was looking for you.

MR. STUPAK. Okay. Is it your testimony then that a patient would come to be screened by you or by your company? They would have a prescription from a doctor?

MR. MASON. If they were not in a State where we qualified for a healing art screen.

MR. STUPAK. Okay. If they did not?

MR. MASON. Yes, sir.

MR. STUPAK. Okay. And when you took these X-rays in the State, you had to be or the person taking the chest X-ray had to be licensed by that State?

MR. MASON. Yes, sir.

MR. STUPAK. Okay. So would you usually get someone from that State? Let us say you are up in Pennsylvania. Would you get someone

from Pennsylvania to come and work for your company then to take these X-rays?

MR. MASON. No, sir. We tried to keep the same X-ray techs because the technique for these films were particular. It was not in a hospital setting.

MR. STUPAK. Okay.

MR. MASON. So what we did was we would have them go take the exam or receive the exam from the State that we were trying to go to previously, and let them take that exam ahead of time.

MR. STUPAK. So there is no question here that your X-ray screenings, whatever you want to call them, were taken according to the standards of the State in which they were conducted?

MR. MASON. Yes, sir.

MR. STUPAK. Okay. Dr. Martindale if I may. I am looking at Tab 11 in the book there which is your letter, I believe to Billy Davis.

DR. MARTINDALE. Yes, sir.

MR. STUPAK. I am at the second paragraph. It says in 2001, 2002, one year, you were hired by N&M, Inc., an industrial testing company to review X-rays of workers "who I was told had been clinically diagnosed." Who told you that, sir?

DR. MARTINDALE. Heath Mason.

MR. STUPAK. Okay. And then goes on to say, next sentence, "I was told that Dr. Harron." Again, who told you that? Mr. Mason?

DR. MARTINDALE. Mr. Mason.

MR. STUPAK. Okay. It says "I was told that Dr. Harron was a specialist in the field and that he performed a medical and occupational history, physical exam, pulmonary function tests, and chest X-ray on each patient, and that each case I would be asked to review involved a positive diagnosis by him." Did you have Dr. Harron's reports for any of these when you made--

DR. MARTINDALE. I was mailed the X-rays.

MR. STUPAK. Correct.

DR. MARTINDALE. Chest X-rays.

MR. STUPAK. Correct.

DR. MARTINDALE. And initially, that was all I was mailed, the chest X-ray which came in a jacket, but the outside of the jacket had Dr. Harron's handwritten--

MR. STUPAK. Notes.

DR. MARTINDALE. --which is in the aisle of shorthand that was essentially chest X-ray interpretation.

MR. STUPAK. Okay. So you really did not have any of these other tests to look at then like a physical, the occupational history. You did not have the physical exam, the pulmonary function test in front of you?

DR. MARTINDALE. At the start of my reading for them?

MR. STUPAK. Right, correct.

DR. MARTINDALE. No, sir.

MR. STUPAK. Okay.

DR. MARTINDALE. That came a little bit later.

MR. STUPAK. That came later. Okay, it goes on, "It was explained to me that the B reader was needed to validate the finding of the examining physician. It was explained to me again by Mr. Mason." Is that yes?

DR. MARTINDALE. Yes, sir.

MR. STUPAK. Okay. I am going down to the next paragraph, third paragraph: "A portion of my reads were reported as negative, but most were consistent with the diagnosis. I was not made aware of any individual who had also been diagnosed with a similar lung disease, either asbestosis or silicosis." You were not informed that, but did you ask these patients. Or you never saw a patient?

DR. MARTINDALE. I never had any contact at all with the patients. If I could just make one point--

MR. STUPAK. Sure.

DR. MARTINDALE. --about the clip that was shown. This is why in that impression, when I looked at it and approved it, I want you to understand the perspective of which I was viewing the paragraph, never having any contact with any of these people, having the whole workup done by someone else, I had been told I was the second interpretation of a chest X-ray. When I read that the diagnosis of silicosis is established, I had been told a diagnosis existed, and I assumed that the diagnosis was Dr. Harron's diagnosis.

MR. STUPAK. Sure. So if you were told that Dr. Harron had already diagnosed them as silicosis, you were there to validate it, and you validated it through reading this X-ray, if you will?

DR. MARTINDALE. Right. I really felt I was more validating his chest X-ray findings and then linking those to his diagnosis.

MR. STUPAK. So anything else that Dr. Harron may have concluded from that patient, you were not really concerned about; you were just to read this X-ray.

DR. MARTINDALE. Yes, sir.

MR. STUPAK. Okay. Could the examining physician make his diagnosis without your reading?

DR. MARTINDALE. Yes, sir. I do not believe that he required a second read. As it was explained to me when I began reading these films, the second read really was, in instances, becoming more prevalent, that for settlement of cases they were requiring a second opinion on the chest X-ray--

MR. STUPAK. Okay.

DR. MARTINDALE. --not on the diagnosis.

MR. STUPAK. Okay. Were you hired by Mr. Mason's company then?

DR. MARTINDALE. Mr. Mason. I had a verbal contract with Mr. Mason, yes, sir.

MR. STUPAK. Okay. And is there an examination or certification you have to take to be a B reader?

DR. MARTINDALE. Yes, I believe that someone on the committee referred to the NIOSH exam--

MR. STUPAK. Right.

DR. MARTINDALE. --as being very rigorous. It is. I am here to tell you very rigorous, and I think I have referenced in my letter that it is so difficult that people such as myself, after four years of medical school, four years of residency, and variable years of training, two thirds in many years do not even pass the test, and it only takes a 50 percent to pass the test.

MR. STUPAK. This NIOSH test, once you take it, do you have to get re-licensed every--

DR. MARTINDALE. You are licensed, initially, for four years. At the end of that period of time, you can go back and get another recertification for four years.

MR. STUPAK. Have you ever gone for recertification?

DR. MARTINDALE. No, sir, my entire experience in B-reading films was from April of 2001 to June of 2002. I read only films for N&M; I did not read anyone else's films.

MR. STUPAK. Well, as you sit here today, do you have any reason to believe that if you look back at these same films, the results differ significantly from what you reported?

DR. MARTINDALE. No, sir. I do not believe the results of my interpretation of the chest X-ray would.

MR. STUPAK. Okay. When you were given these B reads or these films to read were you under the impression that each of the X-rays came from an individual who had been given an initial clinical diagnosis of silicosis?

DR. MARTINDALE. Yes, sir.

MR. STUPAK. Okay. Do you think that, despite the fact that you, personally, did not have a doctor-patient relationship with individuals whose X-rays you were receiving, an individual found to have possibly a serious pulmonary disease, such as silicosis, asbestosis, or fibrosis or cancer, would receive a certified letter from a healthcare professional indicating this to the patient?

DR. MARTINDALE. What I was told initially when I first verbally contracted, and we were discussing some of the ramifications of it, since asbestosis does have a significant increase incident of having carcinoma and things--

MR. STUPAK. Correct.

DR. MARTINDALE. --if my ILO form and my report included anything referencing the possibility of cancer or, i.e., any other significant life threatening illness, that individual would receive from N&M Testing a certified letter notifying them of that. That is what I was told by Mr. Mason.

MR. STUPAK. Okay. Let me ask you this, did you know if Mr. Mason ever had a stack of blank medical forms pre-signed by Dr. Harron?

DR. MARTINDALE. No, sir, I would not know.

MR. STUPAK. Okay. If a physical examination and B read indicated a good possibility of silicosis or other pulmonary disease, was anyone responsible for providing this information to the people being screened? I mean other than the certified letter, did you have any responsibility to pick up a phone and call someone? Maybe not the patient, but Mr. Mason or someone?

DR. MARTINDALE. I would just answer that by saying that every report went back to Mr. Mason, and Mr. Mason processed every report. I would also just go back and reference Dr. Welch again when she said that she felt the physician who ordered the chest X-ray, the pulmonary function test, had done the history and physical on the individual, they bore the responsibility of notifying the patient of any significant disease and the results of those tests.

MR. STUPAK. Okay. So you did not?

DR. MARTINDALE. So, no, sir, I felt no obligation. I would only add to that that again in my professional career and private practice--

MR. STUPAK. Sure.

DR. MARTINDALE. When I interpret X-rays, I do not inform the patient either. There are times I do biopsies. I know the patient has cancer before they leave the room, but it is not my position to do that, not my place to do that.

MR. STUPAK. Sure, I understand that. I just sort of got the impression sitting here all afternoon that there are sort of these tight groups here of people working together and maybe different ones are doing it. Did you have any reason to doubt the diagnosis of Dr. Harron?

DR. MARTINDALE. No.

MR. STUPAK. Okay. Did you receive a lesser payment or no payment if a B read you made was not positive? Did you get a different fee for positive or negative?

DR. MARTINDALE. No, sir, I got $35 whether it was positive or whether it was negative.

MR. STUPAK. Okay. Did you have any reason to believe or suspect that Mr. Mason or his firm was not acting in good faith?

DR. MARTINDALE. No, sir.

MR. STUPAK. The time is up. Mr. Chairman, thank you.

MR. WHITFIELD. At this time, I recognize Dr. Burgess.

MR. BURGESS. Thank you, Mr. Chairman.

Mr. Mason, if I am reading this right in the evidence book that we have under Tab 1 on the sign-in sheet from February 15 of 2002, there were 111 people screened that day. Is that correct?

MR. MASON. If we are looking at the, this is Tab 1, you mean?

MR. BURGESS. Yes.

MR. MASON. This is not a sign-in sheet, sir. This is a report for the lawyers at the end of the day on who is positive and who is negative. This is not a total of who was screened and who was not screened.

MR. BURGESS. Okay. So everyone on this sheet was reported positive?

MR. MASON. Yes, sir. This is a list of people that were positive that day, but there might have been 160 people that came through the door, and they are just not listed. The rest of these people are not listed on the sheet.

MR. BURGESS. And it was reported elsewhere--I think on NPR--that there were days that there were 90-plus positives on these sheets. Is that unusual?

MR. MASON. No, sir.

MR. BURGESS. Well, after someone would test as or screen as positive, what was your role then? Did you help them find legal representation or had that already been prearranged?

MR. MASON. We are going to have to be much more specific because there are 50 different ways that that can come about. I mean you will have to be specific to a client and tell me exactly how he contacted me or did the lawyer send him to me. I mean there are numbers of different ways to answer that question all according to the client.

MR. BURGESS. Well, generally, how would the screenings be set up? Who would bring the patients to you?

MR. MASON. Generally, there was a number of different ways that that happened as well.

MR. BURGESS. Would you just set up in a Wal-Mart parking lot and say come be screened?

MR. MASON. Well, I would not particularly say a Wal-Mart parking lot, no, sir. But, you know, again, you are asking me to be way too broad

on exactly how we set up our screens when there were too many numbers of ways we did.

MR. BURGESS. Well, would patients ever be sent to you by someone to be screened? Let us say Dr. Harron would send you patients to be screened?

MR. MASON. No.

MR. BURGESS. Well, how would N&M initially help a firm select potential silicosis plaintiffs?

MR. MASON. There, again, there is numbers of different ways that that can happen. It is according to what law firm you are asking me about.

MR. BURGESS. Say Campbell Cherry.

MR. MASON. Campbell Cherry would want us to initiate their work history information. They would give us a criteria of what they wanted or what they would accept as reasonable exposure to silica. They would give us, basically, the years that they wanted, like they had to start by 1978 and have at least two years of exposure and they would have to be signed to their exposure and say hey, I have been exposed to silica, and this is where I was exposed, and I was exposed there for this amount of years. That was the criteria from Campbell Cherry, basically.

MR. BURGESS. What were your company's goals for organizing those screenings, like the number of people attending?

MR. MASON. We did not really have any. I mean there, again, it is according to what screen we are trying to do. I mean, basically, it is just hard to say; it is according to the screen.

MR. BURGESS. Well, what kind of strategy would you follow for organizing a screening? I mean do you--

MR. MASON. From whom?

MR. BURGESS. Just from say Campbell Cherry.

MR. MASON. What we would do is we would accept the calls from people that they thought were exposed to silica. We would screen those people over the telephone. We would see if they met the criteria that Campbell Cherry had passed down to us. If they did, especially in silica, we had to forward that information to Campbell Cherry. They had to approve the list of people that we thought were exposed, and then we would set those screens up for them by contacting the client and telling them this is where the screen is going to be; this is when you need to be there. And it was our responsibility to make sure the person was there and that we had took the best work history that we could get from the client.

MR. BURGESS. Okay. So you took a work history. Did you take a medical history as well?

MR. MASON. No, sir. Basically, we asked them whether they smoked cigarettes or not. Over the years, I would have to have what we consider our A sheet to tell you exactly what it was that we did. Dr. Harron basically took their brief medical history when he talked to them.

MR. BURGESS. So if a medical history was taken it was taken by a physician, not by one of your employees?

MR. MASON. All we did, basically, from our staff's standpoint was, ask them whether they smoked cigarettes or not, mainly their history, their address. And basically Dr. Harron spoke with them about the medical things that he thought was important for the case.

MR. BURGESS. Did you retain files on the patients that you screened for the asbestos litigation?

MR. MASON. Yes, sir. We have deposited all of those into Corpus Christi. I assume it is called the depository.

MR. BURGESS. Okay. And the same for the silicosis litigation?

MR. MASON. Yes, sir. Basically, I voluntarily sent every file that we ever did in our life to Corpus Christi when I was in front of Judge Jack.

MR. BURGESS. Now, do you yourself have any specific medical background or training?

MR. MASON. No, sir.

MR. BURGESS. Has your company, N&M, ever had a medical director or been under the supervision of a licensed physician?

MR. MASON. No, sir.

MR. BURGESS. Now your staff asks screening questions in order to determine which patients were most likely to have an occupational exposure to silica, and only those patients were X-rayed. Who drafted the questions that were used in the screening process?

MR. MASON. You know, by the time that silica got there, we were fairly well adept to how to ask people about their exposure. I mean we had been in the asbestos field as well. So in the beginning, silica was new for us, so we sort of went by the client saying that he was exposed to silica and where he was exposed at, and pretty much there was not a question list. That was pretty much it.

MR. BURGESS. Well, did you ever had a law firm review the questions that you asked the patients during the screening process?

MR. MASON. I am sorry?

MR. BURGESS. Did you ever have a law firm review the questions that you ask during the screening process?

MR. MASON. No, sir.

MR. BURGESS. What type of dollars are we talking about for one of these mass screenings? And would you make money doing this?

MR. MASON. Well, sir, I was a businessman. I hope to make money, yes, sir.

MR. BURGESS. So can you give me an idea of what kind of money?

MR. MASON. It is according to what we are talking about. When? How? I mean there are numbers of different ways to make money.

MR. BURGESS. Do we have available any of the financials for N&M? Would we have access to that information?

MR. MASON. Yes, I am sure you could have access to it. I do not know that we have produced it in other depositions that we have been in or other court cases. There is numbers of--

MR. BURGESS. Well, you pay taxes?

MR. MASON. Oh, no, sir, I do not have any problems with that.

MR. BURGESS. So did you make a million dollars that year or--

MR. MASON. No, sir, I never made a million dollars.

MR. BURGESS. A hundred thousand dollars?

MR. MASON. Yes, sir, I am sure I made $100,000.

MR. BURGESS. Okay, so we have narrowed it down.

MR. MASON. Yes, sir. I made between one hundred and a million.

MR. BURGESS. Were you paid regardless of the diagnosis regardless of the findings?

MR. MASON. Sir?

MR. BURGESS. Were you paid regardless of the findings? Were you--

MR. MASON. In what application?

MR. BURGESS. Dr. Martindale testified that he was paid $35 for reading the film whether it was positive or negative.

MR. MASON. I mean you are going to have to be more specific on what screen we are talking about.

MR. BURGESS. Did Campbell Cherry Law Firm only pay you for positives?

MR. MASON. Yes, sir.

MR. BURGESS. How much did they pay you?

MR. MASON. It was different amounts. So you are going to have to be specific on when.

MR. BURGESS. For a positive test in January of 2001.

MR. MASON. I have no idea.

MR. BURGESS. Okay. Were there any firms that paid you only for positives and not for negatives?

MR. MASON. Yes.

MR. BURGESS. Which specifically?

MR. MASON. Which firms?

MR. BURGESS. Yes, which firms?

MR. MASON. Lord, I have no idea. I mean, there is a lot, and there is also firms that paid me for both.

MR. BURGESS. Well, what about the O'Quinn Firm? Does that ring a bell to you?

MR. MASON. Yes, I am very familiar with the O'Quinn firm. Yes, sir.

MR. BURGESS. Would they pay you for positives?

MR. MASON. Here, again, we are not in the same scenario. O'Quinn would hire us to come in to do their chest X-rays, which means we got paid for every chest X-ray we did. Then, O'Quinn would hire us to come in and do their pulmonary functions and physicals, and we got paid for every pulmonary function and physical that we did.

MR. BURGESS. Was the payment different if the chest X-ray, pulmonary function, and physical were consistent with a diagnosis of either asbestosis or silicosis?

MR. MASON. No, sir.

MR. BURGESS. Mr. Chairman, I see my time has expired. I will yield back.

MR. WHITFIELD. Okay, at this time recognize Ms. DeGette.

MS. DEGETTE. Thank you, Mr. Chairman

Dr. Martindale, you are a trained physician. Is that correct?

DR. MARTINDALE. Yes.

MS. DEGETTE. And can you tell me what kind of education and medical training that requires? Where did you go to college? Where did you go to medical school? Where did you do your residency and internship?

DR. MARTINDALE. Yes, I went to undergraduate school to college at the University of Tennessee in Knoxville.

MS. DEGETTE. Great.

DR. MARTINDALE. And medical school at the University of--

MS. DEGETTE. That is four years, right?

DR. MARTINDALE. Four years, of medical school at the University of Tennessee in Memphis, the Health Sciences, and four years of diagnostic radiology training at the University of Virginia in Charlottesville, Virginia.

MS. DEGETTE. And you are a radiologist by trade?

DR. MARTINDALE. I am a diagnostic radiologist.

MS. DEGETTE. And how long have you been practicing?

DR. MARTINDALE. Sixteen-and-a-half years.

MS. DEGETTE. Sixteen-and-a-half years. And in your 16-1/2 years in practice, the vast majority of the diagnostic radiology that you do is for physicians who refer your patients to you and then you give the reports back. Correct?

DR. MARTINDALE. Virtually 100 percent, yes.

MS. DEGETTE. And in fact, the only time that you did not have that type of relationship was in the situation we are talking about now? Correct?

DR. MARTINDALE. Correct. I would only qualify that in that I considered Ray Harron to be a diagnosing physician.

MS. DEGETTE. Right, but you were not hired by him.

DR. MARTINDALE. Right, correct.

MS. DEGETTE. You were hired by Mr. Mason's private company--

DR. MARTINDALE. Correct.

MS. DEGETTE. --which is not a physician, correct?

DR. MARTINDALE. Correct.

MS. DEGETTE. And you were hired to perform a review of these X-rays. Correct?

DR. MARTINDALE. Correct.

MS. DEGETTE. And you send your results back to Mr. Mason, correct?

DR. MARTINDALE. Correct.

MS. DEGETTE. And Mr. Mason was he the one, or his company the one, that provided you with the language that you included in each one of your 3,617 reports as to the diagnosis?

DR. MARTINDALE. Yes.

MS. DEGETTE. Okay. So he gave you that language to sign, correct?

DR. MARTINDALE. Yes.

MS. DEGETTE. Now, you testified earlier today and also in your deposition that, really, you felt that it was your job to give a second opinion. You said, "I did not see my role in making a diagnosis of silicosis. I see my role as interpreting the chest X-ray, producing and ILO based on the chest X-ray." Correct?

DR. MARTINDALE. Yes.

MS. DEGETTE. But Dr. Martindale, on 3,617 forms you stated, and you signed "on the basis of the medical history review which is inclusive of a significant occupational exposure to silica dust physical exam and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty." Correct?

DR. MARTINDALE. Yes.

MS. DEGETTE. Now, Doctor, you said before today, when you agreed to do that, you did not understand what it meant. Is that right?

DR. MARTINDALE. No, I said that when I read that paragraph, I had never been in that position.

MS. DEGETTE. Okay.

DR. MARTINDALE. Yes, ma'am. But it was--

MS. DEGETTE. But did you understand that in that paragraph you are signing something that says that you are confirming a diagnosis of silicosis. Did you understand that part?

DR. MARTINDALE. What--

MS. DEGETTE. Because that is what it says?

DR. MARTINDALE. Well, what I understood from my perspective was I was told when I signed off on that paragraph that this language was needed to better link my chest X-ray reading with the diagnosis.

MS. DEGETTE. Okay. But you are a physician, right?

DR. MARTINDALE. Yes, ma'am.

MS. DEGETTE. You know what it means to make a diagnosis of something. Correct?

DR. MARTINDALE. Yes, ma'am.

MS. DEGETTE. In fact, I assume you have diagnosed problems before, right?

DR. MARTINDALE. Yes.

MS. DEGETTE. But this does not say I am confirming the chest X-ray.

DR. MARTINDALE. Not a clinical diagnosis.

MS. DEGETTE. It says the "diagnosis of silicosis is established within." You are certifying; you are establishing a diagnosis of silicosis. Correct? Doesn't it--

DR. MARTINDALE. What I was trying--

MS. DEGETTE. Go ahead.

DR. MARTINDALE. What I believe that paragraph to say, and my intent, was the diagnosis I was not interpreting taking on as my diagnosis or a diagnosis. The films came with a diagnosis. I was told a diagnosis already existed, and I was saying these findings would be consistent or in keeping within a reasonable degree of medical certainty the diagnosis of Dr. Harron is the way that I was interpreting it.

MS. DEGETTE. Okay. It does not say that does it in that statement that you signed 3,617 forms does it?

DR. MARTINDALE. No, ma'am, and--

MS. DEGETTE. No. Now, Mr. Mason, let me ask you did you write that language that you gave to Dr. Martindale?

MR. MASON. No, ma'am.

MS. DEGETTE. Who wrote that language?

MR. MASON. That came to me from the Campbell Cherry Law Firm.

MS. DEGETTE. The lawyers wrote that language?

MR. MASON. Yes, ma'am.

MS. DEGETTE. And did you tell Dr. Martindale he had to include that in the forms?

MR. MASON. No, ma'am, I sent it there for his approval. I did not say it had to be there. I said this is what the lawyers are saying they have to have--

MS. DEGETTE. And is that true, Dr. Martindale? Did you feel like you had an option to maybe put the words I am confirming Dr. Harron's review of the X-rays or something like that? Did you feel like you had leeway to edit that up?

DR. MARTINDALE. I do not think we ever discussed editing it. When I read that from my perspective, I did not see that it was putting the diagnosis on me. I believe from my perspective, and my intent was, that it was describing Dr. Harron's. I understand now in retrospect in having the--

MS. DEGETTE. Okay. Let me ask you a question from my perspective. Let us say I was a lawyer, and let us say I was practicing personal injury law, and let us say Dr. Harron gave me a diagnosis of silicosis. What I need, as a lawyer, is I need a second opinion from a trained medical doctor confirming the diagnosis. This is what you did. Correct? You confirmed; you gave a second opinion; and you said this is inclusive of a significant occupational exposure to silica dust, physical exam, and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty.

DR. MARTINDALE. Ms. DeGette--

MS. DEGETTE. It does not say anything about Dr. Harron.

DR. MARTINDALE. Ms. DeGette, I was told that this was a paragraph. I was told it was from attorneys that they needed for better legal wording, legalese, to link my chest X-ray findings with the diagnosis. But I never was told, I never was aware, that I was would be changing my role from a B reader, which I had already agreed to the diagnosing physician. It was never discussed ever and I would--

MS. DEGETTE. Well, let me ask you this. Do you think this language is consistent with a B reader now? Now do you think that?

DR. MARTINDALE. I think that in retrospect, I can understand how you can read that and have a different perspective on it than I did. And if I had my choice, I would not word it the same way today.

MS. DEGETTE. Well, I bet that is true.

DR. MARTINDALE. All I can do is emphasize that I did not have that perspective or that intent at the time that I reviewed it.

MS. DEGETTE. Now did you ever, on these 3,617 reviews that you did, find a finding that was inconsistent with Dr. Harron's diagnosis?

DR. MARTINDALE. Yes.

MS. DEGETTE. How many times?

DR. MARTINDALE. I could estimate it would be a guess.

MS. DEGETTE. Okay.

DR. MARTINDALE. Maybe over 400 probably.

MS. DEGETTE. Okay, over 400. And you sent those back to Mr. Mason as well?

DR. MARTINDALE. Yes.

MS. DEGETTE. Now, Mr. Mason, let me ask you this: Dr. Harron was hired by you. Is that correct?

MR. MASON. Yes, ma'am.

MS. DEGETTE. And did Dr. Harron perform actual physicals on all of these patients?

MR. MASON. Not on all of them, no, ma'am.

MS. DEGETTE. How many of the patients did he perform physicians on?

MR. MASON. I am sorry from my end, from the MDL, standpoint I would not know.

MS. DEGETTE. Okay. So basically what happened is the lawyers hired you to have a diagnosis made. Correct? Did the lawyers give you the names of the patients?

MR. MASON. No, ma'am. I mean there is--

MS. DEGETTE. Tell me how it worked.

MR. MASON. There is numbers of different events that we are talking about. Sometimes it would not be on our part at all for a doctor to make a diagnosis, it would just be our portion to come there and do our chest X-rays. The lawyers had their chest X-rays and they were diagnosed by--

MS. DEGETTE. No, yes, I am talking about these cases, the silicosis cases.

MR. MASON. So am I.

MS. DEGETTE. Okay. So sometimes they came from all different sources?

MR. MASON. Yes, ma'am.

MS. DEGETTE. Okay. And then you sent them to Dr. Harron?

MR. MASON. No, ma'am.

MS. DEGETTE. Okay.

MR. MASON. I mean again, there are numbers of different ways that different law firms that we had agreed with different law firms. I mean if we just did a chest X-ray on someone, we sent it to the law firm. The law firm picked whatever doctor they wanted to use and I do not know that that was Dr. Harron that they used for that.

MS. DEGETTE. So you would have no idea if once you got these results back from Dr. Harron, Dr. Martindale--

MR. MASON. We did not get the results.

MS. DEGETTE. Let me finish my question,

MR. MASON. I am sorry.

MS. DEGETTE. Oh, you did not get the results? Where did the results go, directly to the lawyers?

MR. MASON. Yes, ma'am.

MS. DEGETTE. So when Dr. Martindale did his little certification, when he reviewed the X-rays and did his certifications, he did not send that information back to you?

MR. MASON. Okay, that is a totally different subject we are talking about now; that is a different scenario. If we were using Dr. Martindale, then the X-rays came from me. But in other lawyer situations, Dr. Martindale was not used in those situations, so that--

MS. DEGETTE. Well I am talking about in Dr. Martindale's situation.

MR. MASON. Okay. In Dr. Martindale's situation, you asked me. What you are trying to get from me?

MS. DEGETTE. Yes. You hired Dr. Martindale to review Dr. Harron's findings. Correct?

MR. MASON. Right, yes, ma'am.

MS. DEGETTE. He then filled out the certification. He sent it back to you. Correct?

MR. MASON. Yes, ma'am.

MS. DEGETTE. And you sent it to the lawyers. Correct?

MR. MASON. Yes, ma'am.

MS. DEGETTE. You would have no idea if those results, or Dr. Harron's results, ever made it to the patient. Is that correct?

MR. MASON. The only thing that I would know about the patients would be if Dr. Martindale said that he had possible cancer, we would send them a certified letter in the mail, and let them know immediately when we got the results back.

MS. DEGETTE. What if it said as they all, as 3,600 and some said that they had a diagnosis of silicosis? Did you send the patient a certified letter at that point?

MR. MASON. We did not have to. Dr. Harron had told them the same day that we were there that they had silicosis. There was no delay.

MS. DEGETTE. And did you see Dr. Harron tell them that?

MR. MASON. No, ma'am. I mean that was not my job.

MS. DEGETTE. Right.

MR. MASON. But I mean we told them the same day, because we had to tell them that they had something so that they would go to the lawyers.

MS. DEGETTE. Mr. Chairman, I have a lot more questions, but we have got a vote on. You have been very generous.

MR. WHITFIELD. Well, we do have a series of votes, so we are not going to be coming back, but I wanted to just ask a couple more questions.

Mr. Mason what percent of your revenue was generated from doing work for law firms?

MR. MASON. Ninety-nine percent.

MR. WHITFIELD. So basically that was your business, doing for law firms?

MR. MASON. Yes, sir.

MR. WHITFIELD. And there was not anyone in your business that had any legal training, per se. You did not have legal training?

MR. MASON. No, sir.

MR. WHITFIELD. Referring to the case in Texas before Judge Jack--I think there was the law firm of Campbell Cherry--there was the Quinn firm involved in that as well. In those cases, did they contact you, and did you ever have any law firms contact you and say we want you. We want to give you information regarding people who have, or who are diagnosed with asbestosis, and we want to see now if they have silicosis?

MR. MASON. Yes, sir.

MR. WHITFIELD. Which law firms were those?

MR. MASON. Campbell Cherry sent us their inventory. They sent out a letter to their entire inventory with our 800-number on it, and asked us if we would ask the clients that they had if they ever had exposure to silica as well.

MR. WHITFIELD. Okay.

MR. MASON. And that is what we did.

MR. WHITFIELD. So these were people that they had already recovered money for asbestosis.

MR. MASON. I really do not know. I just know that they sent us an inventory.

MR. WHITFIELD. Now were you aware that it is extremely rare that someone would have both of these diseases?

MR. MASON. I had no knowledge of that.

MR. WHITFIELD. Okay. That was not of interest to you. But when you contracted with the Cherry firm, the O'Quinn firm, you were reimbursed only for positives or for positives and negatives from those two firms?

MR. MASON. I was on the O'Quinn side; we were paid for every client.

MR. WHITFIELD. Every client?

MR. MASON. In most instances because of the fact that they started with the chest X-ray, and we got paid for every chest X-ray.

MR. WHITFIELD. Okay.

MR. MASON. They got their results.

MR. WHITFIELD. Okay.

MR. MASON. Then we come back and did their breathing tests and their physicals, and we got paid for every one of those. So from the O'Quinn side on the majority end of it, we got paid for everybody the same fee whether they were positive or negative. We did not know whether they were positive or negative. From the Campbell end of it, you only got paid for the people that were positive.

MR. WHITFIELD. Okay. And did both firms tell you which doctor to use as your primary physician?

MR. MASON. No, sir, they never told us which one to use, but they always wanted to approve the doctor that you were using.

MR. WHITFIELD. So you would select the doctor?

MR. MASON. I would find a doctor that met their qualifications and they would approve whatever doctor they wanted me to use.

MR. WHITFIELD. And what were the qualifications on the Campbell firm or the Cherry firm and the O'Quinn firm?

MR. MASON. Just about every firm had the same qualification basically. You had to be a NIOSH B reader. That was basically the thing. There was not very many so it was--

MR. WHITFIELD. So just like Mr. Martindale here; he is a NIOSH B reader, but he does not do diagnosis per se. How were you introduced to Dr. Harron?

MR. MASON. Dr. Harron worked for another testing group which I was affiliated with before I owned the testing group that I am with now.

MR. WHITFIELD. And so he had good reviews from them and so you asked him if he would do some diagnosing for you?

MR. MASON. Yes, sir. Dr. Harron had a very good reputation.

MR. WHITFIELD. In what way?

MR. MASON. Just in the business period.

MR. WHITFIELD. In what business?

MR. MASON. In the business of asbestos.

MR. WHITFIELD. A good reputation in what way?

MR. MASON. I mean just as far as the people go. As far as he had a reputation as far as nobody had a problem with him being your B reader.

MR. WHITFIELD. Among what groups of people?

MR. MASON. Any.

MR. WHITFIELD. And then you said 99 percent of your revenues came from law firms so are we talking about he had a good reputation with law firms?

MR. MASON. No, I am talking about in general. I mean I did not work with people I did not think had a good reputation just as a good person. We are not talking about--

MR. WHITFIELD. But obviously the law firms were paying you. Correct?

MR. MASON. Sure.

MR. WHITFIELD. And so I am assuming that if they did not feel comfortable with him, then, they would have probably have said something to you about that.

MR. MASON. I will say again the lawyers had to approve every doctor that you use.

MR. WHITFIELD. Okay, okay, okay, well yes, Mr. Stupak.

MR. STUPAK. Let me make because this is going to bother me. The only public health aspect I have heard in this hearing is notification of patients after these X-rays. Dr. Martindale, you indicated there were about 400 patients you saw negative readings on?

DR. MARTINDALE. Yes, sir.

MR. STUPAK. But they were referred to as being a positive reading. Correct? When you had to do the read they were indicated that--

DR. MARTINDALE. Yes, they had been read previously as positive, yes.

MR. STUPAK. As positive. Who would have notified those patients in that in fact that your reading was negative?

DR. MARTINDALE. I assume Mr. Mason. That is where the reports went back to.

MR. STUPAK. Would you have done that then Mr. Mason, reported to those 400 or would they go back to the law firms?

MR. MASON. No, we would not.

MR. STUPAK. And so if anyone did it, would it have been the law firms?

MR. MASON. Yes, sir.

MR. STUPAK. And we do not know to this day if those people were ever notified that after being told they were positive that they are now negative?

MR. MASON. No, sir, we would not know that.

MR. STUPAK. Nothing further.

Thank you, Mr. Chairman, we have got limited time before we have to go vote here.

MR. WHITFIELD. All right, Dr. Martindale, do you know the criteria for diagnosing silicosis?

DR. MARTINDALE. The clinical criteria for diagnosing?

MR. WHITFIELD. Yes.

DR. MARTINDALE. No, sir, and I was very forthright in my deposition that as saying that I did not think I needed to in support of my--

MR. WHITFIELD. Did you tell Mr. Mason that when he retained you?

MR. MASON. I never felt like I was being placed in the position of diagnosing asbestosis or silicosis. I was only doing what I had been certified by NIOSH to do.

MR. WHITFIELD. So Mr. Mason, what did you think Dr. Martindale was doing? Was he diagnosing? You hired him; what was he doing?

MR. MASON. In the silica aspect or the asbestos aspect?

MR. WHITFIELD. The silica aspect.

MR. MASON. In the silica aspect, once I contacted Dr. Martindale to review the diagnosing paragraph, is what we called it, we assumed that he was diagnosing those people.

MR. WHITFIELD. So you assumed he was diagnosing, and he was assuming he was not diagnosing?

MR. MASON. Apparently, yes, sir.

MR. WHITFIELD. Did you ever talk to him about that or--

MR. MASON. I did not feel as I needed to. He reviewed the paragraph, and he okayed the paragraph.

MR. WHITFIELD. Okay. Well, that concludes this hearing. We have a number of votes. I want to thank all of you for being here. We will keep the record open for an appropriate number of days for any additional exhibits or information in our opening statements. In addition to that, we will, may very well be back in contact with some of you for additional information but thank you for being here today and thank you for your presence and this hearing is adjourned.

[Whereupon, at 6:09 p.m., the Subcommittee was adjourned.]

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April 21, 2006

Attention: Tony Cooke
***VIA FACSIMILE* (202) 226-2447**
Honorable Ed Whitfield
Chairman, Subcommittee on Oversight
and Investigations
2125 Rayburn House Office building
Washington, DC 20515

Re: "The Silicosis Story"
My Client: George Martindale, MD

Dear Chairman Whitfield:

I am forwarding the responses of my client, Dr. George Martindale, to the supplemental questions you posted in your letter of April 5, 2006. As you requested, I am forwarding both paper and electronic forms.

Please let me know if you require anything further from Dr. Martindale.

Cordially,

G. Douglas Jones

GDJ/tmf
enclosure
cc: Tony Cooke
Michael Abraham

April 8, 2006

Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
The Honorable Ed Whitfield, Chairman
2125 Rayburn House Office Building
Washington, D.C. 20515

RE: Response to additional questions from Subcommittee on Oversight and Investigations – George Martindale, M.D.

1. You Testified that Heath Mason proposed and you agreed to the insertion of the "Impression" language from your reports?
   a. Did you think you were being pushed into using this language by anyone?

   Response: No. I was told and believed that it was only legalese to better link my B-read report with Dr. Harron's diagnosis.

   b. Were you ever told that if you don't use that language you would not be paid for your work?

   Response: No.

2. In your October 2004 deposition, you testified that you did not know the criteria for diagnosing silicosis or the exposure standards for silica. You further said that the classification of silicosis was beyond your experience as a radiologist.

   a. Did you ever communicate any of this information to Heath Mason at any time prior to the issuance of your silicosis reports or October 2004 deposition?

   Response: No. I had a verbal contract to function only as a B-reader in accordance with my NIOSH certification and knowledge of the criteria for establishing the clinical diagnosis of silicosis wasn't a requisite in the performance of my work. As such, I had no reason/occasion to discuss this with Heath Mason.

b. Did you ever communicate any of this information to any attorney at any time prior to the issuance of your silicosis reports or October, 2004 deposition?

Response: No. The only conversations that I had with any attorneys concerning my B-reading work was just prior to my October, 2004 deposition, and the this subject was not discussed.

3. Prior to your October 29, 2004 deposition, you said you had been contacted by an attorney, Billy Davis, with the Waco, Texas law firm of Campbell, Cherry, Harrision, Davis and Dove in which he had told you that he had identified you to the court as having diagnosed people with silicosis?

a. Who initiated this call?

Response: Mr. Davis

b. Was this the first time you learned that you had been identified as the diagnosing doctor in the lawsuit?

Response: Yes.

c. What did you say when you learned that you had been identified as having made the diagnosis? Was this a surprise to you?

Response: I told Mr. Davis that I had not "diagnosed" anyone with silicosis or asbestosis but had served only as a second B-reader for corroboration (or not) of Dr. Harron's initial B-read. Yes, the fact that I had been cited by Plaintiffs' attorneys as a diagnosing physician was a surprise to me.

d. Did you request that Mr. Davis tell the Court that it was not your finding? If not, why not?

Response: No. I was completely unfamiliar with the details of the litigation and felt that I could clear up any misconceptions concerning the intended context and scope of my reports during my deposition.

4. On March 25, 2005 you wrote a letter to Mr. Davis. On page 2 of that letter you recount that in a telephone conversation with Mr. Davis, you stated that when you told Mr. Davis that you did not diagnose his clients, he stated: "I certainly would hate to hear you say that at your deposition."

a. What do you think Mr. Davis meant by that statement?

Response: I assumed he was verbalizing the fact that it would likely damage his case in Court as he did go on to say that, "Well, then I hope he doesn't ask you."

i. Did you think Mr. Davis, at anytime in that call or later, was pressuring you to stand behind these reports despite your explanation that you were not a diagnosing physician?

Response: No.

b. During that conversation, Mr. Davis also asked whether you would act as an expert. Did he ever suggest that if you agreed, your deposition might be postponed?

Response: Yes. Mr. Davis did state that if they retained me as an expert witness, my deposition would very likely be postponed.

c. How would you describe Mr. Davis's reaction to your statement that you were not the diagnosing physician? Surprised? Angry? Confrontational?

Response: Mr. Davis' reaction was rather direct and matter of fact but was not confrontational. Whether that belied surprise, anger, etc., I simply couldn't say.

d. If you believed that, in your reports, you were only confirming the diagnosis of another doctor, did you ever ask Mr. Davis why this other doctor was not identified as the diagnosing doctor in the litigation?

Response: As I stated above in response 3d, I had no knowledge as to the status of the litigation and/or its participants. As such, I was not aware that Dr. Harron was not also identified as a diagnosing doctor on the individuals whose chest x-rays I had evaluated for N&M, Inc..

5. Did you ever inquire about the medical follow-up for people diagnosed as part of N&M's work?

Response: In general, no. I knew that Dr. Harron, employed by N&M, Inc., had performed the clinical workup. I was told by Heath Mason that Dr. Harron had established the diagnosis on each individual prior to their chest x-ray being sent to me for a second B-read. Therefore, I believed that Dr. Harron and/or N&M had informed each person of any diagnosis made. I did inquire as to the mechanism of informing those tested of any x-ray findings that I felt may represent cancer. I was told point blank by Heath Mason that any individual with x-ray findings of possible cancer would be notified of such findings by N&M via certified letter.

6. Have you ever used your b-reading credentials for any other work apart from litigations?

Response: No. My only B-reading experience involved my work for N&M, Inc., from April 2001 to June 2002.

7. Did you tell your malpractice insurer that you were doing b-reading?

Response: Yes, when I had to reapply for coverage. The application included a question as to whether I was currently involved in any radiology service which I had not been when I completed my previous application.

a. Have you alerted your malpractice carrier to these inquiries? If not, why not?

Response: No. I have viewed my work as a B-reader to be completely within the bounds of my federal certification. My contract work was to provide a consultative second opinion on x-rays of individuals for an industrial testing company. I had no contact or doctor-patient relationship with the individuals tested and, despite the controversy surrounding this matter, I have not received any complaint that would require me to put my malpractice carrier on notice.

George H. Martindale, M.D.

RESPONSE FOR THE RECORD OF HEATH MASON, CO-OWNER AND OPERATOR, N&M, INC.

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May 2, 2006

VIA U.S. MAIL, E-MAIL MICHAEL.ABRAHAM@MAIL.HOUSE.GOV
AND FACSIMILE 202-226-2447
Honorable Ed Whitfield
Chairman
Subcommittee on Oversight
and Investigations
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115
Attn: Honorable Michael Abraham, Clerk

RE: Heath Mason

Dear Sir:

This letter constitutes the response of Mr. Health Mason to the "Supplemental Questions" submitted by Representative Michael C. Burgess following the March 6, 2006, hearing of the Sub-Committee on Oversight and Investigations.

All questions are addressed to Mr. Mason. However, all testing services referred to in the questions were performed by N&M, Inc., a Mississippi corporation. Mr. Mason was an officer and employee of N&M.

These responses are made to the best of the present recollection of Mr. Mason. All records of N&M were delivered to the document depository for the *In Re: Silicosis* MDL litigation in Corpus Christi, Texas. N&M did not retain copies of these records. Some questions cannot be answered without review of these documents. Moreover, Mr. Mason does not have a copy of his testimony of March 6, 2006.

SUPPLEMENTAL QUESTIONS

1. Were you ever paid by any of the following firms for positive diagnoses only?

   a.. Campbell, Cherry, Harrison, Davis and Dove of Waco, TX;
   b. O'Quinn, Laminack and Pirtle of Houston, Texas;
   c. Barton and Williams Law Firm of Ocean Springs, MS;
   d. Law Offices of Alwyn Luckey of Ocean Springs, MS;
   e. Law Office of Jim Zedah, P.C. of Fort Worth, TX;

f.. Scott Hooper and Associates of Houston, TX;
g. Williams Bailey Law Firm, L. L. P. Of Houston, TX;
h. McMurtray and Armistad of Jackson, MS;
I. Pritchard Law Firm of Pascagoula, MS;
j. Swartzfager Law Firm of Laurel, MS; or
k. Foxworth and Casano of Gulport, MS

Response: Mr. Mason was not paid. N&M charged fees to and was paid or reimbursed by various law firms. Records relating to these payments were voluntarily delivered by N&M to the document depository. N&M did not retain copies of these records. Without these records, a complete response cannot be provided. However, it is the present recollection of Mr. Mason, subject to a review of documents, that some law firms paid or reimbursed N&M for testing costs for those persons whom they accepted as clients. To the best of his present recollection, Mr. Mason believes that these may include the Campbell Cherry firm, the O'Quinn Laminack firm, Barton & Williams and Alwyn Luckey. However, there were different arrangements at different times for different firms. For example, Mr. Mason's recollection is that on some occasions, the O'Quinn firm paid for testing services for all persons who were screened and on other occasions only paid or reimbursed N & M for testing of persons they subsequently accepted as clients.

2. Did you ever make patients aware of you fee arrangement in screenings when you would be compensated only for a positive diagnosis?

Response: Persons who were screened were not made "aware" of fee arrangements between the lawyers and N&M. It is Mr. Mason's present recollection that persons who were screened were notified that if their screening was negative there would be no charge. If their screening was positive and if a lawyer accepted a case on their behalf, the amount of the charges for the screening might be deducted from any settlement or recovery as an expense. This was a matter to be agreed upon with the law firm.

3. With respect to any of the law firms listed above, were you ever paid in a manner by which you, in effect, made more money for a positive diagnosis, i.e., a positive diagnosis leading to additional testing?

Response: The records of N & M are not available. To Mr. Mason's best recollection, the answer is no.

4. Did you ever conduct a screening on behalf of a law firm where the majority of results on any given day were negative diagnoses?

Response: The question cannot be answered without a detailed review of records. Such a review would take hundreds of hours. To the best of Mr. Mason's present

recollection, there were screening days in which the majority of the test results were negative.

5. Who ordered the x-rays in each of your screenings? If Dr. Ray Herron, for example, was present at the screening, was he the doctor prescribing the x-rays?

Response: Mr. Mason believes he addressed this issue in his testimony on March 6th. However, as a general matter, Dr. Ray Herron may have been present at screenings at which he did not prescribe x-rays. In some jurisdictions, x-rays were taken pursuant to a "healing arts" exception and without a prescription from a physician.

6. Did you typically rely on a specific doctor or doctors licensed in certain states, when you did work in those states, to act as the prescribing doctor for the x-rays?

   a. If so, where applicable, who was the prescribing doctor for the work you did in the following states: Ohio, Texas, Louisiana, West Virginia, Alabama, California, Mississippi, Florida, Missouri, Wisconsin, Kentucky, Hawaii, Virgin Islands, Arkansas, Illinios, and Pennsylvania?

Response: To the best of Mr. Mason's present recollection, the answer is no. The answer to sub-part "A" varies according to the jurisdiction. In many jurisdictions, N&M did not even perform x-rays. N&M may have only provided pulmonary function testing or N&M may have only provided physicals. X-rays were prescribed by physicians in jurisdictions which required that x-rays be prescribed by a physician.

7. Was it ever assumed that any doctor present at the screening, conducting physicals, making b-reads, etc. was also prescribing the x-rays?

Response: This question is not clear. Mr. Mason did not make any such assumption. In some jurisdictions, such as Florida, doctors present at the screening prescribed x-rays.

8. For every screening, did your company have a specific written record including a signature by a doctor prescribing all x-rays to be taken? If not, why not?

Response: N&M had detailed records for each screening. These records have been delivered to the MDL document depository. Mr. Mason cannot answer this question without a review of the records. Such a review would be very time consuming and expensive. Where a prescription for an x-ray was required, records of the prescription were maintained by N & M.

9. You have testified that, in the event of a positive diagnosis, your purpose was to find people legal representation, if they wanted it .. You've said that it was your "job" to find

the patient a lawyer in the event of a positive diagnosis. Did the patients understand that that was the purpose of your business?

a. Did you ever see it as a part of your business to find positively diagnosed patients follow-up medical care?

Response: Upon inquiry, counsel for Mr. Mason has determined that this question is predicated upon page 339 of Mr. Mason's prior testimony before Judge Jack. This testimony is part of the record and should not be restated. However, Mr. Mason recalls that employees of N&M might notify persons who received a positive diagnosis that a lawyer or group of lawyers were present at nearby locations. N&M did not make referrals to specific lawyers. Persons who were screened were advised that they could select any lawyer or no lawyer. The choice was entirely their own. The "purpose" of the business of N&M was to conduct screenings and testing.

10. Describe how the offer of legal representation from a particular firm took place. If a particular firm sponsored the screening and had representatives on site ready to meet with positively-diagnosed individuals, in what way was a choice of representation made? Did you have available the names and contact information for other attorneys who might represent the individual in the event they did not want to retain the law firm who may have sponsored the screening?

a. In the events at which a law firm representative was present and available to meet the patients, did a positively-diagnosed individual ever choose a different law firm to represent their interests?

I. If so, who paid your fees?

ii. Did you solicit the chosen law firm for payment for the screening and diagnosis of that patient?

iii. Did you ever charge such a law firm, or the patient themselves, for transfer of the screening information and diagnosis? If so, how much?

Response: This question cannot be answered without a review of the N & M records. Moreover, Mr. Mason was not present during discussions with law firms. Law firms did not "sponsor" screenings. However, as a general matter, persons who were screened were advised that representatives of a law firm may be at a nearby location. The person screened could visit that law firm or any other law firm or no law firm. It was entirely their choice. N&M did not select a lawyer to represent any person. Persons who received a "positive diagnosis" frequently choose a different law firm to represent their interests. If they selected another

lawyer and that lawyer requested a copy of the screening records, the records were provided for the same fee. There were different fees charged depending upon the services performed.

11. With respect to each of the law firms listed above in question No. 1., with whom N&M worked, please state the following:

    a. How did you find people to be screened: i.e., did the law firm give you names, ask you to screen people who were already scheduled to be at a certain place?

    b. Was there a minimum number of people for who you would conduct a screening, e. g. to travel to Texas to conduct a screening, you would require at least 40 people available each day to be screened?

    c. Did you ever calculate before or at a screening how many positives you would need to have to cover your expenses given the particular payment arrangement covering that screening event?

Response: This question cannot be answered without a review of the N&M records. However, to the best of Mr. Mason's present recollection, persons who applied to be screened were "found" by various methods. These included lawyer referrals and television and newspaper advertisements. There were different "minimum numbers" of persons necessary to conduct screenings. It may have ranged from 40-70 persons to be available to be screened each day. N&M did not "calculate" how many "positives" would be needed to cover expenses.

12. Was the silica exposure criteria of people to be screened ever set by a law firm? If so, which of the firms listed above in Question No. 1 ever set by a law firm? If so, which of the firms listed above in Question NO. 1 ever set such criteria?

Response: This question is confused or misprinted. As a general matter, "exposure criteria" was not set by law firms. However, law firms did set the number of years of exposure before they would accept a case. Exposure time for most firms was two years or more.

13. Did you ever consult with a doctor about whether any silica exposure criteria set by a law firm was adequate or medically appropriate?

    a. Did any doctor you work with ever question the adequacy of the silica exposure criteria?

Response: This question cannot be fully answered without reference to the records of N&M. As a general matter, however, lawyers did not set "exposure criteria" other than

the number of years of work place exposure. N&M followed guidelines of work exposure in excess of two years and latency of at least twenty years. These guidelines were known to and applied by the physicians who made diagnoses or conducted "B-reads."

14. Were you or employees of your firm ever the first persons to inform a screened individual of their diagnosis of silicosis? If so , please state the following:

    a. The medical training or credentials of the persons within your company who would first inform a screened individual of such findings or diagnosis;

    b. The information regularly given to a screened individual of the meaning or reliability of such tests or findings; and

    c. What follow-up medical information was given to the screened individual.

        I Did you have available at screenings the names and contact information of local doctors to whom you could refer positively-screened individuals for follow-up care?

Response: This question cannot be answered without reference to the records of N&M. A physician at the screening generally informed the person screened whether their test results were positive or negative.

15. If doctors used for your screenings, in the process of their work, found a medical condition for the screened person other than silicosis, how and when would the doctor or your company alert the patient to this additional medical information?

Response: Physicians advised persons whether they appeared to have some other condition such as cancer or an enlarged heart. They would be advised to see their family doctor promptly.

16. Who in your company was responsible for communicating or working with state regulators or other such entities to confirm compliance with any local rules in the states where you were conducting a screening?

Response: Mr. Heath Mason.

17. Did any of your advertisements or solicitations suggest that your screening was a medical process or procedure? In these advertisements or solicitations, did you ever use the terms "medicine," "medical," or "clinic"?

    a. If not, why not?

Response: This question cannot be answered without reference to the records of N&M. Mr. Mason presently does not recall all advertisements for silica screening or testing. However, it is his belief subject to reviewing the records that these terms were not included in advertisements.

18. In instances in which there was a doctor present at the screening conducting physicals, did your company ever give instructions to the doctor concerning the manner in which the physical would be conducted? Did a law firm ever require doctors to conduct physicals in a certain manner? Did a law firm ever present a doctor with a medical history form to be completed at the physicals? If so, which of the firms listed above in question No. 1 ever set such procedures or supplied such medical history forms?

Response: N&M did not give instructions to or place limitations on physicians concerning the manner in which physical examinations were to be conducted. To the best of Mr. Mason's knowledge, law firms did not require doctors to conduct physical examinations in a certain manner and did not give instructions or limitations to physicians. Mr. Mason has no present recollection of whether a law firm ever presented a doctor with a medical history form. He believes that did not occur but cannot answer the question without a review of N&M records.

19. In George Martindale's October 2004 deposition, he testified that he did not know the criteria for diagnosing silicosis or the exposure standards for silica. He further said that the classification of silicosis was beyond his experience as a radiologist. Did he ever communicate any of this information to you at any time prior to his issuance of his silicosis reports?

a. If so, did you communicate this to the law firms to whom you were giving his report? If not, why not?

Response: Dr. Martindale did not communicate such information to Mr. Mason or to any other representative of N&M.

Yours very truly,

Luke Dove
Attorney for Heath Mason

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THE SILICOSIS STORY: MASS TORT SCREENING AND THE PUBLIC HEALTH

FRIDAY, MARCH 31, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield [Chairman] presiding.

Members present: Representatives Whitfield, Ferguson, Burgess, Blackburn, Barton (ex officio), Stupak, and Inslee.

Staff Present: Mark Paoletta, Chief Counsel for Oversight and Investigations; Alan Slobodin, Deputy Chief Counsel for Oversight and Investigations; Anthony Cooke, Counsel; Peter Spencer, Professional Staff Member; Michael Abraham, Legislative Clerk; David Nelson, Minority Investigator and Economist; Jessica McNiece, Minority Research Analyst; and Jonathan Brater, Minority Staff Assistant.

MR. WHITFIELD. I will call this hearing to order.

This is an ongoing hearing regarding the Silicosis Story: Mass Tort Screening and the Public Health.

This morning, we convene the second day of hearings on the important public issues raised by the practice of mass tort screening. Today we have with us representatives from two law firms that have refused to respond to our requests for records and information on furtherance of this important investigation. These firms are the law offices of Jim Zadeh of Forth Worth, Texas, and the Williams Bailey Law Firm of Houston, Texas.

Fortunately, of the 13 law firms to which we have sent requests letters, these two have been the only ones so far that have refused to respond and cooperate with the investigation. This hearing today, among other things, will emphasize how serious the committee takes this investigation. What is more, this hearing demonstrates the resolve of the committee to protect its prerogatives to investigate fully the matters in its jurisdiction.

Accordingly, I would like to thank certainly the Chairman of the full committee, Mr. Joe Barton, our colleagues in the Minority, particularly John Dingell and Mr. Stupak, for their support. We all share this

common ground on matters of Congress's rights and fundamental obligations to investigate, ask questions, and gather evidence to inform our legislative considerations.

Let me start today by giving at least one example of why we sent letters to law firms in this investigation. Last week, Republican and Democratic committee staff had the opportunity to speak with some plaintiffs in the silicosis lawsuits at issue here. Now, while none of the plaintiffs we spoke to were represented by the two firms appearing before us today, their stories plainly demonstrate one of the particularly troubling aspects of the silicosis class action process. The first is the story of a 72-year-old man from Mississippi who was a plaintiff in the Federal lawsuit in Texas. This man became involved in the legal process after responding to a newspaper advertisement, and also one he saw on television, and he reported to a local hotel to receive a chest X-ray.

According to this man, he was first diagnosed with asbestosis by Dr. Ray Harron, and then at a later time, received a letter from a lawyer telling him he also had silicosis. And we know that it is extremely rare that anyone would have both asbestosis and silicosis. But the diagnosing doctor for the silicosis also was the same doctor, Dr. Ray Harron.

Now, I would remind you that Dr. Ray Harron appeared before this committee several weeks ago; and when asked whether his silicosis diagnoses were accurate and made pursuant to all medical practices standards and ethics, he took the Fifth Amendment, protection against self-incrimination. And then the Mississippi man recalled that the letter from the lawyer informing him that he had silicosis included no information about the illness or where he might find treatment or any offer of assistance.

Is this the practice of your law firm as well? And I might say that this 72-year-old man's story gets worse, because at the time our staff spoke to him last week, he did not know that there was any question about his diagnosis of silicosis. If on March 8, Dr. Harron pled the Fifth Amendment when asked about that diagnosis, why has this 72-year-old man not been informed of it? Why is he still living in fear of this disease? And what is more, let us not forget that this man also believes he has asbestosis based on the diagnosis from the same doctor.

Now, we want further investigation to fully understand the information given to us in these brief interviews with the plaintiffs I mentioned today. These stories are the reasons we have included law firms in this inquiry, because we want to find out the process that is being used in manufacturing these lawsuits. Our investigation must know all sides, or we are left with a remarkably troubling picture.

For example, we would like to know from Mr. Zadeh and the Williams Bailey Law Firm how they treat matters of diagnosis in their

firms? How do they identify potential claimants in their law firms? How are medical patients and the public health protected in their law firm?

But among the most troubling aspects of this whole investigation has been the degree to which it appears that lawyers seem to manufacture the class action lawsuits. The lawyers find the doctors, the lawyers find the patients, the lawyers act as intermediaries in coordinating diagnosis and presentation of vital health information to clients.

You might ask then, who are the doctors? Some have suggested to us that doctors do not even regard the work that they do for these lawyers as the practice of medicine.

Now, turning to the matter that sparked this inquiry, the Texas multi-district litigation. The disturbing conduct of the doctors and lawyers is shown in very stark terms. Mr. Zadeh, for example, who appears today before this committee, represented to the Federal court in this case that a doctor, Richard Levine, was the doctor that diagnosed many of his clients with the disease of silicosis. The positive diagnosis of that physician was the reason his client appeared before the court seeking relief. Our staff talked to Dr. Levine and his lawyer, and we have an e-mail and we will speak with Mr. Zadeh about this from an attorney for Dr. Levine, which seems to suggest that Dr. Levine never intended his diagnosis, or his work, to be treated as a diagnosis. In fact, he said, I didn't diagnose anyone.

You might recall that this was the same testimony of Dr. George Martindale, who claims he never diagnosed anyone with silicosis. Indeed, he did not know the criteria for diagnosing silicosis, and yet was represented to the Federal court as being the diagnosing doctor for thousands of plaintiffs in the action.

What were these doctors actually doing? How were these lawyers representing the work of these doctors to the court and, more importantly, to their clients? That is at the heart of this investigation, and the reason we have asked the attorneys involved in the "In Re: Silica" MDL, to give us information and records to get a clear understanding of the way this process works. That, gentlemen, is why you are here today, and that is the kind of information that we are seeking from you.

At this time, I recognize the gentleman from Michigan, Mr. Stupak.

[The prepared statement of Hon. Ed Whitfield follows:]

PREPARED STATEMENT OF THE HON. ED WHITFIELD, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

This morning we convene the second day of hearings on the important public health issues raised by the practice of mass tort screening.

Today we have with us representatives from two law firms that have refused to respond to our requests for records and information in furtherance of this important investigation. These firms are the Law Offices of Jim Zedah, of Fort Worth, Texas, and the Williams Bailey Firm, of Houston, Texas. Fortunately, of the 13 law firms to which we sent such request letters, these two have been the only ones, so far, that have refused to respond and cooperate with this investigation.

This hearing today, among other things, will emphasize how serious this Committee takes this investigation. What is more, this hearing demonstrates the resolve of this Committee to protect its prerogatives to investigate fully the matters in its jurisdiction. Accordingly, I would like to thank my colleagues in the Minority, particularly Mr. Dingell and Mr. Stupak, for their support and guidance on such matters. While we may have different perspectives on some matters of policy – I believe we share broad common ground on matters of Congress's rights and fundamental obligations to investigate, ask questions, and gather evidence to inform our legislative considerations.

Let me start today by giving a couple examples of why we sent letters to law firms in this investigation.

Last week, Republican and Democratic Committee staff had the opportunity to speak with some plaintiffs in the silicosis law suits at issue here. While none of the plaintiffs we spoke with were represented by the two firms appearing before us today, their stories plainly demonstrate the reasons for this inquiry – in very stark and troubling terms.

The first is the story of a 72 year-old man from Mississippi who was a plaintiff in the federal lawsuit in Texas. This man became involved in this legal process after responding to an advertisement he saw on television and reporting to a local hotel to receive a chest X-ray. According to this man, he was first diagnosed with asbestosis by Dr. Ray Harron and, then at some time later, received a letter from a lawyer telling him he also had silicosis. The diagnosing doctor again - Ray Harron. Now recall that Dr. Ray Harron appeared before this Committee several weeks ago and, when asked whether his silicosis diagnoses were accurate and made pursuant to all medical practices, standards and ethics – he took advantage of his Fifth Amendment protections against self-incrimination.

The Mississippi man recalled that the letter from the lawyer informing him that he had silicosis, included no specific information about the illnesses or where he might find treatment in his area. I want to ask Mr. Zedah and Mr. Fabry today: Why would this man learn about a diagnosis of a potentially deadly disease from a lawyer? Is this the practice of your firms as well? But this 72 year-old man's story gets worse: as of the time our staff spoke to him last week, he did not know that there was any question about his diagnosis of silicosis. If on March 8, Dr. Harron pled the Fifth Amendment when asked about his silicosis diagnoses – why has this 72 year-old man been living in fear of having this disease? What is more, let us not forget that this man also believes he has asbestosis based on a diagnosis from Dr. Harron.

And as another example, consider the story of a 54 year-old sandblaster from Mississippi who was told in a letter from a lawyer several years ago that he had a diagnosis of silicosis. Again, from Dr. Ray Harron. And again, the lawyer offered no information about the disease or even doctors in his area where he might seek treatment. Not surprisingly, this man had also been told some time earlier that he also had asbestosis (again thanks to Dr. Harron). This Mississippi man has never sought treatment for either of these diseases. Perhaps it's a good thing that he has not received any additional

medical procedures for his silicosis because he says he has recently received another letter telling him that there was now a question about his diagnosis and that he should follow up with his doctor. But, unfortunately, this 54 year-old laborer does not have a doctor or the money to pay for follow-up. The lawyers were apparently ready with a free exam and diagnosis in the first instance, when there was a potential lawsuit to be made.

I think this man has a right to ask: where are the lawyers now? The lawyers told him in a letter that a doctor diagnosed him with a potentially deadly disease but now these lawyers seem to have abandoned him. I would point out that this is why, in the real world of medicine, doctors – not lawyers - give diagnoses. And finally, again, I would ask what should this man know about the asbestosis diagnosis he had also received from Dr. Ray Harron?

Among the information uncovered in the course of our inquiry, these stories present the human face, and perhaps human tragedy, of the matters we are addressing. Further investigation is needed to understand fully the information given to us in the brief interviews with the plaintiffs I mention today. These stories are the reason we have included law firms in this inquiry. These stories are the reason we will not accept dismissive refusals by these parties to answer questions. Our investigation must know all sides or we are left with a remarkably troubling picture. For example, I would like to know from Mr. Zedah and the Williams Bailey firm how they treat matters of diagnoses in their firms. How do they identify potential claimants? How are medicine, patients, and the public health protected?

To Mr. Zedah, Mr. Fabry, and all the people at your respective firms, this is why we sent you and 11 other law firms letters on February 17. I hope today you can help us better understand what is happening here. I look forward to your testimony.

MR. STUPAK. Mr. Chairman, once again, the Democrats are called upon to support you and our Majority colleagues in protecting the integrity of the investigatory process of the subcommittee. The witnesses subpoenaed before this subcommittee today have challenged the committee by withholding their cooperation. The Democratic leadership of this committee believe that it is completely proper to force subpoenas to have been issued in this instance. When defending the committee's prerogatives, you have our support.

However, Mr. Chairman, we believe that the prerogatives should be defended whenever they are challenged. If we are subpoenaing a witness because they defy our request for documents and testimony being necessary to carry out our oversight responsibilities, then all persons that defy the committee's legitimate request should be compelled to respond.

I raise again the behavior of Rosemary Williams, the general manager of Mountaineer Racetrack. Last November, she testified before this subcommittee. I believe that she clearly gave misleading testimony. Further, I believe her response to certain of our written follow-up questions were equally disingenuous. Her counsel has informed us that she will not extend any further voluntary cooperation to this committee. Yet another case is the apparent willful withholding of documents responsive to a committee subpoena by Wayne Gertmenian, the former self-styled CEO of the Jockeys Guild.

The new management is cooperating fully with the documents subpoenaed to the Guild itself; however, Mr. Gertmenian remains in defiance of this subcommittee's subpoenas of documents relating to his personal consulting firm Matrix Capital.

As you know, the Secretary of Health and Human Services has been withholding documents critical in the investigation into major misbehavior at one of the National Institutes of Health. Mr. Dingell and I joined you and Chairman Barton requesting information regarding this matter last June. While just this week, it appears that sufficient documents may have been produced to allow our inquiry to proceed, the Department is still obstructing our inquiry regarding employee interviews. Contrary to an agreement reached by the Department and the Majority two years ago, HHS is insisting on sitting in with at least one key witness.

Mr. Chairman, we understand responsibilities of the Chair, and the Chair should, could and, can, and that title permits you a great deal of latitude in deciding how to protect the integrity of our process. However, we Democrats supported you in the inquiries into the problems at NIH and the very serious problems surrounding the health care for the jockeys and exercise riders at race tracks. We merely ask that you approach the defiance we have encountered at HHS and Mountaineer with the same determination you have shown in the silicosis matter.

Finally, as I said in my statement at the first silicosis hearing earlier this month, I believe that the problems identified in these silicosis hearings are best addressed by the courts. The courts have the power and it has been exercised in this case to remedy any misrepresentations made in the courtroom. States can and should investigate improper legal conduct and take appropriate action when improper conduct is found, for it is the State who licenses these professionals, not the United States Congress.

Mr. Chairman, with all due respect, you mentioned the lawyers. I would submit lawyers are doing their job, even if you may not agree with how the lawyers did their job. And I would, once again, remind this subcommittee that for the last 5 years, we have been trying to do further follow-up work on Accutane, which we have had 250 more suicides since our last -- initial inquiry, I should say. That is one a week, and yet we continue to do nothing about it.

So what I am asking for, we are willing to stand with you and protect the integrity and the investigative process of this committee, but if we are going to do this, then we have to do it evenhandedly for all matters that come before this committee. And, with that, I would yield back the balance of my time.

MR. WHITFIELD. Thank you, Mr. Stupak. And at this time, I recognize the Chairman of the full committee, Mr. Barton of Texas.

CHAIRMAN BARTON. Thank you, Mr. Chairman. Are Mr. Zadeh and Mr. Fabry in the room? Which one is Mr. Zadeh? And who is Mr. Fabry? Thank you. You all can sit down. You didn't have to stand up.

I want you all to listen to this before we get started, because we might, or we can, save everybody a lot of trouble.

This hearing today in the subcommittee is very similar to a situation that we had 8 years ago when I was subcommittee Chairman. The situation then dealt with a real estate project in Washington called the Portals, and there was a disagreement about the means used to get the contract with the Government, the FCC, for that project.

Your counsel, Mr. Stan Brand, represented a gentleman named Franklin Haney, and your counsel counseled Mr. Haney to defy subpoena of this subcommittee, and Mr. Haney did. And he did until we were preparing to take the contempt citation to the floor of the House, and Mr. Haney did finally comply with the document request. The Minority then strongly disagreed with the policies and the reasons for the investigation, but they supported the Majority in the procedure to get the documents and to get the information.

Now, we may have a similar situation here. I don't know yet whether the Minority disagrees with the policy implications, but I do know that the Minority agrees with the Majority about the procedures. And that is what this hearing today is about, is the procedures.

I want to read a statement that was made back in 1998 by a member of the subcommittee, Chris Cox, who is now the Chairman of the Securities and Exchange Commission. This is what Mr. Cox had to say then. I quote: "Having myself sat through the last meeting of the subcommittee and listening to Mr. Haney's lawyer talk, Mr. Stan Brand, it is very clear to me, at least, that the purpose of the legal approach that he is taking is to delay and to stall and to obstruct. The legal arguments that have been raised against producing lawfully requested documents are extraordinarily specious, and it was made plain to the committee that if Mr. Brand could think of a stratagem to avoid production, he would use it."

Mr. Brand lost that fight. And if he encourages you two gentlemen to take the same kind of a fight today, he and you are going to lose today. It is that simple.

I don't know what your law firms have to gain by this strategy. We had 13 law firms that we subpoenaed documents from; 11 of them have complied, and most of those had much more involvement in the case than the plaintiffs that you represent today. We have got the cameras

here, we have got the microphones here, you are about to be sworn in and give testimony under oath.

You will answer the questions of the committee today, or you are going to return next week on April the 4th at 4:00 p.m. at another hearing that we have already scheduled just for you two to consider a motion to hold you in contempt of Congress. I don't see any sense in that. I think you ought to cooperate today, whatever the documents are, whatever the facts are, you know, put them on the table, and then we will have an honest policy debate and investigation about where those facts lead us.

It is kind of strange to me to even be having this type of a hearing because you are both attorneys, and I think I am correct that you are both attorneys from the same State that I live in, the great State of Texas. I think you have got one final opportunity to cooperate with the committee in our investigation. Any challenges to the prerogatives of this committee and the Congress will be met with decisive action. Your counsel today seems to specialize in enjoying putting his clients on the brink of contempt. I don't know why that is, but I can tell you this: The Energy and Commerce Committee, for over 200 years, has always won the procedural battle to get documents that it requests in these types of investigations, and it is going to win this one. So you can do it the easy way or the hard way. It is up to you folks.

You have got full rights under the Constitution to use all the privileges that the Constitution confers on citizens of the United States of America, but that does not mean that you can hold yourself above the Congress of the United States when we are conducting an investigation. With that, I yield back.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF THE HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Chairman Whitfield - and thank you for holding this second day of hearings on the public health implications of mass tort screenings.

On February 17, 2006, I joined Mr. Whitfield on a letter to 13 law firms involved in the federal silicosis matter in Corpus Christi, Texas seeking important records and information for our investigation. These 13 letters are in addition to more than 40 other letters to doctors, screening companies, State regulators and State medical boards gathering other relevant material. A total of 55 requests for information have been sent since August 2, 2005 pursuant to this investigation, and only two groups have refused to respond and cooperate. The first consisted of the three doctors who appeared before the Committee recently and asserted their 5th Amendment rights against self-incrimination. The second group of reluctant witnesses comes before us today: the Houston, Texas law firm of Williams Bailey; and the Fort Worth, Texas, law firm of Jim Zedah.

Response to a letter sent by this Committee is voluntary. Parties have the right to say no, but sometimes they have a responsibility to say yes. In this case we are investigating the mass diagnoses of men and women who are said to be suffering from

a potentially lethal and largely incurable disease, with little apparent care for their medical well-being by the doctors, screening companies and lawyers who said they were sick. The doctors, screeners and lawyers only concern seems to have been achieving the high profit that a positive diagnosis might generate. An honest diagnosis of silicosis is a matter of life and death, not profit and loss. And we, the Committee on Energy and Commerce, have an obvious responsibility not to take "No" for an answer from people who don't seem to recognize the difference. Such is the case today, and the law firms of Williams Bailey and Jim Zedah do not appear here willingly or happy to explain themselves, but under subpoena.

I have not heard anyone stand up to defend the callous conduct of the doctors, screeners and lawyers that was explored in the June 2005 opinion of Judge Janis Graham Jack. I expect that the Williams Bailey and Zedah law firms don't think that it is something worth a second thought, much less something Congress should be investigating. I, however, am eager to hear how Williams Bailey and the Zedah firm will defend and explain the conduct at issue in the Judge Jack opinion.

All of us have been very disturbed by the way men and woman were drawn into the silicosis lawsuits, and by the consistent disregard for them as fellow human beings. I hope to learn more today about why and how that happened, and I promise that our Committee will continue to pursue this matter wherever it leads.

I look forward to the testimony and yield back the remainder of my time.

MR. WHITFIELD. Thank you, Mr. Chairman. And at this time, I recognize the gentleman from Washington, Mr. Inslee.

MR. INSLEE. I think that there is strong bipartisan support for supporting the ability of Congress to conduct investigations and oversight, and we think it is a very, very important part of American democracy, and I think you will see that exhibited today in this committee. But I want to say something that is parallel to that, and that is that the U.S. Congress has done a pathetic, ineffective, incompetent job of its oversight responsibilities of some other things going on in this country, including massive abuses of democracy by the Executive Branch of the United States.

We are here arguing about this subpoena, and it will be supported today on a bipartisan basis; but at the same time, we have had a total lack of oversight over the Executive Branch, including the Executive Branch that started a war based on information that turned out to be false. And yesterday, I was reading about a memo that was apparently given to the President advising him that the aluminum tubes that he based a war on, in fact, were meant for conventional weapons, not for atomic weapons, and he didn't tell us the truth about this according to the information.

We ought to issue some subpoenas to those folks. We ought to be talking on a bipartisan basis about having subpoenas for Mr. Rove to come down here and explain to us what information was given to the President of the United States before this war started, about whether, in fact, he leveled with us about the intelligence information that has led to the death of 2,500 people. And then let us have some bipartisan support

for the investigatory and oversight authority of the Congress of the United States.

And I say this because I think it is important for Congress to be an effective member of checks and balances in this society, and we are not doing it right now. So I want to speak forcefully for the ability of Congress to be an effective investigatory group. We are going to do this today; I wish we would do it tomorrow involving the Executive Branch of the United States.

I do want to ask one question, Mr. Chairman, if I can, a procedural issue.

MR. WHITFIELD. Yes, sir.

MR. INSLEE. Do we have some mechanism for protecting the attorney/client privilege in this situation? Is there any possibility? I don't think we should intrude on attorney/client privilege information. Will that be protected in some sense?

MR. WHITFIELD. Well, I feel quite confident that that will be protected. Both witnesses today are also represented by legal counsel, and can certainly invoke any legal objections that they may have.

MR. INSLEE. But I am referring to the relationship between the lawyer, the law firm, and their client of that information. Will that be subject to an attorney/client protection?

MR. WHITFIELD. Yes, it will.

MR. INSLEE. Thank you. I appreciate that. I want to yield to Mr. Stupak.

MR. STUPAK. I thank the gentleman for yielding. As I said in my opening, we will stand with you on the process and procedure, but I feel compelled to say a few things about the Portals case because I painfully sat through those hearings for some time, myself, and Mr. Klink. And true, Mr. Haney was a witness and true, Mr. Haney, we had to take a little extra effort to get him to comply, but they did comply. Mr. Haney's attorney actually, I thought, did a wonderful job for him as the whole so-called investigation fizzled out, because the investigation was based not on policy matters, it was based strictly on politics. In fact, if you go back and look at the hearing, I probably referred to the hearings as a kangaroo court, because it was based on politics, and not on policy that affected this country.

There was a lot of publicity back then when the then-majority put out the so-called smoking gun to infer then the Vice President, Mr. Al Gore, had done something wrong. And when we had the hearings, there never was a smoking gun. There was nothing there. And when we put out things like that before a hearing, it certainly turns a hearing that should be based on policy into politics.

So let's put the politics aside. Let's do the committee's prerogative. These people are here, they have exercised all their legal rights, and I expect them to fully utilize their legal rights when they appear before this committee, and we should not cast aspersions upon them because they may be exercising their legal rights or they don't respond as soon as they want them to. That is their right as Americans. We should respect it, we should protect it. And let's move forward with the policy issues before this committee. Thank you.

MR. WHITFIELD. Dr. Burgess, you are recognized for your opening statement.

MR. BURGESS. Mr. Chairman, in the interest of time, I will submit for the record but waive the opening statement.

MR. WHITFIELD. Mr. Ferguson, you are recognized.

MR. FERGUSON. Thank you, Mr. Chairman. I will also submit for the record. But I will just note that I am fully supportive of your comments, the comments of the full committee Chairman. And the suggestion that this hearing may end up like some past situation that may or may not have been characterized by some as a kangaroo court I think does take away from the fact that these are very serious questions that have been raised. The only reason that we are having this hearing today is because we have not received the cooperation that we have requested as others have cooperated as they have been requested. And the reason that a hearing is scheduled next week is to have some assurance that we will get the cooperation that we have asked for today.

So we should not seek to -- we may or may not agree with the substance of this case, and I am pleased that this is a bipartisan effort to exercise the jurisdiction of this committee and the subcommittee. But we should not for a second suggest that we would be here today except for the fact that we were not getting the cooperation that we have sought. And, with that, I would yield back.

MR. WHITFIELD. Thank you. At this time the gentlelady from Tennessee, Ms. Blackburn, is recognized.

MRS. BLACKBURN. I will submit mine for the record. Thank you, Mr. Chairman.

[Additional statements received for the record follow:]

PREPARED STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Thank you Chairman Whitfield for holding this hearing and shining a light on the unscrupulous practices perpetuated by some rogue physicians and medical screening companies. It imperative that we gather all the information on these practices in order to craft oversight procedures to ensure that patients undergoing medical screenings get accurate diagnoses, and it is our duty as members of the Oversight and Investigations subcommittee to exercise our mandate to protect the public's interests.

I was appalled by the information we learned in the hearing we held on this issue on March 7th. Thanks to the diligent efforts of Judge Janis Graham Jack, medical evidence gathered by these dubious screening companies was discovered lacking in any medical basis of reliability. For the 10,000 plaintiffs involved in the "In Re: Silica" matter, only 12 doctors were responsible for almost all of the silicosis diagnoses. In almost every case, none of these doctors treated, met, or physically examined the patients. While these 12 doctors made all 10,000 silicosis diagnoses involved in the case, there were some 8,000 treating doctors involved in the actual treatment of the patients, who subsequently did not see this disease! Dr. Martindale conducted all 3,617 of his reviews in 48 days, averaging 75 reports per day. To put this rate into context, one doctor, for a silicosis diagnosis in a single-plaintiff lawsuit, apart from the Multi-District Litigation, took 17.6 hours on top of his assistant's 46 hours. Dr. Ray Harron, who was involved in the diagnosis of approximately 6,350 plaintiffs in "In Re: Silica," diagnosed more than 1,800 patients with silicosis whom he had—coincidentally-- previously diagnosed with asbestosis. Dr. Harron was also the diagnosing doctor for 53,724 of the 499,766 claims before the John Mansville asbestos trust, for which there was physician information. He also provided supporting medical reports in another 22,500 claims before the trust. These examples barely scratch the surface of the questionable nature of the diagnoses in this suit.

Today, our panel includes attorneys from two of the thirteen law firms involved in the mass tort screenings that were employed in the federal case of In Re: Silica Products Liability Litigation, MDL Docket No. 1553 (S.D. Texas). In hopes of learning more about the medical screening process involved in this case, the committee has subpoenaed these firms to gather specific information regarding the manner in which these firms identified people as potential claimants in the silicosis lawsuits and how they addressed clients' health matters. I hope that these witnesses will join the other thirteen law firms in compliance with this request and cooperate fully with this committee. Particularly, I will be interested in hearing from the panel what role their firms played in selecting the doctors who issued the diagnoses, and the criteria, if any, they used in these diagnoses. I believe it will also be enlightening to discuss what prior business relationship, if any, existed between the law firms, the doctors and/or the screening companies.

I look forward to hearing from the witnesses on these important issues.

Thank you.

MR. WHITFIELD. Thank you. I think that concludes the opening statements. So at this time I would call Mr. Zadeh and Mr. Fabry to the witness stand, please.

Now, you gentlemen are aware that the committee is holding an investigative hearing, and when doing so we do take testimony under oath. Do you have any objection to testifying under oath this morning?

MR. ZEDAH. No, sir.

MR. FABRY. No.

MR. WHITFIELD. The Chair would also advise you that, under the rules of the House and the rules of the committee, you are entitled to be advised by counsel about your constitutional rights. Do you desire to be advised by counsel during your testimony today?

MR. FABRY. Yes, I do.

MR. ZEDAH. Yes.

MR. WHITFIELD. In that case, Mr. Fabry, would you please identify your legal counsel.

MR. FABRY. Mr. Brand.

MR. WHITFIELD. What is his full name?

MR. FABRY. Stan Brand.

MR. WHITFIELD. And which one is Mr. Brand? Thank you. And Mr. Zadeh, who is your legal counsel?

MR. ZEDAH. Mr. Stan Brand.

MR. WHITFIELD. So both of you are represented by Mr. Brand?

MR. ZEDAH. Yes.

MR. WHITFIELD. Okay. All right. Then if you two gentlemen would stand up, I would like to swear you in.

[Witnesses sworn.]

MR. WHITFIELD. Thank you very much. Each of you are now under oath, and if you have any opening statement that you would like to give, I would recognize you for that purpose. Mr. Zedah.

MR. ZEDAH. None.

MR. WHITFIELD. Mr. Fabry.

MR. FABRY. No. But thank you for the opportunity.

MR. WHITFIELD. Okay. I would ask both of you, Mr. Zadeh and Mr. Fabry, you were subpoenaed to come today with the records from your respective firms as set forth in the attachment to the March 23rd, 2006 subpoena. We were advised that the subpoena issued to you would be applied to all the records in the custody and control of your respective firms. Have you come today with the records subpoenaed?

MR. ZEDAH. No, Your Honor -- no, Mr. Chairman, I have not. We are in the process of gathering those records, though, and we do intend on producing those records to the committee subject to any privileges, such as the privilege that Mr. Inslee had brought forward.

MR. WHITFIELD. Mr. Fabry?

MR. FABRY. For the record, it's pronounced Fabry. And I did bring all the records that we were able to locate since receiving the subpoena.

MR. WHITFIELD. You did bring all the records?

MR. FABRY. Yes, sir.

MR. WHITFIELD. And have you presented them to the -- you all presented them? Okay.

I would say that the underlying record requests were transmitted to your respective firms in our letter of February 17, 2006, a full 6 weeks ago. And you are in the process of gathering all the material, and do you expect to deliver that by April the 4th, Mr. Zadeh?

MR. ZEDAH. I don't know if we can do it by April 4th. It is a very big project that you have all asked.

MR. WHITFIELD. Okay. Well, I want to thank you for providing the information that you have provided, Mr. Fabry. And, Mr. Zadeh, we look forward to getting your testimony. And I would like to now go on and ask some specific questions to both of you.

First of all, I would like to begin by asking you both a broad question about the matters discussed by Judge Janice Graham Jack in her June 2005 opinion.

Mr. Fabry, I understand the William Bailey firm joined the Federal lawsuit late and was not specifically included in the conduct described in the opinion, but I would still like for you to comment. Can either of you direct me to any part of the Judge Janice Graham Jack opinion that is wrong on its facts?

MR. FABRY. It is a very long opinion that covers a wide range of issues. I would be very uncomfortable trying to discuss that off the top of my head. I have read the opinion; I have not memorized it. If there is a specific area of concern of the Chairman, I would be happy to address that.

MR. WHITFIELD. But you have read the opinion. And was there anything in the opinion that jumped out at you as being wrong in any -- you know, you read opinions, legal opinions or memos; and if there is something that is -- you have been involved in this case, and you are quite familiar with all the procedures and the facts of the case. Was there anything about the opinion that jumped out to you glaringly that appeared to be wrong?

MR. FABRY. I don't have any personal information factually about the issues addressed there. As you said, we were a latecomer; our case was brought in late. In fact, the one case was subject to a stay order while Judge Jack was conducting her investigation. So from a perspective of personal knowledge, factual information, I have no basis to comment one way or the other.

MR. WHITFIELD. Okay.

Mr. Zadeh, I want to show you an e-mail exchange that you had with an attorney representing Dr. Levine, and ask you to comment on that, if you would. I think it is the second exhibit in your binder. But on December 9, 2004, Dr. Levine's attorney wrote to you and said: What is important for your plaintiffs is that their diagnosis are not based on Dr. Levine's B reads; rather, that the reads are merely an indicator that can

only be verified by a full examination conducted by and for the doctor who will testify.

It seems to me that, based on what his lawyer wrote here, Dr. Levine did not intend to give a diagnosis to your clients. And we do have a document from the court file in which it looks like that Dr. Levine, in the Maxine Woods case, was listed as the diagnosing physician for a number of those plaintiffs. I was wondering if you would be able to explain that apparent conflict to us.

MR. ZEDAH. Sure, Mr. Chairman. Dr. Levine is my B reader, or one of my B readers. He goes ahead and looks at the X-rays and gives an indication as to whether they are negative or whether they are consistent with silicosis.

At that point, we then have the client go see another doctor for a full pulmonary examination. That doctor then does the diagnosis of silicosis. In the situation of the MDL, we were told to put down the doctors that had examined or had anything to do with silicosis with respect to those plaintiffs, and we went ahead and put Maxine or put the people in Maxine Woods down as doctors who had looked at X-rays for that particular plaintiff.

MR. WHITFIELD. Now, is a B read a diagnosis?

MR. ZEDAH. I am not a physician; but my understanding is that a B read is not a complete diagnosis, but a portion of the diagnosis.

MR. WHITFIELD. But in this e-mail that you had sent to Bruce Thrau on December 7, 2004, it says that Dr. Levine is listed as a diagnosing physician on 12 of the plaintiffs.

MR. ZEDAH. He is a portion of the diagnosis. And so when Judge Jack tells me to put down every doctor, I would err on the side of putting the doctor in the disclosure as opposed to not, because then it would look like I was hiding something.

MR. WHITFIELD. But the truth of the matter is that Dr. Levine is not a diagnosing physician for this matter. Is that correct?

MR. ZEDAH. That is correct, Mr. Chairman.

MR. WHITFIELD. Now, in the State of Mississippi, your original lawsuit, was it filed in Mississippi or was it another State?

MR. ZEDAH. It was filed in Washington County, Mississippi.

MR. WHITFIELD. In Mississippi. In Mississippi, is it true that a B read alone does present a cause of action, a positive B read?

MR. ZEDAH. I think that is a matter of opinion right now. I don't think that there is an answer. There is one side of the argument that somebody who has a positive B read has some sort of injury to their lung; and, because they have some sort of injury to their lung, even though it is not considered to be silicosis, that is considered to be a cause of action.

The other line of thought is that a B read alone is not enough to constitute silicosis, and therefore it is not a cause of action. So there is are two lines of thought on that.

MR. WHITFIELD. The plaintiffs that you represented, they came to you through advertisements in the newspaper or radio, I assume?

MR. ZEDAH. Are we talking about the plaintiffs in the MDL?

MR. WHITFIELD. Yes.

MR. ZEDAH. Okay. Those plaintiffs came to me, if I recall correctly, from three sources. One source is word of mouth, existing clients are referring clients to me; a second source would be from referring attorneys, attorneys who have existing cases and want me to handle those cases; and then the third would be through advertisements.

MR. WHITFIELD. And what about your firm, Mr. Fabry?

MR. FABRY. Essentially the same. We get cases by referral, by word of mouth, referral from other attorneys, referrals from prior clients. I think very little from actually any advertising.

MR. WHITFIELD. Now, then would you refer clients to a particular location for an X-ray? And is that what you would normally do? Is that your normal practice?

MR. FABRY. It would depend on the individual, sir. Some people call me specifically because they have had a diagnosis, and it wouldn't require a further examination. Some people are referred to me by an attorney who has already begun the process; perhaps there is a B read that indicates silicosis. Another possibility would be someone who is contacting me because they have a long history of exposure and are concerned.

MR. WHITFIELD. And how many plaintiffs did you have in the MDL lawsuit?

MR. FABRY. Five.

MR. WHITFIELD. And you had?

MR. ZEDAH. Approximately 20.

MR. WHITFIELD. 20. So compared to the other firms, you all are relatively small firm compared to the thousands that were involved. When a B read came back, did your firms have a policy of paying the B readers, whether it was positive or negative? Did you pay them just for their service, or did you pay only for positive readings?

MR. FABRY. The payments were always for service provided. It was not a contingent payment on results, if that's the question.

MR. ZEDAH. That's the same answer for me.

MR. WHITFIELD. So it is for the service, and it was not based on a positive or negative reading, either one.

MR. FABRY. That's correct, sir.

MR. ZEDAH. That's correct, Mr. Chairman.

MR. WHITFIELD. Now, let me ask this question. Mr. Zadeh, would you briefly describe your understanding of the status of the MDL lawsuit today?

MR. ZEDAH. I had what I understand to be the last case that was removed from State court to Judge Jack's court; and then I believe about two months ago it was remanded back for lack of jurisdiction. My understanding is Judge Jack has no pending cases in front of her right now. But that is just my understanding.

MR. WHITFIELD. But your case was remanded?

MR. ZEDAH. The one case I did have was remanded back to State court. Yes.

MR. WHITFIELD. And what is the posture now that it has been remanded?

MR. ZEDAH. I don't mean to laugh. The Mississippi Supreme Court seems to come down with a new opinion every month as to how we handle these cases. There is a new decision that came out called Canadian National in which, if they are in the improper venue, are dismissed. At that point, they have a year to refile. I am not sure whether that case has been formally dismissed or not, but I believe that's the process.

MR. WHITFIELD. Okay. Well, my time is expiring. But before I conclude my questions, Mr. Zadeh, you are going to make every effort to present these documents to us by April the 4th; and we will maintain contact with either you or your attorney, Mr. Brand, to make sure we do that. And then you basically have provided the information that we requested, and our legal counsel is working with you now. Is that right, Mr. Fabry?

MR. FABRY. That's correct. And if we find any additional responsive documents, we will produce those.

MR. WHITFIELD. Thank you very much. Mr. Stupak.

MR. STUPAK. Thank you.

Gentlemen, if you can explain to the panel of the committee what an MDL is, it might be helpful. The last hearing when I was referring to it as class actions, and I think we got that corrected, it was an MDL. Can you explain what an MDL, multi-district litigation, is, Mr. Zadeh?

MR. ZEDAH. Multi-district litigation, there is both Federal and State. There is both Federal and State MDLs. But an MDL, in essence, is -- there's a panel called The Joint Panel on Multi-District Litigation who gets a motion from typically the defendants to consolidate all Federal cases throughout the country. And then if the JPMDL grants that motion, they then choose a court to send all these cases to in one consolidated proceeding. And so there is that for the Federal. And then

some States, including the great State of Texas, has a State MDL in which it is a similar procedure with State court cases.

MR. STUPAK. In this case here, this was a Federal multi-district litigation MDL. Correct?

MR. ZEDAH. Yes.

MR. STUPAK. And it was assigned to Judge Jack?

MR. ZEDAH. Yes.

MR. STUPAK. And Judge Jack has dismissed these cases?

MR. ZEDAH. She has remanded the cases back to State court. They are not dismissed, they are remanded.

MR. STUPAK. In the remand, before Judge Jack remanded it, was there any kind of finding by the court of any possible liability?

MR. ZEDAH. Possible liability against the defendants?

MR. STUPAK. Just that there is a question of liability here that should be tried before the proper court. Some cases, I understand, were outright dismissed, but there are others, I take it like your case pending before the State court, there is a question of at least there's enough evidence to go to a jury or fact-finder as to liability.

MR. ZEDAH. Judge Jack did not make any such decision. The main decision is she didn't have jurisdiction, so she didn't have the power to make any decisions.

MR. STUPAK. So the question of liability or possible liability still has not been determined? Judge Jack based hers strictly on procedural grounds or legal limitations that she did not have jurisdiction over these cases?

MR. ZEDAH. Yes.

MR. STUPAK. Okay. Do either one of you witnesses here today, have you ever made a medical decision in these cases, in your cases that you are personally handling, a medical decision?

MR. FABRY. No.

MR. ZEDAH. I don't have a medical license, so, no.

MR. STUPAK. And the license for doctors are done by a Federal or State agencies?

MR. ZEDAH. I believe so. I don't know.

MR. FABRY. To the best of my knowledge. Yes, sir.

MR. STUPAK. How about for attorneys? Who licenses the attorneys, the Federal government, or the State in which you are admitted to practice law?

MR. FABRY. I have been licensed by the State of South Carolina, the bar there, and the State of Texas, the bar there.

MR. STUPAK. Mr. Zedah.

MR. ZEDAH. The State of Texas and the State of Mississippi for me.

MR. STUPAK. There has been discussions in these hearings, our second hearing here now, about B readers. Did either one of you select the B readers in these MDL cases? Mr. Zadeh?

MR. ZEDAH. In the 20 MDL cases? In my 20 plaintiffs?

MR. STUPAK. In your 20 plaintiffs.

MR. ZEDAH. I don't know if "select" is the word. I was told that these B readers were B readers that would accept these cases, and then they would read them and send them back. I don't know if that means I selected them or not.

MR. STUPAK. So B readers were already being used in the silicosis cases before your cases came in? Because the Chairman said you were both late into these matters. Cases had already been filed before you filed your cases. Is that correct?

MR. ZEDAH. That's correct.

MR. STUPAK. Mr. Fabry, I think you said you had five cases. Was it the same circumstances, those B readers were already being used in other cases related to the silicosis issue?

MR. FABRY. I guess that is a maybe a two-part answer. As to the five cases, the five individual plaintiffs in the Federal silica MDL, I am not actually sure of the status of the B reader. Those individuals had full pulmonary examinations by a pulmonologist, which, in my mind, diminishes the importance of the B reader. So I am not sure. B readers are routinely used in silicosis and other occupational disease litigation.

MR. STUPAK. I guess what I am trying to get at here is there has been inferences that the B readers were selected by legal firms to do the B reading because they would get a favorable reading, and there was some suggestion that if you got a favorable reading you got extra compensation. So I guess my question was to just simply -- I heard you say through the testimony thus far that these cases were going before your 15 cases were presented, Mr. Zadeh, and before your five cases were presented. So I want to know if you helped to select these so-called B readers, or did you use the B readers that were already being used in the other cases pending before this MDL? That is what I am trying to ask.

MR. ZEDAH. In my case, they had already been used by other attorneys in the past.

MR. STUPAK. Mr. Fabry?

MR. FABRY. I am still not sure I understood the question completely. My clients from Missouri, the five who ended up in the MDL, had a full diagnosis, and had met with a pulmonary doctor before those cases were ever transferred to the MDL. Does that answer your question?

MR. STUPAK. Yes.

MR. FABRY. Thank you.

MR. STUPAK. Mr. Zadeh, I think you might have said. You need two doctors before you made a determination of silicosis or asbestosis?

MR. ZEDAH. Some people use the same doctor. Our policy is not to use the --

MR. STUPAK. By your policy, your law firm's policy?

MR. ZEDAH. My law firm's policy is that one person do the B read, and then later, have another person do a full pulmonary examination. I am not -- I believe that's -- in these 20 cases, I believe that happened, and that's typically our policy.

MR. STUPAK. Okay. A similar policy, Mr. Fabry? Or do you have a different policy in your law firm?

MR. FABRY. I wouldn't say we have a policy. I view these from an evidentiary perspective. And the evidence that I need to prove the case at trial, in my opinion, is a full pulmonary examination, whether or not a B read actually occurs. One of the doctors that I have used probably on the majority of my cases is Dr. Gary Friedman, who is not currently a B reader, and therefore would not be able to, although he is familiar with the standards, wouldn't be able to fill out the form as a B reader, but does make the diagnosis.

MR. STUPAK. And then, Mr. Fabry, in your cases, then did you have a pulmonary examination for your five cases, these five individuals?

MR. FABRY. Yes, sir.

MR. STUPAK. Let me ask you each this question. If one B reader gave you a result that did not indicate an occupational disease, would you ever send the same X-ray to another B reader? Mr. Zadeh? Or I should say in these 15 cases that you are --

MR. ZEDAH. I couldn't tell you if we did it in these cases or not.

MR. STUPAK. Mr. Fabry?

MR. FABRY. I don't think so.

MR. STUPAK. Okay.

MR. FABRY. I don't know of instances like that.

MR. STUPAK. I have no further questions, Mr. Chairman.

MR. WHITFIELD. At this time, I recognize the full committee Chairman, Mr. Barton.

CHAIRMAN BARTON. Thank you. First of all, I want to thank you two gentlemen for being here, and I want to thank you for testifying that you are going to comply with the subpoena.

The subpoena that each of you received last week indicated that we wanted you to be here in person this morning. You have done that. And the second thing, we wanted each of you to produce the things identified in the attached schedule touching on matters of inquiry committed to the committee or subcommittee, and you are not to depart from it without leave of said subcommittee or committee. Now, it is my understanding

that, Mr. Fabry, that the envelope of documents that you turned over, you are saying is the complete document file for the matters under investigation. Is that correct?

MR. FABRY. Complete as to what we could find since receiving the subpoena. Yes, sir.

CHAIRMAN BARTON. I want to --

MR. FABRY. And, in fairness, I do believe that, if it is not complete, it is close to complete.

CHAIRMAN BARTON. I want to read what the attachment to the subpoena says. Now, the attachment to the subpoena is identical to a letter that your law firms received back in February. And in terms of documents to comply with the subpoena: Produce all records related to any services, analysis, reviews, consulting, or diagnosis involving in any way the issue of silicosis and related to any of the following persons or entities: Heath Mason, N&M; Charlie Foster, RTS; Jeffrey Guise, Occupational Diagnostics; David M. Miller, Inner Visions; Robert Altmire, MD; James Ballard, MD; Kevin Cooper, MD, MPH; Todd Colter, MD; Andrew W. Harron, DO; Ray A. Harron, MD; Glenn Hillburn, MD; Richard B. Levine, MD; Barry S. Levy, MD MPH PC; George Martindale, MD; W. Allen Oaks, MD; or J.T. Segara, MD; produce all written policies and procedures of your firm related to the information regularly given by your firm to a client or prospective client on the meaning or reliability of any tests or findings indicating that they have silicosis.

So, Mr. Fabry, you are saying that you have either fully complied or to the best of your knowledge almost fully complied with this. Is that correct?

MR. FABRY. Yes, sir.

CHAIRMAN BARTON. And Mr. Zadeh, you are saying that you have not complied but you intend to comply. Is that correct?

MR. ZEDAH. Yes, sir.

CHAIRMAN BARTON. Could you instruct me and the rest of the committee when you intend to comply?

MR. ZEDAH. With all respect, sir, here is the issue we have. As part of my job as a lawyer, I've collected a lot of information over a lot of time with respect to silica, including transcripts from the MDL, and briefing from the MDL. As broad as this subpoena reads, I need to look through all of that information. That is 250 gigabytes of information. When we convert it, that is over a conversion that we did using something on the Internet, is around 16 million pages. I personally haven't even looked through all those pages. This is a congressional subpoena, which I take very seriously.

CHAIRMAN BARTON. I take it very seriously, too. I signed it.

MR. ZEDAH. Yes, sir. And if I miss something and that is determined to be in my possession, that complies with the subpoena, I am in contempt of that subpoena. And so I have to look through 16 million pages of documents to make sure that I fully comply.

CHAIRMAN BARTON. Well, my guess is, and it is a guess, that there are probably, at most, a couple hundred that are truly relevant, and I bet you know where they are. I have a feeling that you have subtitles and set subtitles of files that it would be fairly easy to get your hand on the most pertinent documents.

MR. ZEDAH. Yes, sir. It is the 80/20 rule. 80 percent of them I can get to you, and am working on getting to you.

CHAIRMAN BARTON. Why don't we get that 80 percent. And then I bet, with good-faith effort on your part, the staff on both sides can work on the other 15,999,000 pages, probably work something out that will say you are complying.

MR. ZEDAH. That would be great.

CHAIRMAN BARTON. What is your game plan to get with the staff to make arrangements to get those 80 percent of the documents that you think you can get? You are going to do that today?

MR. ZEDAH. I will rely on counsel, and I will work with the committee.

CHAIRMAN BARTON. Well, I've instructed the staff that -- I agree with what Mr. Stupak said, you got the right to every constitutional guarantee under law. We are not trying to prevent you from exercising your constitutional rights. But we also have an obligation to the Constitution as an investigatory committee empowered to protect the people of the United States to move forward. And I want to hear from the staff today what the true deadline is for you complying to the best of your ability, and I want it to be fairly soon. Do you think you could have some documents by next Tuesday?

MR. ZEDAH. Three days?

CHAIRMAN BARTON. Yes, sir. Because if you can't, you are going to have to come back here and testify under oath again why you haven't found them.

MR. ZEDAH. Sure. No, as long as I have an understanding that I don't have to look through 16 million pages by Monday.

CHAIRMAN BARTON. You know, we're reasonable. I wouldn't want to spend my weekend looking through 16 million pages, either. I understand that.

MR. ZEDAH. I just don't want to be seen as being incomplete, and on Tuesday, if I don't give you something on Tuesday, you come back and hold me in contempt.

CHAIRMAN BARTON. Well, so far the record is, you have 16 million pages, the committee staff has zero. That's a little unbalanced. And I am not a silicosis lawyer, I am not even a lawyer, so I can't make a value judgment on how many documents would be reasonable. Mr. Zadeh, it looked to me like Mr. Fabry turned over looked to me like several dozen documents. It didn't look to me to even be a hundred pages. So you got the first letter back in February; it's now March 31st. I just don't want to belabor this, but I would strongly encourage you to let the Minority and Majority staff know at the end of this hearing what your intention is in terms of volume of documents before next Tuesday. And if it is zero, you will have to come back here and tell us why it is zero.

MR. ZEDAH. That is not my intention.

CHAIRMAN BARTON. If it is not zero, and it looks like it's reasonable, hopefully you won't have to come back again and we can do it, just read the documents, and then do whatever we need to do in terms of correspondence. And there's some other questions in the letters that we would like for you to give some written responses to. I don't think that will be a problem. Do you? Just questions in the letter that you are supposed to reply in writing to?

MR. ZEDAH. I am available here to answer any questions that you have.

CHAIRMAN BARTON. Okay. Well, my general question to both of you is how your law firms became involved in these particular cases in the beginning, just generically. Do you all specialize in these types of cases? Did you have plaintiffs that came to you? Did you seek them out? Did other lawyers doing these cases seek your firms out? How did you get involved? Mr. Zedah.

MR. ZEDAH. We had three groups that were in this. One group was referrals from existing clients, one is referrals from attorneys, and one group was through advertisement.

CHAIRMAN BARTON. Does your firm specialize in this type of a case?

MR. ZEDAH. I do other types of work, but this is the majority of my work.

CHAIRMAN BARTON. Mr. Fabry?

MR. FABRY. I can't answer for how the Williams Bailey firm first began handling silicosis cases. I began handling silicosis cases for the firm in 2001, and took over responsibility for existing cases at that time.

CHAIRMAN BARTON. So you don't have any knowledge how the firm got involved in the beginning?

MR. FABRY. No, sir, I don't.

CHAIRMAN BARTON. What's the status of your clients now in these cases? Are these active cases? Have you all suspended the case given

what happened in the court? Or are you all trying to move forward with them?

MR. ZEDAH. Four of the people that I represented out of the 20 are dead. They died waiting for it to get back. It is in the position right now where they have to be dismissed based on that Canadian National order that I referred to that the Supreme Court of Mississippi came up with last month, and then have 1 year to refile.

CHAIRMAN BARTON. Mr. Fabry, are you referring specifically to the five plaintiffs.

MR. FABRY. Yes. Those cases were transferred by Judge Jack back to the Eastern District of Missouri, and the court there transferred the cases to the Western District of Missouri. I believe we received a scheduling order from that court within the last couple of weeks.

CHAIRMAN BARTON. So it is an active case.

MR. FABRY. Yes, sir, it is.

CHAIRMAN BARTON. Last question. My time has expired. Did any one of you gentlemen ever meet in person any of the plaintiffs?

MR. FABRY. Yes, every one of them.

CHAIRMAN BARTON. You did.

MR. ZEDAH. I have met with some of them.

CHAIRMAN BARTON. Thank you, Mr. Chairman.

MR. WHITFIELD. Thank you. At this time I recognize Dr. Burgess for 5 minutes.

MR. BURGESS. Thank you, Mr. Chairman. I don't know that I will use all my time. I would just like to know -- and I do appreciate the delivery of records this morning. I think that is an important step in solving this problem.

MR. ZEDAH. Mr. Burgess, I don't mean to interrupt. I don't know that -- I have met several of my plaintiffs, but I don't know whether I have met the 20 plaintiffs that Mr. Barton was talking about, and I'm under oath and I want to make sure that that's completely clear. I apologize.

MR. BURGESS. Very well.

Can I ask both of you if one of your doctors reading X-rays comes across a diagnosis that is not silicosis and not an industrial pneumoconiosis, but perhaps something else -- tuberculosis, chest mass -- what happens then? Would that doctor call the patient up, would that doctor tell you that there was an abnormality found on a chest X-ray that wasn't asbestosis or silicosis, or was the patient just simply uninformed about that?

MR. ZEDAH. In some of the cases -- let me answer your question direct. For example, Doctor Levine would sometimes put a reference to

a mass in his B read result and would say something to the effect of refer it to his personal physician as soon as possible.

At that point generally, I'm not going to get into specific attorney-client communications, but generally I would pick up the phone personally and contact that person.

MR. BURGESS. So the committee can be comfortable that there is no one that you are aware of that would be out there with an undiagnosed chest condition that was picked up on a B read by one of your doctors.

MR. ZEDAH. We make every effort to make sure that doesn't happen.

MR. BURGESS. To close the loop then, if you didn't get a letter back from their primary physician saying oh, my gosh, thank you for bringing this to my attention and we have taken care of it, if you didn't get such a letter, what time frame might elapse, or when would you make that call back to make sure that that patient had in fact been taken care of?

MR. ZEDAH. We do send the report to the client. In addition, after the B read we do have a pulmonary examination. So at that point they have a consultation with the doctor.

MR. BURGESS. So none of the patients that came through your office would just simply receive the diagnosis of silicosis with no further instruction or therapy.

MR. ZEDAH. Of the 20 plaintiffs that we had in litigation, generally that is true. What I'm thinking in my mind is we had some people that had lung cancer that may have passed away before they got a full pulmonary exam, but they had treating physicians.

MR. BURGESS. In the entire multi-district litigation in Corpus Christi, how many plaintiffs were involved in that litigation?

MR. ZEDAH. Approximately 10,000, but I don't know for sure.

MR. BURGESS. Of that, your representation was of 20 of those individuals?

MR. ZEDAH. Yes, sir.

MR. BURGESS. The last screening advertisement that we saw, how many people do you think you evaluated, to guess, to those 20 that you eventually took as clients?

MR. ZEDAH. As I said, some of them were word-of-mouth referrals, some of them were referrals from other sources, and then some were through advisement. I have no idea how to answer that.

MR. BURGESS. Will that appear in the information that you provide the Chairman, how many patients went through those screening days that you held? Is there any way to know that? Did you have a sign-in sheet?

MR. ZEDAH. I did not, no.

MR. BURGESS. Just for the record, do you remember the screening companies that you used?

MR. ZEDAH. The ones that my law firm personally used, there was Gulf Coast Marketing and UM Mobile X-Ray is the ones that I know of. There may have been others, but I don't know.

If I may, the screening company, are you talking about people that originally took the X-rays?

MR. BURGESS. Correct.

MR. ZEDAH. Yes.

MR. BURGESS. Mr. Fabry, can I ask you along the same lines, what would have happened if a patient had an unexpected finding on a chest X-ray or B read, what procedures did your office have to follow up for that patient?

MR. FABRY. I want to be very sensitive to attorney-client privilege and answer unequivocally that information is always provided to the individuals.

MR. BURGESS. Okay. Would your office undertake to deliver that information personally, or would it go back to the radiologist who read the film? What sort of path did that travel?

MR. FABRY. Again, being very sensitive to attorney-client privilege, if we receive medical information, the medical information is given to the individuals. Good or bad. Let me add, for many of these folks, when you're talking about someone who is actually having an examination, the doctor would communicate that directly at the time of the examination.

MR. BURGESS. So the doctor would communicate that. So the doctor would be involved in the transmission of the information?

MR. FABRY. The doctor is doing the examination, full pulmonary examination, and I'm not there in the room, but my understanding from the doctors and the testimony that has been given by my clients at their depositions, and based on the reports written by the doctors, all give me great comfort that whatever the findings are, those are communicated by the doctor to the individual.

MR. BURGESS. So let me ask both of you this question -- we'll stay with you Mr. Fabry, but I want to get Mr. Zadeh's response -- at no time did anyone in your firms look at a film and render a diagnosis and communicate that to a patient?

MR. FABRY. We rendered no diagnosis within our office. No lawyers. I do not.

MR. ZEDAH. I don't have a radiologist in my office. We don't look at films in my office.

MR. BURGESS. So there would be no reason for this committee to be worried that the law offices were acting as a conduit for information between the radiologist and the patients. The law firms were not in any way interposing themselves between the patient and the radiologist.

MR. FABRY. That is a very different question. We're certainly not interposing ourselves. If medical information is provided to me, again, being very careful about how that's communicated, if there is a report, the report is given to the client. Because of attorney-client privilege I don't want to discuss what sort of commentary might go along with that.

MR. BURGESS. Mr. Fabry, we saw an advertisement for -- I think you have as one of your documents there the newspaper ad for screening. Does your firm engage in that practice as well? That would be this asbestos and silica dust screening, Exhibit No. 3.

MR. FABRY. Again, a difficult question. I don't recall advertising for screenings. It's not something that I have personally been involved in. To say that we've never advertised or never advertised the availability to represent people with silicosis, I don't think I could go that far.

MR. BURGESS. If your firm paid for an X-ray study to be done and B read, would it have paid a different rate depending upon the diagnosis? Would you have paid more for a positive diagnosis or less for a negative diagnosis?

MR. FABRY. Absolutely not.

MR. BURGESS. Mr. Zadeh, let me ask you the question along the same lines. You stated that there were two companies that you did use. Without violating attorney-client privilege, can you tell us the contractual arrangement with those firms? Was it a flat rate?

MR. ZEDAH. Flat.

MR. BURGESS. And at no time would additional moneys have been paid for a positive diagnosis.

MR. ZEDAH. That's correct.

MR. BURGESS. Mr. Fabry, at the risk of being repetitious, did you ever pay for a positive diagnosis from any of the screening companies that you may have used?

MR. FABRY. I'm not sure I understand the question.

MR. BURGESS. Would there have been a situation where a screening company was paid for a positive diagnosis but not paid for a negative diagnosis?

MR. FABRY. I understand. I believe that's the same question asked a minute ago. All providers are paid for the service provided. It is not contingent upon results. Does that answer the question?

MR. BURGESS. Yes. Thank you both.

Thank you, Mr. Chairman.

MR. WHITFIELD. At this time I recognize Mrs. Blackburn from Tennessee.

MRS. BLACKBURN. Thank you, Mr. Chairman, and I want to thank the two of you for being here and for talking with us about this, because I

think it is something that deserves our attention, and is an item that should be of concern to us.

I want to stay on the same train of thought that Dr. Burgess was just moving along with and look at the ways that your law firms identify and find people. We have had another hearing, we have talked about the B readers, we've talked about the physicians, and the diagnosis process.

And, Mr. Fabry, I want to come to you. I am not a lawyer, I am not a physician, I am pretty much what you would call an average consumer. When I see these things that have the tinge of abuse, sometimes it just kind makes you a little angry and causes great concern, especially when you think there may be people that have been preyed upon or have been dealt with unfairly. I guess part of that is being a mom and part of that is having great concern for the people that I represent.

I went to your Web site, Mr. Fabry, and pulled down a client profile of a client of yours that is on that Web site. I found it so interesting. This client profile is of a Mr. and Mrs. Howell. Are you familiar with that?

MR. FABRY. Yes.

MRS. BLACKBURN. Great. Now, Mr. Howell is called Sonny to his friends, right? And it seems that he worked for 45 years for a company and in '94 he was diagnosed with silicosis. So why don't you describe for me how your law firm became involved with Mr. Howell and this diagnosis, and how the Howells came to the attention of your law firm.

MR. FABRY. I believe that Mr. Howell and his case is one of the cases I assumed responsibility for in 2001.

MRS. BLACKBURN. So you assumed responsibility for that case.

MR. FABRY. Yes.

MRS. BLACKBURN. How many total cases do you have?

MR. FABRY. Currently? I represent 29 individuals.

MRS. BLACKBURN. Twenty-nine. At the height of pursuing this, how many did you have?

MR. FABRY. What do you mean by the "height of pursuing this"?

MRS. BLACKBURN. Well, seems like you aggressively pursued, went after this business. It says on here, WB continues to pursue silicosis cases all over the U.S. How many, total, did you or your firm have?

MR. FABRY. You have got a number of different parts there. I'm still not sure I'm following your question.

MRS. BLACKBURN. I speak pretty plain English. How many cases have you got?

MR. FABRY. Nine lawsuits, 29 plaintiffs.

MRS. BLACKBURN. Go ahead and tell me how the Howells came to your attention.

MR. FABRY. Again, I believe that the Howells were clients of the firm when I began working on silicosis cases for the firm in 2001.

MRS. BLACKBURN. Okay. So they were already there.

MR. FABRY. That is the best of my recollection, yes.

MRS. BLACKBURN. Now, why don't you talk a little bit about how you pursue these cases; since you say you pursue them all over the U.S., how do you pursue them? Do you primarily use advertising in different States, do you use different methods, do you work with physicians in some States, do you work with B readers in some States, do you just do advertisements such as the one that Dr. Burgess saw, do you go on TV, do you go on radio? Exactly how do you pursue these?

MR. FABRY. Respectfully, I think you have a misunderstanding of how the word "pursue" is used. When we file a case, we actively pursue the case for the client. I believe that is what's intended.

MRS. BLACKBURN. Okay. Then how do you find your people?

MR. FABRY. Some people find us, sometimes other lawyers.

MRS. BLACKBURN. How does that link take place?

MR. FABRY. They may visit our Web site. Mr. Howell may run into one of his friends, hypothetically, and say "you might want to call Mr. Fabry." Another lawyer --

MRS. BLACKBURN. So you're saying primarily it's word of mouth.

MR. FABRY. Primarily, yes.

MRS. BLACKBURN. Thank you. I yield back.

MR. WHITFIELD. Thank you. I would ask each of you, do either of you or your firms, do either of your firms have or have you had clients who have been diagnosed specifically with silicosis by Drs. Ray Harron or James Ballard?

MR. FABRY. Not to my knowledge.

MR. ZEDAH. Dr. Ballard is a B reader. Whether or not you call that a diagnosis or not; we had the discussion in the beginning.

MR. WHITFIELD. Then as a B reader. Have you used him as a B reader?

MR. ZEDAH. I have used him and I have used Dr. Harron.

MR. WHITFIELD. Let me ask, Mr. Fabry, we have your documents here, which we appreciate you presenting. You had indicated, I believe, in replying to Chairman Barton's comments, that this represents 95 percent of the documents. Is that the case, or do you expect that there will be more documents coming? Are you still looking?

MR. FABRY. I don't believe I said they were 90 or 95 percent. I said that I am comfortable that that represents the majority of what would be responsive to the subpoena. There may be other areas and we're continuing to look. But simply looking at the subpoena and based on my

memories of doctors we worked with, we were able to target those documents.

MR. WHITFIELD. We appreciate that. Speaking for both of you, I would ask you to make a concerted effort by 5 o'clock Monday to get the documents to us -- our attorneys will be discussing this with your attorneys -- a good-faith effort, because, as you know, we do have your return under this subpoena and we have a scheduled date for you to return on April 4th at 4:00 p.m. And in the discussion that you have had with me, Mr. Zadeh, and the Chairman, we recognize the material that you have is quite a lot of material. As the Chairman also stressed, it is usually known that most of this material can be found rather quickly for the areas that we want. We would ask that your attorney and our attorney continue to discuss about this, and we are going to have you scheduled to return on Tuesday, April 4th, assuming that there will be some documents coming before then and that won't be necessary.

Also, I would ask you that with respect to any documents withheld, that you provide a privilege log for those documents that are going to be withheld.

Of course I want to move, and, without objection this document book here will be placed into the record and we will keep the record open pending the reception of these additional materials that we expect.

[The information follows:]

The New York Times
nytimes.com

March 8, 2006

Testing for Silicosis Comes Under Scrutiny in Congress

By JULIE CRESWELL

Once seen as the next asbestos or tobacco for class-action lawyers, silica and the lawsuits related to it have instead become a messy legal morass for the doctors, X-ray screening companies and plaintiff law firms that have wound up as the subjects of numerous investigations.

Now, Congress is getting involved. Today, four doctors and the chief executive of an X-ray screening company are scheduled to appear before a Congressional subcommittee to answer questions about how patients were screened and how it was determined they had silicosis, a disabling and often fatal lung disease that comes from inhaling silica dust. Silica is a purified sand used as a cleaning abrasive in sandblasting and in making glass, and other materials.

The intensifying investigations into the validity of silicosis claims are having a spillover effect in litigation involving asbestos, and other suspected hazards, with defense lawyers looking for doctors who repeatedly turn up in diagnosing fairly rare occupational-related diseases.

As a result of this new line of inquiry, several thousand silica cases have been dismissed, doctors have been subpoenaed for their records, a federal grand jury has been convened in Manhattan to investigate and lawmakers are looking into whether stricter guidelines are needed on the screening of occupational diseases.

"For now, the hearings are primarily investigative, but obviously lawmakers are wondering what federal role may be taken here," said Edward F. Sherman, dean and professor of law at Tulane Law School, who is scheduled to speak at the hearings.

The aggressive stances against silica and other industrial-related claims are the fallout of a decision last June by Judge Janis Graham Jack of the Federal District Court in Corpus Christi, Tex., who questioned the validity of several thousand silica claims that were before her.

Because of silica's widespread use, some plaintiffs' lawyers viewed it as the source of the next big mass tort. But defendant law firms began looking into whether plaintiffs in the Texas silica lawsuit had previously filed claims against trusts set up to compensate victims injured by asbestos, a cancer-causing flame retardant.

What they found was that about 65 percent of the plaintiffs in the Corpus Christi federal lawsuit had also filed claims for asbestos. While it is medically possible, it is rare for a single person to suffer injuries as a result of exposure to both asbestos and silica. For instance, in at least one case, Dr. James Ballard of Birmingham, Ala., diagnosed asbestosis in a woman in 2000, but then in 2004, looking at the same X-ray, concluded she had a silica-related disease.

"Dr. Ballard's readings were entirely proper with regard to all aspects of his work," said Frederick P. Hafetz, a lawyer representing Dr. Ballard.

Yet in a harshly worded decision, Judge Jack, a former nurse, declared that many of the medical findings in the silicosis lawsuit before her were worthless and that they had been "manufactured for money." She remanded the lawsuit to state courts.

Since then, more than half of those 10,000 silica claims have been dismissed — most of them voluntarily by the law firms that filed them. In mid-December, a plaintiffs' law firm, Campbell Cherry Harrison Davis Dove, agreed to dismiss 4,200 cases that Judge Jack had remanded to the Mississippi state courts.

A number of judges are now using Judge Jack's decision in weighing silica-related claims.

In January, a judge in Broward Circuit Court in Florida became wary of the silica claims before him after concluding that a number of the doctors and screening companies involved in the Judge Jack silica claims also appeared in his cases. The judge, David H. Krathen, pledged to "ride herd" on dubious silica claims, and said the N&M screening company of Mississippi "reeks from fraud." A call to Luke Dove, the lawyer for Heath Mason, the owner and operator of N&M, was not returned.

"I think silicosis is a dying mass tort," said Daniel Mulholland, a lawyer at Forman Perry Watkins Krutz & Tardy of Jackson, Miss., a lead defense law firm in the silica litigation.

Others are taking even closer looks at asbestos claims.

The Claims Resolution Management Corporation, which overseas asbestos claims against the insulation maker Johns Manville as well as other asbestos trusts, announced in the wake of Judge Jack's decision that it would no longer accept claims based on diagnoses and reports from the doctors and screening operations identified in her opinion.

In recently updated data for federal asbestos litigation, the Manville Trust disclosed that on Nov. 21, 1994, Dr. Ray A. Harron diagnosed asbestos-related diseases in 515 people. That meant he had to read X-rays and make diagnoses at a rate of more than one a minute if he worked an eight-hour day. On June 20, 2002, Dr. Harron diagnosed 424 cases of asbestos-related injuries in a single day. In all, Dr. Harron wrote reports in support of 88,258 asbestos claims submitted to the Manville Trust.

"The fact that a number of letters are sent out on one day does not necessarily mean that all of the diagnoses happened that day," said Lawrence Goldman, a lawyer for Dr. Harron. "Do you think Yale or Harvard makes the entire decision about its freshman class on March 10 when it sends out all of the acceptances?"

Dr. Harron is expected to appear before a subcommittee of the House Energy and Commerce Committee today as is his son, Dr. Andrew Harron. Other doctors scheduled to appear are Dr. Ballard and Dr. George Martindale. Mr. Mason of the screening company N&M is also scheduled to appear.

The committee is interested in determining, among other things, whether proper state permits are being obtained by law firms that sponsor the screening vans in restaurant and motel parking lots that offer X-rays to look for silicosis and other diseases. It is also interested in learning what responsibilities the doctors who read X-rays and diagnose a life-threatening disease have in terms of follow-up care and patient relationships.

The Madison St. Clair Record

http://www.madisonrecord.com

WSJ commentary takes a stab at 'dumbstruck' silicosis docs

Tuesday, March 14, 2006

By Ann Knef (ann@madisonrecord.com)

"Lawyered up and hunkered down" is how the Wall Street Journal described asbestos and silicosis diagnosing doctors who took the 5th Amendment before a congressional committee last week.

"The dumbstruck docs were a lot more energetic when it came to their assembly-line diagnosis of both asbestosis and silicosis, a disease caused by exposure to silica particles found in construction materials," roared a WSJ commentary on March 13.

Last week the *Record* reported that Dr. Ray Harron of Harrisburg, WVa., his son, Dr. Andrew W. Harron of Kenosha, Wisc. and Dr. James Ballard of Birmingham, Ala. refused to tell legislators whether they would certify the accuracy of nearly 10,000 silicosis diagnoses on grounds of self-incrimination.

The doctors who were invited to testify before the House Energy and Commerce Subcommittee on Oversight and Investigations on March 8 did not arrive voluntarily. They were subpoenaed as part of a fraud probe which began last summer in federal Judge Janis Graham Jack's courtroom.

Jack lashed out that many of the 10,000 Multi-District Litigation claims channeled into federal court were not driven by health or justice. "They were manufactured for money," she wrote. Jack sent thousands of claims back to state courts and sanctioned a plaintiff's firm.

According to the WSJ's recent commentary, the Manville Trust - which has paid out thousands of lung disease claims -- recently disclosed new statistics about the doctors who have authenticated the diagnoses:

"Ray Harron tops every category, having personally diagnosed disease in 51,048 Manville claims. He also supplied 88,258 reports in support of other claims. And he made it a trifecta by diagnosing more claimants in one day than anyone else: 515 people on November 21, 1994, or the equivalent of more than one a minute in an eight-hour shift.

"Dr. Ballard also ranks high, having provided 10,700 primary diagnoses, and a further 30,329 reports in support of claims. Though Dr. Ballard's all-time daily high is a mere 297, these guys must be truly gifted diagnosticians."

At the committee hearing, radiologist Dr. George Martindale of Mobile, Ala., and the owner of a lung disease screening company he contracted with, Heath Mason, of N&M, Inc., from Moss Point, Miss., explained to the committee how they made money from patient "inventory."

Mason said he provided screenings for many law firms, and singled out a national asbestos firm based in Waco, Texas -- Cherry Campbell-- as a firm that only paid his company for positive diagnoses.

Mason said he counted on physicians such as Dr. Ray Harron to provide them. Harron has reportedly earned nearly $10 million from making diagnoses that became the basis for litigation.

Martindale contracted with Mason to read X-rays. Martindale insisted that he only supported diagnoses made by Harron.

"I had been told that a diagnosis existed," Martindale said. "It was more prevalent for settling cases to have a second opinion."

The Wall Street Journal reports that Martindale was responsible for signing off on more than 3,600 silicosis claims in the "Jack" litigation, "only to admit later that he didn't even know the criteria for diagnosing the disease."

The WSJ commentary continues:

"He had included in his reports a standard paragraph provided by the X-ray screening company (N&M) that had hired him, and Dr. Martindale said he only found out later that lawyers had submitted the claims listing him as the principal diagnosing physician. Dr. Martindale told the committee that he thought he was merely providing a "second opinion" on people Ray Harron had already diagnosed.

"If you're beginning to feel a little slimy just reading this, we know how you feel."

Article 1

US asbestos litigation - Sand storm.
2002 words
16 March 2006
Post Magazine
28
English

A Texas judge has thrown out a huge silicosis tort claim for fraud - and in doing so may have inspired the US defendant bar to be far more aggressive in contesting industrial disease claims. Richard Hopley reports.

Ask a US lawyer about how best to address the never-ending flood of US asbestos claims and you are likely to be told that paying the claims - the bogus along with the genuine - with the minimum of fuss is the only economically viable course.

Faced by the mass screening of many thousands of potential claimants, effectively to recruit plaintiffs, and the sophisticated and well-resourced plaintiff bar, the accepted wisdom has been not to contest claims but rather to find an orderly way in which to pay them. This is despite the near-certainty that many of those claims are at best questionable and at worst fraudulent. This general resignation that the US asbestos litigation problem cannot be fought, still less beaten - an attitude that is hard for English lawyers to comprehend - has been the norm for many years.

However, a Texan federal court decision issued last year may change all that. The case concerned claims arising out of exposure to silica. In demonstrating the scam at the heart of these silica claims, the judge lifted the lid on asbestos litigation. Resignation has given way to some hope - even optimism - that this decision, allied to other positive reforms at state level, will change the landscape of asbestos litigation in the US. It may not lead to a resolution of the problem but it is heading in the right direction.

Mass screening and the doctors

The story began when an unreliable doctor, Dr George Martindale, was called to give evidence in October 2004 in a US mass litigation case: a multi-district litigation brought by approximately 10,000 plaintiffs against more than 250 corporate defendants. Each plaintiff was claiming to be suffering from silicosis, a progressive lung disease caused by inhaling silica, the primary ingredient of sand. The 10,000 claims had been lumped together for administrative reasons and were waiting to be dealt with by a Texan federal court. It appeared that Dr Martindale had been responsible for diagnosing silicosis in more than 3600 of the 10,000 plaintiffs. Furthermore, it emerged that just nine doctors were responsible for the diagnosis of 99% of the claimants. The situation bore a striking similarity to the mass screening and mass tort litigation that has been under way for many years in relation to asbestos.

Under questioning, it became clear that Dr Martindale had never spoken to or met any of his patients, either to take their medical histories or inform them of his diagnoses. His job, he said, was purely to look at an X-ray of their lungs to determine whether they had silicosis. Apparently, he did not think he was 'diagnosing' the patients at all but simply checking the diagnosis of another doctor. He admitted that he "shouldn't have signed his name to (his) silicosis diagnoses".

The other eight doctors were also questioned. It became clear that these doctors were completely beholden to the plaintiff lawyers and screening companies that had hired them. The plaintiffs had been gathered in mass screening drives by the screening companies hired by the law firms. In most cases, the potential claimant was interviewed and X-rayed in a mobile screening van in the car parks of various edge-of-town retail parks. The doctors, who had been handpicked by the screening companies, were then sent the X-rays to see whether the patients had signs of silicosis. Almost without fail these doctors 'did their job': they confirmed the tell-tale signs of silicosis on the X-rays.

Except, of course, they didn't. Their evidence revealed that the diagnoses were totally unreliable. One doctor admitted that he carried out 1239 diagnostic evaluations in 72 hours. He said (and it is unclear

whether he was boasting at this point) he devoted less than four minutes to each evaluation, and one of those minutes was spent proofreading each report for typos.

Another doctor, Dr Ray Harron, admitted that he had not written, read or personally signed any of his reports, apparently because he was too busy. He was so time-pressured that his son, also a doctor, would occasionally stand in for him. Also of concern was that Dr Harron senior did not appear to know the correct diagnostic test for silicosis. Doctor after doctor revealed serious shortcomings in their diagnoses and it became obvious that they could not be depended upon.

The main screening company, N&M, was little better. The X-rays it conducted were hardly ever supervised by a medical professional. The screening companies took their instructions direct from the plaintiff lawyers who were orchestrating the screening drives. The relationships were exceptionally close; for instance, one plaintiff law firm involved in the case had an agreement with N&M under which N&M would conduct mass screenings but would be paid only if silicosis was diagnosed and the 'patient' signed up with the law firm. The scope for abuse was obvious.

So far this will be all too familiar to insurers and reinsurers around the world who for decades have been indemnifying US asbestos claims. What is new, however, is that this has all been set out in a detailed, measured and, at times, sarcastic judgement delivered by a Texan federal judge, Janis Jack. Her judgement in In Re: Silica Products Liability Litigation, delivered last year, meticulously dissects the scheme constructed by a group of lawyers, doctors and screening companies to obtain large payouts from the defendant companies in settlement of meritless claims.

In the end, she concluded that the "diagnoses were driven by neither health nor justice: they were manufactured for money". Remarkably, it appears that Judge Jack is the first judge, and her judgement the first judgment, to have exposed the scam that many people have suspected lay at the heart of mass screening drives and mass tort litigation.

Asbestosis and silicosis

Another shocking fact emerged from the case: more than 6000 of the 10,000 claimants had made previous claims for asbestosis. This discovery is remarkable because, as the expert doctors at the trial testified, although it is theoretically possible to contract both asbestosis and silicosis, it is extremely unlikely. Were these 6000 plaintiffs especially unlucky?

One doctor testifying to the US Senate Judiciary Committee noted that: "Even in China, where I saw workers with jobs involving high exposure to asbestos and silica (such as sandblasting of asbestos insulation), I did not see anyone or review chest radiographs of anyone who had both silicosis and asbestosis."

Most doctors will go through their whole career without ever coming across a patient with both conditions. However, as Judge Jack noted dryly, one of the screening companies in the litigation parked its screening van in a number of edge-of-town store parking lots and found more than 4000 such cases. It appeared that a number of the plaintiff lawyers were simply screening their 'inventories' of asbestos clients and then submitting silicosis claims on their behalf in the silica litigation.

As Judge Jack showed, they were able to do this because of the complicity of the screening companies and the handpicked doctors. Many of the divergent diagnoses were based upon the same X-ray: on one date asbestosis was diagnosed and then, some while later, silicosis would be diagnosed, with no reference to the asbestosis. Often it was the same doctor undertaking each diagnosis.

Criminal and professional investigations

The immediate fallout from Judge Jack's decision has been significant. A New York grand jury is carrying out a criminal investigation of one of the screening companies in the case and subpoenas have gone out to at least two of the doctors involved.

The House of Representatives **Energy and Commerce** Committee has launched a major investigation into the unscrupulous practices uncovered by Judge Jack. The committee has written to 16 physicians and medical screening companies, and more than a dozen plaintiff law firms, requiring under threat of subpoena that they provide comprehensive information as part of the inquiry.

The real significance of the judgement lies in its implications for future asbestos mass tort litigation. Already, the Manville Trust, the oldest and largest asbestos bankruptcy trust, has stated that it will not accept medical reports from the doctors in the case. This is highly significant: one of the physicians in the silica litigation has, over the years, provided medical reports in support of more than 75,000 Manville Trust claimants, some 8% of the claims that have ever been made against the trust. The trust is also refusing to accept claims made by patients screened by N&M, one of the largest asbestos screening companies in the US.

The judgement has emboldened defendants, who have woken up to the possibility that they may be able to get many of the claims against them thrown out as fraudulent or at least lacking proof. Many have started to adopt unusually aggressive litigation tactics. It is clear that one of the main reasons that the defendants were successful in the silica litigation was their aggressive strategy - a strategy, it has emerged, that several insurers involved in the case were reluctant to adopt. The other reasons appear to have been luck and Judge Jack's determination: the normally staid Wall Street Journal has nicknamed her 'the Sheriff' due to her willingness to expose the cowboy tactics of the plaintiff lawyers.

Since the judgement, defendants have started to look more critically at the asbestos claims being submitted. In the past, the main concern was how to pay these claims without becoming submerged. Now, the focus is shifting, with defendants seeking, and perhaps more significantly now obtaining, the right to probe individual asbestos claims.

Recently, WR Grace, the subject of another very large US asbestos bankruptcy, was allowed to send a detailed questionnaire to all of its 118,000 asbestos claimants to obtain information about their doctors and their prior claims. Other bankrupt firms are following similar tactics. In the Congoleum bankruptcy in New Jersey, insurers are contesting thousands of asbestos claims on the basis that they are fraudulent. Large US insurers are starting to hire their own doctors to check the diagnoses of the plaintiff lawyers' medics. All these initiatives are in direct response to Judge Jack's decision.

The future

Many interested parties are pinning their hopes on the proposed Fairness in Asbestos Injury Resolution Act to solve the US asbestos litigation problem. However, in many ways what the Fair Act proposes is just 'business as usual', putting into place an administrative procedure for paying claims. Judge Jack's judgement highlights the Act's dismal failure to address the main problem: the need to throw out unmeritorious claims. Many seasoned observers believe that the Act will prove more expensive than the problem it is supposed to be solving; and even worse, having cost more, that it would not even provide finality. In the changing asbestos litigation landscape, the Act (a lame duck, perhaps even a dead duck in the Senate by now) is rapidly looking like a white elephant.

There are many thousands of genuine asbestos victims and such meritorious claimants deserve to be compensated promptly and in full. What Judge Jack's decision offers defendants and their insurers is an opportunity, at last, to sift those claims from the morass of questionable or bogus claims. However, it is only by adopting a more proactive and aggressive strategy that advances will be made.

Insurers in London, who for years have been paying many of these claims, should be speaking to their advisers to ask them, in light of Judge Jack's decision, what tactics they and their policyholders should be employing to seize this opportunity to throw out meritless and fraudulent asbestos claims.

Richard Hopley is a partner at law firm Kendall Freeman.

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INVESTOR'S BUSINESS DAILY®

Issues & Insights

Lawyers On Trial

Posted 3/9/2006

The Law: Not long ago it appeared that silica would become the next asbestos — a cudgel that trial lawyers could use to shake down deep-pocket companies. But folks who can do something about it have wised up.

Silica is a purified sand that's used as a cleaning abrasive in sandblasting. It's found in foundries, mines, quarries and shipyards and is used extensively in glass making. When this crystalline dust is inhaled, it can cause silicosis — a serious lung disease that has killed many, including — as National Public Radio reports — nearly 800 who worked on the Hawk's Nest Tunnel in West Virginia in the early 1930s.

While silicosis is a legitimate health threat, incidences of the disease have fallen since protections were put in place in the 1970s.Well, at least they'd fallen until trial lawyers saw silicosis as a PIN to big companies' ATM accounts.

A few years ago, the lawyers signed up tens of thousands of "victims" for class-action lawsuits — picking up along the way some plaintiffs who had also filed claims as victims of asbestos. U.S. Silica, the country's largest sand maker, was flooded by more than 20,000 lawsuits in a short period that began in November 2002. Others also got hit.

But some judges, notaly Clinton appointee Janis Jack of the Federal District Court in Corpus Christi, Texas, aren't letting the trial lawyers run freely with silicosis as they did with asbestosis. Lawsuits on behalf of people diagnosed with asbestosis (which isn't always the same thing as actually having it) have made some lawyers rich, left plaintiffs with just a few dollars and bankrupted an estimated 70 companies. Overall cost to the economy: $70 billion.

It was last year, while presiding over a silicosis case, that Jack stood athwart trial lawyer history and shouted, "Whoa." When she learned that nearly two-thirds of the plaintiffs had also filed asbestos claims, the former nurse became skeptical. She knew it would be rare, though not impossible, for a person to have both.

In a 250-page ruling, Jack bluntly said the 10,000 claims of silicosis before her were part of a "scheme" that was "manufactured for money." Since then, more than half of those 10,000 claims have been pitched out of court or voluntarily pulled by trial lawyers — a tacit admission, we'd say, that the claims were bogus to begin with.

Some doctors' shameful willingness to make questionable diagnoses of silicosis to fill up class-action lawsuits has caught the attention of the House Energy and Commerce Committee. On Wednesday, the panel invited a few physicians in for a chat. Two were forced to testify by subpoena, and all three took the Fifth. The committee is also taking a look at some of the lawyers involved.

Meanwhile, corporate victims in two phony silicosis suits are justifiably seeking $330,000 in sanctions from a Texas law firm, alleging that it filed "baseless" and "frivolous" claims.

We're not saying true victims of silicosis shouldn't be compensated. They should. But it's inspiring to see that there are judges who are determined to weed out any fraud. As with asbestos, it's never too late to keep trial lawyers honest.

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Silicosis hearing occasionally turns testy

Thursday, March 09, 2006

By SEAN REILLY
Washington Bureau

WASHINGTON -- In an occasionally combative appearance before a congressional panel investigating the use of mass screenings to detect the diseases silicosis and asbestosis, Grand Bay businessman Heath Mason told lawmakers Wednesday that "99 percent" of his company's screening revenue came from law firms, at least one of which paid only for reports that showed evidence of lung problems.

Campbell, Cherry, Harrison, Davis and Dove, a Mississippi plaintiffs' firm that has filed several thousand silicosis-related lawsuits, only "paid for people who were positive," Mason told the House Energy and Commerce investigations subcommittee. That firm, like another heavily involved in silicosis litigation, also wanted approval authority over the physicians used to read X-rays, Mason said.

"I would find a doctor who met their qualifications, and they would approve whatever doctor they wanted me to use," Mason said. The main qualification was a national "B Reader" certification attesting that a physician was trained to diagnose certain occupational lung diseases through an X-ray review.

Mason, the co-owner of the Pascagoula-area company N&M Inc., was one of four witnesses Wednesday whom the panel had to compel to appear via subpoena. The other three were physicians, including Dr. James Ballard of Birmingham, who had read X-rays for N&M. All three declined to testify on the grounds that doing so would violate their Fifth Amendment right against self-incrimination.

Silicosis and asbestosis are both potentially deadly lung ailments triggered by exposure to purified sand and asbestos, respectively. The subcommittee is probing what critics have called a plaintiffs' mill aimed at overwhelming defendants with hundreds of lawsuits. Attorneys responsible for such cases have paid N&M more than $25 million since the company's formation in 1996, according to an analysis of its records by defendant companies.

Overall, the hearing broke little new ground on what has already become known through litigation. Mason, looking dapper in a broad-striped suit and blue shirt, generally appeared unfazed by sometimes pointed questioning.

"I'm a businessman; I hope to make money," he replied when queried by U.S. Rep. Michael Burgess, R-Texas, about whether he profited from mass screenings. Some in the hearing room audience tittered when Mason would only go so far as to add that his earnings in a given year were between $100,000 and $1 million. He also sidestepped other questions on how the screenings were set up and conducted. The circumstances varied so much, he said, that Burgess needed to be more specific.

Also testifying Wednesday, albeit voluntarily, was Dr. George Martindale, a Mobile radiologist who read thousands of X-rays for N&M.

Martindale's October 2004 deposition in a civil suit is widely seen as the kick-off for the investigations now dogging the screening industry. Under questioning that day, Martindale essentially rescinded his diagnosis of silicosis in 3,617 people who later became plaintiffs. As he did in that deposition, Martindale maintained Wednesday that he was essentially only backreading diagnoses made by doctors with more experience in recognizing evidence of lung illness.

That assertion came under tough questioning from U.S. Rep. Diana DeGette, D-Colo., who noted that the certification Martindale signed in each case carried wording that the "diagnosis of silicosis is established within a reasonable degree of medical certainty."

"You're establishing a diagnosis of silicosis, correct?" DeGette asked. "The film came with a diagnosis," Martindale replied, adding that the job was to determine consistency within that reasonable degree of medical certainty.

As DeGette pressed further, however, Mason acknowledged that the wording came from the Campbell, Cherry firm. Martindale conceded that others might view his role more expansively. "If I had my choice, I would not word it the same way today," he said.

In more than 400 cases, Martindale estimated, he disputed the initial finding of silicosis. It is unclear whether patients were ever notified of that conclusion. That would have been up to the law firms, said Mason, who could not say whether they followed through.

A federal grand jury in New York is also looking into the silicosis situation. Neither Martindale nor Mason has so far been asked to testify, their lawyers said, although Martindale has provided documents, according to his attorney, Doug Jones of Birmingham.

The congressional panel opened its investigation last August, following a ruling by Texas-based U.S. District Judge Janis Graham Jack concluding that some 10,000 silicosis cases were manufactured for money. Besides noting that Campbell, Cherry paid nothing to N&M if the patient was not diagnosed with silicosis or did not sign up with the law firm, Jack cited Mason's testimony that the emphasis was on creating as many positive diagnoses as possible.

Last month, the full Energy and Commerce Committee asked lawyers at Campbell, Cherry and a dozen other firms for information about their financial dealings with doctors and screening companies that support their lawsuits. The panel also asked health officials in Alabama and five other states about their rules governing large-scale diagnostic testing.

Dr. Laura Welch, a Maryland physician with the Center to Protect Workers' Rights who also testified at Wednesday's hearing, worried that the furor will be "a distraction" from legitimate cases of silicosis. While critical of screening programs that lack medical follow-up, Welch said that "the implication is that anybody who files a claim has a fraudulent case."

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SPECTOR GADON & ROSEN, P.C.

Memo to File

To: **File No. 63322-001**

From: Bruce L. Thall

Date: November 18, 2004

Re: Conversation with Jim Zadeh

On Wednesday, November 17, 2004, I spoke at length with Jim Zadeh, attorney for many Plaintiffs in the multi-district litigation matter out of Texas involving Silica.

Zadeh is sending me a list of the Plaintiffs for whom Dr. Levine did the B reads. He says it is only 131 in number.

Zadeh offered to file a Motion similar to that which he has filed on behalf of other Physicians. I told him I would review it and determine whether to join, do nothing and let him file, or file my own.

Zadeh confirmed that Dr. Levine is not a witness in any of his cases. Based on Dr. Levine's reads, Zadeh obtained full complete Physician examinations for each of the Plaintiffs. Those Physicians will testify. Thus, there is no point in harassing Dr. Levine other than the act of harassment.

Bruce Thall

From: Bruce Thall
Sent: Thursday, December 09, 2004 5:28 PM
To: 'Jim Zadeh'
Subject: RE: Order on Motion to Quash

FORGET ABOUT WHO STRUCK JOHN. What is important for your plaintiffs is that their diagnoses are not based upon Dr. Levine's B reads. Rather, that the reads are merely an indicator that can only be verified by a full examination conducted by and for the Dr. who will testify. That is true especially in view of your recitation of the events leading us to this point in time. Why do you not now say to me that for the 5 or 6 plaintifffs for which a physician is making a diagnosis based in part on Dr. Levine's B-read, you have arranged or will arrange for a full diagnostic evaluation on behalf of that plaintiff by a Doctor who will testify. Doesn't that strengthen the position of each of your plaintiffs precisely because none of them can be tarred by the defendants with the stigma they will try to create from reliance on B-reads?
Please answer that for me.
At worst, if you have Dr.s who made diagnoses who in five instances relied on Dr. Levine's B-reads, why can't you limit the depositions to the 5 reads?
Unless I am missing something, which is always possible, you should for your own clients do (1) and at the least should argue for (2).

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 5:09 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: I have not represented that. ... My understanding with Dr. Levine was that he would be my primary b-reader, that there would always be someone else testifying as to diagnosis but that if I needed him to give a deposition to back up a b-read, he would do that. Some of the testifying docs initially rely on Dr. Levine's reports and reference such in their reports. I have been operating under the assumption that this was OK. ... If I misunderstood the arrangement with Dr. Levine, please let me know.

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phone: 817-335-5100
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email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Thursday, December 09, 2004 3:21 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

Have you represented to the Judge that (1) Dr. Levine is not going to testify for any plaintiff and (2) Some other Doctor will be testifying for each plaintiff and (3) the testifying doctor will not be relying for his diagnoses on any read of Dr. Levine? If you have not, you should.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 3:59 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

I agree with you that forcing our doctors to come to Texas is foolish. Hopefully, the judge will think so too. ... As far as why am I allowing this to mushroom – this thing mushroomed the day we got removed to federal court with 10,000 other cases, the day the judge ordered production of all b-read reports over objection from all the plaintiffs' lawyers, and the day Martindale backed off his diagnosis. I have done everything possible to keep you and Dr. Levine informed of every step in the process and to protect Dr. Levine. The judge, sua sponte, set the motion to quash for hearing. There was nothing we could do. I do have several "hands on" physical exams in which another doctor reviewed the x-ray. Unfortunately, even if I had done everything perfectly, this judge would have forced the depo.

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-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Thursday, December 09, 2004 11:50 AM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

You avoid this mess by having physicians do the full diagnoses based only on their examinations and tests. I don't care what happened in the past. There is no reason to depose Dr. Levine as long as he is neither your expert nor had his report adopted uncritically by your physician. Since you need the physician in any event, why are you allowing this to mushroom? I must tell you that I am very doubtful that I can coerce Dr. Levine to go to Texas, nor do I think it is fair to make him do so, lose work time, pay for me and my time, etc., when he will not even be a trial witness.

GET REAL MEDICAL EXAMS and this foolishness evaporates.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 12:39 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Based on Dr. Martindale's deposition, the Defendants have filed numerous motions to strike our experts and appoint a technical advisory panel to, in essence, re-read all the x-rays. I think the Judge will ultimately deny those requests but before she does, she wants to make sure our medicals are sound and have the doctors "look her in the eyes" to back up their b-read/dx. That means she is probably going to require you and Dr. Levine to come to Corpus Christi, Texas where the judge is which means a much more difficult scheduling process. ... However, I just had a thought about possible video conferencing so the judge could sit it in remotely. I will discuss that with everyone else. ... I hope this makes sense.

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-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Thursday, December 09, 2004 11:36 AM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

Good. Just ask him in writing for five or six days in Jan so that you can clear them with your schedule, mine and the Dr. That way it is clear that you are not stalling.
What is this about Court Supervised Doctor Deps?

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 11:50 AM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: what do you think about sending this letter to the bad guys:

Daniel: I have been working to get you dates and locations for Dr. Levine's deposition per your request that we provide you dates on or before December 15, 2004. We had planned on offering Dr. Levine in Bruce Thall's office which would make it simple for Dr. Levine and Bruce Thall to attend. In light of the Court opening the possibility of court supervised doctor's depositions, I would propose we wait until we see if that is what she is going to do and how those are going to work. Obviously, the Court's ruling and the Court's schedule on this issue will impact our potential dates. ... Please let me know if you can agree to extend the December 15, 2004 deadline to provide dates for Dr. Levine's deposition.

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> -----Original Message-----
> **From:** Bruce Thall [mailto:BThall@lawsgr.com]
> **Sent:** Tuesday, December 07, 2004 1:06 PM
> **To:** Jim Zadeh
> **Subject:** RE: Order on Motion to Quash
>
> Go for it
>
> ---
>
> **From:** Jim Zadeh [mailto:jim@zadehfirm.com]
> **Sent:** Tuesday, December 07, 2004 2:02 PM
> **To:** Bruce Thall
> **Subject:** RE: Order on Motion to Quash
>
> Sounds good. ... I would rather do it in January if that is OK with you and the doctor, so I can really get all our ducks in a row and possibly get him out of more of these cases.
>
> Jamshyd (Jim) M. Zadeh
> Law Office of Jim Zadeh, P.C.

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-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 1:02 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

I did not send them dates. I wanted you to know the available dates so that you could then offer them what was convenient to you. I would never give them a date unless or until you had ok'd it. Moreover, I want to be out of the court/processes, including scheduling. Your doing it makes you look good. I can take the heat for being the heavy. Ask them for five or six dates conveninent for them in January if they can't do the ones I've already sent you. Then we will review the five or six, isolate what is good for you, and then pick one that's good for us.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Tuesday, December 07, 2004 1:29 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: I am glad you wrote that last email. I thought you had already sent them the dates. Have you sent the dates yet because I haven't? Their letter says we don't have to even give them dates until the 15th. That is, we need to tell them which dates we have available no later then the 15th but the dates can be anytime, including January. There is another doctor going on December 20. We may want to go after him. Does that change your thoughts?

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-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 12:27 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

The important thing is that the bad guys have received notice that Dr. Levine was available and that they chose to extend it, and not you or Dr. Levine. Is your offer of dates to them in writing? I would not want them to lie about the offer. Remind them, too, preferably in writing, that you want them to produce in advance what they intend to show Dr. Levine at his deposition.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Tuesday, December 07, 2004 1:21 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Actually, I plan on going through the discovery responses and confirming the status of each of the 20 plaintiffs. At that point, I can represent that Dr. Levine is withdrawn as a testifying diagnosing doctor on certain plaintiffs (and file amended fact sheets reflecting same) and try and narrow the field as you suggest. I am just not sure the judge is going to let us limit the depo that way but it is worth the effort. ... The dates you provided were the 10th, 13th, 14th, 15th and 17th. I am no longer free the 10th as we have a meeting to get ready for the hearing on the 17th. I don't know if they can get prepared by next week and I suspect that they are going to contact you for additional dates. Dr. Levine would like it over earlier and I can get everything ready by next week, if necessary. If they call and say they can't do it next week, we are in a good position in that we can say on the 17th that we offered him for depo and they chose not to go forward on those dates. I say we just wait to hear from them and, in the meantime, I will get my stuff together.

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-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 12:02 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

I sent you an e-mail yesterday with dates. I don't remember them offhand. I appreciate the problems with which you are dealing. It seems to me however, that under the Judge's Order only the physician who is testifying at trial as to the diagnosis must be presented for deposition. This is after all precise what Rule 26(b)(4)(A) states. If Dr. Levine is not going to be your trial witness for any case, then why need he be deposed? All you need do is so represent. If for some reason, he must be deposed because his read was relied on by some physician who will testify in cases one, two and five only, isn't testimony of Dr. Levine limited to cases one, two and five?

Dr. Levine would prefer having the dep sooner than later. If you think the MDL hearing will shed some light on my inquires and enable you to know that you don't need Dr. Levine for any purpose since your experts will have done all they need to do on their own and without basing their diagnoses on Dr. Levine's B-reads, then put it off. The choice is yours.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Tuesday, December 07, 2004 12:40 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: Under Texas and Mississippi law, a cause of action for silicosis accrues on the date the client receives a positive b-read result. The course of practice has been to get full exams as quickly as possible after the b-read but, if necessary, you file a case with a b-read only (assuming the client does have silica exposure). ... The Woods case (the one in the MDL) was the last case I filed. It had 20 plaintiffs who came to me after the large screenings, of which I have positive silicosis b-reads on 12 of these folks from Dr. Levine and indications of lung cancer from Dr. Levine's b-read on two others.

The other 1,309 plaintiffs we represent were in front of these folks (as there cases were filed in 2002) and I was getting their full exams first when the Woods case was removed. The judge immediately ordered fact sheets in which she ordered us to list diagnosing doctors including b-readers and produce their reports. At the time, I had full exams on 6 of the 12 Dr. Levine had diagnosed. I did not have time to get a full "hands on" for the remaining 6 and sent Dr. Levine's b-read plus exposure information, etc. to a doctor who did a diagnosing letter relying on the b-read. 3 of those have come back positive, 1 came back negative, 1 we are waiting on and 1 shows we haven't done anything (my medical paralegal is out sick, so I won't know until tomorrow what the issue is with that case).

Dr. Levine is a listed as a diagnosing doctor on these 12. The hands on doctors plus the linking letter doctors are also listed as diagnosing doctors. Dr. Levine may also be listed as a diagnosing doctor on the two other cases where he noted lung cancer (but not silicosis), the patients have since died and we obtained a linking letter. (I will confirm).

I am concerned because the Defendants say they have 17 reports for Dr. Levine and they should only have 14. I am going to go back to my original production and find the reason for the discrepancy.

In that Dr. Levine was originally listed as a diagnosing doctor (the Court ordered us on two occasions to disclose our b-readers under the diagnosing doctor section of the fact sheet), I am uncertain as to whether withdrawing him will shield him from a deposition and, in those cases in which there has not been a "hands on" completed and the linking letter relies on his testimony, I think his testimony is still relevant. Nonetheless, I want to protect Dr. Levine as much as you do. I am going to go back and look at the productions and get as full a handle on what was produced when and see if we can, at least, narrow the cases he has to talk about.

One other thing: We have the big MDL hearing on the 17th. There will be significant developments at that hearing (as there always is) and it may make sense to have his depo after the hearing to get a sense of the direction in which the judge is going. On the other hand, if we just want it over with, we can do

it now. ... I will update you on the info I learn in my review of the production. Do you have a date for the depo yet?

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-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 8:18 AM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

If I am reading the Order correctly, the need for Dr. Levine to be deposed at all evaporates as soon as you demonstrate that your plaintiffs have retained a doctor who will testify as their condition other than Dr. Levine. I must assume that you never presented Dr. Levine as the sole physician diagnosing the injuries which form the bases of plaintiffs' suits. If I am correct, is not now the time for you to represent that Dr. Levine will not testify for your plaintiffs and that Dr. Levine is not the physician who will testify about the injuries forming the bases for your plaintiffs' suits? If I am missing something, please let me know.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Monday, December 06, 2004 3:56 PM
To: Bruce Thall
Subject: Order on Motion to Quash

Bruce: The Court just issued this order (actually it was issued Thursday but it was just sent to everyone this afternoon). It is as if she had just read my email to you, including the Federal Rule cite. ... Let me know if you have any questions.

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ASBESTOS & SILICA DUST SCREENING

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MR. WHITFIELD. Like I said, Mr. Zadeh, we expect you to be back here Tuesday, April 4th at 4:00 p.m. under the subpoena, but anticipate that documents will be coming in before then. So with that --

MR. STUPAK. Mr. Chairman, before you adjourn this hearing, a question or two, if I may.

MR. WHITFIELD. Yes.

MR. STUPAK. Thank you.

Our jurisdiction in this matter here is really public policy and it's the health concerns we have, and I think Mr. Burgess certainly is doing a good job of bringing out our jurisdiction here on the public policy issue; because the concern was by the members of the committee is if there was -- when you testified a B reader saw a mass and how were patients notified -- and I think, Mr. Zadeh, you indicated that an attorney would pick up a phone and inform the client to contact his personal physician or a report was sent to that client and later there was a full pulmonary examination.

Could you tell me, and the question that is still bothering some of us: Was there delay, did it move fairly quickly? What is your responsibility if there is notification that there is something else or there may be a more serious disease discovered through these B readers. How would you handle that? And give me, if you can, a general time frame. I know each case is different.

MR. ZEDAH. We would typically get a B read result back -- again, I'm generally speaking, they are different -- but get it back in 2 to 3 weeks. We would review them, typically, the day they came in, and I would make those phone calls, typically, if I was in the office that day.

MR. STUPAK. Would there have been any patients -- and I think you indicated earlier you had one or two who passed away -- but if anything came in -- this was your primary responsibility, these cases in your law firm?

MR. ZEDAH. Yes, sir.

MR. STUPAK. So there was no delay between you getting that information to a client?

MR. ZEDAH. No, that was my priority. My priority was if that came in, I wanted that highlighted and I wanted that on my desk.

MR. STUPAK. Mr. Fabry, same procedure, B reader. If you'd see anything, what was your procedure, how would you notify clients, and what was the time frame?

MR. FABRY. Fortunately, I have never been faced with a situation in a silicosis case where a B read came in with a mass. I agree with Mr. Zadeh's policy; I would make a phone call if such an event occurred. We have a general policy that no more than 3 days will pass from the arrival of a report in the office to forwarding that report to the client.

MR. STUPAK. Okay. No further questions, Mr. Chairman.

MR. WHITFIELD. Mr. Burgess.

MR. BURGESS. Thank you, Mr. Chairman. If I could just take a minute or two of the committee's time before we finish up. I resisted the urge to pontificate, but I really can't help myself at this point. These are patients who by their very nature are very high-risk patients, so the presence of a chest mass, whether it be from a smoking-related disease or other industrial pneumoconiosis, this is a real possibility, not just an abstract line of questioning. I suspect that there was concomitant or unexpected disease found in a number of these patients, and I hope they were informed in a timely fashion.

I am concerned because I guess the status of the multi-district litigation now is Judge Jack threw the case out; is that correct?

MR. ZEDAH. No, that is not correct. She stated she did not have jurisdiction, which means she had no power to make any ruling over the cases at all, so she sent them back to the Mississippi State courts or Federal courts.

MR. BURGESS. Silicosis is a serious disease and results in serious disability for those who have it. And the unintended consequence of what has happened with this case is that people with a legitimate claim and legitimate disease who have suffered, whose families have suffered, now are likely not to be able to get the redress that they sought. Several cases are likely to leave us before this case is eventually had. We have added probably years to the process of getting any type of help or compensation to the people who have actually been injured, and I think that's a travesty.

I was extremely uncomfortable here, 2 weeks, when we heard Dr. Martindale's deposition. Here's an individual that from all appearances is well trained, well spoken, well credentialed. Had I been interviewing him on my hospital credentials committee I would have probably hired him, he was so well versed in his subject; and his career, of course, is in shambles and the 36 people he read films for are likely not to be able to get compensation if they deserve it, or industry was unjustly penalized because he misread the films and admitted under oath here in this committee that he didn't know what the diagnostic criteria for silicosis was.

I'm just absolutely astounded by the behavior of two of this country's great professions in this litigation. And who gets hurt in the process is the patient. The patients who had legitimate disease, who sought legitimate redress of their grievances through the legal system, who sought help for their health-related problem through the medical system. I couldn't leave this committee room, and, Mr. Chairman, I thank you for giving me the time, without getting that off my chest.

This really points out the worst of both of our professions and I hope this committee will get to the bottom of this and get this straightened out, but it is just unconscionable this type of activity would have occurred.

I'll yield back.

MR. WHITFIELD. Thank you, Dr. Burgess.

We'll now bring the hearing to a conclusion, but I want to remind Mr. Zadeh and Mr. Fabry they remain under subpoena for the records requested, and you are commanded to appear at another hearing of this subcommittee next Tuesday, April 4th, to make production pursuant to the subpoena. We recognize, Mr. Fabry, that you have already presented some documents and you're going to continue to look; and, Mr. Zadeh, you're going to continue to make some productions, and our attorneys will remain in touch with you. But both of you remain under subpoena. And with that, this hearing will recommence on Tuesday.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

THE SILICOSIS STORY: MASS TORT SCREENING AND THE PUBLIC HEALTH

TUESDAY, JUNE 6, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC.

The committee met, pursuant to notice at 2:05 p.m., in Room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield (Chairman) presiding.

Members present: Representatives Pickering, Burgess, Blackburn, Stupak, and Whitfield.

Staff present: Tony Cooke, Counsel; Andrew Snowdon, Counsel; Mark Paoletta, Chief Counsel for Oversight and Investigations; Clayton Mattheson, Research Analyst; Jonathan Pettibon, Legislative Clerk; David Nelson, Minority Investigator/Economist; Jonathan Brater, Minority Staff Assistant; and Jessica McNiece, Minority Research Assistant.

MR. WHITFIELD. I would like to call the hearing to order this afternoon. The subject matter is the silicosis story, mass tort screening and the public health, and it is our third day of hearings on this subject matter. I might add that this investigation began as a result of a decision made by Federal Judge Jack on June 30, 2005, in a district court in Texas regarding multi-district litigation involving silicone, and in her decision, she spent a lot of time talking about law firms, medical screening firms, and physicians and their working together to generate these lawsuits. In that situation they generated diagnoses of 10,000 patients regarding silicosis, but I think we need to be reminded on what Judge Jack concluded as a result of the evidence that she heard and listened to in that case. She concluded that these diagnoses were about litigation and not healthcare. They were driven by neither health nor justice but were manufactured for money. And we continue to gather and review documents and information from the 55 letters sent to doctors, screening companies, State medical boards, law firms, and State health departments involved in this matter.

To date we have held two hearings where we have heard remarkable testimony. We heard one doctor credited with 3,600 diagnoses of silicosis explain that he never meant to diagnose anyone, and in fact, did

not know the criteria for diagnosing silicosis. We heard one screening company tell us that they were paid only when they produced a positive diagnosis of silicosis for one law firm, but they didn't receive anything when they had a negative. We also heard three doctors credited with a combined total of over 1,800 diagnoses of silicosis take advantage of their Fifth Amendment rights when asked if their diagnoses were accurate and made pursuant to medical practices, standards, and ethics.

Today promises to be an equally illuminating day in the committee's inquiry. Today we will examine a fundamental question: Where were the regulatory and medical protections and safeguards for the public health in this process of mass tort screening? To that end, we are joined this afternoon by the medical boards and State radiation regulators of Mississippi and Texas. We are also joined by three screening companies: N&M of Moss Point, Mississippi; RTS, Inc., of Mobile, Alabama; and Occupational Diagnostics of Ocean Springs, Mississippi. Appearing today with each of these three screening companies, respectively, is also one doctor who worked with them.

Among the most basic responsibilities of a government in terms of public health are to protect citizens from unnecessary dangers in the practice of medicine and further to make certain that citizens receive care under a set of medical standards and ethics that ensure good medicine and accountability.

These are two basic standards that we should apply today as we examine mass tort screening practices. First, let us keep consideration of the public from unnecessary risk or dangers in medicine. Radiation in the form of diagnostic testing such as X-rays is an important medical tool, but it comes with real dangers. Most States, such as Mississippi and Texas, have strict rules to make certain that exposure to radiation occurs only for sound medical reasons and under the supervision of certain licensed medical professionals.

We will hear today from these States about their regulations establishing these important health safeguards and we will also hear from N&M, RTS, and Occupational Diagnostics, the screening companies, about what steps, if any, they took to be certain that they operated in a proper procedure. I would repeat that thousands of men's and women's X-rays must meet these rules and we must ensure that proper medical supervision was used to oversee this important yet dangerous diagnostic tool.

Second, with respect to safeguards ensured through medical standards and ethics, we will speak to witnesses from the medical boards of Mississippi and Texas. In particular, we will learn about what constitutes the practice of medicine in those States, what establishes the vital doctor-patient relationships, and what duties and obligations doctors

have to patients as a result of that relationship. We must not forget the protection of public health is built upon ethical and legal frameworks in medicine that set forth standards and practices, ensure accountability by healthcare providers and, if necessary, assign liability. If 10,000 people involved in lawsuits in Texas have been told that a doctor has found they have silicosis, those patients must be confident of that opinion and they must be confident that it was not offered lightly or without some accountability for its accuracy. These are all vital public health questions and I want to welcome all of our witnesses today, particularly those from the Mississippi Department of Health and Texas Department of State Health Services. We look forward to your testimony. At this time I would like to recognize the gentleman from Michigan, Mr. Stupak.

[The prepared statement of the Hon. Ed Whitfield follows:]

PREPARED STATEMENT OF THE HON. ED WHITFIELD, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

This afternoon we convene the third day of hearings on the important public health issues raised by the practice of mass tort screening.

Our investigation, begun in August 2005, continues to gather and review documents and information from the 55 letters sent to doctors, screening companies, state medical boards, law firms and state health departments involved in this matter. To date, we have also held two hearings where we have heard some remarkable testimony: we heard one doctor, credited with 3600 diagnoses of silicosis, explain that he never meant to diagnose anyone and, in fact, did not know the criteria for diagnosing silicosis; we heard one screening company tell us that they were paid only when they produced positive diagnoses of silicosis for one law firm, but nothing for a negative; and we also heard three doctors, credited with a combined total of over 1800 diagnoses of silicosis, take advantage of their Fifth Amendment rights when asked if their diagnoses were accurate and made pursuant to medical practices, standards, and ethics. Today promises to be an equally illuminating day in the Committee's inquiry.

Today we will examine a fundamental question: Where were the regulatory and medical protections and safeguards for the public health in this process of mass tort screening?

To that end, we are joined this afternoon by the medical boards and state radiation regulators of Mississippi and Texas. We are also joined by three screening companies: N&M, of Moss Point, Mississippi; RTS, Inc. of Mobile, Alabama; and Occupational Diagnostics of Ocean Springs, Mississippi. And appearing today with each of these screening companies, respectively, is also one doctor who worked with them.

Among the most basic responsibilities of a government, in terms of public health, are to protect citizens from unnecessary dangers in the practice of medicine and, further, to make certain that citizens receive care under a set of medical standards and ethics that ensure good medicine and accountability. These are two basic standards that we should apply today as we examine certain mass tort screening practices.

First, let us consider the protection of the public from unnecessary risks or dangers in medicine. Radiation, in the form of diagnostic testing such as x-rays, is an important medical tool – but it comes with some real dangers. Most states, such as Mississippi and Texas, have strict rules to make certain that exposure to radiation occurs only for sound medical reasons and under the supervision of certain licensed medical professionals. We will hear today from these States about their regulations establishing these important

health safeguards – and we will also learn from N&M, RTS, and Occupational Diagnostics about the steps and procedures they took to be certain that the manner in which they exposed thousands – and I repeat, thousands – of men and women to x-rays met these rules and ensured that proper medical supervision oversaw the use of this important, yet dangerous, diagnostic tool.

Second, with respect to safeguards ensured through medical standards and ethics, we will speak to witnesses from the medical boards of Mississippi and Texas. In particular, we will learn about what constitutes the practice of medicine in those States, what establishes the vital doctor-patient relationship, and what duties and obligations doctors have to patients as a result of this relationship. We must not forget the protection of public health is built upon ethical and legal frameworks in medicine that set forth standards and practices, ensure accountability by health care providers, and, if necessary, assign liability. If 10,000 people involved in lawsuits in Texas have been told that a doctor has found they have silicosis, these patients must be confident this opinion was not offered lightly or without some accountability for its accuracy.

These are all vital public health questions.

I want to welcome each of our witnesses and particularly those from the Mississippi Department of Health and Texas Department of State Health Services. I look forward to your testimony.

MR. STUPAK. Thank you, Mr. Chairman.

This is now our third hearing to explore the issues involved in the litigation of silicosis cases. While I acknowledge the fairness in which you have conducted this investigation, my Democratic colleagues and I remain unconvinced that this investigation will lead to any legislative effort by this committee that would contribute to public health. Nevertheless, this hearing raises questions about whether State oversight of the medical profession and X-ray operators adequately protects the silicosis victims. I expect today's testimony to be enlightening.

The medical profession is primarily regulated at the State level and is primarily regulated by boards made up of their peers. However, bad doctors rarely seem to lose their license to practice medicine. This hearing will examine medical board systems and how they handle doctors. Last September the American Medical Association took the unusual step of referring doctors named in the silica case to nine State medical societies for examination. Today we will have testimony of the medical board in Mississippi. I hope to learn what, if any, disciplinary action or investigation these two boards undertook to respond to the AMA referral. We will also have an opportunity to examine the regulation of the screening company in Mississippi. I want to know if the States have devoted sufficient resources and implemented sufficient deterrent penalties to assure that proper procedures to protect patients are adhered to by these for-hire mobile X-ray operators.

Mr. Chairman, I must say a word regarding the future of these hearings. To date virtually no issue raised by these hearings is amenable to Congressional remedy. The responsibility rests with either the State regulatory agencies or the courts to assist the patients identified in the

mass screenings receive the appropriate care. I understand that this committee will hear from lawyers in the coming weeks. However, as I have said numerous times, I don't believe this hearing is necessary as the courts and State bar associations exist to address the improprieties such as those suggested by Judge Jack in the silica proceedings.

Again, Mr. Chairman, it seems to me that there are many targets of the subcommittee's attention that would be far more likely to make a positive impact on public health. We still have an open investigation into the fairness of the FDA to assure the safety of our Nation's prescription drug supply including, but not limited to, Accutane.

In fact, Mr. Chairman, if I may, let me read an e-mail I received yesterday. Unfortunately, I receive too many of these e-mails. It is dated Sunday, June 4: "Congressman Stupak, we just buried my son, 17 years old, this past Friday, June 2. On May 18, 2006, my daughter and I came home in the evening to find a note on the kitchen table telling us that he was dead and in heaven. My daughter, who is 15, found the note, and before I had to chance to react, she was already running to her brother's room where she found him shot in the face. He had taken my husband's shotgun and shot himself. He was not depressed and he did not drink or take drugs. This was very out of character for him. He was put on Accutane by a dermatologist which is 70 miles away from where we live. The doctor told us on March 27, 2006, the very first time he had ever met my son, that he was a candidate for Accutane. He did not try anything else first and he assured us that Accutane was safe. I had never heard anything about this medication before that day. I did not have any reason to disagree with him. He was only on the medication for six weeks. All of his friends are in shock right now because this was not like him. He was a very loving and giving son. It just grieves us to know that you tried to take the medicine off the market but to no avail. My son died May 29, 2006, at 2:50 p.m. A friend of ours found a lot of things on the website about Accutane. This is where we found your name. My son will never be brought back to us but I do not want another family to go through the last two weeks that we have been through."

As you know, Mr. Chairman, I have tried numerous times to release the committee report that was done in May of 2003 on Accutane, yet this committee continues to suppress the information that should be made public. Yet we have hearings like today that really I can't find any public health issue in it but other than maybe to try to embarrass the trial bar. For over 2 years now I have asked the Chairman and the Chairman has assured me there would be hearings and still none comes forth. The American people certainly have a right to know about our hearings on Accutane. The Accutane report of May 2003 should be released because

there is public information that could help people like this so we don't receive e-mails like this.

Mr. Chairman, we also should examine a GAO report recently published on the quality of CMS's communications on Part D benefit. Posing as seniors and individuals helping a senior, investigators for the Government Accountability Office placed 500 calls to a 1-800 Medicare number and found that about one-third resulted in faulty information or none at all. When asked what drug plans were most appropriate and least expensive for an individual, customer service representatives got the answer right 41 percent of the time. The committee's resources would be better served investigating issues such as these, as the lack of accurate information for our seniors grappling with this confusing new program.

The available hearing days left in this Congress are few. I suggest that it is well past the time we focus on our issues that are the priority for the health and welfare of the American people.

With that, Mr. Chairman, I would yield back the balance of my time.

MR. WHITFIELD. Thank you very much, Mr. Stupak.

[Additional statements submitted for the record follows:]

PREPARED STATEMENT OF THE HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Chairman Whitfield, and let me thank you and Mr. Stupak for pursuing this important investigation into the public health implications of mass tort screenings.

One of the bottom-line questions for me in this inquiry has always been this one: How on earth can 10,000 people have been possibly misdiagnosed with an often fatal and largely incurable disease? What do you suppose would be happening if the tables were turned and plaintiffs' lawyers were *not* involved in generating all these diagnoses? I suspect that we might be looking at thousands of lawsuits screaming medical negligence, malpractice, and emotional distress.

But the plaintiffs' bar was involved, so we've had to sort this situation out ourselves.

Today the Committee will ask where, in all these mass screenings, were the regulatory and medical protections for patients? Where were the safeguards that protect people from being exposed to doses of radiation without appropriate medical supervision? And where were the medical ethics that create doctor-patient relationships and dictate the responsibilities of doctors to the patients they diagnose?

When we dug into the facts, we found doctors, screening companies and lawyers all standing in a circle, each one pointing to the next as the responsible party. It appears everyone here wanted to take advantage of the litigation value of a so-called "diagnosis," but no one wanted to be accountable for the medical significance of the diagnosis. As Judge Jack wrote in her opinion, "By dividing the diagnosing process among multiple people, most of whom had no medical training and none of whom had full knowledge of the entire process, no one was able to take full responsibility over the accuracy of the process."

This Committee's investigation is beginning to corroborate the Judge's opinion on that point. However, what concerns me is whether these divisions in the diagnosing process were not an accident but rather a matter of the right hand being willfully ignorant of what the left was doing. That is to say, were the doctors, the screeners, and lawyers purposefully turning a blind eye to possible lapses in medical standards, practices, and

ethics so they could not be held accountable? Let me just give one brief example of this blind eye.

A common theme emerging in this Committee's investigation is that, with minor exceptions, there seems to have been an apparent "misunderstanding" between the doctors, lawyers, and screeners about whether the doctors' opinions in this case were actual medical diagnoses. Where there was pretty straightforward diagnosing language in two sets of reports, the doctors have claimed that someone apparently slipped the language into the reports and they were too busy to notice it when they were signed. What's going on here?

This is not a misunderstanding about some minor point in a report. It's a misunderstanding about whether a person does, or does not have, a deadly disease. This is stunning and remarkable. Between the doctors who have taken the Fifth before this Committee and the doctors who now claim they never meant to diagnose anyone, I count as many as 5,000 people whose diagnosis is now questionable or unsupported. Can this be right? How can this happen? Chairman Whitfield, this matter alone underscores the importance of this investigation.

I want to again thank Chairman Whitfield for his work on this issue and for holding this third day of hearings. I look forward to the testimony and yield back the remainder of my time.

PREPARED STATEMENT OF THE HON. MICHAEL BURGESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Mr. Chairman, and thank you for your continued leadership into the investigation of this important public health issue. While today we continue to address the potential problems associated with mass screening and the diagnosis of illnesses, I strongly believe that it is the role and responsibility of this entire committee to address the imminent health care needs of our nation. We must not abdicate our responsibility to the American public to actively pursue public health concerns. Thank you, Mr. Chairman for recognizing this vital role of our committee and investigating such a serious issue.

I have been licensed to practice medicine in the State of Texas since 1977. Through my over twenty years in medical practice, I learned to fully appreciate the importance and need for an efficient and effective medical screening process. Thousands upon thousands of lives have been saved due to medical screening processes that were able to detect illnesses and other serious maladies. This system relies upon trained physicians and other medical personnel to perform reliable diagnostic evaluations. Without this crucial element, the screening system falls apart, thus, jeopardizing the health and welfare of the public that was meant to be protected. The medical community, including physicians and medical boards, must recognize this essential function.

One of the first lessons that a medical student learns is that the doctor/patient relationship is sacred. For a doctor to truly help the patient, the patient must have full faith and trust in the doctor. Once the relationship has been established, the doctor owes a fiduciary duty to the patient, and must exercise a high standard of care towards the patient. This relationship is a cornerstone of the medical community, and cannot be easily disregarded. The situation before us today exemplifies the harm that can occur when patients believe that the relationship has been established but the doctor abandons his duty.

Today, I look forward to examining my homestate's rules and regulations involving mass health screenings in Texas. I would like to especially welcome Mr. Richard Ratliff of the Texas Department of State Health Services, and Dr. Donald Patrick of the Texas Medical Board. Gentlemen, thank you for traveling from Austin today to address this important issue. I look forward to entering into a lively discussion with each of you.

While I am appreciative of these witnesses coming before us today, I would also like to take a moment to express my extreme dissatisfaction regarding the absence of two witnesses on the second panel—Mr. Heath Mason of N&M, Inc., and Dr. Todd Coulter. While they chose not to appear before Congress today, I have full faith that the Chairman will continue to explore all legal means to obtain their testimony.

Again, Mr. Chairman, I thank you for this hearing, and I look forward to working with you and the rest of the committee to achieve real results for the public health and welfare of this country.

I yield back the remainder of my time.

MR. WHITFIELD. At this time I would like to call the first panel up to the witness table, please. On the first panel we have Mr. Robert Goff, who is the Director of Division of Radiological Health, the Mississippi Department of Health. We have Dr. Mallan Morgan, who is Executive Director of the Mississippi State Board of Medical Licensure. We have Mr. Richard Ratliff, who is the Radiation Control Officer for the Division of Regulatory Services, the Texas Department of State Health Services; and we have Dr. Donald Patrick, Executive Director of the Texas Medical Board, who also happens to be a lawyer as well. I want to welcome the four of you gentlemen and we appreciate very much your being here.

You are aware that the committee is holding an investigative hearing and when doing so we have the practice of taking testimony under oath. Do any of you have any objection to testifying under oath today? As you may or may not know, under the rules of the House and the rules of the committee, you are entitled to be advised by legal counsel. Do any of you desire to be advised by legal counsel this afternoon. Yes, sir?

DR. PATRICK. This is Mari Robinson sitting behind me.

MR. WHITFIELD. Would you identify your counsel again? I didn't catch the name.

DR. PATRICK. Mari, M-a-r-i, Robinson.

MR. WHITFIELD. Mari Robinson?

DR. PATRICK. Correct.

MR. WHITFIELD. And Mari, is that you? Okay. Thank you. Now, she will not be testifying but is here to give you advice. Okay.

[Witnesses sworn]

MR. WHITFIELD. Thank you. You are now under oath. You may sit down and give your 5 minute opening statement. Mr. Goff, we can just start with you, so you are recognized for 5 minutes.

STATEMENTS OF ROBERT W. GOFF, DIRECTOR, DIVISION OF RADIOLOGICAL HEALTH, MISSISSIPPI DEPARTMENT OF HEALTH; MALLAN G. MORGAN, M.D., EXECUTIVE DIRECTOR, MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE; RICHARD A. RATLIFF, P.E., L.M.P., RADIATION CONTROL OFFICER, DIVISION OF REGULATORY SERVICES, TEXAS DEPARTMENT OF STATE HEALTH SERVICES; AND DONALD PATRICK, M.D., J.D., EXECUTIVE DIRECTOR, TEXAS MEDICAL BOARD

MR. GOFF. Good afternoon, Congressman Whitfield.

MR. WHITFIELD. Be sure and turn your microphone on as well.

MR. GOFF. Good afternoon, Congressman Whitfield and members of the committee. The Mississippi regulations for--

MR. WHITFIELD. If you could hold just one minute. I am sorry. We still seem to be having a little difficulty.

MR. GOFF. Good afternoon. The Mississippi regulations for control of radiation have provisions which address healing arts screening. These provisions were adopted from the Suggested State Regs, which were developed by the Conference of Radiation Control Program Directors, which is a professional organization made up of radiation programs. Many States use the very same regulations.

The purpose of the healing arts screening is to allow screening of individuals for certain health indications without the requirement that the physician write a specific and individual order for each person. The screening program must be conducted under the authorization of a physician licensed in accordance with the Mississippi statutes. During the past few years we cited and we have investigated four companies with mobile X-ray units that were conducting healing screenings without the agency's approval. Other information from other sources has indicated that other companies may have also entered the State without our knowledge.

Currently, there are only two screening programs approved in Mississippi at two universities for bone density studies. There are no programs approved for silicosis. The Mississippi Department has identified areas in our review process of applications for healing arts screening that need to be improved as well as revisions of the regulations for clarification of screening programs. I would be more than happy to answer any questions you have today.

[The prepared statement of Robert W. Goff follows:]

PREPARED STATEMENT OF ROBERT W. GOFF, DIRECTOR, DIVISION OF RADIOLOGICAL HEALTH, MISSISSIPPI DEPARTMENT OF HEALTH

The Mississippi Radiation Law of 1976, Sections 45-14-1 thru 45-14-69 of the Mississippi Code of 1972, annotated established the Mississippi Department of Health as the state agency to administer a state-wide radiation program and to promulgate regulations for the use of sources of radiation, Sections 45-58-1 through 41-58-5, of the Mississippi Code of 1972 and the Mississippi Department of Health's "Regulations Governing Registration of Medical Radiation Technologists", established the requirements for radiological technologists in 1997.

The Mississippi Regulations for Control of Radiation (MRCR) has provisions which address healing arts screening. These specific provisions were adopted from the Suggested State Regulations, which were developed by the Conference of Radiation Control Program Directors, Inc. to promote uniform radiation protection regulations among the states.

The purpose of healing arts screening was to allow screening of individuals for certain health indications without the requirement that the physician write a specific and individual order for each person. However, a screening program must still be conducted under the authorization of a physician licensed in accordance with the Mississippi statutes.

In order to conduct a health screening program, a company must submit the required information as listed in Appendix B of Section F of the Mississippi Regulations for Control of Radiation in letter form requesting approval, signed by an officer of the company or management given the authority to do so. A health screening program must not be initiated without approval of the Agency.

A review of the records indicates that the Mississippi Department of Health has conducted four investigations of companies with mobile x-ray units for conducting health screening without the Agency's approval. All companies were cited for failure to comply with the regulations. Three of the four companies terminated their activities within the state of Mississippi. The fourth company submitted a screening program which was later approved.

With the exception of two health screening programs approved for bone density studies at two universities, no health screening programs using sources of radiation are currently approved .

The Mississippi Department of Health has implemented certain procedural changes in the review of applications and issuing registrations for screening programs. The Division Director reviews all applications for health screening programs in consultation with the medical members of the Radiation Advisory Council. Only those applications associated with a medical or educational institution and conducting a specific medical study will be considered. All applications will require, in addition to an officer or management signature, the medical director's signature.

The registration for screening programs will contain specific conditions that identifies the program has been approved under the medical director and that the registrant must notify the Agency if any information becomes invalid or outdated. In addition to placing specific conditions on registrations approved for health screening, all mobile x-rays units registrations will have a condition that clearly states that the registrant is not authorized for healing arts screening and that the unit must be used only under the authorization of a physician licensed in accordance with Mississippi statutes.

The staff is currently working on revising Section F, "X-rays in the Healing Arts" of the Mississippi regulations to clarify the healing arts screening requirements. The CRCPD Healing Arts Working Group is also revising the Suggest State Regulations on healing arts screening.

Although, the steps taken above will certainly improved the regulation of screening programs in Mississippi, there will still be those companies that will conduct illegal health screening programs without the knowledge of Mississippi Department of Health .

MR. WHITFIELD. Thank you, Mr. Goff. At this time Dr. Morgan, who is the executive director of the Mississippi State Board of Medical Licensure, you may give your opening statement, Dr. Morgan.

DR. MORGAN. Congressman Whitfield, the Mississippi State Board of Medical Licensure would like to thank you for the invitation and opportunity to testify before this subcommittee on the matter of silicosis screening that took place in several States, including Mississippi.

By way of background, through both statutory and regulatory enactments, the board licenses physicians, osteopaths, and podiatrists in the State of Mississippi. As with any regulatory agency, regulations are adopted from time to time to address certain needs implementing the Board's overall policy to protect the public and ensure the administration of proper medical care. During 2002 the Board received a number of inquires from various entities offering unreferred diagnostic screening in the State of Mississippi. Unreferred screens are those performed without a physician's order. Mobile diagnostic laboratories operated by for-profit entities were traveling throughout the State and offering a number of diagnostic modalities including sonograms and in some cases X-rays. The Board was not aware at the time of any mobile screening being conducted for the identification of plaintiffs in mass tort litigation. In response, the Board adopted a policy on July 18, 2002, subsequently amended on January 15, 2003, thus advising the public as to the Board's position as to unreferred diagnostic screening tests. The policy reads as follows: "It is the opinion of the Mississippi State Board of Medical Licensure that any medical act that results in a written or documented medical opinion, order, or recommendation that potentially effects the subsequent diagnosis or treatment of a patient constitutes the practice of medicine in this State. Further, any physician who renders such a medical opinion, order, or recommendation assumes a doctor/patient relationship with the patient and is responsible for continuity of care with that patient. Failure to provide this continuity of care will be deemed to be unprofessional conduct. The obligation to ensure continuity of care does not apply in those instances where the physician rendering the medical opinion, order, or recommendation has been called in by another treating physician solely for consultative purposes."

During the Board's inquiry, it was determined that patients were being solicited through various advertisements to seek without a prior doctor's order diagnostic modalities in order to determine if any disease or abnormalities were present. The results of the screens were transmitted to out-of-state physicians who rendered diagnoses. The

Board was concerned as to whether or not, one, proper medical and family histories were being taken to rule out contraindications including but not limited to the overexposure of radiation due to frequent utilization of X-rays; two, the manner in which the abnormalities were being communicated to the patient; three, assurances that patients with abnormal screenings were being referred for timely and proper medical intervention; four, whether or not the physicians rendering the diagnoses were properly trained and/or credentialed; and number five, the method by which the Board could hold accountable those physicians rendering such diagnoses.

By virtue of the adoption of this policy on unreferred diagnostic screening tests, the Board requires all out-of-State physicians to be licensed in the State of Mississippi, thus accountable to our Board. Further, the Board determined that in those cases where X-rays were part of the modality offered, an individual or standing order for such an X-ray must be made by a Mississippi-licensed physician. Where the result resulted in the identification of an abnormality, the mobile facility must make reasonable efforts in writing to communicate with the patient and see that the patient is properly referred to a treating physician for needed medical care.

Subsequent to adoption of the above policy, the Board has been advised that certain members of the Plaintiffs' Bar have employed the services of physicians to conduct diagnostic screening for the purpose of identifying potential plaintiffs in silicosis and other mass tort reform--excuse me--tort litigation. On August 29, 2005, the Board was contacted by the Mississippi State Medical Association advising the Board that four Mississippi physicians had been subpoenaed to appear before the Energy and Commerce Committee. The Board of Trustees of the AMA requested that this Board investigate the involvement of the four named physicians. On September 8, 2005, the Executive Committee of the Board discussed the request and elected to defer any investigation until the Federal investigation had been completed. The Board, being not only a licensure agency but also a law enforcement agency under the Mississippi Uniform Controlled Substances Act, has in the past been requested by both Federal and State law enforcement agencies to assist the investigation of certain licensees. In this context, Federal and State authorities have expressed preference that the Board not conduct independent investigations or hearings until after their investigation has been completed. Such requests for abeyance are based on the language set forth in Mississippi Code Annotated 73-25-27, in part: "At such hearing, Licentiate may appear by counsel and personally in his own behalf. Any person sworn and examined as a witness in such hearings shall not be held to answer criminally nor shall any papers or documents

produced by such witness be competent evidence and any criminal proceedings against such witness other than for perjury in delivering his evidence."

It was the opinion of our Attorney General's office that any hearings conducted by the Board, wherein the physician may testify or introduce papers on his or her behalf, could not be used against that physician in the State or Federal case. In response, the Board placed such matters in abeyance.

We point out the above facts, not by way of excuse but to explain the background for the Board's December 8, 2005, decision not to pursue the independent investigation of the four physicians until conclusion of the Federal inquiry. Based on our discussions with Mr. Cooke, Counsel for House of Representatives, Committee on Energy and Commerce, we now have a greater understanding of the nature of the Federal inquiry, in other words, not criminal. The Board fully intends to continue to conduct an exhaustive investigation in response to the information from the AMA and MSMA. This includes evidentiary use of the opinion rendered by The Honorable Janis Graham Jack, depositions of all the Mississippi licensees and the numerous patient history and diagnoses forms bearing the signatures of Mississippi licenses. In so doing, we may be calling upon you and the Committee staff for assistance and/or further information.

The Board takes its responsibility to protect the public very seriously and fully intends to conduct the investigation as expeditiously as possible. In this regard, we are advised by our complaint counsel that any testimony before this committee will be that of the undersigned only and does not represent nor should be construed by the committee and others as expressing any opinion as to the guilt or innocence of the four named physicians. A license to practice medicine is a valuable property right. It cannot be denied or revoked without adequate due process of law, in other words, notice of charges and an opportunity for a hearing before an objective and non-biased decision maker.

Again, we thank you for your assistance.

[The prepared statement of Mallan G. Morgan, M.D. follows:]

PREPARED STATEMENT OF MALLAN G. MORGAN, M.D., EXECUTIVE DIRECTOR, MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE

SUMMARY OF STATEMENT
BY
MALLAN G. MORGAN, M.D.

* The Mississippi State Board of Medical Licensure monitors the practice of medicine in Mississippi by physicians, osteopaths and podiatrist.
* During 2002, the Board received a number of inquiries from various entities offering unreferred diagnostic screening in the State of Mississippi.
* The Board was not aware at the time of any mobile screening being conducted for the purpose of identifying plaintiffs in mass tort litigation.
* On July 18, 2002, the Board adopted a policy pertaining to Unreferred Diagnostic Screening Tests.
* By virtue of the adoption of the policy, the Board requires all diagnostic screening test to be supervised by physicians licensed in the State of Mississippi, thus accountable to the Board. The Board determined that in those cases where x-rays were a part of the modality offered, an individual or standing order for such x-ray must be made by a Mississippi licensed physician. Where the tests resulted in the identification of an abnormality, the mobile facility must take reasonable efforts (in writing) to communicate with the patient and see that the patient is properly referred to a treating physician for needed medical care.
* On August 29, 2005, the Board was advised that four (4) Mississippi physicians had been subpoenaed to appear before the Energy and Commerce Committee.
* The Board is currently conducting an investigation in response to the information received.

May 30, 2006

Hon. Ed Whitfield, Chairman

Subcommittee on Oversite and Investigation

House of Representatives

Committee on Energy and Commerce

Washington, DC 20515-6115

To The Honorable Ed Whitfield:

The Mississippi State Board of Medical Licensure (hereinafter "Board") would like to thank you for the invitation and opportunity to testify before this Subcommittee on the matter of silicosis screening that took place in several states, including Mississippi.

By way of background, through both statutory and regulatory enactments, the Board licenses physicians, osteopaths and podiatrists in the State of Mississippi. As with any regulatory agency, regulations are adopted from time to time to address certain needs when implementing the Board's overall policy to protect the public and insure the administration of proper medical care. During 2002, the Board received a number of inquiries from various entities offering unreferred diagnostic screening in the State of Mississippi. Unreferred screens are those performed without a physician order. The mobile diagnostic laboratories, operated by for-profit entities, were

traveling throughout the state and offering a number of diagnostic modalities, including sonograms, ultrasounds, and in some cases, X-Rays. The Board was not aware at the time of any mobile screening being conducted for the purpose of identification of plaintiffs in mass tort litigation. In response, the Board adopted a policy on July 18, 2002, subsequently amended January 15, 2003, thus advising the public as to the Board's position as to unreferred diagnostic screening tests. The policy reads as follows:

> "It is the opinion of the Mississippi State Board of Medical Licensure that any medical act that results in a written or documented medical opinion, order or recommendation that potentially effects the subsequent diagnosis or treatment of a patient constitutes the practice of medicine in this state. Further, any physician who renders such a medical opinion, order or recommendation assumes a doctor/patient relationship with the patient and is responsible for continuity of care with that patient. Failure to provide this continuity of care will be deemed to be unprofessional conduct. The obligation to ensure continuity of care does not apply in those instances where the physician rendering the medical opinion, order or recommendation has been called in by another treating physician solely for consultation purposes."

During the Board's inquiry, it was determined that patients were being solicited through various advertisements to seek without a prior doctor's order diagnostic modalities in order to determine if any disease and/or abnormalities were present. The results of the screens were transmitted to out-of-state physicians who rendered diagnoses. The Board was concerned as to whether or not (i) proper medical/family histories were being taken to rule out contraindications, including but not limited to overexposure to radiation due to frequent utilization of x-rays, (ii) the manner in which any abnormalities were being communicated to the patient, (iii) assurances that patients with abnormal screens were being referred for timely and proper medical intervention, (iv) whether or not the physicians rendering the diagnoses are properly trained and/or credentialed, and (v) the method by which the Board could hold accountable those physicians rendering such diagnoses.

By virtue of the adoption of the policy on "Unreferred Diagnostic Screening Tests" the Board requires all out-of-state physicians to be licensed in the State of Mississippi, thus accountable to the Board. Further, the Board determined that in those cases where x-rays were a part of the modality offered, an individual or standing order for such x-ray must be made by a Mississippi licensed physician. Where the tests resulted in the identification of an abnormality, the mobile facility must take reasonable efforts (in writing) to communicate with the patient and see that the patient is properly referred to a treating physician for needed medical care.

Subsequent to adoption of the above policy, the Board has been advised that certain members of the Plaintiffs' bar have employed the services of physicians to conduct diagnostic screening for the purpose of identifying potential plaintiffs in silicosis and other mass tort litigation. On August 29, 2005, the Board was contacted by the Mississippi State Medical Association (MSMA) advising the Board that four (4) Mississippi physicians had been subpoenaed to appear before the Energy and Commerce Committee. The Board of Trustees of the American Medical Association (AMA) requested that this Board investigate the involvement of the four named physicians. On September 8, 2005, the Executive Committee of the Board discussed the request and elected to defer any investigation until the federal investigation had been completed. The Board, being not only a licensure agency, but a law enforcement agency under the Mississippi Uniform Controlled Substances Law, has in the past been requested by both federal and state law enforcement agencies to assist the investigation of certain licensees. In this context, federal and state authorities have expressed preference that the Board not conduct independent investigations or hearings until after their investigation had been completed. Such requests for abeyance was based upon the language set forth in Mississippi Code Ann. §73-25-27, in part:

> "At such hearing, Licentiate may appear by counsel and personally in his own behalf.Any person sworn and examined as a witness in such

hearing shall not be held to answer criminally, nor shall any papers or documents produced by such witness be competent evidence and any criminal proceedings against such witness other than for perjury in delivering his evidence."

It was the opinion of the Attorney General's Office, that any hearings conducted by the Board, wherein the physician may testify or introduce papers on his/her behalf, could not be used against that physician in the state or federal case. In response, the Board placed such matters in abeyance.

We point out the above facts, not by way of excuse, but to explain the background for the Board's September 8, 2005, decision not to pursue an independent investigation of the four physicians until conclusion of the federal inquiry. Based on our discussions with Anthony M. Cooke, Counsel for House of Representatives, Committee on Energy and Commerce, we now have a greater understanding of the nature of the federal inquiry, i.e. not criminal. The Board fully intends to conduct an exhaustive investigation in response to the information from the AMA and MSMA. This includes evidentiary use of the opinion rendered by Hon. Janis Graham Jack, depositions of all Mississippi licensees, and the numerous patient history/diagnosis forms bearing the signatures of Mississippi licensees. In so doing, we may be calling upon you and the Committee's staff for assistance and/or information.

The Board takes its responsibility to protect the public very seriously and fully intends to conduct the investigation as expeditiously as possible. In this regard, we are advised by our complaint counsel that any testimony before this Committee will be that of the undersigned only, and does not represent nor should be construed by the Committee and others as expressing any opinion as to guilt or innocence of the four named physicians. A license to practice medicine is a valuable property right and cannot be denied or revoked without adequate due process of law, i.e. notice of the charges and an opportunity for a hearing before objective and non-biased decision makers.

Again, we thank you for your assistance.

Yours truly,

Mallan M. Morgan, M.D.
Executive Director

V. CONTINUING MEDICAL EDUCATION EXEMPTION FOR PHYSICIANS IN A RESIDENCY OR FELLOWSHIP PROGRAM

Physicians participating in an ACGME approved residency or fellowship program for at least one year of the two year CME period may be exempt from acquiring the required 40 hours of CME for renewal.

Adopted April 18, 2002.

VI. UNREFERRED DIAGNOSTIC SCREENING TESTS

It is the opinion of the Mississippi State Board of Medical Licensure that any medical act that results in a written or documented medical opinion, order or recommendation that potentially affects the subsequent diagnosis or treatment of a patient constitutes the practice of medicine in this state. Further, any physician who renders such a medical opinion, order or recommendation assumes a doctor-patient relationship with that patient and is responsible for continuity of care of that patient. Failure to provide this continuity of care will be deemed to be unprofessional conduct. The obligation to insure continuity of care does not apply in those instances where the physician rendering the medical opinion, order or recommendation has been called in by another treating physician solely for consultation purposes.

Adopted July 18, 2002. Amended January 15, 2003.

VII. INTERNAL MEDICINE/PEDIATRICS COMBINED PROGRAMS ACCREDITATION

Information received from ACGME indicates that "combined programs" in Internal Medicine/Pediatrics are not accredited. It is the policy of the Board of Medical Licensure to accept these programs as accredited when both the internal medicine program and pediatrics program are independently accredited by the ACGME for training in each area.

Adopted September 18, 2002.

VIII. USMLE STEP 3 APPLICATION AND FEES

Mississippi rules and regulations require physicians making application with the Federation of State Medical Boards to sit for USMLE Step 3 in Mississippi to make application for a permanent Mississippi medical license. It is the policy of the Board of Medical Licensure that physicians requesting licensure by examination to submit an USMLE Step 3 permanent medical licensure application along with a $50 non-refundable fee. The $50 non-refundable fee will be applied to the $500 licensure fee once the application process has been completed. An applicant for USMLE Step 3 permanent

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Ms. Freeman advised the Executive Committee of the confusion with doctors volunteering during Hurricane Katrina's relief efforts. Ms. Freeman advised that currently FEMA has control organizing out-of-state physicians and that the agency is receiving calls from volunteering doctors not getting any response. This matter was referred to the Full Board for further discussion.

Dr. Burnett and Ms. Freeman discussed phone calls concerning Louisiana physicians wanting to return to work. Ms. Freeman distributed a proposed policy for Emergency Temporary Medical License for the displaced physicians. After a brief discussion, the Executive Committee made the decision to bring before the Full Board for approval.

For informational purposes only, Dr. Burnett advised that a letter had been received from Helen Turner, M.D., Ph.D, President, Mississippi State Medical Association, concerning the investigation of Mississippi physicians involved in the Texas silicosis litigation. Dr. Burnett advised that if there were no objections, he would respond advising that we would defer any investigation until after the Federal investigation has been completed. There were no objections.

ADJOURNMENT

There being no further business, the meeting adjourned at 09:00 a.m.

Dewitt G. Crawford, M.D.
President

Minutes taken and transcribed
by Sherry Harris
Administrative Assistant
September 8, 2005

MR. WHITFIELD. Thank you, Dr. Morgan. At this time I would recognize Mr. Richard Ratliff, who is the Radiation Control Officer for the Texas Department of State Health Services. You are recognized, Mr. Ratliff.

MR. RATLIFF. Good afternoon, Congressman Whitfield and members of the subcommittee. I am Richard Ratliff. I am with the Department of State Health Services.

MR. WHITFIELD. Do you have your microphone on?

MR. RATLIFF. It shows that it is on. Yes, there we go.

I am Richard Ratliff with the Department of State Health Services. In Texas we have a State statute that allows the department to regulate all sources of radiation which includes radioactive material, X-rays, and lasers. We have specific rules and require that physicians prescribe each X-ray procedure. We have developed rules specifically for several types

of screening and they are similar to Mississippi, only for bone densitometry, which is a fairly simply process, for mammography, which is real popular, and for heart CT. In each case, the radiation applicant for the X-ray registration must submit specific requirements so they have a physician on staff, what procedures they will follow, and how they will complete the diagnosis.

We have never authorized screening in our terminology for silicosis, and as we started through, in 1999 one of our State representatives had contacted us and had multiple newspaper articles advertising free X-rays so our inspector and--in Texas we have like 11 health regions. They went to the specific sites and we did find five separate companies that were doing X-ray screening and they were not authorized and so we have at that point advised them they could not continue. One of them had to paid a $10,000 penalty. Three others paid smaller penalties and had notices of violation. All the companies have gone out of Texas now.

After looking at what has happened here, you know, we have 16,000 X-ray registrars in Texas. We have five companies, and so we look at risk, but still if they are not following the rules, they would now go forward with even stricter and severe penalties. We then have determined that we will not allow any company to do any out-of-State X-ray unless they notify us every time they come into the State. Historically, they had a condition on their registration that we could request and within 24 hours they would bring their records to the State but this has brought the fact that we really need to have a condition that any time they come to the State they have to notify us and give us an opportunity to inspect them.

Like I said, none of the companies are continuing in business in Texas. They have all ceased. Two of the ones that were doing screening were medical facilities but somehow got connected with separate law firms. Once they realized what they were doing was screening, they stopped and they are just doing their regular practice of medicine now. I would be willing to answer any questions.

[The prepared statement of Richard A. Ratliff follows:]

PREPARED STATEMENT OF RICHARD A. RATLIFF, P.E., L.M.P., RADIATION CONTROL OFFICER, DIVISION OF REGULATORY SERVICES, TEXAS DEPARTMENT OF STATE HEALTH SERVICES

Good afternoon, Congressman Whitfield and members of the Subcommittee. I am pleased to be here today to discuss the radiation regulatory requirements for medical x-ray users in Texas and answer your questions on specific findings concerning x-ray screening investigations conducted by the Texas Department of State Health Services (DSHS).

Texas Health and Safety Code, Title 2, Subtitle D, Chapter 401 (Texas Radiation Control Act) provides for regulation of sources of radiation to ensure protection of the occupational and public health and safety and the environment. The Texas Radiation

Control Act mandates that a person may not use a source of radiation unless that person has a registration from DSHS and it directs DSHS to adopt rules and guidelines that provide for registration of sources of radiation.

DSHS has adopted rules specific to healing arts screening in Title 25, Texas Administrative Code (TAC), §§289.226 and 227. The rules define healing arts screening, require persons performing healing arts screening to be registered with DSHS prior to initiating the screening program, and requires specific information to be submitted with an application for healing arts screening.

These DSHS rules define healing arts screening as "The testing of asymptomatic human beings using radiation machines for the detection or evaluation of health indications when such tests are not specifically and individually ordered by a licensed practitioner of the healing arts legally authorized to prescribe such x-ray tests for the purpose of diagnosis or treatment**."**

Specific application information includes the diseases or conditions for which the x-ray examinations are to be used in diagnoses, a detailed description of the x-ray examinations proposed in the screening program, a description of the population to be examined in the screening program (age, sex, physical condition) and an evaluation of any known alternate methods not involving ionizing radiation that could achieve the goals of the screening program and why these methods are not used instead**.**

An application for healing arts shall be signed by a licensed practitioner. The application must also be signed by the radiation safety officer. Additionally, the qualifications of the individual who will be supervising the operations and the name and address of the practitioner who will interpret the radiographs must be submitted with the application. A condition is added to the certificate that ties the registrant to commitments made in the application.

A licensed practitioner of the healing arts, licensed in Texas, is required to direct/oversee the operation of radiation machines. Individuals who operate radiation equipment must meet the appropriate credentialing requirements in accordance with the Medical Technologist Certification Act, Texas Occupations Code, Chapter 601.

DSHS does not require a licensed practitioner to be present/on site when a company conducts healing arts screening. However, a practitioner licensed to practice in Texas must be designated to direct and oversee the operation of the radiation machines and to interpret all x-ray films.

An application for authorization to conduct healing arts screening must include the submission of procedures to be used in advising the individuals screened, and their private practitioners of the healing arts, of the results of screening procedures and any further medical needs indicated.

DSHS to date has only authorized healing arts screening for three diagnostic x-ray procedures: mammography, bone densitometry, and heart computed tomography (CT).

In 1999 DSHS began investigations into complaints concerning unauthorized x-ray healing arts screening of individuals for possible illness due to asbestos or silicosis. The DSHS investigators revealed that seven entities had x-rayed individuals after interviewing them for exposure to silica in the workplace. Only one of the seven companies had licensed physicians providing each person x-rayed with an individual prescription and thus was not performing screening x-rays as defined by rule. Five of the other six companies were not authorized to perform x-ray screening procedures.

One company had submitted an application for registration, which was denied after it failed to submit verification that a physician would oversee the operation of the x-ray registration and provide each person x-rayed an individual prescription for the x-ray. Five of the companies were from outside the state of Texas. One company paid a $10,000.00 administrative penalty for violations of DSHS rules and three others were issued notices of violation.

Currently none of the seven companies are performing x-ray screening in Texas. Only two medical facilities are still performing x-ray procedures in Texas. The following table summarizes the Texas DSHS' investigations. All future out of state x-ray registrants will be required to notify the Texas Department of State Health Services each time they do x-ray exams in Texas to assure compliance with all regulatory requirements. Thank you for requesting my testimony on this issue today. I will be happy to answer any questions.

X-ray Screening Company	Date found in Texas performing Screening	Contracted by Law Firm (Yes/No) Status	Violations
RGL Medical Services, Park City, Utah	March 4, 2003	YES, Never registered	1. Not Registered with Texas 2. Performing screening X-rays – not authorized Left Texas after Notice of Violation Issued
Tyler Rehab Associates, L.P., Tyler, Texas	January 11, 2001	Yes, Providing in hospital services	Performing x-ray screening with out authorization. Stopped after Notice of Violation Issued
Occupational Marketing, Inc., Houston, Texas	January 1999-2002	Yes, Registration Terminated by request of the company	Licensed physicians provided each person x-rayed with individual prescription.
Radiology Associates LLP, Corpus Christi, Texas	September 23, 1999	Yes, Providing non-screening radiology services	Performing x-ray screening with out authorization. Stopped after Notice of Violation Issued.
Respiratory Testing Services, Inc., Mobile, Alabama	Application March, 26, 2003	Unknown	Registration application denied for failure to submit verification that a physician would provide each person x-rayed with individual prescription.
US X-Ray, Inc., Chesapeake, Ohio	August 17, 2001	Yes, Registration Terminated by request of the company	Ordered to Cease and Desist. Paid a $10,000.00 administrative penalty.
N & M, Inc, dba N&M Testing, Inc., Moss Point, Mississippi	June, 24, 2002	Registration expired due to failure to pay annual permit fee March 5, 2005	Recommended Notice of Violation, not issued after unable to inspect x-ray operations

MR. WHITFIELD. Thank you, Mr. Ratliff. At this time Dr. Patrick, who is the Executive Director of the Texas Medical Board, we welcome your testimony.

DR. PATRICK. Mr. Chairman and Congressmen, thank you very much for allowing us to be here today.

I am Donald Patrick. I am the executive director of the Texas Medical Board. I represent the State agency that licenses and regulates Texas physicians. Currently more than 55,000 physicians hold Texas licenses. We investigate complaints and the Board takes disciplinary action when appropriate. This last year we had over 500 disciplinary hearings, took 304 disciplinary actions including 70 actions against physicians who are no longer practicing because of that action.

I would like to comment on several broad issues that are being considered by your committee. The first is the definition of the practice of medicine. The Texas Medical Practice Act defines the practice of medicine as "the diagnosis, treatment or offer to treat a disease, disorder, deformity, or injury by any method by a person who either publicly professes to be a physician or who charges for their services." It is 151.002(a)(13) of the Texas Occupations Code.

Diagnosing a disease is clearly within the definition of the practice of medicine. The Medical Practice Act requires anyone who practices medicine in Texas or on patients in Texas to be licensed by the Texas Medical Board. The legislature has deemed that practicing medicine without a license in Texas is a felony, so whenever we hear of an individual practicing medicine without a license, we refer them to law enforcement activity either locally or statewide.

The second issue I want to address is diagnosis. What constitutes a diagnosis? The commonly understood definition of diagnosis is stated in medical dictionaries. It is a determination of the nature of a disease and the art of distinguishing between one disease and another. I suggest that diagnosis is properly made after considering a patient's history, performing a physical examination, and reviewing imaging studies and other diagnostic tests.

The history may be either oral or written and the physician commonly uses a form for past history and occupational history as a questionnaire completed by the patient or a trained office assistant. Ideally, the physician personally takes the present illness and review of systems history information and family history. The delegation of this responsibility to others does create risk of error that every physician recognizes.

The physical examination may be complete or focused. For any lung ailment, a physical examination should include vital signs, observation of the patient's breathing, palpation of the chest wall for abnormal adventitious rubs and symmetrical chest rising and falling, percussion to detect increased or decreased resonance, listening to the heart and lungs for equality of volume, and character of sounds including rales, rhonchi, and wheezes. Also, clubbing of the fingers and cyanosis is also noted.

The next step is to get a chest X-ray and pulmonary function tests as indicated.

Based on all this information, the physician arrives at a diagnosis. This is the proper procedure for making a diagnosis. It does not mean, however, that making a diagnosis with less than the history, physical examination, and imaging and diagnostic studies, if indicated, is not failing to make a diagnosis. It is just doing it poorly. The determination of the nature of a disease by reviewing only an X-ray may be a medically incomplete diagnosis but it is a diagnosis, nevertheless.

Another issue raised in your committee's inquiry is the doctor-patient relationship. More specific to your inquiry is the question: What duty does a physician have to inform a patient of a diagnosis? We believe that a physician has a duty to inform patients of diagnoses reached by that physician unless there is a clear, signed release by that patient that explicitly states that the patient acknowledges that there is no doctor-patient relationship established. Such a release is common for independent reviews in workers' compensation cases. These releases are also common in cases in which an expert witness examines a plaintiff for an attorney in a medical malpractice case. The doctor-patient relationship is implied unless there is an express disclaimer signed by the patient.

I will be glad to respond to any questions that you may have, Mr. Chairman and Congressmen.

[The prepared statement of Donald Patrick, M.D., J.D., follows:]

PREPARED STATEMENT OF DONALD PATRICK, EXECUTIVE DIRECTOR, TEXAS MEDICAL BOARD

EXECUTIVE SUMMARY

- The practice of medicine is the diagnosis, treatment or offer to treat a disease, disorder, deformity, or injury by any method by a person who either publicly professes to be a physician or who charges for the services.
- Diagnosis is the determination of the nature of a disease -- the art of distinguishing one disease from another
- A diagnosis is properly made after considering a patient's history, performing a physical examination, and reviewing imaging studies and other diagnostic tests.
- The determination of the nature of a disease by reviewing only an X-ray may be a medically incomplete diagnosis, but it is a diagnosis, nonetheless.

I am Dr. Donald Patrick, and as Executive Director of the Texas Medical Board, I represent the state agency that licenses and regulates Texas physicians. Currently, more than 55,000 physicians hold Texas licenses. We investigate complaints and the board takes disciplinary actions when appropriate. Last year, the Texas Medical Board took 304 disciplinary actions against licensed Texas physicians.

I would like to comment on several broad issues that are being considered by your committee. The first is the definition of the practice of medicine. The Texas Medical Practice Act defines the practice of medicine as the diagnosis, treatment, or offer to treat a disease, disorder, deformity, or injury by any method by a person who either publicly professes to be a physician or who charges for the services. [see §151.002(a)(13), Texas Occupations Code]

Diagnosing a disease is clearly within the definition of the practice of medicine. The Medical Practice Act requires anyone who practices medicine in Texas or on patients in Texas to be licensed by the Texas Medical Board.

This raises the second issue that I want to address: What constitutes a diagnosis? The commonly understood definition of diagnosis, as stated in medical dictionaries, is the determination of the nature of a disease and the art of distinguishing one disease from another [see Stedman's Medical Dictionary and Dorland's Illustrated Medical Dictionary]. I suggest that diagnosis is properly made after considering a patient's history, performing a physical examination, and reviewing imaging studies and other diagnostic tests.

The history may be either oral or written and physicians commonly use a form for past history and occupational history as a questionnaire completed by the patient or a trained office assistant. Ideally, the physician personally takes the present illnesses and review of systems history information. The delegation of this responsibility creates risks of error that every physician recognizes (or should recognize).

The physical examination may be complete or focused. For any lung ailment, a physical examination should include vital signs; observation of the patient's breathing; palpation of the chest wall for abnormal adventious rubs and symmetrical chest rising and falling; percussion to detect increased or decreased resonance; and listening to the heart and lungs for equality of volume and character of sounds, including râles, rhonchi, or wheezes.

The next step is to get a chest X-ray and pulmonary function tests, as indicated.

Based on all of this information, the physician arrives at a diagnosis. This is the proper procedure for making a diagnosis. It does not mean, however, that making a diagnosis with less than the history, physical examination, and imaging and diagnostic studies, if indicated, is not failing to make a diagnosis – it is just doing it improperly. The determination of the nature of a disease by reviewing only an X-ray may be a medically incomplete diagnosis, but it is a diagnosis, nonetheless.

Another issue raised in your committee's inquiry is the doctor-patient relationship. More specific to your inquiry is the question: What duty does a physician have to inform a patient of a diagnosis? We believe that a physician has a duty to inform patients of diagnoses reached by that physician unless there is a clear, signed release by the patient that explicitly states that the patient acknowledges there is no doctor-patient relationship. Such a release is common for "independent reviews" in workers' compensation cases. These releases are also common in cases in which an expert witness examines a plaintiff for an attorney in a medical malpractice case. The doctor-patient relationship is implied unless there is an express disclaimer signed by the patient.

I will be glad to try to respond to any questions you may have.

MR. WHITFIELD. Dr. Patrick, thank you very much, and I thank all of you for your testimony. I would like to ask this first series of questions to Mr. Goff and Mr. Ratliff to get your responses, please. To make sure I understand this correctly, there are a number of steps that have to be in place before legal X-rays can be taken in Mississippi and

Texas. First you have to have an X-ray machine that is properly registered or licensed. Is that correct?

MR. GOFF. That is correct.

MR. WHITFIELD. All right. Then you have to have a technician that is licensed to operate the machine. Is that correct?

MR. GOFF. That is correct.

MR. RATLIFF. Correct.

MR. WHITFIELD. Now, once you have those two things, an X-ray can be legally taken of a person in both States in only one of two ways. First, a medical practitioner who is licensed in your State can specifically and individually order the X-ray for a patient, so that is one way, correct?

MR. GOFF. Yes.

MR. WHITFIELD. All right. The second way is under this healing arts screening application and approval, then they can do it that way as well. Is that correct?

MR. GOFF. That is correct.

MR. RATLIFF. Yes. In Texas, like I said, it is really limited to just a few procedures.

MR. WHITFIELD. And in Texas, you have never had a healing arts application approved for silica?

MR. RATLIFF. No. In fact, we had one that come through that we actually denied because they would never submit physician qualifications and physician oversight documents.

MR. WHITFIELD. Now, what about in Mississippi? Have you had a healing arts process approved in Mississippi?

MR. GOFF. Yes, we have.

MR. WHITFIELD. And who submitted that application? Do you remember?

MR. GOFF. N&M I believe submitted one and--

MR. WHITFIELD. N&M, and did you approve that?

MR. GOFF. Yes, that was approved. Initially they were conducting it without one and they were later approved in January of 2003.

MR. WHITFIELD. Now, I would ask both of you, have either one of you administered a penalty for anyone conducting a screening without the proper license for screening arts?

MR. GOFF. No, we haven't. We don't have civil penalties in the State of Mississippi. We have criminal penalties. We have to prove willful violation.

MR. WHITFIELD. Okay. So you only have criminal penalties in Mississippi?

MR. GOFF. That is correct. We do have administrative penalties that we can have for cost of investigation and that sort of thing. We have the opportunity to deny or revoke a registration.

MR. WHITFIELD. Okay. But in Texas, you have civil penalties?

MR. RATLIFF. Yes, Congressman. We have civil and administrative. In one case, a company, U.S. X-ray from Chesapeake, Ohio, we ordered them to cease and desist operations when we found them operating and assessed a $10,000 administrative penalty, which they paid.

MR. WHITFIELD. Okay. Now, as we conducted our hearings, one of the things that we discovered, for example, RTS from Mobile, Alabama, wrote to our committee and they said specifically we were never told by anyone that an individual could not request their own X-ray; throughout our years of conducting business, we believed that an individual could request their own X-ray for silicosis screenings. Is that true in Mississippi? Can an individual request the X-ray?

MR. GOFF. The X-ray has to be conducted under a physician's order or either under a screening program authorized by a physician.

MR. WHITFIELD. Okay. And what about Texas?

MR. RATLIFF. Yes, Congressman, you have to have a physician prescription. In fact, we had a company, Respiratory Testing Services, if that is the same one, the one that applied for a registration for screening, which was denied and they were told up front that they could not do screening for silicosis. They had to have a process where a physician looked at each person and wrote a specific prescription.

MR. WHITFIELD. So it is a little surprising to me that companies who are involved in this business would think that these could be self-prescribed, and I take it you would agree with that?

MR. RATLIFF. I would agree.

MR. WHITFIELD. Now, on Tab 9, do you all have an exhibit book on your table there? If you all wouldn't mind looking at Tab 9 in your binder, and I just wanted to ask you this question. In Tab 9, there is a document which is signed by Dr. Jay Segara, M.D., who practices in Ocean Springs, Mississippi, and in that document, he writes a standing order for prescription for X-rays to be taken in Texas, Alabama, Louisiana, and Mississippi. I would ask both of you, is this type of blanket prescription allowed in either of your States?

MR. GOFF. No. In our regulations it says specifically individually ordered, and in my opinion, this would not be individually ordered.

MR. RATLIFF. And I agree. This appears that it is a blanket authorization and the technologist is actually writing the prescription, filling in the data, so it wouldn't be valid.

MR. WHITFIELD. Now, I would like to order that this exhibit book be placed into the record--I think you all have copies of it--since you are testifying from that. Okay. So blanket orders are not allowed either. So if there is a doctor's order, must there be a writing made or note taken of who the doctor is that is responsible for the X-ray such as in the instance

of a doctor in a large hospital who calls the X-ray department and says I am sending down a patient, take this type of X-ray. There is a note in the chart that reflects the ordering physician. Is that correct?

MR. RATLIFF. Yes, in Texas it is. In fact, the doctor can do a standing order for the technician to take the X-rays but there is an individual prescription for the X-ray.

MR. WHITFIELD. But those recordkeeping requirements are also applicable to mobile X-ray screening?

MR. GOFF. Our regulations don't specifically say that.

MR. WHITFIELD. Does not?

MR. GOFF. No.

MR. WHITFIELD. So it would be possible that they could do it the way Mr. Ratliff said they couldn't do it in Texas?

MR. GOFF. Which is? Clarify, please.

MR. WHITFIELD. Well, if a doctor just says I am sending down a patient, take this type of X-ray, he just makes a phone call down to the mobile unit and says this X-ray, is that allowable?

MR. GOFF. He should have some record where he wrote a specific order for that.

MR. WHITFIELD. Okay. All right. Now, Mr. Ratliff, I just want to just ask you a few questions about two companies with us here today: N&M Screening Company and RTS Screening Company. According to the information we have, N&M did 6,757 diagnoses in Texas and RTS, 1,444 diagnoses in Texas. First of all, I would like to ask you, has your State ever approved a healing arts screening application by N&M or RTS?

MR. RATLIFF. No.

MR. WHITFIELD. Okay. Now, if you would look at Tab 3 in your binder, and at Tab 3, did RTS ever have a license to operate an X-ray machine in the State of Texas?

MR. RATLIFF. They had a certificate of registration but it did not allow screening.

MR. WHITFIELD. They had a certificate of registration?

MR. RATLIFF. Right.

MR. WHITFIELD. Now, what does that mean?

MR. RATLIFF. That is equivalent to a license. In X-ray, we have registration and we license radioactive materials.

MR. WHITFIELD. But they never had a license?

MR. RATLIFF. Never had a license and their permit expired by failure to pay their fee this past year.

MR. WHITFIELD. Now, in Tab 3 around page 4, you do have to have a license a Texas doctor signed as a supervising physician on these applications as the one who would be responsible for it, correct?

MR. RATLIFF. Yes, Congressman.

MR. WHITFIELD. And on page 6 in Tab 3 in a fax, RTS leaves the impression in this fax to me to say that the supervising doctor will be Dr. Robert Altmeyer. Down toward the bottom of the page, it says--it is sort of difficult to read it but--well, first off on paragraph 11 of page 1, in the petition it says, "As a licensed practitioner, I do hereby affirm that I am associated with this applicant and provide supervision to non-practitioners administering radiation to human beings or animals" and of course no one signed that so there is no licensed physician, but on page 6 they appear to be saying that a Dr. Robert Altmeyer would be the one that would be responsible for these X-rays. It is my understanding from discussion with people in your office and others that Dr. Robert Altmeyer has never been licensed in the State of Texas. Do you know if that is true or not? Dr. Patrick.

DR. PATRICK. I am sorry. I wasn't asked to--but we can--

MR. WHITFIELD. Okay. Mr. Ratliff?

MR. RATLIFF. Didn't know and in fact we questioned that and then we never got a response and that is why the application then was denied.

MR. WHITFIELD. Okay. So you did question it and you never had a response so you denied it?

MR. RATLIFF. Right.

MR. WHITFIELD. Now, in your testimony, I believe you talked about five or six screening companies operating in Texas, actually taking X-rays, never had a license to do so. Is that correct?

MR. RATLIFF. Yes, Congressman.

MR. WHITFIELD. And would you be able to name those five or six that never had a license to operate in Texas?

MR. RATLIFF. Yes. The ones we have are RGL Medical Services from Park City, Utah, but they were found by our inspectors and issued a notice of violation and they left the State, and sent a letter acknowledging they were in violation. And then we had a Respiratory Testing Services, Mobile, Alabama, had applied. We never found them doing it but their registration was denied because they wouldn't provide the data. Then U.S. X-ray from Chesapeake, Ohio, was found multiple times doing X-ray. One inspector found them in one part of the State and the next day another inspector. They were issued a cease-and-desist order and then they paid a $10,000 penalty. And then N&M Testing from Moss Point, Mississippi, had their registration expire. We had an attorney from one of the law firms when our investigation was doing some investigations in Dallas sent us their brochure showing they were doing screening and the inspector never could catch them. They left the site.

MR. WHITFIELD. Well, I see my time has expired so Mr. Stupak, I will recognize you for your time.

MR. STUPAK. Thank you. Mr. Ratliff, if I may, if we can just go to Exhibit #3 that the chairman was asking you about and on page 1 there he indicated on part--this is Exhibit 3, page 1, number 11 was unsigned and then he goes to page 6 and mentions a Dr. Altmeyer. Because Dr. Altmeyer's signature appeared on that form, does that mean Dr. Altmeyer was in Texas practicing medicine?

MR. RATLIFF. No, our X-ray registration staff would have checked to see was he licensed to do business in Texas. Then when we did the inspection we would have verified that he was actually supervising. When we asked these questions, we never got a response.

MR. STUPAK. And he could have signed that in Mississippi or any other State?

MR. RATLIFF. He has to be a physician licensed in Texas.

MR. STUPAK. Sure, but he could be licensed in Michigan, Washington, D.C., he could still sign this form, right?

MR. RATLIFF. Yes, if he was licensed in Texas, yes.

MR. STUPAK. That violation comes in if a patient takes this form or an X-ray company takes this form and goes to Texas and then tries to take the X-ray, correct?

MR. RATLIFF. Yes, and what happened here, they never got a registration so they weren't authorized to do it anyway.

MR. STUPAK. Sure. Okay. Dr. Morgan, if I may, last September a Michael Mavis, the Executive Vice President and CEO of the American Medical Association, referred to the Mississippi State Board of Medical Licensure the names of Dr. Glyn Hilbun, Dr. Todd Coulter, and Dr. Kevin Cooper for investigation based on the findings of Judge Jack. Did the Board receive the AMA letter?

DR. MORGAN. Yes, they did.

MR. STUPAK. Has investigation or any action been taken based on that letter?

DR. MORGAN. A minimal investigation. As I mentioned earlier, the Board in Mississippi has been under the impression in the past that not only the State authorities but also Federal have asked us that when they have an ongoing criminal investigation, to hold off on our investigation until there is a result thereof. We thought there was going to be an investigation judging by Judge Jack's opinion and we were never told anything any different until Mr. Cooke came along and we got this information that apparently there is no Federal investigation. We thought there was one. So we have obviously stepped up our investigations. It is of interest to know perhaps that there has been a food-basket turnover in the Mississippi Board. We were approved for

seven investigators last summer. We had three which included the chief investigator and two investigators. I myself have been at the Board only six months now so I was not there during the September meeting. I can only go by what the record shows.

MR. STUPAK. So as far as we know, no investigation has been undertaken of these three individuals that--

DR. MORGAN. No, that is not true. An investigation is undergoing and--

MR. STUPAK. It is now undergoing?

DR. MORGAN. Is now undergoing. An investigation of some of these individuals has taken place already but not a full-fledged investigation. None of them have been called before the Board at this point.

MR. STUPAK. When you thought there was going to be other investigation, did your Board communicate to the AMA that you were going to defer your inquiry until these other investigations, State or Federal, were complete?

DR. MORGAN. I note that it is in our minutes that we were going to delay any in-depth investigation until the Federal investigation was completed, but now whether or not they communicated that to the AMA, I don't know.

MR. STUPAK. In your testimony, a statement by the Mississippi State Board of Medical Licensure that, and I quote now: "Any medical act that results in a written or documented medical opinion, order, or recommendation that potentially effects the subsequent diagnosis or treatment of a patient constitutes the practice of medicine." Would you consider a B reader diagnosing silicosis on the basis of an X-ray that as being the practice of medicine under this definition?

DR. MORGAN. Under that definition, yes.

MR. STUPAK. What if the B reader does not have any other relevant information such as occupational history and is under the impression that he is only confirming another doctor's diagnosis? Would such an activity accompanied by a statement such as, and I quote again, "This patient's X-ray shows symptoms consistent with a positive diagnosis of silicosis," would that constitute the practice of medicine in Mississippi?

DR. MORGAN. In my opinion, yes.

MR. STUPAK. The statement goes on to state that a physician who issues a medical opinion as defined above "assumes a doctor-patient relationship with the patient and is responsible for continuity of care of that patient" and that failure to do so would constitute "unprofessional conduct." In the event that a physician looked at hundreds of these X-rays and issued diagnosis without ensuring the continuity of care of these

patients, could this constitute instances--more than one obviously--of unprofessional conduct then?

DR. MORGAN. Obviously it is for my Board to make that decision. However, in my opinion, yes, definitely.

MR. STUPAK. Based upon the scenario I laid out, what action could your Board take?

DR. MORGAN. The only action that--we do not have any criminal authority--so all we can do is either suspend or revoke their license, or perhaps just bring them in for a reprimand if it was something less obvious.

MR. STUPAK. Sure. Now, in Texas you could take the license, right, if you found it would be--you could take their license plus you have criminal authority, Dr. Patrick?

DR. PATRICK. Yes, sir. If they were licensed in the State of Texas, then we would have jurisdiction over them and we could have a wide range of sanctions that we could take against them. Most likely what would be more than administrative penalty would be more serious than that, I would guess, but again, I am not the Board making that decision.

MR. STUPAK. If we go to--if you could take a look at, Dr. Patrick, number three, Exhibit #3 that the Chairman had pointed you, and let us say this is Dr. Altmeyer, which was Exhibit #3, page 6 where he signed his form, and let us say he was licensed in the State of Michigan and he gave this form to one of these X-ray technician companies or one of these X-rays companies and they came to Texas and took chest X-rays looking for silicosis. You would have no action against that doctor because he is licensed in Michigan. You can only take action if they are licensed or actually physically practice medicine in the State of Texas, right?

DR. PATRICK. It would just refer him to law enforcement but your assumption is right that we have no jurisdiction over him.

MR. STUPAK. Refer him to law enforcement in Michigan or in Texas then?

DR. PATRICK. In Texas.

MR. STUPAK. But if he never practiced or was never physically present in Texas or signed these forms in Texas, what would be the grounds of a criminal referral then?

DR. PATRICK. Well, without his signature on this document authorizing X-rays to be taken in Texas, those X-rays could not have been taken in Texas.

MR. STUPAK. But would your action be against the X-ray company that took the X-ray or would it be some doctor in Michigan who happened to sign a form that was then utilized in Texas?

DR. PATRICK. I admit that it has ramifications that I haven't thought through.

MR. STUPAK. Well, I am just trying to think this out here a little bit. That is all. Like I said, we have had three hearings on this and everyone is a little different so I am trying to tie it all together if I can. Would you say that most doctors who consider providing a diagnosis on an X-ray would consider that practicing medicine?

DR. PATRICK. Yes.

MR. STUPAK. Are you familiar with what we call B readers?

DR. PATRICK. Yes.

MR. STUPAK. Do you think B readers take that same advice or would reach that same conclusion?

DR. PATRICK. They are providing a diagnosis.

MR. STUPAK. You indicated that the Texas Medical Board took action I think on 300 and some cases.

DR. PATRICK. This last year, yes.

MR. STUPAK. Against Texas physicians. What were they? Were they for things like this or were they for much more serious things? I am not trying to get anyone's--I don't want any names or anything. I am just trying to get some understanding of the depth of the action that would be taken like in Texas.

DR. PATRICK. Wide range of actions all the way from not doing their continuing medical education, which would be an administrative thing, all the way up to multiple episodes of violation of standard of care and harming patients, in which we would revoke their license.

MR. STUPAK. How about criminal action? Any criminal action then?

DR. PATRICK. We have no criminal action capability but we would refer it--

MR. STUPAK. Refer it.

DR. PATRICK. --to the appropriate--

MR. STUPAK. Of these 300 and some, were some referred to law enforcement for further--

DR. PATRICK. Yes.

MR. STUPAK. Would you say that a company doctor evaluating an employee is subject to the same regulatory professional and ethical standard that the Board's policy specifies as a physician doing consulting work for a screening company?

DR. PATRICK. I think it depends on the facts, and I don't have enough fact from what you just said to me to come up with a conclusion. If he is seeing a patient for the purpose of a diagnosis, treatment, or an offer to treat, then it is clear under our statute that he is practicing medicine.

MR. STUPAK. The reason why I asked the question, some of these hearings we have had, we have had company doctors look at the medical evidence and say there is no silicosis here. Then you have these B readers or something and they say well, yes, there is. So I am trying to figure out how the ethics and the professional standards in the practice of medicine should be the same whether you are a company doctor or a B reader, right?

DR. PATRICK. Oh, I didn't understand your question.

MR. STUPAK. Maybe my explanation is better now. That is what I am trying to drive at.

DR. PATRICK. So we have someone who is operating for the defense, on the side of the defense in a silicosis-type tort litigation and he looks at the same X-ray and says there is no silicosis here, therefore making a diagnosis that there is not silicosis. I think that is a diagnosis that is not silicosis.

MR. STUPAK. But the same professional, legal, and ethical standards would apply to both those cases though?

DR. PATRICK. I have not run into that particular scenario and I can see where it has some subtleties to it but I also see where that is applying a form of a diagnosis. If you say yes or no, sometimes there is more leeway if you are saying no rather than making a diagnosis but if you say yes and make a diagnosis, then that clearly is silicosis. You say no, there is no silicosis, that is a diagnosis.

MR. STUPAK. I know my time is over, but if I say based upon the evidence I can't make a determination, that is not a diagnosis? That is not practicing medicine?

DR. PATRICK. Well, that is--

MR. STUPAK. You don't get yourself in a pickle.

DR. PATRICK. --borderline.

MR. STUPAK. Thanks. Thank you, Mr. Chairman.

MR. WHITFIELD. Thank you. At this time I recognize Mrs. Blackburn from Tennessee.

MRS. BLACKBURN. Thank you, Mr. Chairman, and I want to thank each of you for taking the time to be here and talk with us today.

As some of my colleagues have said and mentioned, this is not the first hearing that we have had on this and we are continuing to work through the issue. We do recognize, certainly recognize that if the licensure boards and the ethics committees were pursuing an aggressive approach to cracking down on the behavior that surfaced in Judge Jack's case that we would not be here having this hearing today and we would not be having this discussion, and since the situation is substantially impacting interstate commerce and if the State boards are not going to perform their oversight duties, then Congress may have to step in to

solve the problem through adoption of some Federal uniform diagnostic procedures so that leads us to trying to figure out exactly what the best course or the better course of action will be.

Dr. Morgan, I want to start with you for my questions, please, sir, and I am going to the letter, the May 30 letter that you sent to Chairman Whitfield, and on page 2 of that letter you go into talking about a Board policy and in this you are--and I am quoting from your letter: "It is the opinion of the Mississippi State Board of Medical Licensure that any medical act that results in a written or documented medical opinion, order, or recommendation that potentially effects a subsequent diagnosis or treatment of a patient constitutes the practice of medicine in this State." What I would like for you to do, if you will, please, sir, is to provide us with a definition of a medical opinion, of an order and then of a recommendation and how you separate these three.

DR. MORGAN. Well, starting with a medical order, it would simply be either a written order on a chart at a hospital or on a prescription pad requesting a chest X-ray, for instance. That would be the order. It is signed by the physician. In the case of a screening company, I think the Board will allow the screening company to do chest X-rays if a physician has taken the authority and the responsibility for that screening company's X-rays and readings, generally a radiologist. It would be assumed that that individual would be on site or be immediately available, readily available in case there was any problem, and would then be reading the X-rays. Now, the diagnosis would be depending on the language. If you have the language saying diagnosis silicosis, then obviously that is a diagnosis. If the reading says something along the lines of this chest X-ray is consistent with silicosis, that may be a different legal question, but if you say, as I think most of these did, a reasonable degree of medical certainty, I think was the wording they used, if they use that particular phrase then they are making a diagnosis that that is what that chest X-ray showed. And then from there the appropriate steps should have been that, number one, they should refer the patient to their treating physician, their family physician. They should probably have notified the Department of Health, which to my knowledge neither of these things took place. But that would be the proper thing unless of course the ordering physician was the family physician for that particular patient in which case he should undertake the treatment of whatever diagnosis he made.

MRS. BLACKBURN. Okay. So I heard you use the words "assume" and "assumption" a couple of times. It doesn't mean that--

DR. MORGAN. Yeah, I know what that means.

MRS. BLACKBURN. --the physician was present but I thank you for that. Okay. So then taking that as being your definition, the Board's

definition of medical opinion, order, or recommendation, then if a medical professional subjects an individual to an invasive or potentially dangerous medical procedure or procedures but lacks the knowledge about the patient's condition or does not have a medical opinion, order, or recommendation to conduct the procedure, do you think that that would violate medical ethics?

DR. MORGAN. That was rather complicated actually depending on which portion of that question. Could I have it in pieces, please, ma'am?

MRS. BLACKBURN. You can break it up however you want it.

DR. MORGAN. Well, I don't have it written down in front of me so I would have to ask you to repeat it.

MRS. BLACKBURN. All right. We will go at it again. If a medical professional subjects a patient, an individual to an invasive or potentially dangerous medical procedure or procedures, but lacks knowledge about the patient's condition, let us say you have got some acting on assumption, as you said, or does not have a medical opinion, order, or recommendation to conduct that procedure, then would that violate medical ethics?

DR. MORGAN. It would probably be considered malpractice.

MRS. BLACKBURN. Okay.

DR. MORGAN. It would for sure be, in my estimation, it would be unethical. But the second part of the question would be a different story because that individual could actually order the test himself if he was a physician licensed in Mississippi or whatever State where he was ordering or delivering the test so he could be licensed to do that but once he renders a diagnosis or subjects somebody to a potentially dangerous procedure, then it is expected that he know something about the patient, enough to be sure that he is being safe in his treatment of the patient.

MRS. BLACKBURN. All right. Dr. Patrick, I want to come to you if I may, please, sir. I know that you are also an attorney, and if a doctor knows that he or she will be giving a patient an incomplete medical diagnosis of a disease but could perform a simple, routine exam to confirm it and does not do so, are they guilty of medical malpractice in your opinion?

DR. PATRICK. Well, I think there probably is a presumption that activity could result in a malpractice action and probably a judgment against the physician, yes.

MRS. BLACKBURN. There are some great articles that have dealt with some of this and as we have dug into this issue, I have enjoyed reading a couple of things out of Academic Radiology and the Pepperdine Law Review and I am sure you are familiar with some of these, and they have stated that the use of just an X-ray for diagnosis

constitutes unreliable expert testimony since the diagnosis is inherently unreliable. Would you agree with that?

DR. PATRICK. There may be certain isolated situations where a particular X-ray finding could be so pathonomonic of that particular disease that nothing else could be it but right now I can't raise one up in my brain to give you an example of that.

MRS. BLACKBURN. Okay. You know, those articles that I mentioned, also they claim that the way these mass tort screenings are used like the ones in Judge Jack's case violate medical ethics and the model rules of professional conduct. Would you agree with that?

DR. PATRICK. I am sorry. Would you--

MRS. BLACKBURN. I am talking about the articles that I had referenced. They claim that the way the mass tort screenings are used like the ones in the case that we are here discussing today, that those actions violate medical ethics and the model rules of professional conduct and I am just asking if you would agree or disagree with that.

DR. PATRICK. There were many instances of professional conduct that I read in Judge Jack's opinion that appeared to mirror just exactly what you are saying.

MRS. BLACKBURN. Okay. Thank you. I yield back, Mr. Chairman.

MR. WHITFIELD. Thank you, Mrs. Blackburn. Mr. Pickering, you may recognize Mr. Goff and Dr. Morgan since you are from Mississippi but you are recognized for your question.

MR. PICKERING. Mr. Chairman, thank you. Dr. Morgan, Mr. Goff, welcome to Washington. I wish it was a different subject but I do appreciate you coming today. I just have a few questions so that I can-- as we understand right, appropriate, and ethical medical practices. But in this particular case in trying to determine whether a physician has a responsibility in a case where a screening company appears to have committed fraud, then the physician is not responsible for the medical care if there has been fraud in the underlying assignments are then in the documents that describe the physicals. My point is this: If we are looking at physician responsibility and a physician is assigned simply to do physicals, nothing else, but then later it appears that somehow those general physicals were then turned into some type of diagnosis or verification of silicosis without his knowledge, then that physician should not be responsible for the continuing care of a verification or of, in this case, a fraudulent case of silicosis assignment. I wish I had asked that more clearly and succinctly, but do you understand my question?

DR. MORGAN. Which one of us are you asking?

MR. PICKERING. Let me start with you, Dr. Morgan.

DR. MORGAN. I was afraid that is what you would say. It is a rather complicated situation. If the physician just does a history and physical and records that without any impression, without any diagnosis--

MR. PICKERING. Without any responsibility of--not being asked to give the diagnosis of silicosis, just being assigned the responsibility of a general physical.

DR. MORGAN. If he is asked to just do a history and a physical and report his findings without any diagnosis and he does not make any diagnosis, then I would not think that he would be responsible for continuation of care. I mean, we do this all the time for young people for athletic physicals at the schools and that sort of thing and we don't assume care for those people. We do a history and physical and generally without making a diagnosis. If something shows up, we sent that kid on to their family doctor. So that would be a situation where you do a physical and take a history but not be responsible for anything beyond just--past that point. If you find something, you send them to somebody who can take care of them.

MR. PICKERING. So whoever made the diagnosis would be responsible for the continuing care responsibility or whoever fraudulently doctored reports would be criminally responsible. Is that--

DR. MORGAN. In my opinion.

MR. PICKERING. In your opinion?

DR. MORGAN. I don't know how the Board would vote on that but in my opinion, that is correct.

MR. PICKERING. Thank you, Dr. Morgan. Dr. Goff, do you have anything else you would like to add?

MR. GOFF. No.

MR. PICKERING. Thank you. Mr. Chairman, that is all.

MR. WHITFIELD. Thank you, Mr. Pickering. At this time I will recognize I guess the only physician we have on our committee, Dr. Burgess of Texas.

MR. BURGESS. Thank you, Mr. Chairman. Thank you for holding this hearing. Can I ask unanimous consent that my opening statement be made part of the record?

MR. WHITFIELD. Without objection--

MR. BURGESS. Because it was a good opening statement and I hate it that I wasn't here to give it, and I do want to welcome Dr. Patrick and Mr. Ratliff to our hearing from my home State of Texas. Dr. Patrick, and for the benefit of the gentleman from Michigan, you have done a great job as head of the Texas State Board of Medical Examiners to put a lot of information up online and make it very transparent to Texas consumers and for that I thank you.

But in your oversight of thousands of doctors in Texas, how did this occur? Is this something that the Texas State Board of Medical Examiners should have picked up at some point along the line?

DR. PATRICK. Our statute assigns us to work on the basis of complaints. We are a complaint-based organization. If a complaint comes in, then we investigate it. If it does not, then we do not.

MR. BURGESS. I guess, Mr. Ratliff, a similar question to you. Do you think your regulatory agency in Texas did a good job as far as protecting patients from what appears to be a fairly predatory, if not a fraudulent practice?

MR. RATLIFF. I think so, because once we found each of these companies we either ordered them to cease and desist operations or on the one case we thought were possibly legal but if they were doing screening we said they had to stop and so we stopped the practice.

MR. BURGESS. Now, in Texas, would it fall to the Texas Department of Health--would someone have to report--I mean, a diagnosis of silicosis is fairly rare in and of itself even with all the dust we have out in west Texas so would someone be required to report that? Is that a reportable illness? The gentleman from Mississippi indicated it would be in his State. Is it in Texas?

MR. RATLIFF. Not that I know of because my group just does the radiation aspect of it, but we would regulate the companies who would do the X-rays to make the findings.

MR. BURGESS. Let me pick up on some stuff that the gentleman from Michigan was asking about the B reader rendering a diagnosis. Dr. Patrick, how is this different from someone rendering, say, a second opinion for an insurance company? If someone was to come to me saying my doctor has recommended a surgery, I am coming to you to see if you concur with that, would that establish a doctor-patient relationship between myself and that patient or was I simply there to say yes or no to the other doctor's diagnosis and then we both part company and go on about our business?

DR. PATRICK. At that point you typically give that patient your opinion about what you think should be done so you have established a doctor-patient relationship. You have done the history, the physical examination, seen the films, and you have given an opinion to the patient and then the patient can take your opinion and do what they wish with it. They may say well, if you think surgery shouldn't be done, I won't have it done; if you think it should be done, perhaps I will have it done by somebody else other than the person that sent it or whatever. So there are many ramifications of that relationship but typically your responsibility to that the patient is to tell them what your diagnosis is somewhere typically right away. That is normally what you would do.

MR. BURGESS. And is your concern with what we are dealing with here is that patients were not informed of their diagnoses?

DR. PATRICK. Right.

MR. BURGESS. Just along the same lines of the Texas Medical Practice Act and you referenced that someone would be in violation of that if they were from another State, does that same hold true to, say, a medical director? If I tell a patient they need surgery, in order to get that cleared by the insurance company I have got to dial 1-800 Minnesota, talk to a medical director, say she doesn't meet our criteria for that surgery, surgery is denied. Is that person practicing medicine outside of the--do they need a Texas license to be able to deny that surgery?

DR. PATRICK. That is our position.

MR. BURGESS. And do you enforce that?

DR. PATRICK. We are in the process of working through the rules on that but you can imagine the stakeholders that we have involved in that and the bloodletting in those discussions.

MR. BURGESS. I can't even begin to imagine. Well, that is interesting. I didn't realize that. The other question I would ask is, of course this all came to light--a Federal judge saying oh, my gosh, there is a virtual epidemic of silicosis cases in this country, it almost seems like a sand bomb must have been dropped somewhere. Why is it that a federal judge had to come to that conclusion and say whoa, wait a minute, this isn't right; we are seeing thousands of diagnoses that we never see under the normal circumstance. It seems to me that someone in the medical community should have caught that and that the medical community should have been on top of this. Am I just being too harsh on Texas doctors?

DR. PATRICK. Well, as I understand it, these--the X-rays were they come into a Texas doctor, they would come in in bulk to his office, who would look at them and give a diagnosis, send them back. If there was a screening unit that came in, my understanding is that it is a tractor-trailer, 18-wheeler with all the accoutrements of an X-ray machine and perhaps a doctor's office, they go to Wal-Mart. They don't go to the hospital. And why nobody saw that and reported that to us, I don't know, but we didn't get a whiff of it.

MR. BURGESS. Do you feel in general that would be a good way to deliver medical care, diagnostic or therapeutic?

DR. PATRICK. No, I don't.

MR. BURGESS. Are there other instances where that is happening in our State?

DR. PATRICK. There are, for example, other prescription medical devices such as Dopplers, sonograms. Those are two I can think of right now where they are screening in our State and we are in the process of

developing rules for that. Again, it is the same very complicated sort of interaction trying to come up with the right rules.

MR. BURGESS. Again, I just have to say, you have done such a great job of bringing the regulation of Texas medicine to the people and I just wonder if there is a place for some type of public services announcement or advertisement about this type of practice because I think you and I would agree, this is unusual, it is odd, it doesn't seem to lend itself to credible diagnosis and treatment, and you would have to ask yourself if the patients of Texas are being well served by that type of activity. I don't know, just a thought. The fact that this had to come to light by a Federal judge when it was happening under our noses collectively in Texas is to be distasteful and I am glad the judge caught it, but I would feel much better about this whole investigation if Texas doctors had taken the lead on this. I guess the only other question I want to ask is, if--you made reference to a batch of X-rays that might come to a physician. Now, if that physician is in another State, pick West Virginia, for example, and those X-rays have been taken all over the country, now, that doctor is still practicing medicine in West Virginia where presumably he or she is licensed so that is not a violation of any statute, is it, if they are asked to render an opinion on an X-ray that happens to have been taken at Fort Worth and then brought to their office in West Virginia to read?

DR. PATRICK. In Texas we have a telemedicine license that you have to apply for. It costs the same as a regular license and there is a whole list of qualifications and things that you can do, and if you do have a telemedicine license from another State, then you can review X-rays from Texas and render an opinion.

MR. BURGESS. In my mind, though, telemedicine implies a real time sort of event. This patient is in the office, they are having an X-ray made, that film then is digitally transferred to West Virginia and read, but if a law firm, for example, has a thousand patients that they want to pursue this multidistrict litigation, the X-rays have been taken all over the country and they take a packet of those X-rays up to a doctor in another State. Is that doctor prevented from reading those X-rays because they have not been taken in his home State?

DR. PATRICK. It is the rendering of an opinion to a Texas patient is the problem, as I see it.

MR. BURGESS. Well, I must say in this case, in our review of this case, I have never known radiologists to be a group of people who will take a definitive stand. Usually their reports are full of all types of subjective tenses and "might be" and "could relate." I have never known a radiologist to be so forthright and say this X-ray shows silicosis. Perhaps during my practice lifetime I wasn't blessed with radiologists

who are so self-assured. Well, I thank you for taking the trip all the way up here to Washington and being part of this panel today. I think you have been enormously helpful.

MR. WHITFIELD. Dr. Burgess, thank you very much. I would like to ask a couple of additional questions to Dr. Patrick. Dr. Patrick, on page 10 of the exhibit book on Tab 10, there is an asbestosis medical examination under the name of Robert Altmeyer, M.D., pulmonary medicine, and under the history--do you have it there?

DR. PATRICK. Yes, sir, I do.

MR. WHITFIELD. Under the history it says, "This patient is a male whom I examined in Texas on June 23, 2003, at the request of the law firm of--" so and so and so and so. And then on the under impressions on page 2, he says, "Based on the above data, it is my opinion with a reasonable degree of medical certainty that this man has simple silicosis." Now, if you look at that, I mean, that phrase "with a reasonable degree of medical certainty" would certainly appear to be a diagnosis if a physician said that, correct?

DR. PATRICK. Yes.

MR. WHITFIELD. And the fact that the person was examined in Texas, if you are not licensed in Texas, then that would be practicing without a license. Is that correct?

DR. PATRICK. This might fall under the periodic examination statutes that we have. I am looking for it. She is going to find that for me.

MR. WHITFIELD. Okay. Well, I will tell you, while we are waiting for her--

DR. PATRICK. It is an unusual little crack.

MR. WHITFIELD. You do have an exemption for a periodic?

DR. PATRICK. Yes.

MR. WHITFIELD. Okay. We can talk about that in a minute. Mr. Ratliff, in your testimony you specifically say that Respiratory Testing Services of Mobile, Alabama, that their request to obtain a license to operate in Texas was denied, primarily because they didn't have a verification that a physician would provide each individual with a prescription for an X-ray.

MR. RATLIFF. Yes.

MR. WHITFIELD. If you would look under Tab 13 in the same book, there is an invoice from Respiratory Testing Services dated June 23, 2003, which was just a few months after they made their application and this is an invoice to the law firm of Provost and Umphrey in Beaumont, Texas. In this invoice which is in the amount of $50,000, it gives three days in which they made X-rays in Tyler, Texas. Now, if they are doing

that without a license to operate, then that would be a violation of your rules and regulations. Is that correct?

MR. RATLIFF. Yes, and in fact, they were specifically told in writing they couldn't do any screening unless they made all these requirements so they were on notice by us.

MR. WHITFIELD. So would you have the authority to fine them based on this invoice showing that they were doing this in Texas on those days?

MR. RATLIFF. We would refer it to our general counsel but I think this would be something that they could look at, and if so, we could proceed.

MR. WHITFIELD. But they would have to be in Texas in order to be fined or do you have authority to--

MR. RATLIFF. Just in Texas. We have authority in Texas.

MR. WHITFIELD. Okay.

MR. RATLIFF. We denied their registration application so we didn't give them permission to do anything, so now there is no permission but I have to check with our attorneys just to see--I don't think we have any jurisdiction outside the State.

MR. WHITFIELD. But you have civil and criminal penalties?

MR. RATLIFF. Civil, criminal, yes.

MR. WHITFIELD. Okay. Thank you. Dr. Patrick?

DR. PATRICK. The episodic consultation is intended for a Texas physician like one who lives in Texarkana to take care of a patient in Arkansas. It is not intended for someone in another State to come into Texas. So I had episodic consultation on my brain but I had the facts reversed.

MR. WHITFIELD. Okay. So it would not apply in this situation?

DR. PATRICK. That is correct.

MR. WHITFIELD. Now, one other question, Dr. Morgan, I would like to ask you if I can find it here. This committee in investigating this had a number of encounters, I will say, with Dr. H. Todd Coulter of Ocean Springs, Mississippi. Are you aware of Dr. H. Todd Coulter of Ocean Springs, Mississippi?

DR. MORGAN. I know Dr. Coulter.

MR. WHITFIELD. Well, we wrote to medical boards in 21 States in March of this year about issues that we are discussing here today and while not all the States felt they could release all information they had about individual doctors and disciplinary matters, Dr. Coulter from Ocean Springs by far had the most extensive personal file that we have received, and after reviewing the documentation from your office files as best we could understand the files. It seems that Dr. Coulter was the subject of numerous complaints for professional misconduct between

1999 to 2005 including a DEA investigator in 1999 reported that Dr. Coulter was prescribing known drug abusers large quantities of controlled substances. In 2001, your agency and the MS Bureau of Narcotics visited Dr. Coulter's office investigating reports that patients were getting prescriptions filled at multiple pharmacies, several on the same day, and getting new prescriptions when they already had prescriptions. In 2002, the Board of Pharmacy was concerned that Dr. Coulter was writing notes on his prescriptions directing patients to specific pharmacies. In 2002, Ocean Springs Hospital reported that the hospital administration was concerned about Dr. Coulter prescribing OxyContin to a patient with a history for drug abuse and no real medical justification other than headaches, and I could go on and on but I guess my question is, is he subject to any disciplinary hearings at this time with your State licensure board?

DR. MORGAN. I am not sure how to answer that. I was told not to say anything about impending actions against any one of our physicians.

MR. WHITFIELD. Okay.

DR. MORGAN. I am not going to take the Fifth. I can tell you that you probably got that information probably from one of our files, which would suggest that he is under investigation at the present time, and your question is the same question--as I mentioned before, I have only been there for six months on the Board so your question is the same question that I asked our investigator and I can tell you that I was told by him that the investigation is underway.

MR. WHITFIELD. Well, you know he has been one of the physicians involved in contracts with these screening firms and so forth and I appreciate your remarks about that. Anyone else have anything? Well, in that case, I want to thank you very much for your testimony today. We genuinely appreciate your time coming up here and we thank you for your cooperation, and with that--yes, sir, Dr. Morgan?

DR. MORGAN. Could I ask one question, please, sir?

MR. WHITFIELD. Yes, sir.

DR. MORGAN. Well, actually two questions. Number one, will we be given a summary of what takes place on this committee so we will know what you all come up with? And the other question would be, I have not heard about--we will discipline those physicians who we can prove did something that they should not do. My question is, going back through history we see the history of asbestosis. Some of these patients were diagnosed as asbestosis and then again as silicosis. We see Phen-Phen and we see Propulcid and now some of the NSAIDs, the nonsteroidal anti-inflammatory drugs. It seems like the legal profession has gone crazy by continuously filing new suits where they involve admittedly what appear to be some bad doctors, and my question really

is, are we doing anything to investigate the attorneys and those who seem to be involved in these questionable suits?

MR. WHITFIELD. Well, I can tell you that this Committee on Oversight and Investigations has had representatives of some of the law firms with us. We are going to have another hearing in which we are just going to be dealing with them. As you know, there has been a lot of legislation, some of which has passed the House on tort reform and malpractice reform. As you also probably know, the Department of Justice is now filing charges against one of the largest class-action law firms in New York City and I think has indicted two of their main partners because they were allegedly paying money for people to sign on as plaintiffs in those class-action lawsuits, and as Mrs. Blackburn mentioned in her remarks, we are also looking at the possibility of whether or not there needs to be some Federal standard or not relating to mass medical screenings, and we do have a website that you could have access to that almost on a daily basis says what the committee is doing, but as you well know, it is a very complicated process and we are exploring all avenues to address this issue in every way that we can.

DR. MORGAN. Thank you.

MR. WHITFIELD. Thank you. The first panel is dismissed. Now, at this time I would like to call up the second panel, and on the second panel we have Heath Mason with N&M, Inc.; Dr. Glyn Hilbun from Moss Point, Mississippi; Charles Foster and Charlie Brooke Brazell with RTS, Inc. of Mobile, Alabama; Dr. Robert Altmeyer of Wheeling, West Virginia; Jeffery Guice with Occupational Diagnostics out of Ocean Springs, Mississippi; and Dr. Todd Coulter of Ocean Springs, Mississippi. Now, if everyone on that panel would come forward.

Before we proceed any further, I would like to note the absence of Health Mason of N&M, Inc. from Moss Point, Mississippi, and Dr. Todd Coulter from Ocean Springs, Mississippi. The committee had invited these two witnesses to testify today but both refused, citing other obligations. The committee did subsequently issue subpoenas to command their attendance and although both men are represented by counsel, with whom our staff has been speaking to at some length, neither Mr. Mason nor Dr. Coulter authorized their counsel to accept service of the subpoena. The U.S. Marshal Service has sought to make personal service on these two individuals but has been unsuccessful. Dr. Coulter's conduct unfortunately is not new to the committee. When this investigation began with a letter in August 2005, Dr. Coulter refused to speak with our staff, he hung up the phone on staff, and in one particularly remarkable exchange, said that the way things were done in Mississippi was through subpoenas. Accordingly, we tried to accommodate him with a subpoena for his records on November 3, 2005,

and served him with a subpoena through the U.S. Marshal Service. Nevertheless, when staff contacted Dr. Coulter on November 21, 2005, about his overdue response to the subpoena, he responded that he did not even look at it. Ultimately the committee received a one-page response from Dr. Coulter stating that he had no records for the almost 237 people that he diagnosed with silicosis. We also issued a subpoena for Dr. Coulter's attendance here today, but as I noted, his attorney was not authorized to accept service on his behalf. Dr. Coulter has truly distinguished himself before the committee in his disregard for the legal process and I would like to state that we do intend to continue our pursuit of Dr. Coulter and we do intend to have him testify before this committee at some point in time.

Now, with that, I want to thank all of you for being here today to assist us in this investigation. At this time I would like to call all of you before the Chair and you recognize that we are holding an investigatory hearing and when doing so it is the practice of this committee to take testimony under oath. Do any of you have any difficulty testifying under oath today? Okay. The Chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by legal counsel. Do any of you desire to be advised by counsel during your testimony today? Mr. Guice?

MR. GUICE. Yes.

MR. WHITFIELD. And who is your legal counsel?

MR. GUICE. Mark Shamwell.

MR. WHITFIELD. Mark Shamwell. Okay. Thank you. And Mr. Foster?

MR. FOSTER. Don Foster.

MR. WHITFIELD. Don Foster? Okay. So Don Foster will be legal counsel for Mr. Foster. Anyone else here wanting to have legal counsel today? Okay.

[Witnesses sworn]

MR. WHITFIELD. Thanks very much. You are now under oath, and Dr. Hilbun, I will recognize you for your 5 minute opening statement.

STATEMENTS OF GLYN HILBUN, M.D.; CHARLES E. FOSTER, RTS, INC.; CHARLIE BROOKE BRAZELL, RTS, INC.; JEFFERY GUICE, d/b/a OCCUPATIONAL DIAGNOSTICS; AND ROBERT ALTMEYER, M.D.

DR. HILBUN. Good afternoon, Chairman Whitfield, and members of the committee. My name is Dr. Glyn R. Hilbun. I have been a practicing physician for the past 40 years on the Mississippi Gulf Coast.

Before I begin my formal remarks, I would like to make a brief comment regarding the recent disaster on the Gulf Coast. As a resident of Jackson County, Mississippi, who sustained major property damage from Hurricane Katrina, I would like to thank the members of the Energy and Commerce Committee for their efforts on behalf of everyone from the Gulf Coast. We have begun a long process of rebuilding and will continue to need support of Congress. We will build back better than before.

Now I would like to make a brief statement regarding the matter before this committee. Approximately 4 years ago I was hired by N&M Incorporated to do physical examinations on patients that were suspected of testing positive for silicosis. I traveled to Columbus, Mississippi, to a location designated by the testing company where I spent approximately 5 days performing these examinations. I performed a short physical examination and signed the forms that were provided by the company. I never gave an opinion nor rendered a diagnosis on any of these patients. I saw no pulmonary function studies, no X-ray reports. I only performed a physical examination and signed each form and immediately returned to my private practice in general surgery. I was compensated $5,000 per day plus lodging. Approximately one month later I was in surgery when my office manager called stating that someone from N&M, Incorporated wanted the typed physical examinations that I had previously performed to be re-signed. My response was that my office manager stamped them, that I had previously signed them. I assumed they had retyped the original ones I had signed. To my dismay, someone had typed in three sentences without my knowledge which indicated that I had made the diagnosis of silicosis. This was brought to my attention after being asked to give a deposition in this matter. The original forms that I had signed had no such wording and I testified to this in my deposition.

In conclusion, I want to state to this committee that in my 40 years of practice, I have never made a diagnosis of silicosis, never tested anyone for silicosis, and I never owned or had access to any equipment used in testing of silicosis.

Thank you, and I would be happy to answer any of your questions.

[The prepared statement of Glyn Hilbun, M.D. follows:]

PREPARED STATEMENT OF GLYN HILBUN, M.D.

Good afternoon Chairman Whitfield, and members of the Committee. My name is Glyn R. Hilbun, M.D. I have been a practicing physician for the past forty years on the Mississippi Gulf Coast. Before I begin my formal remarks, I would like to make a brief comment regarding the recent disaster on the Gulf Coast. As a resident of Jackson County, Mississippi, who sustained major property damages from Hurricane Katrina, I want to thank the Members of the Energy and Commerce Committee for their efforts on

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Approximately one month later, I was in surgery when my office manager called stating that someone from N&M Incorporated wanted the "typed" physical exams that I had previously performed to be resigned. My response was for my office manager to stamp them as I had previously signed them. I assumed that they had retyped the originals. To my dismay, someone had typed in three sentences without my knowledge which indicated that I had made the diagnosis of silicosis. This was first brought to my attention after being asked to give a deposition in this matter. The original forms that I had signed had no such wording and I testified to this in my deposition.

In conclusion, I want to state to this Committee that in my forty years of practice, I have never made a diagnosis of silicosis, never tested anybody for silicosis, and have never owned or had access to any equipment used in testing of silicosis.

Thank you and I will be happy to answer any questions that you may have.

MR. WHITFIELD. Thank you, Dr. Hilbun. Mr. Foster, do you have an opening statement?

MR. FOSTER. No, sir.

MR. WHITFIELD. Ms. Brazell, do you have an opening statement?

MS. BRAZELL. Hello. I am Charlie Brook Brazell. On behalf of myself, I would like to thank you for allowing me the opportunity to address your issues of concern today.

I have worked in the capacity of road manager since the latter part of 2002 at Respiratory Testing Services and have enjoyed that position while meeting the backbone of America. I am not nor have I ever been in a position of ownership with regards to RTS but I do believe, however, that RTS has offered a valuable service to a people who would have otherwise never received its type of service. We rest assured knowing that RTS has always been topnotch with regards to its employees and procedures. RTS has always had highly qualified and certified doctors which can be verified by the resumes that have been submitted. With regards to the technicians for X-ray and PFT, they are properly certified as well.

I firmly believe that RTS has always been above the standard with regards to the screening industry. I feel that we certainly measure exceptionally well next to other screening companies.

Again, I appreciate the chance of allowing me to address your concerns.

MR. WHITFIELD. Thank you, Ms. Brazell. Mr. Guice, do you have an opening statement?

MR. GUICE. I have no statement.

MR. WHITFIELD. Dr. Altmeyer?

DR. ALTMEYER. Yes, sir.

MR. WHITFIELD. You are recognized.

DR. ALTMEYER. Mr. Chairman and members of the committee, my name is Robert Altmeyer. I am a pulmonologist from West Virginia. I have been invited by you to appear here today.

By way of introduction, I have been practicing pulmonary medicine in West Virginia for 25 years. I am certified by the American Board of Internal Medicine in internal medicine and pulmonary medicine and I am certified by the National Institute for Occupational Safety and Health as a B reader. My practice is limited to pulmonary medicine. On a daily basis I see patients in local hospitals and in my office with occupation-related and non-occupation-related lung diseases. I am currently the only lung specialist in my area in West Virginia who sees patients for free if they have no insurance or other method of payment. For the past several years I have been listed in "Best Doctors" in the United States as outlined on my CV. For the past 25 years I have also been involved in the medicolegal aspects of occupationally related lung disease. I have served as a consultant both for plaintiff attorneys and for defense attorneys. The vast majority of my time, however, is spent in the active practice of clinical pulmonary medicine in West Virginia.

I would now like to comment on the steps necessary to make a diagnosis of silicosis. First and most important is the fact that a diagnosis of silicosis cannot be made on the basis of a chest X-ray alone. In my 25 years of practice in pulmonary medicine, to my knowledge I have not diagnosed silicosis on the basis of a chest X-ray alone. The diagnosis of silicosis requires knowledge of silica dust exposure coupled with a physical examination and a medical history that excludes other more likely causes of the densities on the X-rays. Infectious diseases, cancer, sarcoidosis, and many other illnesses can mimic silicosis on an X-ray. A chest X-ray consistent with silicosis is not a partial diagnosis but rather one of the components that when combined with an appropriate history and physical leads to an actual diagnosis of silicosis.

According to NIOSH protocol, if a chest X-ray shows sufficient changes to be consistent with occupational pneumoconiosis, then on the B reading report form, box 2A is checked. This box does not indicate that the findings are diagnostic of pneumoconiosis but rather are consistent with pneumoconiosis. This is an important distinction. Apparently there may be some confusion regarding this point among some attorneys.

I would now like to outline my connection with the Federal Silica MDL in Corpus Christi, Texas. In about the year 2002, I was requested by a law firm to review chest X-rays as a B reader. I reviewed these X-rays, approximately 250 of them, in my office over an approximately 4-month period of time in West Virginia. I felt that of the approximately 250, that 50 were consistent with silicosis. Of these, approximately 35 were in the Texas MDL. I did not make diagnoses of silicosis. My office staff can find only B readings on these individuals and not examinations. However, for a number of these B readings, apparently I was listed as the silicosis diagnosing physician. This is not correct. In my reports I clearly stated that the X-rays were consistent with silicosis. I know of no complete examinations with diagnoses of silicosis that I authored in this MDL. However, we were unable to find two charts so there is some slight hesitation. We just can't find two of them.

I was not requested to appear in any hearings in the Texas Silica MDL. I was not asked to appear at the Daubert hearings before Judge Jack. In her order she stated, "The diagnoses and underlying methodology of Dr. Altmeyer and Dr. Levine are not discussed in this Order. By agreement of the parties (because of the relatively small number of diagnoses Dr. Altmeyer and Dr. Levine issued), neither doctor testified at the Daubert hearings/Court depositions." Again, to the best of my knowledge I only performed B readings and did not make diagnoses of silicosis on any of the individuals in the MDL. I was not criticized by Judge Jack and I believe I have not engaged in any of the activities like the ones that she was critical of in her order.

Over the years when performing a B reading, if I saw anything potentially dangerous to a patient such as masses or nodules, this was noted very clearly on my narrative report of the B reading and also on the B reading form in the comment section. My office staff would contact the law firm or ordering physician by phone to let them know of the abnormality so that the individual could have follow-up in a timely fashion. This protocol provided a triple check to ensure that the person had appropriate follow-up by his treating physician.

I have been involved in on-site screening for silicosis. When present at screenings and if I felt a chest X-ray was consistent with silicosis, then I would examine the patient. The examination consisted of confirming the occupational and medical history. I would accomplish this by actually dictating the patient's report on a small tape recorder in the patient's presence at the time of the exam so that he or she could make any additions, corrections, or deletions. This methodology was to obtain the most accurate information possible. Then a physical examination directed at the cardiopulmonary system was done. This included auscultation, or listening to the lungs, inspection of the chest, percussion

of the chest, listening to the heart, looking for clubbing and cyanosis of the fingers, looking for supraclavicular adenopathy, or lymph nodes above the breast bones, and checking for edema as well as a general inspection of the patient.

Therefore, the individual would know precisely what was in his report. If there was any concern about a nodule, for example, on the X-ray, I would show this to the patient myself. It was my practice not only to tell the patient of any significant abnormalities but also to give written notification to the patient at that time. Often after the dictation, the individual would ask me about his report and I would answer fully. My concern is and always has been to make sure that the individual understands the results of his testing so that he can have follow-up by his own doctor. Whenever I made a diagnosis of significant lung disease, I informed the individual and advised follow-up by the personal treating physician. It has been my understanding that without making specific recommendations regarding treatment or prescribing medications that a doctor-patient relationship was not established by this procedure and I was acting more as a consultant, not a treating physician. Nonetheless, I have always strove to protect the patient's health in these screenings. I believe that my B readings are accurate as are any of the diagnoses which I have made. Because of my understanding of a lack of doctor-patient relationship, I believe that I was able to perform examinations in States in which I didn't have a license. It subsequently several years ago came to my attention that this was probably not accurate. As soon as I realized that there was any potential problem with performing these examinations in a State in which I did not have a license, I stopped doing them.

Thank you.

[The prepared statement of Robert Altmeyer, M.D. follows:]

PREPARED STATEMENT OF ROBERT ALTMEYER, M.D.

My name is Robert Altmeyer. I am a pulmonologist from West Virginia. I have been invited by the chairman, Mr. Whitfield to appear here today. By way of introduction, I have been practicing pulmonary medicine in West Virginia for the past 25 years. I am certified by the American Board of Internal Medicine in Internal Medicine and Pulmonary Medicine and am certified by the National Institute for Occupational Safety and Health as a B Reader. My practice is limited to pulmonary medicine. On a daily basis, I see patients in local hospitals and in my office with occupationally related and non-occupationally related lung diseases. I am currently the only lung specialist in my area in West Virginia who sees patients for free if they have no insurance or other method of payment. For the past several years I had been listed in "Best Doctors" in the United States, as outlined on my curriculum vitae.

Over the past 25 years I have been also involved in the medico legal aspects of occupationally related lung disease. I have served as a consultant both for plaintiff

attorneys and for defense attorneys. The vast majority of my time, however, is spent in the active practice of clinical pulmonary medicine in West Virginia.

I would now like to comment on the steps necessary to make a diagnosis of silicosis. First and most important is the fact that a diagnosis of silicosis cannot be made on the basis of a chest x-ray alone. In my twenty five years of practicing Pulmonary Medicine, to my knowledge, I have not diagnosed silicosis on the basis of a chest x-ray alone. The diagnosis of silicosis requires knowledge of silica dust exposure, coupled with a physical examination and medical history that excludes other more likely causes of the densities found by chest x-ray. Infectious diseases, cancer, sarcoidosis, drugs and other factors can mimic silicosis on a chest x-ray. A chest x-ray consistent with silicosis is not a partial diagnosis, but rather one of the components, that when combined with an appropriate history and physical, leads to an actual diagnosis of silicosis.

According to NIOSH protocol, if a chest x-ray shows sufficient changes to be consistent with occupational pneumoconiosis, then box 2A is checked. This box does not indicate that the findings are diagnostic of pneumoconiosis but rather are consistent with pneumoconiosis. This is an important distinction. Apparently there may be some confusion regarding this point among some attorneys. However, if they are sophisticated enough to request a B reading, it is my opinion they should be aware of this fact.

I now would like to outline my connection with the Federal Silica MDL in Corpus Christi, Texas. I was requested by a law firm to review chest x-rays as a B reader. Of several hundred chest x-rays, I felt that approximately 50 were consistent with silicosis. Of these, approximately 35 were in this MDL. I did not make diagnoses of silicosis. My office staff can find only B readings on these individuals and not examinations. However, for a number of these B Readings, apparently I was listed as the silicosis diagnosing physician. This is not correct. In my reports, I clearly stated that the x-ray was consistent with silicosis. I know of no complete examinations with diagnoses of silicosis, that I authored, in this MDL. However, there are two records we cannot locate.

I was not requested to appear in any hearings in the Texas Silica MDL. I was not asked to appear at the Daubert hearings before Judge Jack. In her order she stated that "The diagnoses and and underlying methodology of Dr. Altmeyer and Dr. Levine are not discussed in this Order. By agreement of the parties (because of the relatively small number of diagnoses Dr. Altmeyer and Dr. Levine issued), neither doctor testified at the Daubert hearings/Court depositions." Again, I would point out that I performed B readings and did not make silicosis diagnoses, to my knowledge, on any of these individuals in the MDL. I was not criticized by Judge Jack and I have not engaged in any activities like the ones described by Judge Jack.

Over the years, when performing a B Reading, if I saw anything potentially dangerous to the patient such as masses or nodules, this was noted very clearly on my narrative report of the B reading and also in the " comment " section of the actual B Reading form.. My office would contact the law firm or ordering entity telephonically to let them know of the abnormality so that the individual could have follow-up in a timely fashion. This protocol provided a triple check to ensure that the person had appropriate follow up by his treating physician.

I have been involved in on-site screening for silicosis. When present at screenings, and if I felt that a chest x-ray was consistent with silicosis, then I would examine the person. This examination consisted of confirming the occupational and medical history. I would accomplish this by dictating the individual's report in his or her presence so that he or she could make any additions, corrections or deletions. This methodology was to obtain the most accurate information possible. Then a physical examination directed at the cardiopulmonary system was done. This included auscultation or listening to the lungs, inspection of the chest, percussion of the chest, auscultation the heart, inspection for clubbing and cyanosis of the digits, checking for supraclavicular adenopathy (lymph

nodes above the collar bones), checking for peripheral edema (swelling of the legs) and a general assessment by inspection of the person.

Therefore, the individual would know precisely what was in his report. If there was any concern about a nodule, for example, on the x-ray, I would show this to him. It was my practice not only to tell the person of any significant abnormalities, but also to give a written notification to the patient. Often, after the dictation, the individual would ask me questions about his report, which I would answer fully. My concern is and always has been to make sure that the individual understands the results of his testing so that he can have follow-up by his personal physician. Whenever I made a diagnosis of any significant lung disease, I informed the individual and advised followup by the personal treating physician. It has been my understanding that without making specific recommendations regarding treatment or prescribing medications, that a doctor-patient relationship was not established by this procedure and that, I was acting more as as a consultant and not a treating physician. Nonetheless, I have always strove to protect the patients' health in these screenings. I believe my B Readings are accurate as are any diagnoses which I have made. I would be glad to answer any questions you have.

Robert B. Altmeyer, M.D.

MR. WHITFIELD. Thank you, Dr. Altmeyer. Mr. Foster, you are the owner and operator of Respiratory Testing Services, Inc., RTS as we have referred to it today. Can you tell me with certainty that your company in each of the States where it conducted screenings complied with applicable Federal, State, and local law and regulation concerning the administration of diagnostic tests such as X-rays?

MR. FOSTER. With all due respect, sir, to this honorable subcommittee, on the advice of counsel I decline to answer the questions and assert my Fifth Amendment privileges against self-incrimination.

MR. WHITFIELD. Now, Mr. Foster, are you refusing to answer all of our questions based on the right against self-incrimination offered to you under the Fifth Amendment of the U.S. Constitution?

MR. FOSTER. Yes, sir.

MR. WHITFIELD. And it is your intention to assert this right in response to every further question that we might have today?

MR. FOSTER. Yes, sir.

MR. WHITFIELD. Well, given that, if there are no further questions from the members, I will dismiss you at this time subject to the right of the Chair to recall you and remind you that you remain under the subpoena, so at this time you are excused.

MR. FOSTER. Thank you, sir.

MR. WHITFIELD. Mr. Guice, as the owner and operator of Occupational Diagnostics, Inc., can you tell me with certainty that your company in each of the States where it conducted screenings complied with applicable Federal, State, and local law and regulation concerning the administration of diagnostic tests such as X-rays?

MR. GUICE. On the advice of counsel, I invoke my Fifth Amendment privilege against self-incrimination.

MR. WHITFIELD. So you are refusing to answer all of our questions based on this right against self-incrimination afforded to you under the Fifth Amendment of the U.S. Constitution?

MR. GUICE. Yes.

MR. WHITFIELD. And it is your intention to assert that right for any questions we may have today?

MR. GUICE. Yes.

MR. WHITFIELD. Given that, if there are no further questions from the committee, I will dismiss you at this time subject to the right of recall by the Chair and remind that you remain under our subpoena subject to the subpoena, and at this time you are excused.

MR. GUICE. Thank you.

MR. WHITFIELD. Now, Ms. Brazell--is it Brazell?

MS. BRAZELL. Yes, sir, it is Brazell.

MR. WHITFIELD. What is your title at RTS?

MS. BRAZELL. I was road manager.

MR. WHITFIELD. Road manager?

MS. BRAZELL. Yes, sir.

MR. WHITFIELD. And what is your position today?

MS. BRAZELL. Well, RTS is no longer really in business.

MR. WHITFIELD. Oh, you are no longer in business?

MS. BRAZELL. We are not conducting business.

MR. WHITFIELD. When did you go out of business?

MS. BRAZELL. It would be 2005.

MR. WHITFIELD. Were you with them at that time?

MS. BRAZELL. Yes, sir.

MR. WHITFIELD. Now, at that time you were contracting with law firms to do screenings and provide names to the law firm of those who had positive screenings. Is that correct?

MS. BRAZELL. I am sorry. Can you say that again?

MR. WHITFIELD. I said, it was your contract with law firms or agreement with law firms that you would do screenings and provide names to the law firms of those people who had positive readings for silicosis?

MS. BRAZELL. Yes.

MR. WHITFIELD. Is that correct?

MS. BRAZELL. That is correct, sir.

MR. WHITFIELD. And how many doctors were hired by your firm to help with this project?

MS. BRAZELL. I can't answer that accurately. There were several.

MR. WHITFIELD. Was Dr. Altmeyer one of your physicians?

MS. BRAZELL. Yes, sir.

MR. WHITFIELD. Okay. And when you hired these physicians, what did you ask them to do?

MS. BRAZELL. I did not hire the physicians.

MR. WHITFIELD. Well, what was your understanding as to why they were hired?

MS. BRAZELL. To read X-rays.

MR. WHITFIELD. And to--

MS. BRAZELL. See the patient if needed.

MR. WHITFIELD. Did you expect them to give diagnoses?

MS. BRAZELL. Yes, sir.

MR. WHITFIELD. And so when they were retained, that was understood. Is that correct?

MS. BRAZELL. Yes, sir.

MR. WHITFIELD. Now, Dr. Altmeyer, you have indicated in your testimony that that was not your understanding, that you were simply a B reader. Is that true?

DR. ALTMEYER. No, at times I would read X-rays as a B reader. I was on site at some silicosis readings in which if the X-ray was consistent with silicosis, then RTS would perform a pulmonary function test, a chest X-ray. I mean perform pulmonary function studies and then I would examine the patient and perform a history, a physical examination, interpretation of the pulmonary function test and a B reading and issue a report. If the X-ray was negative in terms that it was not consistent with silicosis, then that would be it. It would just be the end of my report.

MR. WHITFIELD. So in some instances you were diagnosing silicosis and in other instances you were not?

DR. ALTMEYER. That is correct.

MR. WHITFIELD. Now, you may have heard earlier when I was discussing with the first panel that you were in Texas on behalf of RTS examining patients in the State of Texas on June 23, 24, and 25 of 2003. Were you licensed to practice medicine in Texas?

DR. ALTMEYER. No, sir.

MR. WHITFIELD. And did you consider what you were doing there on those three days to be the practice of medicine?

DR. ALTMEYER. I didn't feel that it was the practice of medicine. The reason in my thinking was at that point in time was I didn't believe that there was a doctor-patient relationship and I couldn't understand how you could be practicing medicine without a doctor-patient relationship. Now, maybe I would think different of that now because now I know more than I did then at that point in time. When I learned that this may be the practice of medicine, I stopped it.

MR. WHITFIELD. So what you were actually doing in Texas? I mean, were you examining these patients? Were you taking medical histories?

DR. ALTMEYER. What I would do, if the X-ray was consistent with pneumoconiosis, then a pulmonary function test was performed and then I would do a history and physical examination on the patient and combine that with the chest X-ray and the pulmonary function test into a report.

MR. WHITFIELD. And you would submit that report to RTS?

DR. ALTMEYER. Yes.

MR. WHITFIELD. And in that report did you have some diagnosis?

DR. ALTMEYER. Yes. If the X-ray was negative, then my report would say not consistent with pneumoconiosis. If the X-ray was positive--or consistent with and that led to the performance of a history and physical examination and after that history and physical examination I believed that the densities on the X-rays were due to silicosis or asbestosis, then I would so state.

MR. WHITFIELD. Well, you know, in the forms that you submitted to RTS, it does use the phrase "with reasonable medical certainty I do believe that this patient has silicosis" and at least Dr. Morgan and Dr. Patrick, as head of the medical licensure in Mississippi and Texas, both stated, that if you are using those terms, that that is a diagnosis and that certainly is the practice of medicine.

DR. ALTMEYER. I know that now.

MR. WHITFIELD. Well, Dr. Hilbun, in your testimony you had indicated that you frequently were quite busy and that they would call and ask for these reports and that you had examined many, many patients but that you were not aware that you were making a diagnosis of any of those patients. Is that correct?

DR. HILBUN. I never made a diagnosis of silicosis.

MR. WHITFIELD. So that was never your intent to do that?

DR. HILBUN. No, I was just hired to do a physical. I never expressed any opinion.

MR. WHITFIELD. All right. And you were hired by N&M Screening Company?

DR. HILBUN. Yes, sir.

MR. WHITFIELD. And is that Mr. Heath, is he the President of that group, or do you know?

DR. HILBUN. It was Mason.

MR. WHITFIELD. Yex, Heath Mason.

DR. HILBUN. I don't know if he was the President or not but he was one of them.

MR. WHITFIELD. He is the one that you worked with. But if you look at Tab 7, this is a form with your name on it and it talks about--we have redacted information, the names of the patients and so forth--but in the summary it says, "On the basis of this client's history of occupational exposure to silica and a B reading of the client's chest X-rays, then within a reasonable degree of medical certainty, this person has silicosis," and it has your signature on the bottom, but your position is that you did not understand that that was there or maybe you didn't sign this or what happened?

DR. HILBUN. That is correct. Those three sentences are not even in my vocabulary. I have never heard of them. I hand-signed the physical examination. These are stamped, which is my stamp, and I didn't read it, but I did not place those three sentences in there and then sign it.

MR. WHITFIELD. So Ms. Brazell, I don't think Dr. Hilbun worked with you all but did you as a matter of practice change these documents submitted to you by the physicians?

MS. BRAZELL. Absolutely not.

MR. WHITFIELD. I see my time has expired. Mr. Stupak.

DR. ALTMEYER. Mr. Whitfield, I just want to maybe correct something that didn't--to clarify it. I made diagnoses of silicosis in some cases but to my knowledge, not in this specific MDL.

MR. WHITFIELD. Okay. Thank you.

MR. STUPAK. Dr. Hilbun, let us pick up where the Chairman left off on Exhibit 7. You are saying the last three lines there--do you have that book there? You have a book there. You can take a look at Exhibit #7.

DR. HILBUN. This one?

MR. STUPAK. Yes. Go to #7 there, Exhibit 7. So those last three lines where it says "summary," you are saying that is not your statement?

DR. HILBUN. No, sir. That is not my statement.

MR. STUPAK. How about the rest of the stuff on the form? Is that your statement? Like the history there that the individual smoked one or two cigars--

DR. HILBUN. Most of the history was already on the little form I had when I signed it.

MR. STUPAK. Okay.

DR. HILBUN. You know, I was presented with that.

MR. STUPAK. But that is your signature on the bottom?

DR. HILBUN. Right. That is a stamped signature, yes, sir.

MR. STUPAK. So you didn't sign it?

DR. HILBUN. No, sir.

MR. STUPAK. You stamped it?

DR. HILBUN. Stamped it.

MR. STUPAK. Before you stamped, was there anything under "summary"?

DR. HILBUN. There was no such wording as "summary" on the original physical that I signed.

MR. STUPAK. So where would this form stop then? After X-ray?

DR. HILBUN. Sir?

MR. STUPAK. Well, where would the form stop before you put your stamp on there? Under X-ray?

DR. HILBUN. Right. No, I didn't even do the X-ray. I don't even know a thing about X-ray.

MR. STUPAK. What did you stamp then with your stamp?

DR. HILBUN. It says, "Breath sounds normal, no ankle edema, clubbing, yes, cyanosis, no, cancer"--that is a history--"enlarged heart, no." That's the physical examination.

MR. STUPAK. Okay.

DR. HILBUN. That is what I signed.

MR. STUPAK. So all you did was--so you only signed a form that just had examination on it? It didn't have X-ray on it, didn't have the summary on it?

DR. HILBUN. I never saw an X-ray. I couldn't put down X-ray. No, I didn't see one.

MR. STUPAK. Okay. But did the report that you stamped have X-ray on it? The report that you stamped, did it have summary on it?

DR. HILBUN. No.

MR. STUPAK. How did this stuff magically appear then? Any idea? I mean, it is all lined up pretty good. I mean, everything seems pretty consistent there.

DR. HILBUN. All I can say is, this is not the form that I originally signed when I did the physical.

MR. STUPAK. Okay. You said you gave no medical opinion, you just examined, right?

DR. HILBUN. Right.

MR. STUPAK. What was the purpose of the exam?

DR. HILBUN. I was hired to do a physical examination.

MR. STUPAK. When you do a physical examination as a medical doctor, don't you come to some opinions as to that patient?

DR. HILBUN. No. It is like a football physical or Army physical.

MR. STUPAK. No, I don't know. Explain to me.

DR. HILBUN. Well, I am not there to give a diagnosis: I am there to do a physical examination.

MR. STUPAK. But based upon your examination, your physical examination, someone must rely upon that examination, right? I mean, you just didn't volunteer in Mississippi one day to go down and do some

examinations. Someone asked you to do examinations for a reason, right?

DR. HILBUN. Well, I knew why I was going to--

MR. STUPAK. What was your understanding of why you were going there?

DR. HILBUN. It was silicosis testing. They were testing for silicosis.

MR. STUPAK. And then based upon your examination, physical examination, someone was going to make some determination whether this person had silicosis or not, right?

DR. HILBUN. I don't know of any way you can make a diagnosis of silicosis on a physical examination.

MR. STUPAK. Okay. You indicated in your testimony, you said that "approximately a month later I was in surgery when my office manager called stating someone from N&M, Incorporated wanted the typed physical exams I had previously performed to be re-signed." Do you remember that?

DR. HILBUN. Yes.

MR. STUPAK. "So my response was for my office manager to stamp them as I had previously signed them. I assumed that they had retyped the originals." So in other words, you did sign originals?

DR. HILBUN. I signed the original one.

MR. STUPAK. Okay.

DR. HILBUN. Okay.

MR. STUPAK. And then to your dismay, "someone had typed in the three sentences without my knowledge."

DR. HILBUN. Right.

MR. STUPAK. Okay. And that was brought to your attention during a deposition. Did you ever learn who typed in these three lines?

DR. HILBUN. No, sir.

MR. STUPAK. Did you make any discovery or make any attempt to discover who typed them in?

DR. HILBUN. No, sir.

MR. STUPAK. Had this ever happened to you before as a medical doctor?

DR. HILBUN. No, sir.

MR. STUPAK. Wouldn't you be concerned that people are typing in--

DR. HILBUN. Yes, sir.

MR. STUPAK. So what have you done about it?

DR. HILBUN. That is why I am here.

MR. STUPAK. That is why you are here?

DR. HILBUN. Yes, sir.

MR. STUPAK. To clear the record, or what?

DR. HILBUN. Yes, sir.

MR. STUPAK. Well, I would think if someone rendered a legal opinion for me being an attorney or for you as a medical doctor, you would try to find out who did it. Who paid you for all this work? N&M, Incorporated?

DR. HILBUN. That was the company that paid me, yes, sir.

MR. STUPAK. Did you ever ask N&M what happened, how come you got three more lines on your report that--

DR. HILBUN. I never had any more contact with N&M after the litigation started, and that is when I found out that these lines had been added.

MR. STUPAK. So you never contacted N&M? You have to answer yes or no, sir.

DR. HILBUN. Didn't know anything about it.

MR. STUPAK. You stated in your testimony that your office manager stamped the physical exams at your order and that it wasn't until you went to your deposition you found out that they were changed. How about your medical office manager there? Do they have any medical training?

DR. HILBUN. Just mostly from years of experience.

MR. STUPAK. Pardon?

DR. HILBUN. Just OJT.

MR. STUPAK. Okay. Would he or she have been qualified to notice any changes of a medical significance on a report?

DR. HILBUN. Probably so, yes, sir.

MR. STUPAK. Well, did they say anything to you?

DR. HILBUN. No.

MR. STUPAK. All right. I am sure glad you came and cleared this up. Dr. Altmeyer, if I may, on form 10 there--do you want to look at Tab 10 there? This is a form that the Chairman had referred to earlier. This is the asbestos medical examination. Did you find it there?

DR. ALTMEYER. Yes.

MR. STUPAK. So you said you were surprised to learn that you were listed as the examining doctor?

DR. ALTMEYER. Not on this one.

MR. STUPAK. Okay.

DR. ALTMEYER. What happened was, there is a list of silica diagnosing doctors and B reading doctors from the Texas MDL, and what I did was, I went down the list and tried to find my name anywhere that it was listed as what they call it on the list, the S doctor. I assume that meant the silicosis diagnosing doctor, and we tried to find all reports that we could on those and we found about, I believe, 35.

MR. STUPAK. Would this be one of the 35 because on page 2 under impression "based on the above opinion it is my opinion with a

reasonable degree of medical certainty that this man has simple silicosis." Would this be one of those S files?

DR. ALTMEYER. I don't know without knowing the name of the individual.

MR. STUPAK. Well, is this a report you would have done then? Would you have given an opinion with a reasonable degree of medical certainty as to whether a patient had or did not have silicosis?

DR. ALTMEYER. Yes.

MR. STUPAK. And that rendering a medical opinion, that is practicing medicine, right?

DR. ALTMEYER. That is what I understand now in the State of Texas. At the time I didn't think so.

MR. STUPAK. Well, even if you were in West Virginia, if you were going to give an opinion with a reasonable degree of medical certainty--

DR. ALTMEYER. I am sorry. I think I misunderstood. Could you repeat your question?

MR. STUPAK. Sure. When you put on this report here "with a reasonable degree of medical certainty" that this man has simple silicosis, that is a medical opinion, right?

DR. ALTMEYER. That is

MR. STUPAK. And you don't dispute the originality of this report, do you, this three-page report?

DR. ALTMEYER. No, I don't.

MR. STUPAK. And of the 50 cases or so, 35 of them had silicosis, you thought?

DR. ALTMEYER. They were chest X-rays consistent with--

MR. STUPAK. Silicosis?

DR. ALTMEYER. Silicosis.

MR. STUPAK. But once you got the chest X-ray, then you went and--

DR. ALTMEYER. Many times I have seen patients who have chest X-rays that look like occupational pneumoconiosis.

MR. STUPAK. Sure.

DR. ALTMEYER. And then after I examine them, I find out they have rheumatoid arthritis, for example, which can cause changes on an X-ray very similar to pneumoconiosis, asbestosis, for example. I saw somebody--

MR. STUPAK. Sure, but you wouldn't just take a look at the X-ray, you would also--if you thought it was silicosis, you would get occupational history, smoking history, medical history?

DR. ALTMEYER. Of course.

MR. STUPAK. Okay. So it sounds like a pretty thorough exam then.

DR. ALTMEYER. What I try to do before a diagnosis of occupational pneumoconiosis is in my mind confirm that they have had occupational exposure to a dust of sufficient--

MR. STUPAK. To reinforce your diagnosis?

DR. ALTMEYER. --quality and quantity and then I make a physical examination. Sometimes the physical examination puts the diagnosis into doubt.

MR. STUPAK. Sure.

DR. ALTMEYER. I had a lady who had metastatic thyroid cancer to her lungs with multiple small nodules that looked just like silicosis but it wasn't silicosis but you wouldn't know that without doing a--

MR. STUPAK. Well, this individual here with a simple case of silicosis, after you saw this person, did you ever follow up with them, urging them to get treatment or anything like this or would you just follow up with the law firms?

DR. ALTMEYER. In my report, I indicated I advised him to have periodic X-rays and follow-up examination by his personal physician.

MR. STUPAK. Was he referred to you by his personal physician?

DR. ALTMEYER. No.

MR. STUPAK. My time has expired. Thank you, Mr. Chairman.

MR. WHITFIELD. Thank you, Mr. Stupak. At this time I recognize the gentleman from Mississippi, Mr. Pickering.

MR. PICKERING. Dr. Altmeyer, you are a pulmonologist?

DR. ALTMEYER. Yes, sir.

MR. PICKERING. So your specialty, you would be qualified, you would have an expertise, you would have experience in diagnosing silicosis. Is that correct?

DR. ALTMEYER. Occupational pneumoconiosis has been a large part of my professional life going back to 1978 when I started training. Where I trained, the emphasis of research was on occupational pneumoconiosis and that is how I got into this whole part of medicine to begin with.

MR. PICKERING. Thank you, Dr. Altmeyer. For the gentleman from Michigan, if I can help clarify, I know that from his earlier questions he was unsure if he had a clear understanding--let me if I can try to bring some clarity. You have I think in these types of cases, you would have a radiologist who would take the X-rays, you would have a pulmonologist like Dr. Altmeyer who could make a diagnosis through his qualifications and experience. The screening company went to Dr. Hilbun to simply ask for the physical examination to give general physical health characteristics. They did not ask him to take the X-ray, examine the X-ray, or to make a diagnosis of silicosis. He was simply given very--with his background as a general surgeon who has never had any expertise or

experience in silicosis, he was not expected to nor was he asked to make any diagnosis nor would he be qualified to give a diagnosis of silicosis. But with his general practice he is very qualified to give a physical and that is what he was asked to do. That is what he did, and I think it is significant to remember that there were two other folks today that avoided subpoenas. We have had two people take the Fifth Amendment today. Dr. Hilbun traveled all the way from the coast after losing his home on the coast, having serious illnesses in his family, to testify on a voluntary basis. So I think it is very significant that Dr. Hilbun in both his deposition and in the hearing today tried to expose what really happened and the fraud that took place. And so let me just clarify for the record for Dr. Hilbun. Thank you very much.

MR. WHITFIELD. Thank you. At this time I recognize Dr. Burgess for his 10 minutes.

MR. BURGESS. Well, Dr. Hilbun, then if I may ask you, do you feel that you have been the victim of some type of fraud by the N&M Company?

DR. HILBUN. Yes, sir.

MR. BURGESS. Just so I understand it correctly and completely, you had sort of a check-off sheet that you did as you did the physical exam?

DR. HILBUN. Correct.

MR. BURGESS. And then someone came to your office with a stack of typed reports which is why they look so nice and regular and all lined up as was pointed out previously. You were not in the office and simply directed someone to sign those charts in your absence?

DR. HILBUN. That is correct. I assumed they were the same as the originals.

MR. BURGESS. Yeah, I don't think you will ever do that again, will you?

DR. HILBUN. Well, it is just what you get in the habit of doing.

MR. BURGESS. And I understand that. You said you were paid $5,000 a day when you were doing these exams?

DR. HILBUN. Yes, sir.

MR. BURGESS. And how many exams would you do during the course of the day?

DR. HILBUN. I would say--I didn't count them but I would say 80, maybe 100. I mean, I don't know. I would say around 80.

MR. BURGESS. So you would see a lot of people?

DR. HILBUN. Oh, they would just run through like, you know--

MR. BURGESS. Dr. Altmeyer, let me ask you just a couple of questions, and we may not take the whole time today. Everything that you present to us, your written testimony, and I thank you for that, it was succinct, it was to the point, it was very complete. It was much more

careful than most of the things that I write, quite honestly, and yet you didn't realize that doing a physical exam or rendering a diagnosis in Texas when you didn't have a license was outside the scope and practice of Texas medicine? I guess like Mr. Stupak, I do ask for a yes or no. I am sorry.

DR. ALTMEYER. At the time that I was doing it, honestly I didn't think I was practicing medicine, and after what I have heard today, the testimony today and over the past couple years when I tried to gain more knowledge about what is a doctor-patient relationship, what is the responsibility of a doctor, et cetera. Then I have come to learn that that is in Texas practicing medicine if you make a diagnosis. Now, I never advised any treatment. See, I always thought if you didn't advise treatment other than follow-up by your own doctor, get chest X-rays by your own doctor, I often would tell them to stop smoking and I didn't give any medicine, I thought that was not practicing medicine. And that is why I did it. Of course, if I would have known, if I would have in my heart thought that that was the practice of medicine back when I was doing it, there is no way I would have done it.

MR. BURGESS. Well, what was it specifically what Dr. Patrick or Dr. Morgan testified to today that made you realize that this was in fact the practice of medicine?

DR. ALTMEYER. Well, I think he said if you make a diagnosis, if you actually make a diagnosis. If you, say, make a diagnosis of silicosis even if you don't give medicine or recommend treatment or something else, that apparently is enough to trigger.

MR. BURGESS. Yes, I would think so. I mean, if when I was practicing, if someone had asked me to sit down and write down the definition, I don't know that I could have done that, but just like Justice Potter Stewart, I would have known it if I had seen it, and this looks like an awful lot like practicing even from that vantage point. Under the smoking history on this physical exam report we have under Tab 10, you report "has never smoked tobacco." If the patient had smoked tobacco, what would your line there have looked like?

DR. ALTMEYER. If the patient had--

MR. BURGESS. This is under the asbestosis medical exam on Tab 10.

DR. ALTMEYER. If he had smoked tobacco, what would it have said under smoking history?

MR. BURGESS. Well, yeah. How would that line have read?

DR. ALTMEYER. What I try to do is, I try to as accurately as I can calculate pack-years, which is the number of packs per day times the number of years, and if I can get the history, I would like to know when they started and when they stopped because the risk of developing lung cancer from smoking does go down after one stops smoking so if there is

any question about cancer or something, one can use what is known about the effect of smoking cessation on decreasing the risk of lung cancer. So in other words, if somebody has 30 pack-years and they are still smoking--

MR. BURGESS. Right. You would have attempted to quantify it?

DR. ALTMEYER. Yes, certainly.

MR. BURGESS. Now, under the occupational history, the line is there "from 1994 until 2003, worked as an assembler with direct exposure to asbestos transite, cloth, gloves, gaskets and valve packing, and fire brick," so that is a fairly substantial exposure, nine-year exposure to asbestos. The next line though, "He also worked around sandblasting," and yet the primary diagnosis is silicosis. I guess I am just a little bit troubled that you didn't try to quantify the silica exposure as well as you would have the tobacco exposure or even the asbestos exposure.

DR. ALTMEYER. I would prefer also to have more-extensive history and the reason why though the diagnosis was silicosis was because the type of opacities were consistent radiographically with silicosis and not asbestosis. They were Q/Q, which are small, rounded opacities whereas asbestosis typically causes irregular line-line opacities at least starting in the lower lung bases.

MR. BURGESS. But based on what you have recorded here, I mean, the silica exposure could have been as transient as walking by the sandblasting booth once a week versus immersed in it for his total employment time.

DR. ALTMEYER. Although I don't have a specific silica exposure, I doubt that because in all of these things I try to put in my mind when I am talking to somebody. Does this person have enough exposure to cause the diagnosis that I am subsequently going to make?

MR. BURGESS. And I guess when I was reading this, that was my question too. Everything else you have been so careful and so painstakingly consistent about things and yet the one key element of the patient's history--

DR. ALTMEYER. Yeah, I agree with you. I wish it was more extensive but I can say that at the time I was doing this that I had to convince myself in my own mind's eye that there was enough silica exposure to have caused small, rounded opacities on a chest X-ray. Now, would it have been better to write more down? Yes.

MR. BURGESS. But at no time did any of the law firms involved ask you to try to make the diagnosis of silicosis?

DR. ALTMEYER. No. If a law firm ever tried to convince me or coerce me to make a diagnosis of occupational pneumoconiosis, I would have been out the door in a heartbeat.

MR. BURGESS. Let me just ask one last general question of both our physicians because one of the things as a doctor sitting up here that kind of bugs me is, it is like no one is taking responsibility for the patients that were involved here, and there may have been some things that were added to reports or there may have been some things that were done erroneously whether it was intentional or not, do you know, are you aware of any efforts that have been made to contact the patients involved and set the record straight as to the fact that you were in fact their treating physician at that point or set the record straight that there has been now a report generated that is different from the report that you would have signed the day they left the clinic in Mississippi? Dr. Hilbun, I will go to you first but I do want an answer from both doctors.

DR. HILBUN. I really don't have any way of just performing a physical examination, I didn't feel there was a doctor-patient relationship.

MR. BURGESS. Right. I don't meant to interrupt but my time is short, but now you see that a report has been generated over your signature under a patient's name and that person is going to have a hard time getting life insurance. They may not be employable. Are you aware of any efforts made to contact these individuals and set the record straight on your behalf or on their behalf?

DR. HILBUN. No, sir. I don't have any records of any of the patients, you know.

MR. BURGESS. So it would be your opinion that it would be the law firm that would be involved that would be--or N&M, the screening company, that would be responsible for that?

DR. HILBUN. Yes, sir.

MR. BURGESS. What about you, Dr. Altmeyer? Have any efforts to go back and correct the record on behalf of the patients?

DR. ALTMEYER. I believe that my B readings are accurate on anybody I have done B readings. I believe strongly that the diagnoses of this disease which I have made through the whole process are accurate. To my knowledge, I have never told anybody that they had silicosis that I didn't believe had it. I believe that my diagnoses when I did make them are accurate.

MR. BURGESS. So this patient that we have here under Tab 10, the report would read the same had they come into your office in West Virginia?

DR. ALTMEYER. Absolutely. The same methodology that I use in my office is what I use when I see people. I ask them the same questions over and over and over again. If somebody comes into my office for a non-occupational reason, they have something, I may not get into the occupational history as deeply as if they are coming in because they may

have occupational asthma or they think they have silicosis or asbestosis. But my way of examining them--the questions, the smoking history, the pertinent review of systems--is the same that I have always done.

MR. BURGESS. But if this had been a West Virginia patient that we are reading about under Tab 10, you would have a way of knowing whether or not they did those things that you recommended for follow-up as far as going to see their personal physician for routine X-rays? There would be some method to ensure that your orders or requests were complied with. If the patient is in Texas and you don't ever go back, it is virtually impossible to know whether or not those recommendations were complied with.

DR. ALTMEYER. Even in West Virginia, if somebody comes in to see me for asthma and I find that they--I see a skin lesion or something like that, I tell them, that could be skin cancer on your shoulder, you need to see your own doctor, don't blow me off, take it seriously. Now, that patient may never come back to see me again and honestly, you are a doctor --

MR. BURGESS. Yeah, but if you saw a big, bad, black mole on someone, you would say let me help you make that decision, let me help you make that appointment--

DR. ALTMEYER. And we often do make an appointment. It is almost a matter of degree. If it is a big black one up there and I am the lung doctor. We spend a lot of time in my office trying to get family doctors for patients, dermatologists. It takes three months to see a dermatologist--

MR. BURGESS. But would you have done that in Texas being there for three days?

DR. ALTMEYER. If I saw something on a patient's shoulder that looked like cancer, I certainly would have told them that they have cancer and I also would give written notification of that, which I did routinely, to take to their own doctor.

MR. BURGESS. Let me just ask one more time to get it on the record. Did any law firm ever give you specific exposure criteria that you were to record?

DR. ALTMEYER. No.

MR. BURGESS. Thank you, Mr. Chairman. You have been generous.

MR. WHITFIELD. Thank you. I just have a couple more brief questions. Dr. Hilbun, when you were employed by N&M or under contract with N&M, did you ever prescribe the X-rays for the people who came in to have the X-rays?

DR. HILBUN. No, sir.

MR. WHITFIELD. And Dr. Altmeyer, did you ever prescribe the X-rays for the people who came in while you were working with RTS?

DR. ALTMEYER. Up until today, I would have said no but there is this one form in here that looks like I did and there may have been one time when I did.

MR. WHITFIELD. Which form was that?

DR. ALTMEYER. I think that is number--it was something at the beginning you were asking. I don't recognize it but--

MR. WHITFIELD. Number 5? You don't remember that?

DR. ALTMEYER. I really don't recall that but that is my signature and so there may have been one time when I did it.

MR. WHITFIELD. Okay. But you were not aware that that was something you normally did?

DR. ALTMEYER. I don't normally do that and I am very surprised to see that.

MR. WHITFIELD. Okay. Were you ever asked to prescribe by RTS and refused to do so?

DR. ALTMEYER. Yes.

MR. WHITFIELD. Now, Ms. Brazell, you have heard and we have heard the testimony of the gentleman from the Texas regulatory body that a license was never issued to RTS to conduct these X-rays in Texas, and yet you probably also saw the invoice that RTS submitted to the law firm of Provost and Umphrey in Beaumont, Texas, in the amount of $50,150 for the days of June 23, 24, and 25, which was like two and a half months after you had submitted an application to be approved to take X-rays in Texas.

MS. BRAZELL. Where is that invoice?

MR. WHITFIELD. Tab 13. But, it looks very clear that you all were never licensed to do this in Texas. It was a violation of Texas rules and regulations and you all ignored that. Is that your conclusion that you come from having looked at this invoice that was sent out for tests in June 23, 24, and 25?

MS. BRAZELL. By the invoice, it looks like we were in Texas.

MR. WHITFIELD. Were you the road manager at that time?

MS. BRAZELL. I can't specifically say that yes or no.

MR. WHITFIELD. Were you ever in Texas yourself taking X-rays with RTS?

MS. BRAZELL. I would say yes.

MR. WHITFIELD. And did you know that you were not licensed to do so?

MS. BRAZELL. No, sir.

MR. WHITFIELD. And who would have known that?

MS. BRAZELL. In order to take X-rays, that would--

MR. WHITFIELD. Yes, I mean who is the head of the company?

MS. BRAZELL. Well, in order to know if we were licensed to take X-rays in a particular State, that would have been our X-ray technician to know if we were licensed or not.

MR. WHITFIELD. Well, I would think the president of the company would probably want to know that.

MS. BRAZELL. I can't answer for him.

MR. WHITFIELD. Well, I think it is quite obvious you were not licensed to do so, you were doing so, you had a contract with law firms and you were paid to provide them with positive readings.

I would also note that we want to keep this record open for 30 days. We want to move into the record the binder of documents from our March 8, 2006, hearing, and we would also like to include into the record the opening statements from anyone for today.

MR. BURGESS. Mr. Chairman, if I may just ask one follow-up question of Ms. Brazell on the issue of the licensing of the X-ray equipment. In Texas, it is my understanding that you do have to have a designated radiation safety officer in order to have that license so I assume you did not have that radiation safety officer as part of your road trip?

MS. BRAZELL. I am not aware of anything of that title.

MR. BURGESS. Was there a physician involved in the taking of the X-rays or was there a physician involved in the site?

MS. BRAZELL. Yes, sir. We always traveled with a physician.

MR. BURGESS. My understanding is that the physician involved can--in fact, that would be reason for loss of licensure. We could ask our friend from Texas if that is correct, but I know when we got radiology equipment in our office, we very much had to comply with those things. So that is again another reason why it is important that these State jurisdictions be followed because there are rules that are in place for a very good reason.

MS. BRAZELL. Yes, sir.

MR. BURGESS. Dr. Altmeyer, let me ask you one other question. In your regular practice you said it would be unusual for you to see a patient with silicosis? Did I understand that correctly?

DR. ALTMEYER. No, I do see patients with silicosis. I am in the area of the country where we have coal mines, foundries, steel mills, et cetera. I would say that the number of silicosis cases which I have seen since I went in practice in just purely pulmonary medicine in 1981 is decreasing and not only that, the profusion or the number of densities by the B reading scale has gone down, I think. I think any of the new patients which I may be seeing tend to have milder disease than patients who I saw when I first went into practice.

MR. BURGESS. Well, then did it strike you as odd that you had 50 cases in Texas where we don't have the same kind of mining activity? We strip-mine in Texas, we don't go down into the ground.

DR. ALTMEYER. Well, of the cases in this MDL, those were B readings. They may subsequently turn out to be silicosis or not turn out to be silicosis. I mean, like I have tried to emphasize, you can't make a diagnosis of silicosis.

MR. BURGESS. I am just concerned that no one, besides Judge Jack, ever blew the whistle that there was an epidemic of silicosis. Thank you, Mr. Chairman.

MR. WHITFIELD. Thank you. And so without objection, the record will be open for 30 days. The March 8, 2006, documents from that hearing will be inserted and the binder from this hearing and the opening statement, and with that, the hearing is concluded. Thank you.

[The information follows:]

[redacted] – Tab 1

MISSISSIPPI STATE DEPARTMENT OF HEALTH

Certified Mail

June 14, 2005

Mr. Charles E. Foster, President
Respiratory Testing Services, Inc.
4362-A Midmost Drive
Mobile, AL 36609

Dear Mr. Foster:

I have tried on several occasions to contact you concerning your Registration No. 99-9-044 and possible violations of the Mississippi State Board of Health Regulations for Control of Radiation. Also, the registration fees have not been paid for this fiscal year.

If you would like to continue your registration, please contact us at (601) 987-6893.

Sincerely,

Herman B. Gaines

Herman B. Gaines, M.S.
Health Physicist Administrative
Mississippi State Department of Health
Division of Radiological Health
X-Ray Branch

HBG: ssf

MISSISSIPPI STATE DEPARTMENT OF HEALTH

June 30, 2005

CERTIFIED MAIL

Charles E. Foster, President
Respiratory Testing Services, Inc., (RTSI)
4362-A Midmost Drive
Mobile, AL 36609

Dear Mr. Foster:

This letter serves as "Official Notice of Violation" concerning the activities conducted under Registration No. 99-9-044. The following items are in noncompliance with the Mississippi Department of Health Regulations for Control of Radiation. Herman Gaines discussed these items with you by telephone on June 30, 2005.

1. Section 801.B.13 of the Mississippi Department of Health Regulations for Control of Radiation states, in part, that "whenever any radiation machine is to be brought into the state for temporary use, the person proposing to bring such a machine into the state shall give written notice to the Agency at least three (3) days before such a machine is to be used in the state.

   Item No. 2 of the RTSI's application for Registration No. 99-9-044 signed by Charles Foster states, in part, that "the Agency will be notified in accordance with Section 801.B.13.

   Contrary to the above, on numerous occasions, RTSI's personnel conducted registered activities in the state of Mississippi without notifying this office. **This item is classified as a violation.**

2. Section 801.F.3(a)(11) of the Mississippi Department of Health Regulations for Control of Radiation states, in part, that "Any person proposing to conduct a healing arts screening program shall not initiate such a program without prior approval of the Agency. When requesting such approval, that person shall submit the information outlined in Appendix B of this section.

   Contrary to the above, RTSI conducted healing arts screening program without the Agency's approval. **This item is classified as a violation.**

Brian W. Amy, MD, MHA, MPH, State Health Officer

570 East Woodrow Wilson • Post Office Box 1700 • Jackson, Mississippi 39215-1700
1-800-489-7670 • Fax 601/576-7931 • www.msdh.state.ms.us

3. Section 801.F.3(a)(7) of the Mississippi Department of Health Regulations states, in part, that individuals shall not be exposed to the useful beam except for healing arts purpose and unless such exposure has been authorized by a licensed practitioner of the healing arts.

   Contrary to the above, RTSI's personnel conducted x-ray examinations without the authorization of a licensed practitioner of the healing arts. **This item is classified as a violation.**

   In addition to the above, Mississippi Registration No. 99-9-044 has expired. **RTSI must not conduct registered activities in the state of Mississippi until such time a new Registration is issued.** A completed application and the required registration fee for fiscal year 2006 may be submitted to this office for consideration.

Please respond to the above cited items within ten (10) days of your receipt of this Notice. In your response, state the corrective actions that have been taken, and the date when full compliance is achieved. Should you disagree that the violations occurred, describe the circumstance(s) and produce records substantiating such claims.

Section 801.J.11.(d) of the Mississippi State Board of Health Regulations for Control of Radiation requires this letter and your response to be posted for a period of five (5) working days or until corrective actions are completed, whichever is later.

Should you have any questions or comments concerning this "Notice", please contact Herman Gaines at (601) 987-6893.

Sincerely,

Robert W. Goff

Robert W. Goff, Director
Division of Radiological Health

RWG: ssf

Mississippi Department of Health
Radiological Health
3150 Lawson Street
Jackson, Ms. 39215-1700

Dear Mr. Goff:

We are writing this letter in response to the letter we received from your office on July 12, 2005, relating to the "Official Notice of Violation". The following items below are written in response to the letter that we received. Please accept our response along with statements of corrective actions for the violations you have us listed for.

In response to #1-

Pertaining to (Section 801.b.13). R.T.S. Inc. has never received any correspondence from the state of Mississippi about giving notice as to when our company was coming into the state of Mississippi. Had we known to submit notice at least (3) days prior to coming to the state we would have gladly done so.

Item No. 2 – After checking for past licenses or paperwork where Mr. Foster would have signed, we found no forms stating that we would need to send written notification of when we would be traveling in the state of Mississippi. In our research we found several forms titled (Radiological Health Form RH-17). This form states nothing pertaining to the written notification aspect. Other forms found during our search have either Mr. Charlie Foster or Mr. Guy Foster's signature yet still nothing about providing written notification. We ask that you grant us mercy along with a chance to make corrections for not having any information pertaining to this in our records.

If in fact there was information pertaining to notifying the state in past licenses, it would have been a complete oversight of Mr. Foster or our bookkeeping staff for not keeping such important forms and/or by not remembering the stipulation of the license contract. We plan to make it right as of July 20, 2005, in respect to the Mississippi State Department of Health.

In response to #2-

On the contrary to what is stated in item # 2, paragraph 1 & 2 by the Mississippi Department of Health, our company is not performing "healing arts". We are a consulting firm doing consulting work.

In response to #3-

Pertaining to Section (801.F.3(a)(7)), please explain to me if a chiropractor falls under the "healing arts" category. This will clear up any confusion as to whether our company should be classified as violating the regulations set forth in above stated Section.

This letter is our response within (10) days of having received the previous letter by the Mississippi State Department of Health on July 12, 2005. We are trying to understand more clearly the rules set forth by the Department in order to make sure we have in fact performed acts of violation with regards to regulations set forth by the Department. If in fact we have made such violations, we do plan to take the necessary steps to correct our process in order to fall within complete compliance with the state of Mississippi and its regulations set forth by the Department of Health.

Thank you for taking time to read this response. If you have any questions please call us at 251-341-0206.

Sincerely,

Charlie Foster
Owner/President
Respiratory Testing Services Inc.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

July 26, 2005

CERTIFIED MAIL

Charles E. Foster, President
Respiratory Testing Services, Inc., (RTSI)
4362-A Midmost Drive
Mobile, AL 36609

Dear Mr. Foster:

This letter is concerning your response to the "Official Notice of Violation" received July 25, 2005. Your response to this "Notice of Violation" was not acceptable; therefore, you must meet with us to discuss this matter. You must not conduct registered activities in the State of Mississippi until this matter has been resolved.

Please contact Robert W. Goff at (601) 987-6893 to set up an appointment.

Sincerely,

Herman B. Gaines

Herman B. Gaines, MS
Mississippi State Department of Health
Division of Radiological Health
X-Ray Division

HBG: ssf

MISSISSIPPI
STATE DEPARTMENT OF HEALTH

570 East Woodrow Wilson
Post Office Box 1700
Jackson, Mississippi
39215-1700

Brian W. Amy, MD, MHA, MPH
State Health Officer

July 14, 2003

MEMORANDUM

TO: Out-of-State Registrants

FROM: Herman B. Gaines, M.S.
Health Physicist Administrative
Division of Radiological Health
X-Ray Branch

RE: Notification of X-ray Machine(s) Brought Into The State of Mississippi

Pursuant to Section 801.B.13, of Section B, "Registrations of Radiation Machines, Facilities and Services" of the Mississippi State Board of Health Regulations for Control of Radiation, you are required to notify this Office prior to conducting registered activities in the State of Mississippi.

If you do not plan to continue your radiation program in the State of Mississippi, please inform this Office in writing.

Should you have any questions, please contact me at (601) 987-6893.

HBG:tsm

601/576-7634
601/576-7931 FAX
www.msdh.state.ms.us
Equal Opportunity In Employment/Services

MAY.17.2005 3:25PM NO.867 P.1

MISSISSIPPI STATE DEPARTMENT OF HEALTH

Receiv...
MAY 17 2005
Radiological Health

May 3, 2005

Respiratory Testing Services, Inc.
4362-A Midmost Drive
Mobile, AL 36609

Dear Owner(s):

This is to notify you that your Registration No. 99-9-044 issued by the Mississippi State Department of Health, authorizing your possession and use of radiation machine(s) expires on July 1, 2005.

Pursuant to 801.B.1, 801.B.8, 801.B.10 and 801.B.13, of Section B, "Registration of Radiation Machines, Facilities and Services" of the Mississippi State Board of Health Regulations for Control of Radiation, you are required to apply for renewal and/or amendment of your registration if you plan to continue the possession and use or radiation machine(s).

In order to prevent your registration from expiring and, therefore, possessing radiation machine(s) without a valid registration, you must request renewal. If you plan to actively continue your radiation program and wish to have your registration renewed, please check Bland No. 1 below, and sign in the space provided or have an authorized individual to sign on behalf of the registration.

1) ✓ PLEASE RENEW

Authorized By: _____
(Signature)

(Print Name and Title) Charles E. Foster, President

IF YOU WISH TO CONTINUE YOUR RADIATION PROGRAM, BUT INTEND TO HAVE YOU REGISTRATION AMENDED, (i.e., changes regarding name, address, and/or individuals(s) responsible for radiation protection, new and/or additional x-ray machines, etc), THEN CHECK BLANK NO. 2; AND SUBMIT IN WRITING A FORMAL REQUEST FOR THE AMENDMENT.

2) ____ AMEND

If you do not plan to continue your radiation program in the State of Mississippi, please inform this office in writing. Please mail this information to: Division of Radiological Health, Mississippi State Dept. of Health, P. O. Box 1700, Jackson, MS 39215-1700, or fax to (601) 987-6887.

Sincerely,

Herman B. Gaines

Herman B. Gaines, MS
Health Physicist Administrative
MSDH-Division of Radiological Health

HBG:cbc

Mississippi State Department of Health
Division of Radiological Health

REGISTRATION
OF
HEALING ARTS OR VETERINARY X-RAY TUBES AND FACILITIES

Pursuant to the Mississippi Radiation Control Act and Mississippi State Board of Health Environmental Regulations, "Regulations for Control of Radiation in Mississippi," and in reliance on statements and representations heretofore made by the registrant, a notice of registration is hereby issued. This registration is subject to all applicable rules and regulations of the State Board of Health and to any conditions specified below.

Amendment No. 7

REGISTRANT

1. Name: Respiratory Testing Services, Inc.

2. Address: 4362-A Midmost Drive
Mobile, AL 36609

3. Registration Number: **99-9-044**

4. Expiration Date: **July 1, 2005**

5. Classification	6. Type	7. Manufacturer	8. Model Number	9. Serial Number
Mobile Van	Chest	Summit Ind.	E7239FX	70248

CONDITIONS

10. Unless otherwise specified, the authorized place of use is the registrant's address stated in 2 above.
Pursuant to Section 801.B.13 of the Mississippi State Board of Health Regulations, the registered x-ray device may be used at temporary locations in Mississippi.

FOR THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

Date June 21, 2004

by Robert M. Buff

Mississippi State Department of Health — Revised 10-90 — Radiological Health Form No. RH–17

RTS00389

MAY.17.2005 3:25PM NO.867 P.1

MISSISSIPPI STATE DEPARTMENT OF HEALTH

Receiv...
MAY 17 2005
Radiological Health

May 3, 2005

Respiratory Testing Services, Inc.
4362-A Midmost Drive
Mobile, AL 36609

Dear Owner(s):

This is to notify you that your Registration No. 99-9-044 issued by the Mississippi State Department of Health, authorizing your possession and use of radiation machine(s) expires on July 1, 2005.

Pursuant to 801.B.1, 801.B.8, 801.B.10 and 801.B.13, of Section B, "Registration of Radiation Machines, Facilities and Services" of the Mississippi State Board of Health Regulations for Control of Radiation, you are required to apply for renewal and/or amendment of your registration if you plan to continue the possession and use or radiation machine(s).

In order to prevent your registration from expiring and, therefore, possessing radiation machine(s) without a valid registration, you must request renewal. If you plan to actively continue your radiation program and wish to have your registration renewed, please check Bland No. 1 below, and sign in the space provided or have an authorized individual to sign on behalf of the registration.

1) ✓ PLEASE RENEW

Authorized By: _____
(Signature)

(Print Name and Title) Charles E. Foster, President

IF YOU WISH TO CONTINUE YOUR RADIATION PROGRAM, BUT INTEND TO HAVE YOU REGISTRATION AMENDED, (i.e., changes regarding name, address, and/or individuals(s) responsible for radiation protection, new and/or additional x-ray machines, etc), THEN CHECK BLANK NO. 2; AND SUBMIT IN WRITING A FORMAL REQUEST FOR THE AMENDMENT.

2) ____ AMEND

If you do not plan to continue your radiation program in the State of Mississippi, please inform this Office in writing. Please mail this information to: Division of Radiological Health, Mississippi State Dept. of Health, P. O. Box 1700, Jackson, MS 39215-1700, or fax to (601) 987-6887.

Sincerely,

Herman B. Gaines

Herman B. Gaines, MS
Health Physicist Administrative
MSDH-Division of Radiological Health

HBG:cbc

Mississippi State Department of Health
Division of Radiological Health

REGISTRATION
OF
HEALING ARTS OR VETERINARY X-RAY TUBES AND FACILITIES

Pursuant to the Mississippi Radiation Control Act and Mississippi State Board of Health Environmental Regulations, "Regulations for Control of Radiation in Mississippi," and in reliance on statements and representations heretofore made by the registrant, a notice of registration is hereby issued. This registration is subject to all applicable rules and regulations of the State Board of Health and to any conditions specified below.

Amendment No. 7

REGISTRANT

1. Name: Respiratory Testing Services, Inc.

2. Address: 4362-A Midmost Drive
Mobile, AL 36609

3. Registration Number: **99-9-044**

4. Expiration Date: **July 1, 2005**

5. Classification	6. Type	7. Manufacturer	8. Model Number	9. Serial Number
Mobile Van	Chest	Summit Ind.	E7239FX	70248

CONDITIONS

10. Unless otherwise specified, the authorized place of use is the registrant's address stated in 2 above.
Pursuant to Section 801.B.13 of the Mississippi State Board of Health Regulations, the registered x-ray device may be used at temporary locations in Mississippi.

FOR THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

Date June 21, 2004

by Robert W. Goff

Mississippi State Department of Health — Revised 10-90 — Radiological Health Form No. RH–17

RTS00389

-Tab 2

MISSISSIPPI STATE DEPARTMENT OF HEALTH

September 16, 2002

Ms. Molly Netherland
N & M, Inc.
2810 Andrews Avenue
Pascagoula, MS 39567

Dear Ms. Netherland:

This letter serves as "Notice of Investigational Findings" concerning the registered activities authorized under Registration Nos. 30-9-001 and 30-9-002. The investigation was conducted on September 4, 2002, by Herman Gaines and Jimmy Carson.

During the investigation, the following items were found to be in noncompliance with the Mississippi State Board of Health Regulations for Control of Radiation:

1) Section 801.F.3(a)(11) of the Mississippi State Board of Health Regulations for Control of Radiation states, in part, that "Any person proposing to conduct a healing arts screening program shall not initiate such a program without prior approval of the Agency. When requesting such approval, that person shall submit the information outlined in Appendix B of this section."

   Section 801.F.2. of the Mississippi State Board of Health Regulations for Control of Radiation states, in part, that "Healing arts screening" means the testing of human beings using x-ray machines for the detection or evaluation of health indications when such tests are not specifically and individually ordered by a licensed practitioner of the healing arts legally authorized to prescribe such x-ray tests for the purpose of diagnosis or treatment.

   Contrary to the above, the registrant conducted a healing arts screening program, as define in the Mississippi Regulations, without the Agency's approval. **This item is classified as a violation.**

2) Section 801.F.3(a)(13) of the Mississippi State Board of Health Regulations for Control of Radiation states, in part, that "Each facility shall maintain an x-ray log containing patient's name, type of examinations, and dates the examinations were performed."

F. E. Thompson, Jr., MD, MPH, State Health Officer
3150 Lawson Street • Post Office Box 1700 • Jackson, Mississippi 39215-1700
601/987-6893 • Fax 601/987-6887

Contrary to the above, the x-ray log did not contain the type of examinations performed. **This item is classified as a violation.**

Please respond to the above cited items within ten (10) days of your receipt of this Notice. In your response, state the corrective actions that have been taken and the date when full compliance is achieved. Should you disagree that violations occurred, describe the circumstance(s) and produce records substantiating such claim.

Section 801.J.11(d) of the Mississippi State Board of Health Regulations for Control of Radiation requires this letter and your response to be posted for a period of five (5) working days or until corrective actions is completed, whichever is later.

Should you have any questions or comments concerning this "Notice" or investigation, please contact Herman Gaines or Jimmy Carson at (601) 987-6893.

Sincerely,

Robert W. Goff

Robert W. Goff, Director
Division of Radiological Health

RWG:tsm

N & M
TESTING, INC.

2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

HEALING ARTS SCREENING

I. N & M, INC. is located at 2810 Andrew Ave., Pascagoula, MS.
II. X-ray's are being taken for evaluation of asbestosis or silicosis.
III. We will be performing a PA and Lateral chest x-ray.
IV. We will be evaluating people over the age of 40 and mainly males with the exception of some females with enough exposure.
V. There are no alternative methods that we know of for evaluating people for asbestosis and silicosis.
VI. The x-ray exposure will vary between people according to size. The chart for this procedure is posted in front of the x-ray technicians and is located in section VIII.
VII. We begin by reviewing the processor's temperature to make sure that it falls within the acceptable range. Second, the technician warms the tube. Then, the technician reviews the films for quality assurance. We also have a physician on staff that reviews the quality of every film.
VIII. A copy of the technique chart is posted in front of the technician. A photocopy is available upon request.
IX. Mississippi licensed x-ray technician.
X. Molly Netherland is the supervisor to the operators of the x-ray equipment. She also evaluates the work performance of technician and equipment. Her qualifications are mainly hands on experience for the last twelve years.
XI. Ray Harron Texas
Phillip Lucas Mississippi
Jay Segarra Mississippi
XII. The people will be advised of their results the same day.
XIII. All records and films are forwarded to the attorney.
XIV. We evaluate people between five and ten days a month.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

FAX COVER SHEET

DATE: 10-14-02

TO: Molly Netherland

COMPANY: N&M Testing

PHONE:

FAX: 228-762-3330

FROM: Dale Tallman TITLE: B.S.R.T. (R), HPS

Mississippi State Department of Health
Division of Radiological Health
3150 Lawson Street (39213)
P. O. Box 1700
Jackson, Mississippi 39215-1700
Office: (601) 987-6893
Fax: (601) 987-6887

COMMENTS:

Number of Page(s) Including Cover Page: 3

[X] Please acknowledge receipt of this facsimile by contact the sender. Thank you.

N & M TESTING, INC

2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703
762-3330

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

HEALING ARTS SCREENING

I. N & M, INC. is located at 2810 Andrew Ave., Pascagoula, MS.
II. X-ray's are being taken for evaluation of asbestosis or silicosis.
III. We will be performing a PA and Lateral chest x-ray.
~~IV.~~ We will be evaluating people over the age of 40 and mainly males with the exception of some females with enough exposure. more info. what kind of exp.? who did they possibly get this exp.? Etc.
V. There are no alternative methods that we know of for evaluating people for asbestosis and silicosis.
~~VI.~~ The x-ray exposure will vary between people according to size. The chart for this procedure is posted in front of the x-ray technicians and is located in section VIII. physicists' survey
~~VII.~~ We begin by reviewing the processor's temperature to make sure that it falls within the acceptable range. Second, the technician warms the tube. Then, the technician reviews the films for quality assurance. We also have a physician on staff that reviews the quality of every film. how often is the processor cleaned ~~Step test~~ screen cleaning darkroom clean Etc.
VIII. A copy of the technique chart is posted in front of the technician. A photocopy is available upon request.
IX. Mississippi licensed x-ray technician.
~~X.~~ Molly Netherland is the supervisor to the operators of the x-ray equipment. She also evaluates the work performance of technician and equipment. Her qualifications are mainly hands on experience for the last twelve years.
~~XI.~~ Ray Harron Texas
Phillip Lucas Mississippi MD's (Radiologist ?.....)
Jay Segarra Mississippi
~~XII.~~ The people will be advised of their results the same day. Say letter sent to a copy of report sent to their primary MD?
XIII. All records and films are forwarded to the attorney.
XIV. We evaluate people between five and ten days a month.

what about neg. screens ? where do the films go. ?

A verbal approval is given upon submission of the corrected information

N & M TESTING, INC.
2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

HEALING ARTS SCREENING

I. N & M, INC. is located at 2810 Andrew Ave., Pascagoula, MS.
II. X-rays are being taken for evaluation of asbestosis or silicosis.
III. We will be performing a PA and Lateral chest x-ray.
IV. We will be evaluating people for asbestosis and silicosis. People are usually over the age of 40, mainly males, with the exception of females with adequate exposure. Exposure would result from jobsites, sandblasting, sheetrock work, automotive mechanic repair, textile work, and other sites as discovered with adequate exposure.
V. There are no alternative methods that we know of for evaluating people for asbestosis and silicosis.
VI. The x-ray exposure will vary between people according to size. The chart for this procedure is posted in front of the x-ray technologist and is located in section VIII. Barco X-ray Co., Mobile, AL evaluates all x-ray equipment every two years, meeting all of the State's requirements.
VII. We begin by reviewing the processor's temperature to make sure that it falls within the acceptable range. Second, the technologist warms the tube. There are five to seven films run through the processor to evaluate equipment performance. Then, the technologist reviews the films for quality assurance. When requested, we have a physician on staff that reviews the quality of every film. The physician compares each film to NIOSH standard film, in order to assure quality. Department meetings are held monthly. Repeat film assessments are also performed monthly. All processor repairs, maintenance and cleaning are performed as needed, with an average time of approximately every five weeks. Screens are cleaned monthly.
VIII. A copy of the technique chart is posted in front of the technologist. A photocopy is available upon request.

N & M TESTING, INC.

2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

IX. Mississippi and American Registry of Radiologic Technologists. See attached credentials.

X. Molly Netherland is the supervisor to the operators of the x-ray equipment. She also evaluates the work performance of the technologist and equipment. Her qualifications are mainly hands on experience for the past twelve years. Mrs. Netherland also attends seminars to support her experience and to continue her education in x-ray screenings.

XI. Dr. Ray Harron
2437 Bay Area Blvd. PMB 47
Houston, TX 77058
(304) 842-6570

Dr. Phillip H. Lucas
220 Winged Foot Circle
Jackson, MS 39211
(601) 957-2262

Dr. Jay Segarra
2123 Government Street
Ocean Springs, MS 39564
(228) 872-2411

XII. The people will usually be advised of their results the same day. On some days of testing, the attorney will send the results to the individual. They will receive a copy of the results on the average of two to six months.

XIII. All records and films are forwarded to the attorney. The attorney keeps the records and films in perpetuity. The attorney determines the storage and location of records and films.

XIV. We evaluate people between five and ten days a month.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

July 8, 2003

Ms. Molly Netherland
N & M, Inc.
2810 Andrews Avenue
Pascagoula, MS 39567

Dear Ms. Netherland:

Thank you for your response received January 6, 2003 to our Notice of Investigational Findings issued on September ~~18, 2000~~ 10 2002 HG, concerning the activities under Registration 30-9-001 and 30-9-002.

My staff has evaluated the response and found that the corrective actions appear to be satisfactory. We will determine the implementation of the corrective actions during the next inspection.

If we can be of assistance to you, please contact me at (601) 987-6893.

Sincerely,

Herman B. Gaines

Herman B. Gaines, M.S.
Health Physicist Administrative
Division of Radiological Health

HBG/ccc

Brian W. Amy, MD, MHA, MPH, State Health Officer
570 East Woodrow Wilson • Post Office Box 1700 • Jackson, Mississippi 39215-1700
601/576-7634 • Fax 601/576-7931 • www.msdh.state.ms.us

- Tab 3 (1)

TEXAS DEPARTMENT OF HEALTH
BUREAU OF RADIATION CONTROL
REGISTRATION APPLICATION FOR USERS OF RADIATION MACHINES
IN HEALING ARTS, VETERINARY MEDICINE AND ACADEMIC FACILITIES

INSTRUCTIONS - Complete ALL ITEMS of the application. Mail original(s) to the Texas Department of Health, Bureau of Radiation Control(BRC), 1100 West 49th Street, Austin, Texas 78756-3189. Upon approval of the application, the applicant will receive a Certificate of Registration. Submit the appropriate fee with an application for NEW REGISTRATIONS ONLY. If there are any questions, contact the BRC at (512)834-6688.

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.tdh.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

1.a. Legal name of business, facility or individual:*
RESPIRATORY TESTING SERVICES, INC

b. Business mailing address:
4362 MIDMOST DRIVE, SUITE A
MOBILE, AL 36609

2. Physical address where radiation machines will be used :
(Submit separate application forms for each additional use location under this registration.)
MOBILE UNIT
VARIOUS LOCATIONS

M830138
$165.00
4-4-03

3. County of Use:
VARIOUS

4. Telephone No.:
251 341 0206

5. Fax No.:
251 341 0213

6. E-mail Address:
RESPIRATORYTESTINGSERVICES@NETZERO.COM

7. Type of Action: (Check all that apply)
X New registration (Attach appropriate fee)
___ Renewal of registration no. _____
___ Amendment to registration no. _____
___ Name change ___ Address change
___ RSO change ___ Equipment change*
___ Additional use location

8. Radiation Safety Officer(RSO)* (Submit qualifications)
RICHARD C MEASE SR RT

9.a. Machine data for this location. Complete inventory must be submitted for new, renewal and address changes.

Manufacturer	Use Code* (see table on back)	Control Panel: Model No.	Control Panel: Serial No.
SEDECAL	DIA	SHF 310	C 13367

RECEIVED
TDH
APR 08 2003
BUREAU OF
RADIATION CONTROL

b. Total number of radiation machines (control panels) now possessed: 3 (including any in storage that are operable)
c. Number of radiation machines (control panels) at this use location: 1
d. If mobile services are used, indicate name and registration number of the "Provider of Equipment":
Provider DIAGNOSTIC IMAGING Provider's Registration No. _____

11. As a licensed practitioner, I do hereby affirm that I am associated with this applicant and provide supervision to non-practitioners administering radiation to human beings or animals.

Signature of Licensed Practitioner* | Date | Typed or Printed Name | Licensing Board No.

12. I do hereby accept the responsibilities of radiation safety officer.

Signature of Radiation Safety Officer* | Date | Typed or Printed Name | Licensing Board No.
/s/ C Mease Sr RT | 3-26-03 | RICHARD C MEASE SR RT | 333554

13. I certify that the administration of radiation to human beings or animals in association with this application shall be under the supervision of an appropriately licensed practitioner. Furthermore, I attest that the information contained in this application is true and correct to the best of my knowledge.

Signature of Applicant | Date | Typed or Printed Name
Signature of Owner or Partner* | Date | Typed or Printed Name | Driver's License No.

*SEE REVERSE FOR INSTRUCTIONS

BRC Form 226-2 (rev02/02)

2

Veterinary

Veterinarian
Texas Veterinary License Board No._____

Non Veterinarian
2 years experience

Academic and/or Research and Development

Faculty or staff member in radiation protection, radiation engineering or related discipline must submit evidence of the following:
Educational course(s) on radiation safety
Experience with x-ray equipment
Knowledge of potential radiation hazards

Certification

I hereby certify that I will fulfill the duties and responsibilities of RSO.

Signature of designated Radiation Safety Officer

Documentation of radiation machine experience:

Name of Facility	Date of Employment (from - to)	Type of Radiation Equipment Operated
RESPIRATORY TESTING SVC	8-99 TO PRESENT	VARIOUS

A complete listings of the requirements which the RSO must meet are located in 25 Texas Administrative Code (TAC) §289.226(w)(1).

(3)

REPSPATORY TESTING SERVICES INC.
MOBILE, ALABAMA 36609

15299

Texas Dept of Health

Check Number: 15299
Check Date: Mar 27, 2003
Check Amount: $165.00

Item to be Paid	Discount Taken	Amount Paid
2003 REGISTRATION		165.00

Telephone Message

4

4/3/01 Phone Number (___)

All To: Name Richard Means

Referred To Need md sig on applic. - will fax monday

How many units do you have only 1 Permanent Texas where will meaning - need Okc Hours at office on app

4/10/03 Call to Richard Means
- how they will operate as mobile
(→ left message)

4/14/03 call back from Richard → will try to call
(number → left message)

4/16/03 mobile xray for asbestosis
(work for an OK TX attorney)
1st Dr → Robert Altemeier - W.Va ~6 hours to be
(not sure if TX lic. will need state specific

~(please write fax # to verify this ok to x-ray in TX)

4/17/03 Call to Richard
- he will have to resubmit OP/Std Procedures to reflect

Site #	Code #	Units	Site #	Code #	Units	Site #	Code #	Units
		address & CO physicals are on 4/3						
	(2)	need state not std dr not met them on site & address						
	(3)	need dor. fee to mail the std. 3rd						
	(4)	Dr. Altemeier → need dep.t. he has TX state authority.						
		(he understands we're to submit						
4/29/03		Rich called On speaker phone to Rachael						
		(requested Names of additional orgs to be tested						
		(he will find. Says they are NOT operating						

in TX since app. dr. not completely credentialed

04/07/2003 13:20 3343410213 RESPIRATORY TESTING PAGE 01

(5)

RESPIRATORY TESTING SERVICES, INC.
4362 MIDMOST DRIVE
MOBILE, AL. 36609
(251) 341-0206

THIS FAX IS TO: Pat

LOCATION: _____

FAX NUMBER: 512-834-6716

NUMBER OF PAGES INCLUDING COVER SHEET: 2

THIS FAX IS FROM: JENNIFER F. SEIBERT / Richard Mease

LOCATION: R.T.S.

FAX NUMBER : (251) 341-0213

COMMENTS:

any questions you can call Mr. Mease at 251-591-9001

Thanks,

Jennifer

Received Apr-07-2003 01:54pm From-3343410213 To-TDH RadCon L.R.& S. Page 001

04/07/2003 13:20 3343410213 RESPIRATORY TESTING PAGE 02

(6)

BUREAU OF RADIATION CONTROL
REGISTRATION APPLICATION FOR USERS OF RADIATION MACHINES
IN HEALING ARTS, VETERINARY MEDICINE AND ACADEMIC FACILITIES

INSTRUCTIONS - Complete ALL ITEMS of the application. Mail original(s) to the Texas Department of Health, Bureau of Radiation Control (BRC), 1100 West 49th Street, Austin, Texas 78756-3189. Upon approval of the application, the applicant will receive a Certificate of Registration. Submit the appropriate fee with an application for NEW REGISTRATIONS ONLY. If there are any questions, contact the BRC at (512)834-6688.

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.tdh.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section §§ 552.021, 552.023, 559.003 and 559.004)

1. Legal name of business, facility or individual:* RESPIRATORY TESTING SERVICES, INC

Business mailing address: 4362 MIDMOST DRIVE, SUITE A, MOBILE, AL 36609

2. Physical address where radiation machines will be used: (Submit separate application forms for each additional use location under this registration.) MOBILE UNIT, VARIOUS LOCATIONS

X 07988

3. County of Use: VARIOUS

4. Telephone No.: 251 341 0206

5. Fax No.: 251 341 0213

6. E-mail Address: RESPIRATORYTESTINGSERVICES@[illegible]

7. Radiation Safety Officer (RSO) (Attach qualifications): RICHARD C MEASE SR DT

Type of Action: (Check all that apply)
New registration (Attach appropriate fee)
Renewal of registration no. ____
Amendment to registration no. ____
___ Name change ___ Address change
___ RSO change ___ Equipment change*
___ Additional use location

Machine data for this location. Complete inventory must be submitted for new, renewal and address changes.

Manufacturer	Use Code* (see table on back)	Control Panel Model No.	Control Panel Serial No.
SEDECAL	0104	SHF 310	C1[illegible]367

Total number of radiation machines (control panels) now possessed: 1 (including any in storage that are operable)

Number of radiation machines (control panels) at this use location: 1

If mobile services are used, indicate name and registration number of the "Provider of Equipment":

Provider: DIAGNOSTIC IMAGING Provider's Registration No. ____

As a licensed practitioner, I do hereby affirm that I am associated with this applicant and provide supervision to non-practitioners administering radiation to human beings or animals. For CXR's taken by Respiratory Testing Services on dates April 24, 25, 26, 27 ONLY in [illegible]

[signature] Date 4/7/03 Robert ALTMEYER, MD 11535
Signature of Licensed Practitioner* | Typed or Printed Name | Licensing Board No.

I do hereby accept the responsibilities of radiation safety officer.

R/C Mease Sr DT 3-26-03 RICHARD C MEASE SR DT 333554
Signature of Radiation Safety Officer* | Date | Typed or Printed Name | Licensing Board No.

I certify that the administration of radiation to human beings or animals in association with this application shall be under the supervision of an appropriately licensed practitioner. Furthermore, I attest that the information contained in this application is true and correct to the best of my knowledge.

____ Date ____ Typed or Printed Name ____
Signature of Applicant

____ Date ____ Typed or Printed Name ____ Driver's License No.
Signature of Owner or Partner*

*SEE REVERSE FOR INSTRUCTIONS

BRC Form 226-1 (rev.03/02)

Received Apr-07-2003 01:54pm From-3343410213 To-TDH RadCon L,R.& S. Page 002

(7)

TDH

Texas Department of Health

Eduardo J. Sanchez, M.D., M.P.H.
Commissioner of Health

1100 West 49th Street
Austin, Texas 78756-3199

Bureau of Radiation Control
(512) 834-6688

Ben Delgado
Chief Operating Officer

Nick Curry, M.D., M.P.H.
Executive Deputy Commissioner

23 SEPTEMBER 2003

RESPIRATORY TESTING SERVICES INC
ATTN PRESIDENT
4362 MIDMOST DR STE A
MOBILE AL 36609

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Application No.: R27605

7000 0520 0024 5456 7045

Dear PRESIDENT:

Your application for a Certificate of Registration has been denied. The Agency notified you of the intent to deny on 07/18/03 and advised you of your opportunity to request a hearing as provided by the Texas Radiation Control Act. No request to that effect was submitted within the specified 30 day time period.

Operation of x-ray equipment without being registered is in violation of the Act. Failure to comply may result in this Agency seeking legal remedies as authorized by the Act. You are advised that civil penalties are available in such cases.

If you have questions regarding the denial of your application, do not hesitate to contact us.

Sincerely,

for

Ruth E. McBurney, C.H.P., Director
Division of Licensing, Registration and Standards
Bureau of Radiation Control

Enclosures
cc: Division of Compliance and Inspection

Nancy Ivester ~~F.F BC HW JO~~ COMPLAINT 1685

To: Royce Harmon
Subject: R22903, Complaint1685

[redacted]
-Tab 4

Hi Royce,
I've been given a memo from complaint investigations with enclosures regarding chest x-ray screening. There is a narrative from you detailing findings from a visit conducted on 6/24/02. However, I don't have an actual report or anything that has come through compliance and been issued a compliance number.
Please let me know if you submitted a report or field activity for this complaint or if there is some info I'm missing. Thanks, Nancy

ROUTE

TEXAS DEPARTMENT OF HEALTH
Austin, Texas
INTEROFFICE MEMORANDUM

COMPLAINT 1685

THRU: Robert Free, Deputy Director
Thomas Cardwell, Deputy Director **ROUTE**

TO: Jack England, X-Ray Reviewer

FROM: James H. Ogden, Jr, Incident Investigator

DATE: August 16, 2002

SUBJECT: Recommended Notice of Violation for N & M Inc. dba N & M Testing, Inc.(Complaint 1685)

Violation:

The Registrant initiated a healing arts screening program without prior approval by this Agency, in violation of 25 TAC §289.226(j)(1).

This is a Severity Level I violation.

Note To Reviewer: The letter was provided by Kerry A. Jackson, in response to the question which firm was supporting their operation when Mr. Harmon discovered their operation at 1600 South University Drive, Fort Worth, Texas, on June 24, 2002. The information on the firm was provided by Facsimile. **The Registrant is R22903-000.**

Enclosures:

1. (Working Copy) Report, dated June 24, 2002, from Royce Harmon, PHR #3.
2. (Working Copy) Letter provided by Jackson Crane, P.C., August 16, 2002, Re: Asbestos Testing.

(**Note To Reviewer:** Please forward a completed copy of the Notice of Violation to the Incident Investigation Program, for completion of our files for Complaint 1685, Attn.: James H. Ogden, Jr.)

On June 24, 2002, I received a telephone call from Jenny Perez, Administrative Tech., Region 2/3 regarding a telephone call complaint from an anonymous individual. Ms. Perez asked me to investigate the circumstances of the alleged complaint.

The complainant stated that a group of people were conducting screening chest x-rays at 1660 S. University Drive, Fort Worth. He stated that there were several young women, standing on the sidewalk, holding up signs for passing traffic to see, indicating that "free" screening tests were being done at that location. The complainant requested that the Health Department check into this situation.

Later the same morning, Ms. Perez again telephoned me to provide an "update" as to another adjacent location, where she was told the same type of screening was also taking place. This second location was indicated to be the Marriott Hotel, also near S. University Drive.

I went to the scene arriving at approximately 12:20 p.m. at the first location, which is in front of the Staples Office Supply, at the 1600 block of S. University Drive and spoke with an elderly gentleman who was standing next to a card table in the parking lot. There were two young women standing at the entrance to the parking lot holding up signs. I asked the gentlemen if they were providing screening tests, what type and if they were providing chest x-ray exams. He replied that they were interviewing persons for asbestos and silica exposure, but denied that they were taking any chest x-ray studies. I then asked him what the disposition of the persons were that they were interviewing. He replied that they were just "interviewing". I then asked him if they had been taking chest x-ray studies at this location that morning and he answered, "They weren't taking any x-rays."
NOTE: I personally observed x-ray folders which are normally used to store or transport x-ray films on the card table next to him.

This same person then told me that they were taking x-ray studies just down the street at the Marriott Hotel. There was no further conversation and I went down S. University Drive to the second location at 3150 Riverfront Drive.

At the street entrance to Riverfront Drive from S. University Drive was a large sign indicating "Free Screening." As I drove into the side parking lot I observed a large white Chevrolet truck. On the side of the enclosed truck was written the following: Occupational Health Testing Unit, Respirator Medical Evaluations, Occupational Marketing, Inc., 1-800-869-6783, www.occupational.com. The truck also had an electrical generator on a small trailer hooked up at the rear.

I went into the Hotel, asked the hotel clerk how long the truck had been outside and she said since early that morning and that she was told that they might possibly be there another day. I thanked her, followed the signs and went into a room where I observed several persons seated at desks interviewing others.

I identified myself and asked to speak privately with whomever was in charge. A person, who identified himself as Mr. Dennis Jaminet, and I then went into another adjacent room where I asked him to explain what the type of screening they were conducting.

(2)

He stated that he was a representative of the Law Office of Stuart & Lyle, L.L.P., Attorney & Counselor at Law, 1110 E. Weatherford Street, Fort Worth, Texas 76102. I asked him if he was an attorney and he replied, "No."
He explained that this Law Firm was advertising Chest X-Ray Screening for persons previously exposed to asbestos and or silica.
I explained that the Texas Department of Health has regulations governing procedures regarding screening and told him that our department's interpretation is "self referral." Since this was apparently what was occurring I asked him to provide me with additional information and asked to also see the inside of the Mobile X-ray truck parked outside. He explained that his Law Firm had hired the Mobile X-ray Company from Houston for this screening situation and that he had "checked" them out beforehand.
Mr. Jaminet was very cooperative and then escorted me outside to the truck.

As we entered the truck I was introduced to two x-ray technologists, Robinson Montero, L.M.R.T., TDH #200737 and Alvaro Mendez, N.C.T., TDH #NC0212. I explained my purpose for being there and I proceeded to review their records.

They showed me a copy of their Certificate of Registration, R-23138, and showed my the following records:

1. Operating and Safety Procedures
2. E.P.E. dated 1-2-2002, Robert Perry, Ph.D., MP 0114
3. Recent Personnel Monitoring reports.
4. Lead Apron tests
5. Darkroom Light leak tests.
6. T.A.C.
7. Technique chart

occupational
Marketing JT
R23138
Hollister
Bill Sullivan 125

Mr. Montero stated that they were averaging (4) patients a day....sometimes as many as (20) a day in their mobile unit. He stated that they had only done (4) so far, that day.

I thanked them for their cooperation and Mr. Jaminet and I returned to the Hotel. I told Mr. Jaminet that the persons down the street from them had notified my department the same morning, that his organization was conducting screening tests. His response was that he was aware of that and then told me that two of the women involved at the other scene were attorneys attempting to do the same type of screening.

He further stated that there had been a Mobile X-Ray unit at the other location early that morning but it was seen leaving approximately mid-morning. He asked if I had spoken with them and I told him that I had stopped by there, but was going to return immediately following the conclusion of my business with him.

He asked if there was anything else he needed to do. I told him that it is necessary for his Law Firm to submit the criteria for screening to the Bureau of Radiation Control for approval and that he should keep a copy of the same document with him if they again engage in this type of service. He stated that information was readily available. I further suggested that he contact Debbie Borden, B.R.C., Austin and provided him with her telephone number.

I then returned to the first location at 1600 S. University Drive, where I observed that there were now only two other young women adjacent to the card table on the parking lot.

I introduced myself and explained my reason for being there. The first lady identified herself as Leslie Crane. I then asked her if she was an attorney and she replied, "Yes."

I asked her what type of service they were providing and she said that they were just interviewing people. I mentioned that it had been reported earlier that a Mobile X-Ray Unit had been on this scene and asked her if that was true. She said that it had been there but they had sent it away, "because there weren't any patients."

I asked her if she could provide me with the name of the company. She became very evasive and said, "I'm not sure of the company name." She then said she believed it came from Mississippi and she wasn't sure who made the arrangements. She went on to say that she and her associate, Kerry, had met the mobile company's representatives at a convention at Fort Lauderdale before and that's how they got involved. I asked if she had a telephone number for the company and she denied that she did. She then said that I should speak with the Kerry, who at the time was interviewing another person. I agreed and Ms. Crane immediately walked over to Kerry and began talking with her.

After a few minutes I spoke with the second lady, who identified herself as Kerry Jackson. I also asked her if she was an attorney and she replied, "Yes." I introduced myself and told her my purpose for being there.

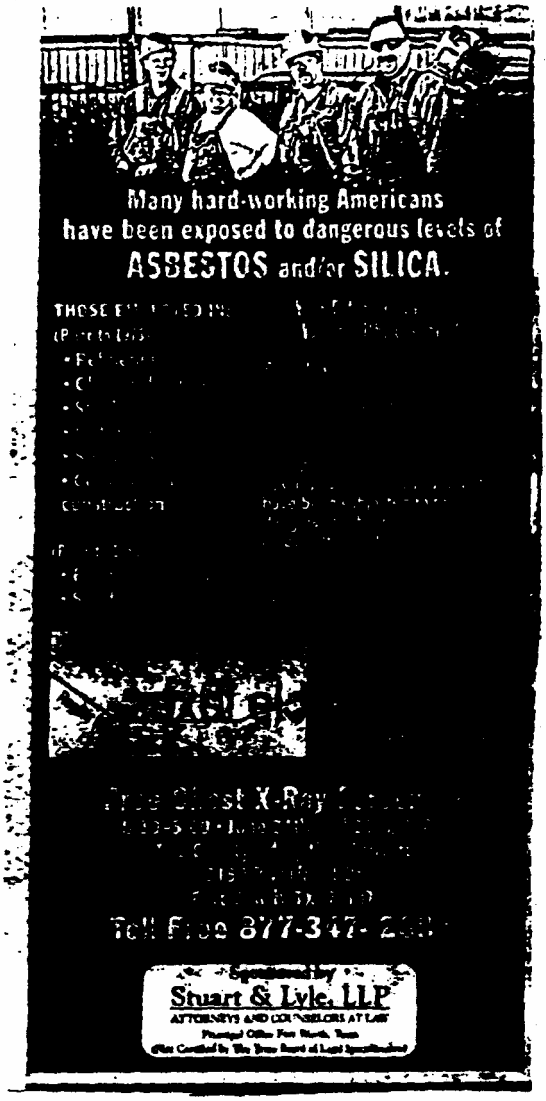
She was even more evasive in her conversation than the Ms. Crane. I explained to her that if they are going to engage in any screening activity that it will be necessary to contact the Bureau of Radiation Control before they set up anything. I provided Ms. Crane with Debbie Borden's telephone number and suggested that she contact her for additional information. Her response was, "We're just a couple of young attorneys trying to make a living."

I gave her my business card and asked her to contact me if she had any additional questions later. I left the scene approximately 2:30 p.m. and proceeded to the Regional Office.

Note: Review of additional information from a business card provided by Mr. Dennis Jaminet, indicates Kerry A. Jackson, Attorney, is officed at 2944 Portales, Fort Worth, 76116, Mobile Phone 214 505-7112, Fax: 817 244-5408. This same business card also lists Jackson Crane, P.C. as an Attorney and Counselor at Law.

Ms. Leslie Crane, whom I interviewed earlier provided me two telephone numbers: Office number (817) 244-5408 and her Cell. Phone (817) 929-9732.

Note: Attachment with this report is a copy of the ad placed in the June 24th edition of the Fort Worth Star Telegram Newspaper.


Many hard-working Americans
have been exposed to dangerous levels of
ASBESTOS and/or SILICA.
Stuart & Lyle, LLP
ATTORNEYS AND COUNSELORS AT LAW

No.: _____

TEXAS DEPARTMENT OF HEALTH
BUREAU OF RADIATION CONTROL
COMPLAINT/TECHNICAL ASSISTANCE REQUEST FORM

Compl. & Insp.: X Lic., Reg., & Stan.: ___ T/A or Complaint No: 1685

Form of T/A Request/Complaint: X Telephone ___ Written ___ Visi
Referral From: _____

Complainant\Requestor: Anonymous
Address: _____ Telephone: _____
City: _____ State: _____ Zip: _____

T/A Request\Complaint Site: Unknown
Address: 1660 South University Drive Telephone: _____
City: Fort Worth Zip: _____ Co.: _____
Region: 03 License/Registration/Permit No.: _____

Description of T/A Request\Complaint: A company was flagging people in of
the street to take x-rays at the above location. Individual was concerne
about the legality and safety of this procedure.

T/A Request\Complaint Received By: Bradley Caskey Date: 06/24/0
Referred to: Earlon Shirley Date: 06/24/0
Investigated by: Royce Harmon, X-Ray Inspector, Reg. 2/3 Date: 6-24-02

Notice Of Violation? _____ Follow-up Inspection? _____ When? _____

Signed: _____ Title: _____

Reviewed by: _____ Title: _____

Disposition and Action Taken: (SEE ATTACHED NARRATIVE AND SCREENING AD.)

TEXAS DEPARTMENT OF HEALTH
Bureau of Radiation Control

Page 1 of

FIELD ACTIVITY FEE FY

Compliance #: _____

Name & Address of Licensee/Registrant	Date of Activity		
	Type of Activity (Investigation, Close-out Survey, Etc.)		
Address Where Activity Conducted:	Lic./Reg. No. Lic.# Reg.#		
	Compliance Letter To:		
Person(s) Contacted (Titles):	Telephone Number	Insp. Region	04


Report Date
Date Reviewed

RF RC HW JO

COMPLAINT 1685

JACKSON CRANE, P.C.
ATTORNEYS AND COUNSELORS AT LAW
2944 Portales
Fort Worth, TX 76116
Fax: 817-244-5408
Telephone: 817-244-6886

August 16, 2002

ROUTE

FACSIMILE COVER SHEET

TO: ***Facsimile Only #1-512-834-6654***
JIM OGDEN
Texas Department of Health

FROM: Kerry Jackson

RE: Information Requested

PAGES: 2

N & M
TESTING, INC.

2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

R22963

Please allow me to introduce myself. My name is Heath Mason. I am presently working with N & M, Inc. We have been testing people for asbestosis and silicosis for over five years and are very aware of the latest criteria. We simply want to offer you a quicker service combined with a competitive price.

Our equipment is able to meet your local as well as your out of town needs. We have mobile x-ray units that enable us to travel around and test clients no matter where they may be. If the need is strong enough, we also have x-ray units that can be setup inside of a testing facility. This allows us to serve you in any type situation.

Not only do we offer out of town x-ray services, but we offer pulmonary function test as well. These test are all done to meet NIOSH qualifications as well as the ATS standards. Respiratory therapist and NIOSH certified technicians who have had plenty of hands on experience administer them.

We have one more advantage to using our service. Not only do we provide you with an excellent quality x-ray and pulmonary function test, we also provide you with a reading of the x-ray and physical by well-known and respected B-reader's.

I look forward to discussing this with you personally in the near future. Thank you in advance for you further consideration.

Thanks again,

Heath Mason
VP

RF BC HW JO

TEXAS DEPARTMENT OF HEALTH
Bureau of Radiation Control
Division of Compliance and Inspection
1100 West 49th Street
Austin, Texas 78756-3189
phone: 512-834-6688/FAX: 512-834-6622

COPY

EE 1685

COMPLAINT

ROUTE

***** NOTICE OF VIOLATION *****

July 10, 2002

COMPLIANCE NO. R022454
REGISTRATION NO. R23138-000
COMPLAINT NO. 1685

REGISTRANT

Occupational Marketing, Incorporated
Attn: Bill Sullivan, R.S.O.
11211 Katy Freeway, Suite 420
Houston, Texas 77079

INVESTIGATION ADDRESS

Same

REGISTRANT REPRESENTATIVE

Bill Sullivan, R.S.O.

INVESTIGATOR

Royce Harmon

INVESTIGATION DATE

June 26, 2002

STAFF REVIEWER

Jack England

The following alleged violation was found during an investigation of operations under the registration number above.

1. The Registrant initiated a healing arts screening program without prior approval by this Agency, in violation of 25 TAC §289.226(j)(1).

   This is a Severity Level I violation.

You are required to initiate corrective action immediately and submit a written reply to the Agency within 30 days of receipt of this NOTICE. Use the enclosed guide for preparing your response. Include the above compliance and registration numbers in your response and retain this notice as a part of your records.

Item 1 is health related or potentially health related and should be corrected immediately. 25 Texas Administrative Code, Chapter 289 requires this notice to be posted or made available for employee review.

REVIEWER JCarter for Jack England

JE:sd

James H. Ogden, Jr.
Incident Investigation Program

COPY

nov1.frm

BRC Use Only
F C R 06

Tab 5

RESPIRATORY TESTING SERVICES

REQUEST FOR CHEST X-RAY AND/OR PULMONARY FUNCTION TEST (P.F.T.)

NAME [redacted]

ID# [redacted]

SER. SOC.# [redacted]

D.O.B. [redacted]

DATE [redacted]

WEIGHT _____

HEIGHT _____

ARE THERE ANY EXISTING OR PREXISTING CONDITIONS THAT YOU ARE AWARE OF THAT WOULD KEEP YOU FROM PERFORMING (BREATHING) THE PULMONARY FUNCTION TEST AND/OR X-RAYS, YES ____ OR NO ✓

IF YES PLEASE EXPLAIN _____

SIGNATURE [redacted]

IF FEMALE: I HEREBY CERTIFY THAT I AM NOT PREGNANT.

SIGNATURE: _____

DATE: _____

REASON FOR X-RAY/CLINICAL HISTORY: OCCUPATIONAL EXPOSURE TO ASBESTOS PRODUCTS. R/O ASBESTOSIS

TYPE OF EXAMINATION: PA, LATERAL, AND BILATERAL OBLIQUE CHEST X-RAYS.

DR. Robert Altmayer, M.D.

SMOKER _____ NON-SMOKER _____ EX-SMOKER ✓

[redacted] – Tab 6

Occupational Diagnostics
P.O. Box 331
Ocean Springs, MS 39566-0331
228-875-1114

Silicosis Evaluation Summary - Wednesday, February 26, 2003
Test Results with hands on Medical Examination

[redacted] Test Date: February 22, 2003

PA & lateral views of chest X-rays confirmed the presence of increased pulmonary parenchymal markings. Film quality grade 1. There is increased prepondurance of interstitial lung tracings in lower lobes bilaterally. On closer examination of the bilateral lobar markings, there are multiple enhanced lucent circular opacities. These are disparate, and are prominent in both PA and lateral films. There is moderate presence of bronchial cuffing. Chest X-ray findings in consort with the physical exam and exposure history revealed a diagnosis of primary silicosis.

The physical examination is hallmarked by audible but coarse rhonci with minimum to moderate rales on auscultation. Manual examination of the chest revealed both tactile and vocal fremitus.
Diagnosis Silicosis

This report relates only to the diagnosis of occupational lung diseases including exposure to asbestos or silica asbestos-related diseases, and is not intended to serve as a comprehensive medical evaluation.

H. Todd Coulter, M.D.

HTC/cjp

[redacted]

Exhibit A.
Exposure Work History
(also list any other activity for which you claim silica exposure)

Plaintiff [redacted]

Employer and Exposure Site	Address	Dates of Exposure	Job Description	Types of Products (List all manufacturers or models you remember)
[redacted]				

Dr. Glyn Hilbun, M.D.
4105 Hospital St., Ste. 109
Pascagoula, MS 39581
(228) 762-7868

JO-1413-S
[redacted]
-Tab 7

Name: [redacted]

DOB: [redacted] Age: [redacted] Phone: [redacted]

Address: [redacted]

SILICOSIS

ENTERED

Family: Married Number of Legal Children: [redacted]

Smoking History: How many years: 1or 2 cigars a day for 10 years. The client was advised to stop smoking for their health and the health of those with whom they live.

Work History:
The client claims exposure to silica while working as a [redacted] at:

FROM/TO	NAME OF EMPLOYER	CITY, STATE/ SUB-CONTRACTOR
[redacted]	[redacted]	[redacted]

Complaints:
Shortness of Breath: Yes

Has or Had Cancer: No TB: Yes, 1974 the client indicated that it was bone TB and took medicine for 1 year.

Has or Had Connective Tissue Disease: No

Surgery in the last 6 months: No

Exam:
Height: 70 Weight: 250

Enlarged Heart: No Possible Cancer: Yes Comments: RLZ. The client was advised to see their doctor.

Ankle Edema: No Fingernails: Clubbing: Yes Cyanosis: No

Breath Sounds: Normal

X-Ray:
X-Ray Report: See attached Pulmonary Function Test: See attached

Summary:
On the basis of this client's history of occupational exposure to silica and a B reading of the client's chest x-ray, then within a reasonable degree of medical certainty [redacted] has silicosis.

Exposure to silica is associated with an increased incidence of lung cancer, connective tissue diseases and autoimmune disease. Therefore, this client should consult with his or her physician.

I certify that I saw and examined [redacted] in Columbus, MS on April 23, 2002.

Signature: Glyn R. Hilbun, MD Date 04/23/02
Glyn Hilbun, M.D.

Dr. Kevin Cooper, M.D., M.P.H.
4305 Denny Ave.
Pascagoula, MS 39581
(228) 762-2044

Name: [redacted]

DOB: [redacted] Age: [redacted] Phone: [redacted]

Address: [redacted]

Family: [redacted] Number of Legal Children: [redacted]

Smoking History: Cigarette ¾ ppd

How many years 6 Quit 1987

Work History:

The client claims exposure to silica while working at:

1) [redacted] as a [redacted] Start: 1971 Finish: 1973
2) [redacted] as a [redacted] Start: 1973 Finish: 1975
3) [redacted] as a [redacted] Start: 1975 Finish: 2002

Complaints:

Shortness of Breath: No

Has or Had Cancer: No TB: No

Has or Had Connective Tissue Disease: No

Surgery in the last 6 months: No

Exam:

Height: 72 *inches* *Weight:* 198 lbs

Ankle Edema: No *Fingernails: Clubbing* Yes *Cyanosis* No

Breath Sounds: Abnormal *Comments: Mild Rhonchi*

X-Ray:

X-Ray Report: See Attached Pulmonary Function Test: See Attached

Summary:

On the basis of this client's history of occupational exposure to silica and a B reading of the client's chest x-ray, then within a reasonable degree of medical certainty, [redacted] has silicosis.

Exposure to silica is associated with an increased incidence of lung cancer, connective tissue disease, and autoimmune diseases. Therefore this client should consult with his other physicians.

I certify that I saw and examined [redacted] in Pascagoula, MS on date 4/15/2002

Signature: _____ Date: 4/15/02

Kevin Cooper, M.D., M.P.H.

SELF SUPPORT

R.T.S. mobile clinics are completely self contained and supportive. The units are powered by a 50 kw generator to ensure ample electrical power in all situations.

The mobile units are not only functional but very appealing to the eye. Your clients will be impressed not only with the service, but also the comforts such as central air and heat and modern design of our clinics.

RESPONSIVENESS

R.T.S. is dedicated to the quickest possible service to both our clients and our patients. We maintain 3 complete mobile medical facilities complete with Pulmonary Function machines with gas diffusion, Radiological equipment, audiometry equipment, to mention a few, as well as a complete, licensed, certified and NIOSH (National Institute for Occupational Safety and Health) approved Physicians and medical staff.

You might have been exposed to asbestos if you worked at one of the following plants or in the trade with at least 3 years exposure prior to 1973:

1. Aluminum Plant
2. Auto Mechanic Shop (Asbestos Brakes & Clutches)
3. Boilermakers
4. Carpet Mills w/boilers
5. Carpenters
6. Chemical Plant
7. Electricians
8. Fertilizer Plant, Protochemical Plant
9. Glass Foundries
10. Insulators
11. Ironworkers
12. Laborers
13. Machinists/Millwrights
14. Mine Workers
15. Navy Ships in boiler room
16. Oil Refinery
17. Painters
18. Papermill
19. Pipefitters
20. Power Houses
21. Power Plant
22. Railroad
23. Rubber Plants
24. Shipyard
25. Steel Foundry
26. Steel Mill

RESPIRATORY TESTING SERVICES, INC.

TESTING FOR ASBESTOSIS
DONE LOCALLY
CALL FOR APPOINTMENT

1-800-997-8378

R.T.S., Inc.

Asbestos and Silica Disease Screening Throughout the United States

Facilities with 100% mobile capabilities

1-800-997-8378

Tab 8

Thank you for allowing me the time to present Respiratory Testing Services to you.

Working as a pipefitter in the building trades for many years, I was exposed to products containing asbestos. I was tested for an asbestos related lung disease in 1988. The results were positive with an ILO reading of 1/0 which progressed to a reading of 1/1 within 3 years. My ILO reading, which is a measurement of the degree of lung damage, is a perfect example of the progressive nature of this disease. Asbestosis may take approximately 25 to 30 years before it is evident on a chest x-ray.

Our mobile clinic provides complete medical evaluations by Board Certified, NIOSH (National Board of Occupational Safety and Health) approved Physicians, Radiologic Technologists, Respiratory Therapists and/or Technicians. The screening includes a complete work history, followed by a chest x-ray consisting of 2-4 films which is performed by a registered Radiologic Technologist. Once the x-rays are completed a Pulmonologist (Lung Specialist) evaluates them.

If there is no radiographic evidence of disease after the x-ray has been evaluated, the testing procedure is over and the patient is notified that asbestosis is a progressive disease, and with their exposure history should be re-tested every year and a half to two years.

For the patients with positive results, a board certified Respiratory Therapist/Technician will perform a Pulmonary Function Test which will include Spirometry, Lung Volumes, and a Diffusion Test that are performed by the American Thoracic Society standards. To finish the test a physical exam is done by a Certified Pulmonologist experienced in occupational lung diseases. The Physician then consults with the patient to make a complete medical interpretation. This provides the patient with a thorough understanding of their test results and lung condition.

There is no out of pocket expenses to the patient. For those who are diagnosed positive, the cost of the test will be deducted from any recovery made from the manufacturers of asbestos products. When the medical aspect of the testing is over, an attorney or their representative will discuss with the patient their rights, under the law, for compensation due to occupational exposure to asbestos. They will also answer any questions related.

Sincerely,

Charles R. Foster, Sr.

EXPERIENCE AND PERFORMANCE

Respiratory Testing Services, Inc. was formed in 1994 to fill a void in the South East United States.

R.T.S. offers local service in our facility at 4362 Midmost Drive, in Mobile, AL as well as being entirely mobile with all of our diagnostic testing services.

We retain on our staff, full time, the following board certified and NIOSH (National Institute for Occupational Safety and Health) approved physicians:

Pulmonologist
- Internal Medicine
- Pulmonary Disease
- Critical Care Medicine
- NIOSH approved B-Reader

Internal Medicine Specialist
- Emergency Medicine
- Hyperbaric Medicine
- Audiology
- Diving Medicine

We also maintain board certified and NIOSH approved, CRTTs, RTs, Med Techs, as well as other technical staff with a combined 180+ years of medical experience and expertise.

RESPIRATORY TESTING SERVICES, INC.

TESTING FOR ASBESTOSIS
DONE LOCALLY
CALL FOR APPOINTMENT

1-800-997-8378

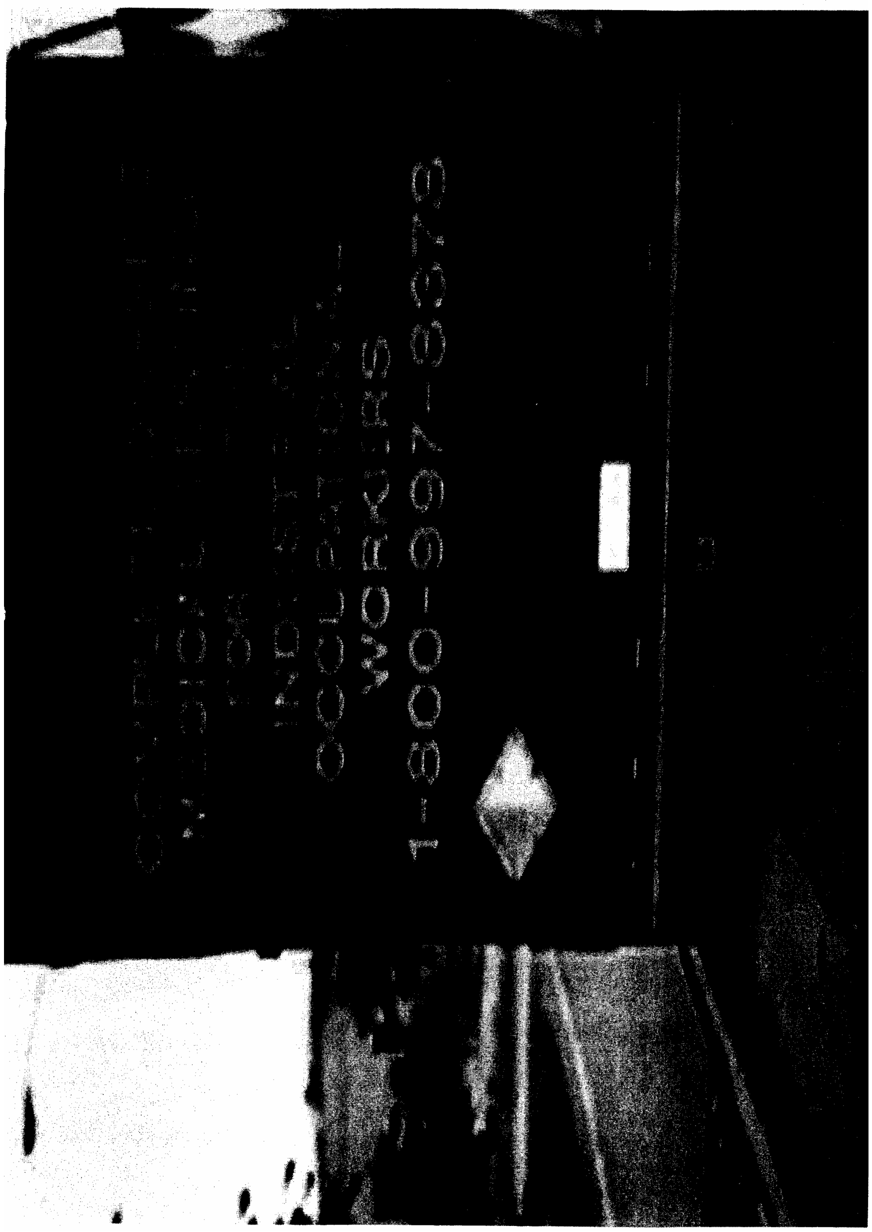
PROFESSIONAL SUPPORT

R.T.S. works with state and federal agencies so that at all times, R.T.S. not only meets, but exceeds those standards set forth by government agencies.

BACKED BY TECHNOLOGY

R.T.S. has spared no expense in equipping the mobile units with state of the art equipment. This all but eliminates equipment break down or flawed test results. All equipment is maintained and calibrated according to NIOSH (National Institute for Occupational Safety and Health) and ATS (American Thoracic Society) standards.

VMAX 2200 SERIES


WORKERS

Jay T. Segarra, M.D., FACP *NIOSH Certified B-Reader*

Board certified in Internal Medicine, Pulmonary Diseases, & Critical Care
Camellia Place • 2123 Government Street • Ocean Springs, Mississippi 39564
Phone/Fax (228) 872-2411

Tab 9

Date:_____

Patient Name:_____

SSN:_____

DOB:_____

Please let this serve as a standing order for a plain chest radiograph (PA and lateral), subject to the usual precautions and standard procedures that govern accredited facilities and/or certified technician in the states of Texas, Alabama, Louisiana, and Mississippi. This order should apply to all individuals (without known or suspected pregnancy) who believe they have sustained exposure to asbestos-containing substances, or believe that this is a significant possibility.

If I can be of further assistance please do not hesitate to phone/fax me at (228) 872-2411.

Sincerely,

Jay T. Segarra, M.D., FACP

JTS/cla
Requestform

EXHIBIT C

[redacted] Tab 10

Robert B. Altmeyer, M.D.
PULMONARY MEDICINE

DIPLOMATE AMERICAN BOARD OF INTERNAL MEDICINE
DIPLOMATE AMERICAN BOARD OF INTERNAL MEDICINE IN PULMONARY DISEASES
CERTIFIED BY AMERICAN BOARD OF INTERNAL MEDICINE IN GERIATRIC MEDICINE
CERTIFIED B READER BY THE NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH
1131 NATIONAL ROAD
WHEELING, WV 26003
(304) 243-1448

ASBESTOS MEDICAL EXAMINATION

[redacted]

SS# [redacted]
DOB: [redacted]
DATE OF EXAMINATION: 6/23/03

HISTORY

This patient is a [redacted] male whom I examined in [redacted], Texas, on June 23, 2003, at the request of the law firm of Negem & Bickham, PC.

OCCUPATIONAL HISTORY

From 1980 until 1982, he worked for [redacted], in Tyler, Texas. He worked at the palette conveyor, in the core area, as a machinist and in the fabricator shop. He [redacted] from 1982 until 1990. From 1990 until 1994, he worked as [redacted]. From 1994 until 2003, he worked for [redacted] as an assembler. He has had direct exposure to asbestos transite, cloth, gloves, gaskets, valve packing and firebrick. He also worked around sandblasting, core making, etc.

SMOKING HISTORY

He has never smoked tobacco.

MEDICAL HISTORY

He has a chronic dry cough, chronic shortness of breath, wheezing and occasional exertional chest pain but no hemoptysis. I advised him to have the exertional chest pain evaluated by his personal physician. He has no history of myocardial infarction, stroke, rheumatic fever, valvular heart disease, TB, TB exposure, chest trauma, chest surgery, pneumonia, asthma, allergies, hay fever, emphysema, COPD, rheumatoid arthritis, connective tissue disease or pleurisy.

He has no known allergies to medications.

MEDICATIONS

He takes no medications.

[redacted]
Page 2

PHYSICAL EXAMINATION

HEIGHT:	67 inches
WEIGHT:	204 pounds
RESPIRATORY RATE:	18
HEART RATE:	90
CHEST:	On auscultation of the chest, there are no wheezes and no rhonchi. The forced expiratory time is normal. There are no crackles.
HEART:	The heart is regular. There is no S3 or S4 gallop.
NECK:	There is no supraclavicular adenopathy.
EXTREMITIES:	There is trace peripheral edema. The nails are not cyanosed or clubbed.

PULMONARY FUNCTION STUDIES

A pulmonary function study performed by Respiratory Testing Services, Inc., in Tyler, Texas, on 6/23/03, shows mild restriction, no obstruction and a normal specific diffusing capacity.

CHEST X-RAY INTERPRETATION

I interpreted a chest x-ray, as an NIOSH certified B reader, taken by Respiratory Testing Services, Inc., in Tyler, Texas, on 6/23/03, as showing category 1/0 q/q in both upper lung zones and in the right mid lung zone by the ILO International Classification of Radiographs of Pneumoconioses.

IMPRESSION

Based on the above data, it is my opinion, with a reasonable degree of medical certainty, that this man has simple silicosis. I make that diagnosis on the basis of the characteristic small rounded opacities predominantly in the upper lung zones in an individual who has had a significant exposure to silica dust and no other obvious cause for such rounded capacities. He is at an increased risk for the development of lung cancer because silicosis has been recognized as a primary pulmonary carcinogen. I advised him to have periodic chest x-rays and follow-up examinations by his personal physician.

[redacted]
Page 3

Since he has had a significant exposure to asbestos dust, he is also at an increased risk for the development of lung cancer, mesothelioma, loss of lung function, gastrointestinal cancers and other conditions. For that reason, I also advised him to have periodic chest x-rays and follow-up examinations by his personal physician.

Sincerely,

Robert B. Altmeyer, M.D.

RBA/rcg

TEXAS Department of State Health Services

Tab 11

Schedule of Biennial fees for Medical or Educational/Healing Arts Certificate of Registration for Radiation Machines and Lasers

Each application for a certificate of registration shall be accompanied by a two year non-refundable administrative fee. Fee payments by check or money order shall be made payable to the Department of State Health Services

In the case of a Certificate of Registration that authorizes more than one category of use, the total fee is the category with the highest corresponding fee.

MEDICAL AND ACADMEMIC /HEALING ARTS

(1) Computerized Tomography (CT)	$ 1656.00
(2) Fluoroscopy	$ 816.00
(3) Accelerator, Simulator, or Other Therapeutic Radiation Machine	$ 586.00
(4) Radiographic Machines Only (A) Medical (B) Bone Densitometry (C) Chiropractic	$ 517.00
Podiatric Radiographic Only	$ 374.00
(6) Dental Radiographic Only	$ 330.00
(7) Veterinary, Including CT, Fluoroscopy, and Accelerators	$ 264.00
(8) Other Industrial	$ 575.00
(9) Morgues and Educational Facilities Utilizing Radiation Machines for Human Use	Appropriate Fee as Indicated Above

CERTIFICATION OF MAMMOGRAPHY SYSTEMS

An application for Certification of Mammography Systems shall be accompanied by a fee of $422.00 for each unit.

NON-IONIZING MEDICAL/RESEARCH/ACADEMIC

Lasers	Fee - $200.00	No additional fee per device or additional use locations.

Additional ***AUTHORIZED USE*** site where radiation machines or services are authorized under the same registration with the exception of Mammography.	30% of Applicable Fee

Continued on Page 2

Schedule of Biennial fees for Certification of Registration for Industrial Radiation Machines, Services and Lasers

INDUSTRIAL RADIOGRAPHY	
(1) Industrial Radiography	
(A) Fixed Facility	$ 1,702.00
(B) Temporary Job Sites	$ 2,852.00
(2) Other Industrial	$ 575.00
(A) Diffraction	
(B) Computerized Tomography	
(C) Fluoroscopy / Hand Held Intensified	
(D) Fluoroscopy/ X-ray	
(E) Flash Radiography	
(F) Hand-Held Light Intensifying Image Devices	
(G) Spectrograhpy	
(H) Industrial Accelerator	
(I) Portable Hand Held Fluorescence (open beam)	
(J) Research –Non –Human use	
(K) Other- Industrial	
(3) Morgues and Educational Facilities (Teaching & Training Only) utilizing Radiation Machines for Non-human Use, Including CT, Fluoroscopy, and Accelerators	$ 575.00
(4) Minimal Threat Radiation Machines as Specified in 25 TAC §289.231(II)(3) of this Title	$ 264.00
(A) Cathodoluminescence	
(B) Electron Beam Welding	
(C)Fluorescence X-Ray (closed beam)	
(D) Gauge X-Ray	
(E) Ion Implantation	
(F) Package X-Ray	
(G)Partical Size Analyzer X-Ray	
(H) Cabinet X-Ray (Certified)	
(I) Other- Minimal Threat	
(5) Exposure Rate of Dose Measurements performed by a Licensed Medical Physicist as Specified in 25 TAC §289.226(b)(9) of this title.	$ 253.00
(6) Services as Specified in 25 TAC §289.226(b)(10) of this Title	$ 253.00
(A) Exposure Rate or Dose Measurements	
(B) Radiation Machine Output Measurements	
(C) Agency-Accepted Training Courses	
(D) Calibration of Survey and Radiation Measurement Instruments	
(E) Demonstration/Sales	
(F) Assembly, Installation or Repair	
(G) Equipment Performance Evaluations on Dental Radiation Machines	
(H) Provider of Equipment	
(7) Laser – Medical/Research/Academic	$ 200.00
(8) Laser – Industrial/Services/Entertainment	$ 340.00
(9) Reciprocity	Fee of Applicable Category
Additional Authorized Use Location Where Radiation Machines or Services are Authorized Under the Same Registration	30% of Applicable Fee

TEXAS Department of State Health Services

BUSINESS INFORMATION FORM

INSTRUCTIONS - Complete the box that is applicable to your business. Mail or fax original(s) to the Texas Department of State Health Services, Radiation Safety Licensing Branch (RSLB), 1100 West 49th Street, Austin, Texas 78756-3189. Fax number (512)834-6716. If there are any questions, contact RSLB-Machine Source Group at (512) 834-6688.

COMPLETE THIS BOX IF THE APPLICANT IS A CORPORATION

REGISTRATION/CERTIFICATION NUMBER _____
(Applicants applying for New Registration will not have a registration/certification number)

NAME OF CORPORATION: _____

DOING BUSINESS AS: _____

TYPE OF CORPORATION: _____

BUSINESS ADDRESS: _____

_____

TELEPHONE NUMBER: _____

REGISTERED AGENT: _____

REGISTERED AGENT ADDRESS: _____
(if different than facility address above)

REGISTERED AGENT TELEPHONE NUMBER: _____

TEXAS SECRETARY OF STATE CHARTER NUMBER: _____
Charter Number – Taxpayer Identification Number, Filing Number or Federal Identification Number
For more information concerning Texas Secretary of State Charter Number call 800-252-1381

I certify that the information provided above is true and correct:

_____ _____
Signature of an Officer of the Applicant | Typed or Printed Name

_____ _____
Position with Applicant | Date

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021. 552.023, 559.003 and 559.004).

SEE BACK FOR ADDITIONAL OPTIONS

COMPLETE THIS BOX IF APPLICANT IS ANOTHER TYPE OF BUSINESS ORGANIZATION OTHER THAN A CORPORATION

REGISTRATION/CERTIFICATION NUMBER _____
(Applicants applying for New Registration will not have a registration/certification number)

NAME OF BUSINESS: _____

DOING BUSINESS AS: _____

TYPE OF BUSINESS ORGANIZATION: _____
(i.e., partnership, professional association, etc.)

BUSINESS ADDRESS: _____

_____

TELEPHONE NUMBER: _____

TEXAS SECRETARY OF STATE CHARTER NUMBER: _____
Charter Number – Taxpayer Identification Number, Filing Number or Federal Identification Number
For more information concerning Texas Secretary of State Charter Number call 800-252-1381

I certify that the information provided above is true and correct:

_____ _____
Signature of an Officer of the Applicant Typed or Printed Name

_____ _____
Position with Applicant Date

COMPLETE THIS BOX IF APPLICANT IS AN INDIVIDUAL

REGISTRATION/CERTIFICATION NUMBER _____

NAME: _____

DOING BUSINESS AS: _____

BUSINESS ADDRESS: _____

_____

TELEPHONE NUMBER: _____

I certify that the information provided above is true and correct:

_____ _____
Signature of Individual Owner Typed or Printed Name

_____
Date

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

ZZ113-120

TEXAS Department of State Health Services

REGISTRATION APPLICATION FOR USERS OF RADIATION MACHINES IN HEALING ARTS, DENTAL, VETERINARY MEDICINE AND MEDICAL ACADEMIC FACILITIES

INSTRUCTIONS - Complete ALL ITEMS of the application. Mail original(s) to the Texas Department of State Health Services (TDSHS), Radiation Safety Licensing Branch (RSLB), 1100 West 49th Street, Austin, Texas 78756-3189. Submit the appropriate fee with an application for NEW REGISTRATIONS ONLY. Upon approval of the application, the applicant will receive a Certificate of Registration. If there are any questions, contact RSLB, Machine Source Group, at (512) 834-6688.

1. a. Legal name of business, facility or individual:*

b. Business mailing address:

2. Physical address where radiation machines will be used: (Submit separate application forms for each additional use location under this registration.)

3. Type of Action: (Check all that apply)

____ New registration (Attach appropriate fee)

____ Renewal of registration no. _____

____ Amendment to registration no. _____

____ Name change* ____ Address change

____ RSO change ____ Add unit(s)

____ Additional use location ____Delete unit(s)

4. County of Use:

5. Telephone No.:

6. Fax No.:

7. Radiation Safety Officer (RSO)* (Submit qualifications)

8. *Machine Category use at this location- (as indicated in box 2)
(Please the **total number** of units used in each category)

____Medical Fluoroscopic ____**Medical Accelerators

____Computerized Tomography

____Medical Radiographic ____**Screening Authorization

____Podiatric Only

____Veterinary ____** Mobile

____Dental Only

____Minimal Threat

____Other Industrial

9. (Delete) Category Use for this location (as indicated in box 2)
(Provide the number of units to be deleted in each category)

____Medical Fluoroscopic ____Medical Accelerators

____Computerized Tomography

____Medical Radiographic ____Screening Authorization

____Podiatric

____Veterinary ____Mobile

____Dental Only

____Minimal Threat

____Other Industrial

10. As a licensed practitioner, I do hereby affirm that I am associated with this applicant and provide supervision to non-practitioners administering radiation to human beings or animals.

Signature of Licensed Practitioner* Date Typed or Printed Name Licensing Board No.

11. I do hereby accept the responsibilities of Radiation Safety Officer.

Signature of Radiation Safety Officer* Date Typed or Printed Name Licensing Board No.

12. I certify that the administration of radiation to human beings or animals in association with this application shall be under the supervision of an appropriately licensed practitioner. Furthermore, I attest that the information contained in this application is true and correct to the best of my knowledge.

Signature of Applicant Date Typed or Printed Name

Signature of Owner or Partner* Date Typed or Printed Name

*SEE REVERSE SIDE FOR ADDITIONAL INFORMATION
** SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

BRC Form 226-2 (Rev.01/12/05)

INSTRUCTIONS

The following denotes a detailed explanation for the specific items indicated by an asterisk (*) and asterisks (**) from the front page.

*Item(s) 1a and 3: Legal name of business, facility or individual.
A Business Information Form (BRC Form 226-1) must be submitted for all new applications and for any name or ownership change.

Item 7: Radiation Safety Officer (RSO).
The individual named as RSO must meet the requirements specified in 25 Texas Administrative Code (TAC) §289.
For licensed practitioners, only signature and Texas license number are required.

RSO responsibilities are outlined in:
Dental §289.232(h)(11)
Veterinary §289.233(h)(1)(E)(iv)
Medical §289.226(t)(2)

For multiple use locations, one individual shall be designated as RSO for all sites.

Item 8: Add Use Category(s). (For Category explanation, See Table below)
Item 9: Delete Use Category(s)-Provide the number of units to delete.

567-COMPUTERIZED TOMOGRAPHY
For Example:
CT Scanning

J01-FLUOROSCOPY
For Example:
Fluoroscopy
Medical Radio-Fluoro
Lithotripter
Fluoro-Hand Held-Intensifying Device
C-Arm

57_ .ADIATION MACHINES
For Example:
Chiropractic
Medical Radiographic
Bone Densitometer
Other
Mammo for non-human use

572-MINIMAL THREAT ONLY
For Example:
Fluorescence
Cabinet X-ray

573-Other Industrial
For Example:
Diffraction
Lithotripter
Fluoro-Hand Held Intensfying Device

566-PODIATRIC RADIOGRAPHIC ONLY
For Example:
Podiatric

571-VETERINARY
For Example:
Veterinary (including Dental, Fluro, CT, Accelerator)

886-DENTAL ONLY
For Example:
Dental

****878-ACCELERATOR, SIMULATOR OR OTHER THERAPEUTIC**
For Example:
Medical Accelerators
X-ray Therapy
Simulator

**Submit Operating and Safety Procedures AND receive a Certificate of Registration before beginning operation of:
An accelerator See 25 TAC §289.226(f)(2)
Healing Arts Screening See 25 TAC §289.226(h)
Mobile Operation See 25 TAC§229.226(g), Dental §289.232(h)(2), Veterinary §289.233(h)(2)

Item 10: Signature of Licensed Practitioner
The signature of the Administrator, President or Chief Executive Officer of the facility will be accepted if the facility is a licensed hospital or a medical facility with more than one licensed practitioner who may direct the operation of radiation machine(s).

Item 11: Signature of the Radiation Safety Officer (RSO)
The signature of the person listed in Item 7, as RSO, is required for the processing of all registration actions.

Item 12: Signature of Applicant
This should be the signature of a person duly authorized by the applicant or registrant to act for and on the behalf of the applicant or registrant.
Signature of Owner or Partner
This line does not need to be completed if the business is a corporation.

TEXAS
Department of
State Health Services

Machine Source Group
Radiation Safety Officer (RSO) Information

This form may be used to request a change in RSO for your facility. Select from the categories listed below and submit the credentials of the designated RSO that are specific to your situation. Listings of the requirements, which the RSO must meet, are located in 25 Texas Administrative Code (TAC) §289. You may document years of experience on the reverse side of this form. Mail or fax completed form along with the appropriate documentation to the Texas Department of State Health Services, Radiation Safety Licensing Branch (RSLB), 1100 West 49th Street, Austin, Texas 78756-3189. Fax number (512)834-6716. If there are any questions, contact RSLB-Registration at (512) 834-6688. Retain a copy for your records.

REGISTRATION/CERTIFICATION NUMBER: _____
(Applicants applying for New Registration will not have a registration/certification number)

I. Name of Facility_____

Telephone No. _____ Fax No. _____

Address of Facility_____

_____

II. RSO Designee _____
Individual's Full Name (Print or type)

Healing Arts

Licensed Practitioner (M.D., D.D.S., D.O., D.C., D.P.M.)
Texas Licensing Board No._____

ARRT, ARCRT or Medical Radiological Technologist with general certificate.
Copy of certificate; and
2 years experience

Medical Radiological Technologist with limited certificate
Copy of certificate; and
4 years experience

Associate degree in radiological technology, health physics or nuclear technology
Copy of degree; and
2 years experience

Registered with the Board of Nurse Examiners as a registered nurse or nurse practitioner with an extended scope of practice performing radiologic procedures
Copy of registration; and
2 years of experience

Registered with the Physician Assistant Examiner's Board
Copy of registration; and
2 years of experience

Registered with the Licensed Practitioner's Board, or the Texas State Board of Dental Examiners to perform radiological procedures
Copy of registration; and
4 years of experience

Bachelor degree in natural or physical science, health physics, radiological science, nuclear medicine, nuclear engineering
Copy of degree

Licensed Medical Physicist
Copy of Texas license

Radiotherapy

RRT or ARCRT certificate; and
4 years radiotherapy experience

Veterinary

Veterinarian
Texas Veterinary License Board No. _____

Non Veterinarian
2 years experience

Academic and/or Research and Development

Faculty or staff member in radiation protection, radiation engineering or related discipline submit evidence of the following:
Educational course(s) on radiation safety
Experience with x-ray equipment
Knowledge of potential radiation hazards

Certification

I hereby certify that I will fulfill the duties and responsibilities of RSO as required in 25 TAC §289.

_____
Signature of designated Radiation Safety Officer

Documentation of radiation machine experience:

Name of Facility	Date of Employment (from - to)	Type of Radiation Equipment Operated

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

TEXAS DEPARTMENT OF STATE HEALTH SERVICES

Excerpt from 25 Texas Administrative Code (TAC) § 289.226(h)(1)

Persons proposing to conduct *HEALING ARTS SCREENING* must submit the following information:

A. Administrative Controls

1. The name and address of the applicant and, where applicable, the name and address of the representative(s) within Texas.
2. The diseases or conditions for which the x-ray examinations are to be used in diagnoses.
3. A detailed description of the x-ray examinations proposed in the screening program.
4. A description of the population to be examined in the screening program (e.g., age, sex, physical condition and other appropriate information). *
5. An evaluation of any known alternate methods not involving ionizing radiation which could achieve the goals of the screening program and why these methods are not used instead of the x-ray examination.

B. Operating Procedures

1. An evaluation by a licensed medical physicist with a specialty in diagnostic radiological physics of the x-ray systems to be used in the screening program. The evaluation by the radiation expert shall show that such systems do satisfy all requirements of these rules.
2. A description of diagnostic film and/or digital quality control program.
3. A copy of the technique chart for the x-ray examination procedures to be used.

C. Training

1. The qualifications of each individual who will be operating the x-ray systems.
2. The qualifications of the individual who will be supervising the operators of the x-ray systems. The extent of supervision and the method of work performance evaluation shall be specified.
3. The name and address of the practitioner who will interpret the radiographs.

D. Records

1. A description of the procedures to be used in advising the individuals screened, and their private practitioners of the healing arts, of the results of screening procedures and any further medical needs indicated.
2. A description of the procedures for the retention or disposition and other records pertaining to the x-ray examinations.

* SEE OTHER SIDE FOR OSTEOPOROSIS AND HEART SCREENING INFORMATION.

Minimum requirements and exemptions for Osteoporosis Screening using Bone Densitometers are listed below:

1. Persons proposing to conduct *OSTEOPOROSIS SCREENING* shall be limited to the following:

   a. An estrogen deficient woman at clinical risk for osteoporosis.

   b. An individual with vertebral abnormalities.

   c. An individual with primary hyperparathyroidism.

   d. An individual with a history of bone fractures.

   e. An individual who is receiving long-term glucocorticoid therapy.

   f. An individual who is being monitored to assess the response to or efficacy of an approved osteoporosis drug therapy.

2. In lieu of item B.1., operating procedures for bone densitometers shall include the following:

   The manufacturer's evaluation of a bone densitometer may be submitted in lieu of an evaluation by a physicist.

Minimum requirements for *CORONARY HEART DISEASE SCREENING* are listed below:

1. Males must be forty (40) to sixty-five (65) years of age.

2. Females must be forty-five (45) to seventy (70) years of age.

3. The self-referred screening candidate must have one of the following risk factors:

   a. Diabetes,

   b. Current Smoker,

   c. Obesity,

   d. Family history of heart disease,

   e. Cholesterol level greater than 160/LDL,

   f. Blood pressure greater than 140/90.

TEXAS
Department of
State Health Services

Eduardo J. Sanchez, M.D., M.P.H.

1100 West 49th Street
Austin, Texas 78756-3199

Radiation Safety Licensing
Branch
(512) 834-6688

Ben Delgado
Chief Operating Officer

Nick Curry, M.D., M.P.H.
Executive Deputy Commissioner

Registration of Mobile Services Used in the Healing Arts and Veterinary Medicine

In addition to the requirements of 25 TAC §289.226(e) and (f) or 25 TAC §289.232(h)(2), as applicable, each applicant shall apply for and receive authorization for mobile services before beginning mobile service operation. The following shall be submitted.

(a) An established main location where the machine(s), records, etc., will be maintained for inspection.

(b) A sketch or description of the normal configuration of each x-ray unit's use, including the operator's position and any ancillary personnel's location during exposures. If a mobile van is used with a fixed unit inside, furnish the floor plan indicating protective shielding and the operator's location.

(c) Each application for mobile services used in the healing arts shall submit a current copy of the applicant's Operating and Safety Procedures regarding radiological practices for protection of patients, operators, employees, and the general public.

PART 801

SECTION F

APPENDIX B

INFORMATION TO BE SUBMITTED BY PERSONS

PROPOSING TO CONDUCT HEALING ARTS SCREENING

Persons requesting that the Agency approve a healing arts screening program shall submit the following information and evaluation:

I. Name and address of the applicant and, where applicable, the names and addresses of agents within this State.

II. Diseases or conditions for which the x-ray examinations are to be used in diagnoses.

III. A detailed description of the x-ray examinations proposed in the screening program.

IV. Description of the population to be examined in the screening program, i.e., age, sex, physical condition, and other appropriate information.

V. An evaluation of any known alternate methods not involving ionizing radiation which could achieve the goals of the screening program and why these methods are not used instead of the x-ray examinations.

VI. An evaluation by a qualified expert of the x-ray system(s) to be used in the screening program. The evaluation by the qualified expert shall show that such system(s) do satisfy all requirements of these regulations. The evaluation shall include a measurement of patient exposures for the x-ray examinations to be performed.

VII. A description of the diagnostic x-ray quality control program.

VIII. A copy of the technique chart for the x-ray examination procedures to be used.

IX. The qualifications of each individual who will be operating the x-ray system(s).

X. The qualifications of the individual who will be supervising the operators of the x-ray system(s). The extent of supervision and the method of work performance evaluation shall be specified.

XI. The name and address of the individual who will interpret the radiograph(s).

XII. A description of the procedures to be used in advising the individuals screened and their private practitioners of the healing arts of the results of the screening procedure and any further medical needs indicated.

XIII. A description of the procedures for the retention or disposition of the radiographs and other records pertaining to the x-ray examinations.

XIV. An indication of the frequency of screening and the duration of the entire screening program.

TEXAS Department of State Health Services

Schedule of Biennial fees for Medical or Educational/Healing Arts Certificate of Registration for Radiation Machines and Lasers

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) Podiatric Radiographic Only	$ 374.00
(6) Dental Radiographic Only	$ 330.00
(7) Veterinary, Including CT, Fluoroscopy, and Accelerators	$ 264.00
(8) Other Industrial	$ 575.00
(9) Morgues and Educational Facilities Utilizing Radiation Machines for Human Use	Appropriate Fee as Indicated Above

CERTIFICATION OF MAMMOGRAPHY SYSTEMS

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MEDICAL/RESEARCH/ACADEMIC

Lasers	Fee - $200.00	No additional fee per device or additional use locations.

Additional ***AUTHORIZED USE*** site where radiation machines or services are authorized under the same registration with the exception of Mammography.	30% of Applicable Fee

Continued on Page 2

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(A) Diffraction	
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(C) Fluoroscopy / Hand Held Intensified	
(D) Fluoroscopy/ X-ray	
(E) Flash Radiography	
(F) Hand-Held Light Intensifying Image Devices	
(G) Spectrograhpy	
(H) Industrial Accelerator	
(I) Portable Hand Held Fluorescence (open beam)	
(J) Research –Non –Human use	
(K) Other- Industrial	
(3) Morgues and Educational Facilities (Teaching & Training Only) utilizing Radiation Machines for Non-human Use, Including CT, Fluoroscopy, and Accelerators	$ 575.00
(4) Minimal Threat Radiation Machines as Specified in 25 TAC §289.231(II)(3) of this Title	$ 264.00
(A) Cathodoluminescence	
(B) Electron Beam Welding	
(C)Fluorescence X-Ray (closed beam)	
(D) Gauge X-Ray	
(E) Ion Implantation	
(F) Package X-Ray	
(G)Partical Size Analyzer X-Ray	
(H) Cabinet X-Ray (Certified)	
(I) Other- Minimal Threat	
(5) Exposure Rate of Dose Measurements performed by a Licensed Medical Physicist as Specified in 25 TAC §289.226(b)(9) of this title.	$ 253.00
(6) Services as Specified in 25 TAC §289.226(b)(10) of this Title	$ 253.00
(A) Exposure Rate or Dose Measurements	
(B) Radiation Machine Output Measurements	
(C) Agency-Accepted Training Courses	
(D) Calibration of Survey and Radiation Measurement Instruments	
(E) Demonstration/Sales	
(F) Assembly, Installation or Repair	
(G) Equipment Performance Evaluations on Dental Radiation Machines	
(H) Provider of Equipment	
(7) Laser – Medical/Research/Academic	$ 200.00
(8) Laser – Industrial/Services/Entertainment	$ 340.00
(9) Reciprocity	Fee of Applicable Category
Additional Authorized Use Location Where Radiation Machines or Services are Authorized Under the Same Registration	30% of Applicable Fee

TEXAS
Department of
State Health Services

BUSINESS INFORMATION FORM

INSTRUCTIONS - Complete the box that is applicable to your business. Mail or fax original(s) to the Texas Department of State Health Services, Radiation Safety Licensing Branch (RSLB), 1100 West 49th Street, Austin, Texas 78756-3189. Fax number (512)834-6716. If there are any questions, contact RSLB-Machine Source Group at (512) 834-6688.

COMPLETE THIS BOX IF THE APPLICANT IS A CORPORATION

REGISTRATION/CERTIFICATION NUMBER _____
(Applicants applying for New Registration will not have a registration/certification number)

NAME OF CORPORATION: _____

DOING BUSINESS AS: _____

TYPE OF CORPORATION: _____

BUSINESS ADDRESS: _____

_____

TELEPHONE NUMBER: _____

REGISTERED AGENT: _____

REGISTERED AGENT ADDRESS: _____
(if different than facility address above)

REGISTERED AGENT TELEPHONE NUMBER: _____

TEXAS SECRETARY OF STATE CHARTER NUMBER: _____
Charter Number – Taxpayer Identification Number, Filing Number or Federal Identification Number
For more information concerning Texas Secretary of State Charter Number call 800-252-1381

I certify that the information provided above is true and correct:

_____ _____
Signature of an Officer of the Applicant | Typed or Printed Name

_____ _____
Position with Applicant | Date

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SEE BACK FOR ADDITIONAL OPTIONS

BRC Form 226-1 Rev. 11/04

COMPLETE THIS BOX IF APPLICANT IS ANOTHER TYPE OF BUSINESS ORGANIZATION OTHER THAN A CORPORATION

REGISTRATION/CERTIFICATION NUMBER _____
(Applicants applying for New Registration will not have a registration/certification number)

NAME OF BUSINESS: _____

DOING BUSINESS AS: _____

TYPE OF BUSINESS ORGANIZATION: _____
(i.e., partnership, professional association, etc.)

BUSINESS ADDRESS: _____

_____

TELEPHONE NUMBER: _____

TEXAS SECRETARY OF STATE CHARTER NUMBER: _____
Charter Number – Taxpayer Identification Number, Filing Number or Federal Identification Number
For more information concerning Texas Secretary of State Charter Number call 800-252-1381

I certify that the information provided above is true and correct:

_____ _____
Signature of an Officer of the Applicant | Typed or Printed Name

_____ _____
Position with Applicant | Date

COMPLETE THIS BOX IF APPLICANT IS AN INDIVIDUAL

REGISTRATION/CERTIFICATION NUMBER _____

NAME: _____

DOING BUSINESS AS: _____

BUSINESS ADDRESS: _____

_____

TELEPHONE NUMBER: _____

I certify that the information provided above is true and correct:

_____ _____
Signature of Individual Owner | Typed or Printed Name

_____
Date

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

BRC Form 226-1 Rev. 11/04

ZZ113-120

TEXAS Department of State Health Services

REGISTRATION APPLICATION FOR USERS OF RADIATION MACHINES IN HEALING ARTS, DENTAL, VETERINARY MEDICINE AND MEDICAL ACADEMIC FACILITIES

INSTRUCTIONS - Complete ALL ITEMS of the application. Mail original(s) to the Texas Department of State Health Services (TDSHS), Radiation Safety Licensing Branch (RSLB), 1100 West 49th Street, Austin, Texas 78756-3189. Submit the appropriate fee with an application for NEW REGISTRATIONS ONLY. Upon approval of the application, the applicant will receive a Certificate of Registration. If there are any questions, contact RSLB, Machine Source Group, at (512) 834-6688.

1. a. Legal name of business, facility or individual:*

b. Business mailing address:

2. Physical address where radiation machines will be used: (Submit separate application forms for each additional use location under this registration.)

3. Type of Action: (Check all that apply)

___ New registration (Attach appropriate fee)

___ Renewal of registration no. _____

___ Amendment to registration no. _____

___ Name change* ___ Address change

___ RSO change ___ Add unit(s)

___ Additional use location ___Delete unit(s)

4. County of Use:

5. Telephone No.:

6. Fax No.:

7. Radiation Safety Officer (RSO)* (Submit qualifications)

8. *Machine Category use at this location- (as indicated in box 2)
(Provide the **total number** of units used in each category)

___Medical Fluoroscopic ___**Medical Accelerators

___Computerized Tomography

___Medical Radiographic ___**Screening Authorization

___Podiatric Only

___Veterinary ___** Mobile

___Dental Only

___Minimal Threat

___Other Industrial

9. **(Delete)** Category Use for this location (as indicated in box 2)
(Provide the number of units to be deleted in each category)

___Medical Fluoroscopic ___Medical Accelerators

___Computerized Tomography

___Medical Radiographic ___Screening Authorization

___Podiatric

___Veterinary ___Mobile

___Dental Only

___Minimal Threat

___Other Industrial

10. As a licensed practitioner, I do hereby affirm that I am associated with this applicant and provide supervision to non-practitioners administering radiation to human beings or animals.

Signature of Licensed Practitioner* Date Typed or Printed Name Licensing Board No.

11. I do hereby accept the responsibilities of Radiation Safety Officer.

Signature of Radiation Safety Officer* Date Typed or Printed Name Licensing Board No.

12. I certify that the administration of radiation to human beings or animals in association with this application shall be under the supervision of an appropriately licensed practitioner. Furthermore, I attest that the information contained in this application is true and correct to the best of my knowledge.

Signature of Applicant Date Typed or Printed Name

Signature of Owner or Partner* Date Typed or Printed Name

*SEE REVERSE SIDE FOR ADDITIONAL INFORMATION
** SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

BRC Form 226-2 (Rev.01/12/05)

INSTRUCTIONS

The following denotes a detailed explanation for the specific items indicated by an asterisk (*) and asterisks (**) from the front page.

*Item(s) 1a and 3: Legal name of business, facility or individual.
A Business Information Form (BRC Form 226-1) must be submitted for all new applications and for any name or ownership change.

Item 7: Radiation Safety Officer (RSO).
The individual named as RSO must meet the requirements specified in 25 Texas Administrative Code (TAC) §289.
For licensed practitioners, only signature and Texas license number are required.

RSO responsibilities are outlined in:
Dental §289.232(h)(11)
Veterinary §289.233(h)(1)(E)(iv)
Medical §289.226(t)(2)

For multiple use locations, one individual shall be designated as RSO for all sites.

Item 8: Add Use Category(s). (For Category explanation, See Table below)
Item 9: Delete Use Category(s)-Provide the number of units to delete.

567-COMPUTERIZED TOMOGRAPHY
For Example:
CT Scanning

J01-FLUOROSCOPY
For Example:
Fluoroscopy
Medical Radio-Fluoro
Lithotripter
Fluoro-Hand Held-Intensifying Device
C-Arm

57 ADIATION MACHINES
For Example:
Chiropractic
Medical Radiographic
Bone Densitometer
Other
Mammo for non-human use

572-MINIMAL THREAT ONLY
For Example:
Fluorescence
Cabinet X-ray

573-Other Industrial
For Example:
Diffraction
Lithotripter
Fluoro-Hand Held Intensfying Device

566-PODIATRIC RADIOGRAPHIC ONLY
For Example:
Podiatric

571-VETERINARY
For Example:
Veterinary (including Dental, Fluro, CT, Accelerator)

886-DENTAL ONLY
For Example:
Dental

****878-ACCELERATOR, SIMULATOR OR OTHER THERAPEUTIC**
For Example:
Medical Accelerators
X-ray Therapy
Simulator

****Submit Operating and Safety Procedures AND receive a Certificate of Registration before beginning operation of:
An accelerator See 25 TAC §289.226(f)(2)
Healing Arts Screening See 25 TAC §289.226(h)
Mobile Operation See 25 TAC§229.226(g), Dental §289.232(h)(2), Veterinary §289.233(h)(2)

Item 10: Signature of Licensed Practitioner
The signature of the Administrator, President or Chief Executive Officer of the facility will be accepted if the facility is a licensed hospital or a medical facility with more than one licensed practitioner who may direct the operation of radiation machine(s).

Item 11: Signature of the Radiation Safety Officer (RSO)
The signature of the person listed in Item 7, as RSO, is required for the processing of all registration actions.

Item 12: Signature of Applicant
This should be the signature of a person duly authorized by the applicant or registrant to act for and on the behalf of the applicant or registrant.
Signature of Owner or Partner
This line does not need to be completed if the business is a corporation.

Machine Source Group
Radiation Safety Officer (RSO) Information

This form may be used to request a change in RSO for your facility. Select from the categories listed below and submit the credentials of the designated RSO that are specific to your situation. Listings of the requirements, which the RSO must meet, are located in 25 Texas Administrative Code (TAC) §289. You may document years of experience on the reverse side of this form. Mail or fax completed form along with the appropriate documentation to the Texas Department of State Health Services, Radiation Safety Licensing Branch (RSLB), 1100 West 49th Street, Austin, Texas 78756-3189. Fax number (512)834-6716. If there are any questions, contact RSLB-Registration at (512) 834-6688. Retain a copy for your records.

REGISTRATION/CERTIFICATION NUMBER: _____
(Applicants applying for New Registration will not have a registration/certification number)

I. Name of Facility_____

Telephone No. _____ Fax No. _____

Address of Facility_____

_____

II. RSO Designee _____
Individual's Full Name (Print or type)

Healing Arts

Licensed Practitioner (M.D., D.D.S., D.O., D.C., D.P.M.)
Texas Licensing Board No._____

ARRT, ARCRT or Medical Radiological Technologist with general certificate.
Copy of certificate; and
2 years experience

Medical Radiological Technologist with limited certificate
Copy of certificate; and
4 years experience

Associate degree in radiological technology, health physics or nuclear technology
Copy of degree; and
2 years experience

Registered with the Board of Nurse Examiners as a registered nurse or nurse practitioner with an extended scope of practice performing radiologic procedures
Copy of registration; and
2 years of experience

Registered with the Physician Assistant Examiner's Board
Copy of registration; and
2 years of experience

Registered with the Licensed Practitioner's Board, or the Texas State Board of Dental Examiners to perform radiological procedures
Copy of registration; and
4 years of experience

Bachelor degree in natural or physical science, health physics, radiological science, nuclear medicine, nuclear engineering
Copy of degree

Licensed Medical Physicist
Copy of Texas license

Radiotherapy

ARRT or ARCRT certificate; and
4 years radiotherapy experience

Veterinary

Veterinarian
Texas Veterinary License Board No. _____

Non Veterinarian
2 years experience

Academic and/or Research and Development

Faculty or staff member in radiation protection, radiation engineering or related discipline submit evidence of the following:
Educational course(s) on radiation safety
Experience with x-ray equipment
Knowledge of potential radiation hazards

Certification

I hereby certify that I will fulfill the duties and responsibilities of RSO as required in 25 TAC §289.

_____
Signature of designated Radiation Safety Officer

Documentation of radiation machine experience:

Name of Facility	Date of Employment (from - to)	Type of Radiation Equipment Operated

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.dshs.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

TEXAS DEPARTMENT OF STATE HEALTH SERVICES

Excerpt from 25 Texas Administrative Code (TAC) § 289.226(h)(1)

Persons proposing to conduct *HEALING ARTS SCREENING* must submit the following information:

A. Administrative Controls

1. The name and address of the applicant and, where applicable, the name and address of the representative(s) within Texas.
2. The diseases or conditions for which the x-ray examinations are to be used in diagnoses.
3. A detailed description of the x-ray examinations proposed in the screening program.
4. A description of the population to be examined in the screening program (e.g., age, sex, physical condition and other appropriate information). *
5. An evaluation of any known alternate methods not involving ionizing radiation which could achieve the goals of the screening program and why these methods are not used instead of the x-ray examination.

B. Operating Procedures

1. An evaluation by a licensed medical physicist with a specialty in diagnostic radiological physics of the x-ray systems to be used in the screening program. The evaluation by the radiation expert shall show that such systems do satisfy all requirements of these rules.
2. A description of diagnostic film and/or digital quality control program.
3. A copy of the technique chart for the x-ray examination procedures to be used.

C. Training

1. The qualifications of each individual who will be operating the x-ray systems.
2. The qualifications of the individual who will be supervising the operators of the x-ray systems. The extent of supervision and the method of work performance evaluation shall be specified.
3. The name and address of the practitioner who will interpret the radiographs.

D. Records

1. A description of the procedures to be used in advising the individuals screened, and their private practitioners of the healing arts, of the results of screening procedures and any further medical needs indicated.
2. A description of the procedures for the retention or disposition and other records pertaining to the x-ray examinations.

SEE OTHER SIDE FOR OSTEOPOROSIS AND HEART SCREENING INFORMATION.

Minimum requirements and exemptions for Osteoporosis Screening using Bone Densitometers are listed below:

1. Persons proposing to conduct *OSTEOPOROSIS SCREENING* shall be limited to the following:

   a. An estrogen deficient woman at clinical risk for osteoporosis.

   b. An individual with vertebral abnormalities.

   c. An individual with primary hyperparathyroidism.

   d. An individual with a history of bone fractures.

   e. An individual who is receiving long-term glucocorticoid therapy.

   f. An individual who is being monitored to assess the response to or efficacy of an approved osteoporosis drug therapy.

2. In lieu of item B.1., operating procedures for bone densitometers shall include the following:

   The manufacturer's evaluation of a bone densitometer may be submitted in lieu of an evaluation by a physicist.

Minimum requirements for *CORONARY HEART DISEASE SCREENING* are listed below:

1. Males must be forty (40) to sixty-five (65) years of age.

2. Females must be forty-five (45) to seventy (70) years of age.

3. The self-referred screening candidate must have one of the following risk factors:

   a. Diabetes,

   b. Current Smoker,

   c. Obesity,

   d. Family history of heart disease,

   e. Cholesterol level greater than 160/LDL,

   f. Blood pressure greater than 140/90.

TEXAS
Department of
State Health Services

Eduardo J. Sanchez, M.D., M.P.H.

1100 West 49th Street
Austin, Texas 78756-3199

Radiation Safety Licensing
Branch
(512) 834-6688

Ben Delgado
Chief Operating Officer

Nick Curry, M.D., M.P.H.
Executive Deputy Commissioner

Registration of Mobile Services Used in the Healing Arts and Veterinary Medicine

In addition to the requirements of 25 TAC §289.226(e) and (f) or 25 TAC §289.232(h)(2), as applicable, each applicant shall apply for and receive authorization for mobile services before beginning mobile service operation. The following shall be submitted.

(a) An established main location where the machine(s), records, etc., will be maintained for inspection.

(b) A sketch or description of the normal configuration of each x-ray unit's use, including the operator's position and any ancillary personnel's location during exposures. If a mobile van is used with a fixed unit inside, furnish the floor plan indicating protective shielding and the operator's location.

(c) Each application for mobile services used in the healing arts shall submit a current copy of the applicant's Operating and Safety Procedures regarding radiological practices for protection of patients, operators, employees, and the general public.

PART 801

SECTION F

APPENDIX B

INFORMATION TO BE SUBMITTED BY PERSONS

PROPOSING TO CONDUCT HEALING ARTS SCREENING

Persons requesting that the Agency approve a healing arts screening program shall submit the following information and evaluation:

I. Name and address of the applicant and, where applicable, the names and addresses of agents within this State.

II. Diseases or conditions for which the x-ray examinations are to be used in diagnoses.

III. A detailed description of the x-ray examinations proposed in the screening program.

IV. Description of the population to be examined in the screening program, i.e., age, sex, physical condition, and other appropriate information.

V. An evaluation of any known alternate methods not involving ionizing radiation which could achieve the goals of the screening program and why these methods are not used instead of the x-ray examinations.

VI. An evaluation by a qualified expert of the x-ray system(s) to be used in the screening program. The evaluation by the qualified expert shall show that such system(s) do satisfy all requirements of these regulations. The evaluation shall include a measurement of patient exposures for the x-ray examinations to be performed.

VII. A description of the diagnostic x-ray quality control program.

VIII. A copy of the technique chart for the x-ray examination procedures to be used.

IX. The qualifications of each individual who will be operating the x-ray system(s).

X. The qualifications of the individual who will be supervising the operators of the x-ray system(s). The extent of supervision and the method of work performance evaluation shall be specified.

XI. The name and address of the individual who will interpret the radiograph(s).

XII. A description of the procedures to be used in advising the individuals screened and their private practitioners of the healing arts of the results of the screening procedure and any further medical needs indicated.

XIII. A description of the procedures for the retention or disposition of the radiographs and other records pertaining to the x-ray examinations.

XIV. An indication of the frequency of screening and the duration of the entire screening program.

Tab 12
475

TONY CANTER
Business Manager/
Financial Secretary

INTERNATIONAL BROTHERHOOD *of*
Painters and Allied Trades
Local Union No. 1275 1104 Cleveland Avenue
Columbus, Ohio 43201
(614) 294-5301
Fax: (614) 294-9014

Pager (614) 521-1442
Voice Mail 1-(888) 780-1525

tested
3-27-00
Columbus, OH

Dear Brother or Sister:

As you may be aware, the active members and retirees of our Local have been exposed to asbestos containing products and silica dist in our work environment for some time. Medical professionals have advised us that exposure to asbestos and silica is dangerous to the pulmonary system and to general health.

International Brotherhood of Painters & Allied Trades, Local 1275, 356 372(Glazers) has made arrangements for you to be tested for various diseases related to asbestos exposure and silica dust exposure. This testing will be sponsored by Young, Reverman & Napier Co., L.P.A. and Jackson, Taylor & Martino, P.C. Legal representatives will be available to you on the day of the screening to advise you of your rights with regard to any potential legal claim you may have against the manufacturers and/or suppliers of the asbestos-containing and/or silica products. The medical screening will be conducted by Respiratory Testing Services, Inc. You may contact the testing service at 1-800-997-8378 and they will make arrangements for you to be tested.

There will be no out-of-pocket expense for this screening and the results will be given the day of testing by a doctor experienced in asbestos-related and silica-related diseases. The cost of the testing will be recovered out of any recovery made on your behalf.

We at **Local 1275, 356 & 372** believe that it is important for all of our active members and retirees to be tested to determine if their health has been damaged by occupational exposure to asbestos-containing and/or silica-containing products. If your health has been damaged because of this exposure, a lawsuit can be filed on your behalf to ensure that you are properly compensated for the injury.

ASBESTOS CRITERIA

A. Exposure beginning prior to 1969.
B. At least 3 years of exposure.
C. Not already represented by an attorney in a asbestos claim
D. At least 2 years since last tested.

SILICA CRITERIA

A. Occupation - Painter or Sandblaster.
B. At least 10 years of exposure.
C. Not already represented by an attorney a silica related claim.

This testing is very important to your health. We look forward to seeing you there.

To see if you qualify or to schedule an appointment

CALL 1-800-997-8378

TESTING BEGINNING IN MARCH

Locations

Columbus & Zanesville Oh.

39
EXHIBIT
RTS Dep

PACE LOCAL 602
4574 HWY. 569
FERRIDAY, LA. 71334

ROGER JOHNSON-PRESIDENT

150
Done
+ mailed
01-09-02

Asbestosis and Silicosis Testing

Dear Brothers/Sisters:

As you may be aware, the active members and retirees of **PACE LOCAL 602** may have been exposed to **asbestos** containing products and **silica** dust from **sand blasting** in our work environment. Medical professionals have advised us that exposure to **asbestos and silica** containing materials is dangerous to your pulmonary system and to your health in general.

As a service to you, **Local 602** has set up testing for **asbestosis/silicosis** and other related lung diseases. We have also made arrangements for attorneys *BARTON & WILLIAMS* to be present at the screening to advise you of your rights should you be diagnosed with **asbestosis or silicosis** or other related lung diseases.

We at **Local 602** believe that it is important for all of our members and retirees that qualify be tested to determine if their health has been damaged by occupational exposure to **asbestos or silica** containing materials. If so, they can be properly compensated for their injury by the companies that manufactured or supplied those products.

Qualifying Criteria Testing for Asbestosis:

(1) Must have at least 4 years of **asbestos** exposure before 1973; (2) Have never been tested positive for **asbestosis**; (3) If tested negative, at least three years has passed, and (4) Not represented by an attorney in an **asbestos** claim.

Qualifying Criteria Testing for Silicosis (Sand Blasting):

(1) Worked in construction or as a **sand blaster, foundries** or **glass plants** for at least 5 years prior to 1986 (2) Have never been tested positive for **silicosis**, and (3) If tested negative, at least 2 years has past since your last test.

There will be no out of pocket charge for this medical testing. You will not be responsible for the cost of the test unless there is recovery from the manufacturers of **asbestos** or **silicosis** products. If there is a recovery, the costs of the test will be deducted from that recovery.

The testing is very important to your health. We look forward to seeing you there.

PLEASE CALL RESPIRATORY TESTING SERVICES, INC.
IMMEDIATELY FOR AN APPOINTMENT

1-800-997-8378

RTS 00258

International Brotherhood of
BOILERMAKERS • IRON SHIPBUILDERS
BLACKSMITHS • FORGERS & HELPERS

CHARLES H. VANOVER
Business Manager & Secretary-Treasurer

LOCAL LODGE #374
6333 Kennedy Avenue
Hammond, Indiana 46323-1097
Phone (219) 845-1000 INDIANA
Fax (219) 845-1099

ucm
1,545 Copies

ASBESTOSIS /SILICOSIS TESTING

Dear Brothers/Sisters:

As you may be aware, the active members and retirees of **Boilermakers, Local 374may have been exposed** to **asbestos** containing products and **silica dust** from **sand blasting** in our work environment. Medical professionals have advised us that exposure to **silica and asbestos** containing materials is dangerous to our pulmonary system and to our health in general.

As a service to you, **Local No. 374** has set up testing for **asbestosis/silicosis**. Attorneys from **Fitzgerald & Associates, P.A.** will be present at the screening to offer legal advice should you be diagnosed with **asbestosis or silicosis**.

We at **Local No. 374** believe that it is important for all of our members and retirees that qualify be tested to determine if their health has been damaged by occupational exposure to **asbestos or silica** containing materials. If so, they can be properly compensated for their injury by the companies that manufactured or supplied those products.

Qualifying Testing Criteria for Asbestosis:

(1) **Must** have 3 years **asbestos** exposure prior to1972; (2) **Must** not have previously tested positive for **asbestosis**; (3) If prior tests were negative, must be at least one year since last tested; (4) **Must** not be represented by an attorney for an **asbestosis** claim.

Qualifying Testing Criteria for Silicosis (Sand Blasting):

(1) Must have 3 years of silica exposure prior to 1990; (2) Must have worked as a sandblaster, sandblasters helper or worked around sandblasting; or brick masons, cement workers, glass plant workers, etc.

There will be no out of pocket charge for this medical testing. You will not be responsible for the cost of the test unless there is recovery from the manufacturers of **asbestos or silica** products. If there is a recovery, the costs of the test will be deducted from that recovery.

This testing is very important to your health. We look forward to seeing you there.

PLEASE CALL IMMEDIATELY FOR AN APPOINTMENT

1-800-997-8378

Charles H. Vanover

RTS 00310

Tab 13 –

RESPIRATORY TESTING SERVICES, Inc.

4362 Midmost Dr., Suite A • Mobile, AL 36609 • (251) 341-0206

Invoice

Invoice Number: 99796
Invoice Date: 7/1/03
Page: 1

Sold To:
Provost & Umphrey
P O Box 4905
Beaumont, TX 77704

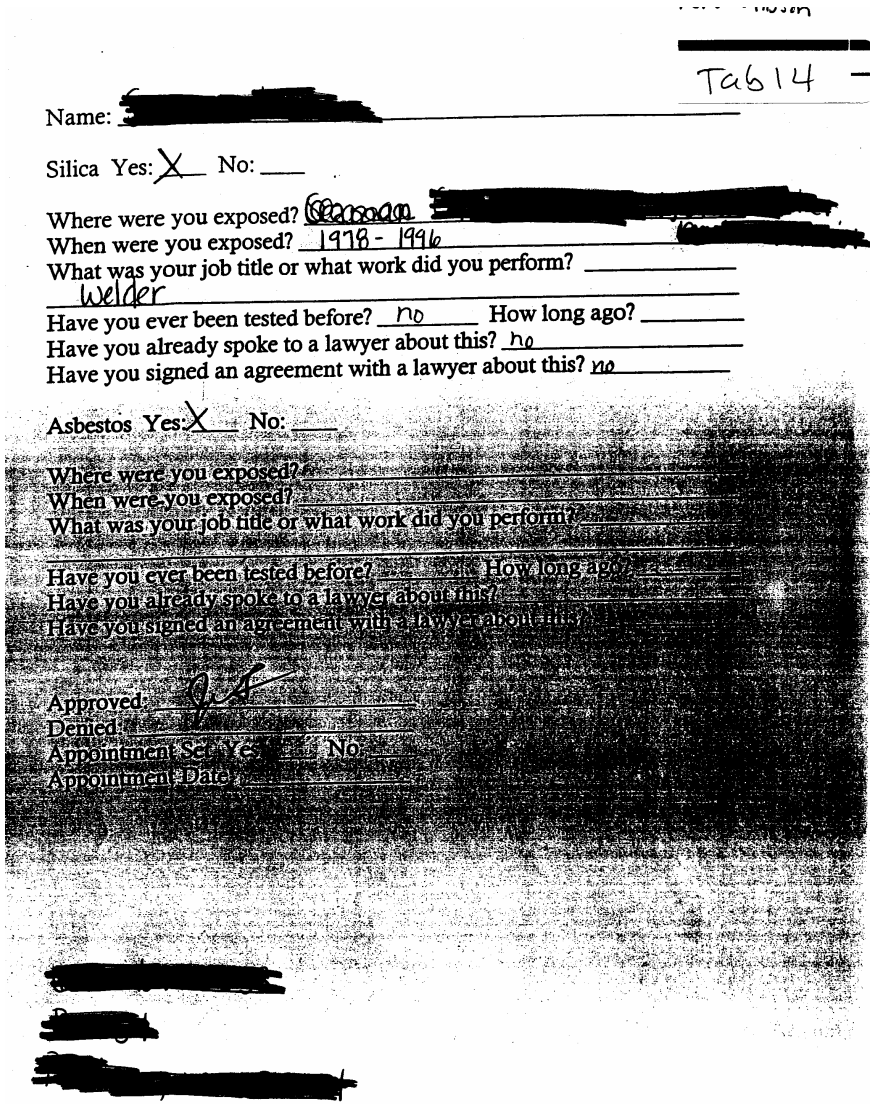
Customer ID: PROVOST

Customer PO	Payment Terms		
	C.O.D.		

Description	Amount
TYLER, TX 06/23/03 49 X-RAYS AND PFT'S MEETING AMERICAN THORACIC SOCIETY CRITERIA INCLUDING COMPLETE MEDICAL AND WORK HISTORY INTAKE @ $425.00 EACH	20,825.00
TYLER, TX 06/24/03 47 X-RAY'S AND PFT'S MEETING AMERICAN THORACIC SOCIETY CRITERIA INCLUDING COMPLETE MEDICAL AND WORK HISTORY INTAKE @ $425.00 EACH	19,975.00
TYLER, TX 06/25/03 22 X-RAY'S AND PFT'S MEETING AMERICAN THORACIC SOCIETY CRITERIA INCLUDING COMPLETE MEDICAL AND WORK HISTORY INTAKE @ $425.00 EACH	9,350.00

Total Invoice Amount	50,150.00
Payment Received	48,875.00
Net Due this Invoice	1,275.00

RTS 00187



Tab 14 –

Name: [redacted]

Silica Yes: X No: ___

Where were you exposed? [redacted]
When were you exposed? 1998 - 1996
What was your job title or what work did you perform? ___
Welder
Have you ever been tested before? no How long ago? ___
Have you already spoke to a lawyer about this? no
Have you signed an agreement with a lawyer about this? no

Asbestos Yes: X No: ___

Where were you exposed?
When were you exposed?
What was your job title or what work did you perform?
Have you ever been tested before? How long ago?
Have you already spoke to a lawyer about this?
Have you signed an agreement with a lawyer about this?

Approved: [redacted]
Denied
Appointment Set: Yes No
Appointment Date:

[redacted]

[Whereupon, at 4:35 p.m., the subcommittee was adjourned.]

THE SILICOSIS STORY: MASS TORT SCREENING AND THE PUBLIC HEALTH

WEDNESDAY, JULY 26, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC.

The subcommittee met, pursuant to call, at 2:06 p.m., in Room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield (Chairman) presiding.

Members present: Representatives Pickering, Bass, Walden, Burgess, Blackburn, Barton (ex officio), Stupak, DeGette, and Inslee.

Staff present: Mark Paoletta, Chief Counsel for Oversight and Investigations; Alan Slobodin, Deputy Chief Counsel for Oversight and Investigations; Andrew Snowdon, Counsel; Clayton Matheson, Research Assistant; John Halliwell, Policy Coordinator; Ryan Ambrose, Legislative Clerk; David Nelson, Minority Investigator/Economist; and Jonathan Brater, Minority Staff Assistant.

MR. WHITFIELD. This hearing will come to order. I want to thank all the witnesses for being with us today. This afternoon we convene the fourth day of hearings on public health issues raised by the practices of mass tort screenings. Today's hearing will focus of the role and conduct of various law firms in the Federal silicosis multi-district litigation entitled "In re: Silica Products Liability Litigation."

The evidence gathered by the committee in the form of records, interviews, and sworn testimony reveals that law firms, including at least some of those today appearing before us, orchestrated mass silicosis screenings largely because the asbestos well was running dry. These screenings were much less about medical care than they were about finding grist for the litigation mill.

Campbell, Cherry, for instance, sent letters to 18,000 to 20,000 of its existing asbestos clients, inviting them to be screened for silicosis, even though most experts agree that it would be rare for one individual to have both diseases.

The suspect nature of these mass tort claims can be seen in the comments of the lawyers themselves. Remarkably, when asked during a hearing in the silicosis MDL last year, why such a high percentage of his silicosis clients also had prior asbestos diagnoses, Richard Laminack of

the O'Quinn firm responded that he doubted the validity of the prior asbestos claims. "I think the explanation on a lot of these cases is the asbestosis diagnosis is wrong." Unfortunately for Mr. Laminack, at least several of these dubious asbestos diagnoses were issued by Dr. Ray Harron, the same doctor who issued the silicosis diagnosis. I wonder what Mr. Laminack would say about these silicosis diagnoses a few years down the road when they somehow conflicted with the newest mass tort disease.

To quote Judge Jack's scathing opinion in the silicosis MDL, "And if the lawyers turned a blind eye to the mechanics of the scheme, each lawyer had to know that Mississippi was not experiencing the worst outbreak of silicosis in recorded history." Each lawyer had to know that he or she was filing at least some claims that falsely alleged silicosis. And yet, once the lawyers got the ball rolling they abdicated responsibility for the health and welfare of those being tested. The lawyers did very little to ensure that the screening companies or doctors were properly licensed, and as we heard during our last hearing, a large number of screenings conducted by N&M and RTS, two of the major players in the silicosis MDL, violated State laws and regulations. Moreover, most of the lawyers apparently made little, if any, effort to follow up with their clients, many of whom were relatively uneducated and had limited access to doctors, to ensure that they were getting appropriate medical care. One of the real tragedies of litigation based on mass tort screenings is that those who are truly sick can get lost in the shuffle.

Intent on generating hundreds, if not thousands of plaintiffs, screening doctors and lawyers often do not give adequate attention to those that need it the most. While some firms, such as Luckey and Mullins, seem to have demonstrated genuine concern for those they were representing, this appears to have been the exception rather than the rule.

This investigation has utilized the silicosis MDL in the Southern District of Texas as a case study; however, the problems of mass tort screenings are by no means limited to one case or one State, or even one disease. Even after Judge Jack's opinion and the committee's investigation, silicosis cases continued to proliferate, many even involving the same doctors and screening companies whose conduct had been so thoroughly discredited.

I am familiar with several cases, for example, in Illinois and West Virginia, and I would like to read a passage from a report prepared several years ago by former U.S. Attorney General Griffin Bell. "Many cases supported only with X-ray interpretations are generated through mass litigation screenings and mobile X-ray vans. The purpose of these screenings often is to generate lawsuits, not to provide screened

claimants with medical treatment or advice. These mass screenings often are not attended or supervised by a physician, nor do the physicians typically prescribe the X-rays for claimants or report the screening results to the claimant. Many screened workers never even speak with a doctor, much less meet one in person, or benefit from a physical examination." While Judge Bell was actually referring to conduct in asbestos litigation, he does parallel with what went on in this silicosis MDL. As with asbestosis, silicosis litigation will ultimately run its course. But unless some meaningful changes are made, we will undoubtedly be confronted down the road with the same abuses in the context of a different disease.

One proposal put forth by Judge Bell that I would like to explore today is the use of neutral independent physician panels to review X-rays and make proper medical diagnoses. Such panels would go a long way toward producing accurate diagnoses, weeding out frivolous claims, and preventing mass tort litigation from devolving into a battle of experts.

I want to thank all of the witnesses here today, particularly Mr. Laminack, who is making a valiant effort to participate by video teleconferencing under difficult circumstances. I also want to emphasize that this committee has unfinished business with Heath Mason and he is sorely mistaken if he thinks he can continue to avoid service.

[The prepared statement of Hon. Ed Whitfield follows:]

PREPARED STATEMENT OF THE HON. ED WHITFIELD, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

This afternoon we convene the fourth day of hearings on the important public health issues raised by the practice of mass tort screening. Today's hearing will focus on the role and conduct of several law firms in the federal silicosis multi-district litigation, entitled In Re: Silica Products Liability Litigation.

The evidence gathered by this Committee, in the form of records, interviews, and sworn testimony, reveals that law firms, including at least some of those before us today, orchestrated mass silicosis screenings largely because the asbestos well was running dry. These screenings were much less about medical care than they were about finding grist for the litigation mill.

Campbell Cherry, for instance, sent letters to 18,000 to 20,000 of its existing ***asbestos*** clients inviting them to be screened for silicosis, even though most experts agree that it would be rare for one individual to have both diseases.

The suspect nature of these mass tort claims can be seen in the comments of the lawyers themselves. Remarkably, when asked during a hearing in the silicosis MDL last year why such a high percentage of his silicosis clients also had prior asbestos diagnoses, Richard Laminack of the O'Quinn firm responded that he doubted the validity of the prior asbestos claims: "I think the explanation on a lot of these cases is the asbestosis diagnosis is wrong." Unfortunately for Mr. Laminack, at least several of these dubious asbestos diagnoses were issued by Dr. Ray Harron -- the same doctor who issued the silicosis diagnoses. I wonder what Mr. Laminack would say about these silicosis diagnoses a few years down the road if they somehow conflicted with the ***newest*** mass tort disease?

To quote Judge Jack's scathing opinion in the silicosis MDL: "And if the lawyers turned a blind eye to the mechanics of the scheme, each lawyer had to know that Mississippi was not experiencing the worst outbreak of silicosis in recorded history. Each lawyer had to know that he or she was filing at least some claims that falsely alleged silicosis."

And yet once the lawyers got the proverbial ball rolling, they abdicated responsibility for the health and welfare of those being tested. The lawyers did very little to ensure that the screening companies or doctors were properly licensed, and, as we heard during our last hearing, a large number of screenings conducted by N&M and RTS -- two of the major players in the silicosis MDL -- violated various state laws and regulations.

Moreover, most of the lawyers apparently made little, if any, effort to follow up with their clients -- many of whom were relatively uneducated and had limited access to doctors -- to ensure that they were getting appropriate medical care. One of the real tragedies of litigation based on mass tort screenings is that those who are truly sick can get lost in the shuffle. Intent on generating hundreds, if not thousands, of plaintiffs, screening doctors and lawyers often don't give adequate attention to those who need it the most. While some firms, such as Luckey & Mullins, seem to have demonstrated genuine concern for those they were representing, this appears to have been the exception rather than the rule.

This investigation has utilized the silicosis MDL in the Southern District of Texas as a case study. However, the problems of mass tort screenings are by no means limited to one case, or one state, or even one disease. Even after Judge Jack's opinion and the Committee's investigation, silicosis cases continue to proliferate, many even involving the same doctors and screening companies whose conduct has been so thoroughly discredited. I am particularly familiar with several cases in Illinois and West Virginia.

I would like to read a passage from a report prepared several years ago by former United States Attorney General Griffin Bell:

> Many [ ] cases supported only with X-ray interpretations are generated through mass litigation screenings in mobile x-ray vans. The purpose of these screenings often is to generate lawsuits, not to provide screened claimants with medical treatment or advice. These mass screenings often are not attended or supervised by a physician, nor do the physicians typically prescribe the X-rays for claimants or report the screening results to the claimant. Many screened workers never even speak with a doctor, much less meet one in person or benefit from a physical examination."

While Judge Bell was actually referring to conduct in *asbestos* litigation, the parallels to what went on in the silicosis MDL are striking. As with asbestos, silicosis litigation will ultimately run its course, but unless some meaningful changes are made, we will undoubtedly be confronted down the road with the same abuses in the context of a different disease. At the very least, I hope that Judge Jack's opinion, and this Committee's investigation, will encourage other judges around the country, both state and federal, to give their mass tort dockets greater scrutiny.

One proposal put forth by Judge Bell that I would like to explore today is the use of neutral, independent physician panels to review x-rays and make proper medical diagnoses. Such panels would go a long way towards producing accurate diagnoses, weeding out frivolous claims, and preventing mass tort litigation from devolving into a battle of experts.

I would like to thank all of the witnesses here today, particularly Mr. Laminack, who is making a valiant effort to participate via video teleconference under difficult circumstances. I also want to emphasize that this Committee has some unfinished

business with Heath Mason, and if he thinks that he can continue to avoid service, he is sorely mistaken.

With that, I yield to the Ranking Member of this Subcommittee, Mr. Stupak.

MR. WHITFIELD. With that, I would like to yield to the Ranking Member of the subcommittee, Mr. Stupak of Michigan.

MR. STUPAK. Thank you, Mr. Chairman, and first of all, I would like to enter into the record the statement of the Honorable John Dingell.

MR. WHITFIELD. Without objection.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF THE HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

This Subcommittee has spent much time on this narrow public health issue, yet other major public health issues also require our attention. So I join the rest of my Democratic colleagues in questioning whether this investigation is the best use of the Subcommittee's limited time and resources. You, however, have conducted this inquiry with fairness and we have supported each of the procedural steps that you and Chairman Barton have taken to acquire the documents and testimony necessary to this investigation.

It is the responsibility of the Chair to protect the rights of the Congress to acquire the information necessary to promulgation of just and effective laws and the oversight of their proper administration. With that, responsibility comes a certain amount of discretion regarding the conduct of inquires such as the one we are engaged in today. If documents are needed, then the Committee should have them.

Among the prerogatives of the Chair is the discretion to decide what documents and testimony are necessary. This discretion includes whether or not to honor a claim of attorney/client privilege, a privilege that may apply in courts of law but not automatically in Congress.

If the subjects of our inquiries find our requests are truly burdensome or problematic then those concerns should be addressed. However, making overly imaginative claims of privilege, refusing to discuss those claims, providing inadequate privilege logs and/or failing to conduct adequate searches suggests that someone is choosing to pick a fight.

Mr. Chairman, you have the discretion as to how you and Chairman Barton want to proceed. And you will have my support in upholding the right of the Committee obtain information needed to conduct a proper inquiry.

MR. STUPAK. Thank you, Mr. Chairman. Thankfully and hopefully this will be our last hearing on the silicosis issue. I understand that we still have a person dodging our subpoena and I am sure we will deal with that in due time.

As this series of hearings draws to a close, I have four observations I believe my fellow Democrats share. The first is that this inquiry has been conducted fairly, as is your usual practice, Mr. Chairman. Accordingly, you have had our support on all procedural issues.

The second is that these hearings were unnecessary and consumed a lot of time and resources that would have been better expended on the issues that trouble Americans and that lend themselves to a legislative solution. I will return to this point shortly.

Thirdly, whereas this investigation was conducted fairly, that does not mean it was unbiased. While the problems with the silica litigation uncovered by Judge Jack spoke to possible mischief on the plaintiff's side, her opinion in this investigation ignored equally troubling behavior on the defense bar, the expert B readers used by the defendants, breaches in both legal and medical ethics by professionals in the pay of the insurance companies, and producers of asbestosis and silica products.

Finally, and perhaps most importantly, this inquiry into the public health consequences of silica litigation has never attempted to look at the human health costs of occupational exposure to silica dust. This inquiry, the jurisdictional basis of which is the impact on public health, has never even been raised or ever raised a question of the toxic effects of silica exposure, much less examine whether silica exposure is adequately regulated.

Mr. Chairman, you mentioned the Honorable Griffin Bell, former Judge and Attorney General of the United States. Let me also quote from Judge Bell. "And who writes for a legal think tank dominated by corporate lawyers has acknowledged that the Courts retained the power to correct any procedural injustices in mass torts litigation." Judge Bell is incorrect in his dismissal of the usefulness of mass tort screening. Dr. Laura Welch, in our first hearing, one of our first witnesses, told us how mass medical screenings ought to be done. None of the problems that Judge Jack discovered and that have been laid out in these hearings would have occurred if the silica screeners had employed the testing model Dr. Welch employed while overseeing the testing of 115,000 sheet metal workers. Judge Bell also notes, and I quote, "The risk of exaggerated claims of asbestos disease by plaintiff physicians or understated claims of disease by defendant physicians have been sufficiently documented in the Manvel and Attire Workers Medical Audits to warn concern about the objectivity of paid medical experts in asbestos litigation." Judge Bell argues that if the courts were truly interested in dealing with the problematic testimony given in cases like asbestos, they would make use of neutral physician panels to review the X-rays and make proper medical diagnoses.

Mr. Chairman, we have heard no testimony, nor has the Majority made any request for documents relating to the B readers of defense experts. We have taken the plaintiff's bar to task for doctors that do not feel an obligation to the patients that they test for litigation purposes; however, no one from the defense bar has been called to account for the failure of their experts to acknowledge disease where it is, in fact, present. Nor has the Majority inquired of the company's doctors that report findings to the company but not to the workers, their patients. Of course, if medical doctors make diagnoses based on personal financial

interest rather than the well-being of patients, the State Medical Boards should take appropriate disciplinary action.

Mr. Chairman, I ask that the portion of OSHA's current regulatory agenda relating to silica exposure be placed in the record. This is the Administration's analysis of occupational exposure to silica, and here is what the Bush Administration says, and I quote, "The seriousness of the health hazards associated with silica exposure is demonstrated by the fatalities and disabling illnesses that continue to occur. Between 1990 and 1996, 200 to 300 deaths per year are known to have occurred where silicosis was identified on death certificates as the underlying or contributing cause of death. It is likely that many more cases have occurred where silicosis went undetected." The Administration goes on to assert that silica has been responsible for increased risk of TB, cancer, renal and autoimmune disease, as well as non-malignant respiratory diseases, i.e., silicosis, and that workers continue to be exposed to a level of silica far in excess of current exposure limits.

After noting the inadequacy of the current standard in measurement techniques, the Bush Administration goes on to make a preliminary determination that "Workers are exposed to significant risk of silicosis and other serious disease, and that rulemaking is needed to substantially reduce that risk." Yet, the Administration has let 5-½ years pass without undertaking any rulemaking, just as this committee has had four days of hearings into public health problems associated with silica litigation, but has chosen not to explore the public health risks associated with actual exposure of people to silica.

Mr. Chairman, I repeat my annoyance with these silicosis hearings. I believe it is past time to move beyond this issue. There are many targets of this subcommittee's attention that would be far more likely to make a positive impact on public health.

Thank you, Mr. Chairman.

MR. WHITFIELD. Thank you, Mr. Stupak.

At this time, I recognize Mrs. Blackburn of Tennessee.

MRS. BLACKBURN. Thank you, Mr. Chairman. I want to thank you for your continuing work on the hearings, and I want to thank all of our witnesses for being here with us today.

As you can see, we are all learning a good bit about silicosis and asbestosis through this series of hearings, and from the information that I have heard at some of these hearings, I believe that we, unfortunately, have some lawyers and some doctors who are or have chosen to engage in some unethical and possibly liable behavior through conducting the type of mass tort screenings that this committee has been examining.

It is the type of actions that I have just mentioned that are driving up the cost of medical malpractice insurance and healthcare, and many of

the doctors in my State and across this Nation are very concerned about how this impacts their professions and their businesses. We have constituents who are quite concerned about how it impacts their access to healthcare and the delivery of healthcare in their areas.

Today's witnesses are going to testify to their conduct in the silicosis litigation, and I am looking forward to hearing the responses and then how they are going to address the situation, and the questions that we have for each of you.

But I found some very disconcerting circumstances in the MDL case. First, it appears that one law firm only paid for positive diagnoses and expected the medical screening company to pay the doctors for negative test results. This looks a lot like an incentive to create litigation, and that is of concern.

Second, from the testimony given to this committee, many lawyers that are appearing before the committee state, and I am quoting, "understandings" between them and the medical screening companies on use of qualified physicians. I want to know how the lawyers came to these, and again I quote, "understandings."

Also, I want the lawyers to expound to this committee on the rules of professional conduct. The rule for misconduct seems to apply to many of the attorneys in this case, especially in the use of unreliable testimony to deceive the court and their clients. The doctors who testified before this committee in June said that many of the doctors involved in the MDL case violated medical ethics and that there is significant evidence for malpractice. Some of them were also lawyers, and stated that the procedures in the cases violated the attorney ethics rules. I want to know what the witnesses think of these testimonies, and how it affects these cases.

Mr. Chairman, again, I thank you for your diligence. I thank the staff for their work on the issue. I thank you for the hearing today, and I am going to yield back the balance of my time so that we can move to the witnesses.

MR. WHITFIELD. Thank you, Mrs. Blackburn.

At this time, I recognize the gentleman from Washington, Mr. Inslee.

MR. INSLEE. Just briefly, I would just say that it has been my experience that this Congress typically is just interested in one side of the story, and I think that has been the case in this series of hearings in the respect that our litigation system is not perfect, but I think it would be interesting to look at some of the issues regarding some of the defense practices associated with some of these mass torts, as well as on the plaintiff's side. I think we would find interesting issues on both sides, but that is not the way this Congress works.

I also note that there may be two things, health and money, and we are talking about money here rather than health, which is also the way this Congress works, which is instead of having hearings about increased neurological effects of mercury caused by coming out of the use of coal, particulate matter coming out of the use of diesels, silicosis caused by exposure to silicon, instead of trying to deal with issues that actually help Americans' health, that is not the way this Congress works. We will deal with other issues. I think it is very regrettable, because we have a situation right now, it is not just workers exposed to silicosis, it is workers and non-workers and retired people exposed to all types of toxins. The way this Congress works is to expose Americans to more toxins: more arsenic in our water, more silt in our air, more mercury in our fish, because the way this Congress works is it deals with money, not health. These hearings in part are a continuation of that tradition. And while I think there are some legitimate issues that need inquiry in this situation involving mass tort litigation, I also believe it is a dereliction of our committee's responsibilities not to deal with the defense aspects of how to handle these cases where there are all kinds of legitimate issues, nor to deal with the health ramifications of the toxins that are being put in our air because the way this Congress works is to protect the industries that are putting them in the air.

So as always, I look forward to this hearing, and the chair has always acted fairly to both sides during these hearings, and I commend his work in that regard, but I think it is disappointing that we have not taken the other part of our responsibilities seriously. Thank you.

MR. WHITFIELD. Thank you.

At this time, I recognize the Chairman of Energy and Commerce Committee, Mr. Barton of Texas.

CHAIRMAN BARTON. Thank you, Mr. Chairman. I appreciate you holding this hearing. Although the subject matter is serious and somewhat complicated, I welcome our witnesses, most of whom come from my home State of Texas, and one of whom comes from the town I was born in, Waco, Texas, Mr. Davis. We welcome you before the committee.

This is our fourth hearing on the public health implications of mass tort screenings. Today, we are finally going to get to examine the role of a key set of players in this issue, the attorneys who orchestrated the X-ray screenings of tens of thousands of people, apparently in their search for profitable clients to fuel a silicosis litigation machine. I look forward to hearing what they have to say, especially what, if anything, they have done to actually help the people who they searched out to become diagnosed with a fatal disease through these screenings that they sponsored. I am very interested to hear if the firms have done anything

to help their clients, many of whom are not highly educated and have limited access to regular medical care, to get any kind of follow-up care at all once they were diagnosed as having silicosis, which is a very serious disease. I fear the answer is going to be they haven't done anything. If they have, we have not been able to determine that in our staff investigation. It sure appears that once the clients signed on to the bottom line, they became just a part of that particular lawsuit's inventory. That is really a shame if that is realy what has happened.

I want to mention an issue that gives me great concern, in addition to what I just said. We had hoped to have a number of individuals here today who actually have been diagnosed through these screening processes as having silicosis. We wanted to hear from them firsthand what they experienced, what they were told, how they felt about it, what is being done to help them in the present. Unfortunately, the law firms before us that represent most of those folks haven't been real helpful in making that happen. They have refused repeated requests from the staff for interviews with the plaintiffs on the grounds of attorney/client privilege. To be fair, one of the law firms, the O'Quinn firm, did make some effort to facilitate a few interviews, but the rest of the law firms have not. The firms declined to even ask their clients if they would be willing to talk to us and perhaps waive attorney/client privilege. We have made it clear at the staff level that there are numerous questions which would be posed without treading on any privileged information. An example of a question that we would hope to ask some of the plaintiffs was, was there really a doctor present at the screening? Who took your work history? How did you first learn that you might have silicosis? Did anyone present discuss with you where and how to obtain follow-up medical treatment? Those aren't privileged information, those are just basic questions. These questions are critical for understanding how the process unfolds, and whether patient interests were put first.

The law firms before us don't want their clients to answer questions like that, so they have invoked an attorney/client privilege, which is their right under the Constitution. It sure looks like a smokescreen to me, though. I find the prospect particularly repugnant given that this is a public health issue and because so many others with knowledge of these practices in this investigation have asserted their Fifth Amendment right against self-incrimination and declined to testify. Using a highly, in my opinion, dubious application of attorney/client privilege to hide the truth doesn't serve the client's interest, and it certainly doesn't serve the public's interest to know.

Mr. Chairman, at the end of the day, we have been seeking to ensure that the patients' interests are put back at the center of the mass screening process. Silicosis is a dangerous disease. People that really have the

disease deserve to be treated in a compassionate and humane fashion. This is not only a matter of protecting public health, it is a matter of fairness to those with a pressing need for medical care, as well as those with legitimate claims for redress of their grievances in court. It doesn't appear to me that the law firms before us today have served that purpose very well.

With that, Mr. Chairman, I yield back.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF THE HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Chairman Whitfield for this fourth hearing on the public health implications of mass tort screenings. Today we will finally examine the role of a key set of players in this troubling case study: the attorneys who orchestrated x-ray screenings of tens of thousands of people in their search for profitable clients to fuel the silicosis litigation machine.

I look forward to learning what these law firms did to help those people who had been diagnosed with a fatal disease through screenings that they sponsored. Specifically, I want to hear what the firms did to ensure that their clients -- many of whom were not highly educated and had limited access to regular medical care -- received appropriate follow-up care. I fear that the answer is that they did nothing. It looks like once clients signed on the bottom line, they stopped being sick people and became just part of the firm's "inventory." That's the ultimate shame in a business that invented ways to be shameful.

I would also like to mention an issue in this investigation that gives me great concern. We had hoped to have several individuals here today who actually went through the screening process so that we could hear first-hand what they experienced, what they were told, and how they felt about it. Unfortunately, the law firms representing these folks must have thought that wasn't helpful to their cause. They refused repeated requests from the staff for interviews with the plaintiffs on the grounds of attorney-client privilege. To be fair, the O'Quinn firm did make some effort to facilitate a few such interviews, but Campbell Cherry and others did not.

These firms declined even to ask their clients if they would be willing to waive attorney-client privilege. Furthermore, we made it clear that there were numerous relevant questions that could be posed without treading on privileged information, such as: (1) "was a doctor present at the screening?" (2) "who took your work history?" (3) "how did you first learn that you might have silicosis?" and (4) "did anyone discuss with you where and how to obtain follow-up medical treatment?" These questions are critical for understanding how this process unfolded and whether patient interests were put first. Evidently, the law firms don't want their clients to talk.

These firms are misusing the attorney-client privilege as a smokescreen to protect themselves. I find this prospect particularly repugnant given the public health issues involved here and because so many others with knowledge of these practices have asserted their Fifth Amendment rights against self-incrimination and declined to testify. Using a highly dubious application of attorney-client privilege to hide an ugly truth doesn't serve the clients' interests, and certainly does not serve the public interest.

Mr. Chairman, at the end of the day, we have been seeking to ensure that patients' interests are put back at the center of the mass screening process. This not only is a matter of protecting public health, it is also a matter of fairness to those who have a

pressing need for medical care, as well as those with legitimate claims for redress of their grievances in court.

MR. WHITFIELD. Thank you, Mr. Chairman.

At this time, I recognize Ms. DeGette of Colorado.

MS. DEGETTE. Thank you, Mr. Chairman. I share Mr. Stupak's confusion about exactly why this committee has spent so many hours on this issue of the silicosis suits. I, too, think it is a terrible thing what happened in these cases, and the thing I worry the most about is some of these patients who had a positive diagnosis, and at least according to our prior hearings on this issue, had no follow-up to let them know that there was a diagnosis that they had a fatal disease. I would be interested to hear about that from the panel.

The thing that perplexes me is--and I think this was sort of a low point in a profession that I called myself a proud member of for 15 years when I practiced law in Denver. I clearly, like everyone else on this panel, do not think people should be ginning up lawsuits just for litigation. I don't think doctors should be screening patients without actually ever seeing them or knowing their health history. I don't think lawyers should be filing lawsuits and then not following up with their clients. The thing that perplexes me is it seems to me that the judicial process worked in this case because Judge Jack was able to take a look at these approximately 10,000 claims and say that really there was no bonafide lawsuit here. So I think that the system worked, and I am not really sure what kind of public policy reason there would be to have all of these hearings. I don't see the Oversight and Investigations Committee of the U.S. Congress as the uber legal or medical ethics panel, and I think these issues will be and are being resolved in other venues.

So as I say, it was a sad day for the legal system and for the patients. I think it is a shame on the medical profession for some of these doctors who were making these diagnoses in the way they were, and I think a lot of people abrogated their duties to their clients and to their patients. But having said that, I really don't know what the long-term impact of these hearings will be.

And at that, I will yield back.

MR. WHITFIELD. Thank you, Ms. DeGette.

At this time, I recognize Dr. Burgess of Texas.

MR. BURGESS. Thank you, Mr. Chairman. I appreciate the continued hearings into what I consider a very important matter. The Chairman already has alluded to it. This is the most troubling aspect; this is the very human aspect, the failure to follow-up, the failure to ensure continuity of care. Well, today we continue to address the serious allegations concerning silicosis and the mass tort screenings. Our past

hearings have focused on doctors and mass screening companies. Today, we will look at the attorneys that were involved. It was Judge Jack who mentioned, and I quote, "These diagnoses were about litigation rather than healthcare." She further went on to say "They were driven by neither health nor justice, but were manufactured for money."

While the legal cases were about money, let me remind you that you, the plaintiffs attorneys, you are supposed to be looking out for the little guy. That is what we always hear. That is whose side you are on. Let us talk for just a minute on what true silicosis medical cases are all about. Silicosis is a serious occupational hazard. The most recent edition of *Harrison's Principles of Internal Medicine* describes the disease as one which may become rapidly fatal in less than 2 years.

This isn't just about taking a snapshot and getting an X-ray that has an abnormality that we can then walk away from. What happens to these abnormalities over time? Well, recall from our previous testimony from the doctors, the chest X-ray is taken and it may show some rather typical calcifications of hyler nodes, but then *Harrison's* goes on to say this nodular fibrosis may be progressive in the absence of further exposure. That is, the guy doesn't work in the sandblasting factory anymore. You don't tell that he has got the disease. He is not working there anymore. He thinks it is over, because after all, he had an X-ray, someone looked at it, and didn't recommend any further therapy. *Harrison's* goes on to say "These masses can become quite large and are characteristic of progressive passive fibrosis. Significant functional impairment with both restrictive and obstructive components may be associated with this form of silicosis. In the late stages of the disease, ventilatory failure may develop." I think we would all agree, that is a serious projectory that some of these patients may have been set upon, and I will again ask the questions that were asked by our Chairman. Were these patients referred to a specialist? Were they referred back to their primary doctor? Were they followed in any way? How were they treated?

Well, we have a panel of lawyers here today, and counselors, I think you understand that silicosis is a very serious and real ailment. To fund the mass screenings and the diagnoses of cases without any follow-up for these patients is the personification of unethical behavior. As an attorney, you have a fiduciary duty to your client, and surely, this extends to ensuring that your clients that were diagnosed in these mass tort screenings are seeking appropriate medical treatment.

Many of you are from my home State of Texas. In Texas, you took an oath of office when you began your practice of law, and when you took that oath to practice in Texas, you solemnly swore to discharge your duties to your clients to the best of your abilities. How can this not

include making certain that your clients were getting treatment for such a serious disease, a disease that you paid to diagnose for them?

Mr. Chairman, I look forward to hearing the answers to these serious questions. Once again, thank you for holding this hearing. In the interest of time, I will yield back.

MR. WHITFIELD. Thank you, Dr. Burgess.

I think that concludes the opening statements, so at this point, I would like to introduce the first panel. On the first panel, we have Mr. Billy Davis with Campbell, Cherry, Harrison, Davis, & Dove Law Firm out of Waco, Texas; we have Mr. Abel Manji with the O'Quinn Law Firm in Houston, Texas; we have Mr. Joseph Gibson, the Law Office of Joseph Gibson in Houston, Texas; we have Mr. Jim Zadeh with the Zadeh Law Firm in Fort Worth, Texas; we have Mr. John Fabry with the Williams Bailey Law Firm in Houston, Texas; we have Mr. Steven Mullins with Luckey and Mullins in Ocean Spring, Mississippi; and then we have Mr. Alwyn Luckey with Luckey and Mullins in Ocean Springs, Mississippi; and then we have Mr. Richard Laminack with Laminack, Pirtle, and Martines of Houston, Texas, who is with us by video teleconference. As I stated in my opening statement, Dr. Laminack, we genuinely appreciate your being with us today and realize that you are at a health center at M.D. Anderson, I believe.

So as you know, this is an Oversight and Investigations Subcommittee hearing, and it is our policy to take testimony under oath. I would ask any of you if you have any objection or difficulty testifying under oath. You also, under the Rules of the House and rules of this committee are entitled to legal counsel. Do any of you have legal counsel with you today? Okay. Mr. Davis, would you introduce your legal counsel?

MR. DAVIS. Mr. Brown.

MR. WHITFIELD. Mr. Brown, thank you. And Mr. Gibson, did you--

MR. GIBSON. Mr. Steve Gordon.

MR. WHITFIELD. Mr. Steve Gordon, thank you. Mr. Manji, did you?

MR. MANJI. Yes, I have Patrick Bonz.

MR. WHITFIELD. Pat Bonz, okay. Thank you. Mr. Zadeh?

MR. ZADEH. Stan Brown and Andy Herman.

MR. WHITFIELD. Stan Brown, okay. Mr. Fabry?

MR. FABRY. Stanley Brown and Andrew Herman, and for the record, my name is pronounced Fabry, Mr. Chairman.

MR. WHITFIELD. Thank you. I always have difficulty with names. Thank you.

MR. FABRY. Thank you.

MR. WHITFIELD. Mr. Mullins?

MR. MULLINS. No.

MR. WHITFIELD. Mr. Luckey?

MR. LUCKEY. No, we are not represented by counsel.

MR. WHITFIELD. All right. And Mr. Laminack, I am assuming that you do not have legal counsel either. Is that correct?

MR. LAMINACK. It is not correct. I am represented by Pat Bonz, Mr. Chairman.

MR. WHITFIELD. Pat Bonz, okay.

Well, at this time I would ask the members of the panel, the ones who will be giving the openings statements if you would rise and raise your right hand. I would like to swear you in.

[Witnesses sworn]

MR. WHITFIELD. Thank you very much. All of you are under oath now, and so at this time I would recognize Mr. Davis for his opening statement.

TESTIMONIES OF BILLY DAVIS, ESQ., CAMPBELL, CHERRY, HARRISON, DAVIS & DOVE; ABEL K. MANJI, ESQ., THE O'QUINN LAW FIRM; JOSEPH V. GIBSON, ESQ., LAW OFFICE OF JOSEPH V. GIBSON, P.C.; ALWYN H. LUCKEY, ESQ., LUCKEY & MULLINS PLLC; AND RICHARD N. LAMINACK, LAMINACK, PIRTLE, AND MARTINES

MR. DAVIS. Good afternoon, Chairman Whitfield, Ranking Member Stupak, and members of this subcommittee. My name is Billy Davis and I am a shareholder in the law firm of Campbell, Cherry, Harrison, Davis, & Dove, and I am here today testifying on behalf of their firm.

In 2000 and 2001, some of our firm's previous and current clients, including asbestos clients, began contacting our firm, asking if we were representing individuals in silica litigation. In response to inquiries from many of our clients, the firm sent a letter to many of its current and former clients concerning silica exposure and silicosis. The firm notified its clients to call N&M, an experienced Mississippi medical screening company, to set up a medical screening if they felt like they had a silica claim. It was up to the individual to determine if he had been exposed to silica and wanted to be tested. If so, that individual would engage N&M to perform the medical screening. It was then up to the doctors hired by N&M to determine if the individual had a silica-related injury. Generally only after that happened did our firm accept representation of the individual for a silica claim and advance that client's costs to N&M for the medical screen.

For substantially all of our firm's clients, our firm had a reasonable basis for believing that its plaintiffs had a bonafide claim for silicosis

before it ever accepted them as silica clients, and before suit was filed on their behalf.

First, our firm required that its potential clients have at least 2 years of occupational exposure prior to 1980. N&M established that the firm's potential clients met this exposure even before they came to the medical screen, and then again at the medical screen.

Second, after the requisite silica exposure history was verified, N&M's qualified technicians performed a new chest X-ray on each potential client. The X-ray was then read onsite by a NIOSH-certified B-reader physician hired by N&M to determine if the X-ray showed radiographic changes consistent with silicosis.

Third, if the NIOSH-certified B-reader physician found the X-ray showed radiographic changes consistent with silicosis, a qualified physician onsite, hired by N&M, would take a medical history and perform a target physical examination. Based on the exposure history, the X-ray findings, the medical history, and the physical exam, the NIOSH-certified B-reader physician hired by N&M would make a diagnosis. If the diagnosis was silicosis, the doctor would communicate that to the potential client in person at the screen.

Fourth, potential clients diagnosed with silicosis were sent to perform pulmonary function tests administered by N&M's qualified technicians.

Generally, all of these steps occurred before the potential client ever met with any representative of our firm and before they became a silica client of our firm. As a general rule, the firm did not file suit for these clients until our firm had received a second positive X-ray finding and a second diagnosis of silicosis for the potential client. For substantially all of the firm's silicosis clients, the firm required N&M to obtain a second positive X-ray reading from a NIOSH-certified B-reader physician and a second diagnosis of silicosis by a second qualified physician. This conservative practice of having two diagnoses for each client before filing suit has been used by our firm in its asbestos litigation long before it started representing silica complainants.

Medical experts recognize that individuals may contract both asbestosis and silicosis. Some of the industries that NIOSH has recognized as having both asbestos and silica exposure include abrasive blasting, foundry work, drywall hanging, automotive repair, construction, and pottery. Many of our firm's asbestos clients worked in industries in which they were exposed to both silica and asbestos, or worked in different industries in which they were exposed to asbestos in one industry and silica in another. Less than one out of five of our firm's asbestos clients were diagnosed with silicosis, but those individuals were diagnosed by two separate doctors.

This fact in no way supports an inference that these clients do not have silicosis or that our firm's representation of these individuals is improper. We believe that our firm required and relied upon more extensive criteria to screen for silicosis than did others. For substantially all of our firm's silica plaintiffs, prior to the filing of silica claims, the firm had evidence of at least 2 years occupational exposure to silica, current X-rays read positive as consistent with silicosis by two NIOSH-certified B-reader physicians, medical history and physical exam taken by qualified physician, diagnosis of silicosis by two qualified physicians, and an onsite communication of the diagnosis to the client by one of the diagnosing physicians. Every diagnosing doctor relied upon by our firm has testified that they stand behind their silicosis diagnosis of our firm's silica plaintiffs, except for Dr. George Martindale; however, Dr. Martindale has testified before you that he stands behind his X-ray readings of our silica plaintiffs that show radiographic changes consistent with silicosis.

The firm's reliance on the screening company and the X-ray readings, physical exams, and diagnoses of silicosis by the qualified physicians hired by the screening company was and continues to be reasonable. The firm believes that the silicosis diagnoses of its clients are real, and that the claims that it brought on behalf of the silica clients are valid, legal claims.

Thank you.

[The prepared statement of Billy Davis follows:]

PREPARED STATEMENT OF BILLY DAVIS, ESQ., CAMPBELL, CHERRY, HARRISON, DAVIS & DOVE

1. For substantially all of the firm's silica plaintiffs, the following criteria was satisfied prior to each plaintiff becoming a silica client of the firm and prior to such plaintiff's case being filed:

   A. Evidence of occupational exposure to silica for at least 2 years prior to 1980 was provided by the plaintiff;
   B. Current chest x-rays taken of the plaintiff;
   C. Positive x-ray finding consistent with silicosis by a NIOSH certified B-reader;
   D. Medical history taken and physical exam of the plaintiff by a qualified physician;
   E. Diagnosis of silicosis by a qualified physician communicated in person to the plaintiff;
   F. A pulmonary function test on the plaintiff to determine degree of lung impairment;
   G. Second positive x-ray finding consistent with silicosis by a second NIOSH certified B-reader; and
   H. Second diagnosis of silicosis by a second qualified physician.

2. The firm advanced the testing costs only for individuals satisfying this criteria and that the law firm accepted as a client.

3. Many of the firm's clients worked in industries recognized by the government as having both asbestos and silica exposure. Less than 1 out of 5 of the firm's asbestos clients were diagnosed with silicosis and represented by the firm. These clients had 2 diagnoses of silicosis. Asbestosis and silicosis are not mutually exclusive.
4. Physicians relied upon by the firm that diagnosed the firm's silica plaintiffs stand behind their diagnoses except for Dr. George Martindale who still stands behind his x-ray readings that show radiographic findings consistent with silicosis.
5. Silicosis diagnoses of the firm's silica plaintiffs are real, and the plaintiffs' claims are valid, legal claims.

I. Background.

Good morning, Chairman Whitfield, Congressman Stupak, Members of the Subcommittee. My name is Billy H. Davis, Jr. and I am a shareholder in the law firm of Campbell~Cherry~ Harrison~Davis~Dove, P. C. ("CCHDD"). The firm consists of seven lawyers and 27 staff members, with offices in Waco, Texas and Jackson, Mississippi. The firm engages primarily in a plaintiff's civil practice with a focus in the area of personal injury law.

The attorneys and staff of the firm are dedicated to providing quality legal services to individuals and businesses needlessly harmed by the conduct of others. We are committed to the preservation of the right of every citizen to a trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution. We believe that every citizen should have equal access to the courts of our judicial system.

I am testifying here today on behalf of the firm.

II. CCHDD's Entry into Silica Litigation.

The firm has represented Plaintiffs in various types of personal injury litigation including injuries caused by asbestosis, silicosis, pharmaceutical products, automotive products, and trucking and automobile accidents.

In 2000 and 2001, some of the firm's previous and current clients, including asbestos clients, began contacting the firm asking if the firm was representing individuals in silica litigation. At that time the firm was not, but it was aware of the increase in silica litigation that had begun earlier and knew that many of its asbestos clients had worked in trades and industries in which they may have also been exposed to silica. In response to inquiries from many of its clients, the firm sent a letter to many of its current and former clients concerning silica exposure and silicosis. The firm notified its clients to call N&M, Inc., an experienced Mississippi medical screening company, to set up a medical screening if they felt they had a silica claim. The firm understood that N&M would test anyone, including our clients, who called them and had appropriate silica exposure. It was up to the individual to determine if he had been exposed to silica and wanted to be tested. If so, that individual would engage N&M to perform the medical screening. It was then up to the doctors to determine if the individual had a silica related injury. Generally, only after that happened, did our firm accept the representation of the individual for a silica claim, and advance that client's cost to N&M for the medical screening.

The law firm filed two actions in Noxubee County, Mississippi in 2002. These actions were filed in Mississippi because the overwhelming majority of the firm's silica Plaintiffs was located in the southeastern United States and the Mississippi joinder and procedural rules applicable at that time made Mississippi an attractive forum in which to file these actions. Since that time, due to changes in Mississippi procedural law, applied retroactively by the courts, many of the Plaintiffs claims in these actions have been voluntarily dismissed. Their dismissals have nothing to do with the merits of their

claims, but rather, are based on a retroactive change in Mississippi procedural rules making Mississippi an improper forum for these Plaintiffs to bring suit.

The firm exercised due diligence in filing and prosecuting silica claims and believes that the silicosis claims it filed are valid, legal claims.

III. The Silicosis Claims Filed By CCHDD Are Valid.

A. Prior to filing suit, CCHDD established criteria to ensure that its clients had *bona fide* claims for silicosis. CCHDD was reasonable in relying on that process.

For substantially all of its silica clients, the firm had a reasonable basis for believing that its plaintiffs had a *bona fide* claim for silicosis before it ever accepted them as silica clients and before suit was filed on their behalf. Specifically, the firm established conservative criteria to screen persons it might represent. The conservative criteria were to ensure that individuals had *bona fide* diagnoses of silicosis before the firm accepted them as silica clients.

The conservative criteria defined by the firm included the following:

First, the firm required that its potential clients have at least two years of occupational exposure to silica prior to 1980. N&M established that the firm's potential clients met such exposure criteria even before they came to the medical screening, and then again at the medical screening. This initial screening for exposure helped eliminate from the medical screening process individuals who could not have been diagnosed with silicosis due to a lack of silica exposure.

Second, after the requisite silica exposure history was verified, N&M's qualified technicians performed a chest x-ray on each potential client. The x-ray was then read on site by a NIOSH certified B-reader physician, hired by N&M, to determine if the x-ray showed radiographic changes consistent with silicosis.

Third, if the NIOSH certified B-reader physician found the x-ray showed radiographic changes consistent with silicosis, a qualified physician on site, hired by N&M, would take a medical history and perform a target physical examination. Based on the exposure history, x-ray findings, medical history and physical exam, the NIOSH certified B-reader physician hired by N&M, Inc. would make a diagnosis. If the diagnosis was silicosis, the doctor would communicate that to the potential client, in person, at the screening.

Fourth, potential clients diagnosed with silicosis were sent to perform pulmonary function tests administered by N&M's qualified technicians. These tests helped to determine the degree of lung impairment for each potential client.

Generally, all of the above mentioned steps occurred before the potential client ever met with any representative of the firm, and before they became a silica client of the firm.

Following this screening process performed by N&M, and the physicians hired by N&M, if a potential client had a positive silicosis diagnosis, and satisfied all of the above criteria and requested the law firm to represent him or her, the potential client signed a contract of representation with the firm. However, as a general rule, the firm did not file suit until receiving a second positive x-ray finding and a second diagnosis of silicosis for the potential client. For substantially all of the firm's silicosis clients, the firm required N&M to obtain a second positive x-ray reading from a NIOSH certified B-reader physician, and a second diagnosis of silicosis by a second qualified physician. This was generally done within 4-6 weeks after the initial diagnosis and prior to the filing of a silica case on behalf of the client. This conservative practice of having two diagnoses for each client before filing suit had been used by the firm in its asbestos litigation long before it began representing silica plaintiffs.

B. CCHDD was diligent in utilizing the screening company.

The company that tested the firm's clients was an experienced Mississippi medical screening company. In addition, N&M's testing equipment was inspected and certified by the State of Mississippi. Moreover, the on-site physicians and technicians on our firm's cases, who were selected, hired and paid by N&M to screen potential clients for silicosis were licensed by the State of Mississippi. The firm had used N&M before, and reasonably relied upon the medical screening performed by N&M for potential clients.

C. CCHDD was diligent in relying on the screening company doctors' silicosis diagnoses.

The firm was also reasonable in relying on the medical doctors hired by N&M for x-ray reads, physical exams, and silicosis diagnoses. Importantly, all of the firm's clients were diagnosed with silicosis by NIOSH certified physicians. While the firm advanced medical screening costs to N&M only for testing of individuals diagnosed with silicosis who satisfied the above criteria and that the firm accepted as a client, it was and is the firm's understanding that N&M paid its physicians the same dollar amount for every x-ray read, and for every physical exam performed, and for every diagnosis made, regardless of whether the individuals were diagnosed with silicosis whether or not they became clients of the firm. Accordingly, the physicians who read the x-rays, or performed the physical exams or who ultimately made the silicosis diagnoses for all of the firm's clients were not biased by the firm's method of compensation to N&M.

IV. <u>Asbestosis and Silicosis are not Mutually Exclusive and there are many Industries in which there is Both Silica and Asbestos Exposure</u>.

Medical experts recognize that individuals may contract both asbestosis and silicosis. Some of the industries that the government (NIOSH) has recognized as having both asbestos and silica exposure include: (1) abrasive blasting; (2) foundry work; (3) dry wall hanging; (4) automotive repair; (5) construction; and (6) pottery. Many of the firm's clients diagnosed with both silicosis and asbestosis worked in one or more of these industries.

Notably, only a small percentage of the firm's asbestos clients were ultimately diagnosed with silicosis. Specifically, out of approximately 20,000 firm asbestos clients, only approximately 3,500 were subsequently diagnosed with silicosis and represented by the firm. Moreover, approximately 700 of the firm's silica clients were not asbestos clients of the firm. Many of the firm's asbestos clients worked in industries in which they were exposed to both silica and asbestos or worked in different industries in which they were exposed to asbestos in one industry and silica in another. Less than 1 out of 5 of the firm's asbestos clients was diagnosed with silicosis, and by 2 separate doctors. This fact in no way supports an inference that these clients do not have silicosis or that the firm's representation of these individuals is improper.

V . <u>Summary</u>.

We believe that our firm required and relied upon more extensive criteria to screen for silicosis than did others. For substantially all of its silica plaintiffs, prior to the filing of silica claims, the firm had evidence of at least 2 years occupational exposure to silica, current x-rays read positive as consistent with silicosis by two NIOSH certified B-reader physicians, medical history and physical exam taken by a qualified physician, diagnosis of silicosis by two qualified physicians, and an on-site communication of the diagnosis to the client by one of the diagnosing physicians. Every diagnosing doctor relied upon by the firm has testified that they stand behind their silicosis diagnoses of our firm's silica plaintiffs, except for Dr. George Martindale. However, Dr. Martindale has testified before you that he stands behind his x-ray readings of our silica plaintiffs that show radiographic changes consistent with silicosis. The firm's reliance on the screening

company and the x-ray readings, physical exams, and diagnoses of silicosis by the qualified physicians hired by the screening company was and continues to be reasonable. The firm believes that the silicosis diagnoses of its clients are real and that the claims it brought on behalf of its silica plaintiffs are valid, legal claims.

MR. WHITFIELD. Thank you. Mr. Manji, you are recognized for 5 minutes.

MR. MANJI. Chairman Whitfield, Ranking Member Stupak, and members of the subcommittee, my name is Abel Manji and I am currently an attorney with The O'Quinn Law Firm located in Houston, Texas, formerly known as O'Quinn, Laminack, and Pirtle. I am testifying today as a representative of The O'Quinn Law Firm. I must state at the outset that while I am here on behalf of the O'Quinn firm, my direct and personal knowledge of a number of the issues raised in the subcommittee's investigation is limited, as I first joined the firm in May of 2005, one month prior to Judge Janis Jack's 2005 opinion and order. It was at that time I took over the firm's silica cases.

With that said, I am, however, familiar with the documents produced to the subcommittee. With these constraints, I will certainly attempt to answer your questions to the best of my ability and knowledge.

Mr. Chairman, prior to addressing some of the public health issues that the subcommittee has raised regarding silicosis, I would like to thank you and the subcommittee staff for its continued cooperation in accommodating the O'Quinn firm. As a result of the sheer volume and logistical challenges connected with reviewing hundreds of separate case files, the subcommittee agreed that it made sense for our firm to provide copies of a representative sample of 30 randomly selected client files equally drawn from its Mississippi and Texas silicosis case portfolios, all the while respecting accepted categories of privilege. Again, we appreciate these accommodations.

Additionally, Mr. Chairman, I would like to briefly give the subcommittee an overview of my professional experience. I have been an attorney for the past 13 years. In that time period, I have handled hundreds of cases, both criminal and civil litigation. I have represented defendants as well as plaintiffs.

I think it is important to remember that silicosis is a devastating and incurable disease and that accurate exposure statistics are not available, as the Federal agency charged with compiling that data, OSHA, has not reevaluated the silica exposure standards in over a decade. This is striking, and from my experience, handling workers' injury claims due to silica exposure, I am confident that such exposure is more widespread than people think. Silicosis is a real disease that has killed and will continue to kill hundreds, if not thousands, of hardworking men and women for years to come.

I understand that the subcommittee has focused extensively on Judge Jack's opinion and the concerns raised about screening companies, doctors, and lawyers. It is important to note, however, the O'Quinn firm responded to Judge Jack's opinion by no longer using the screening companies and B-readers questioned by the court and had its clients X-rays reevaluated by different doctors.

At this point, Mr. Chairman, I would like to briefly discuss a few very important points as they relate to The O'Quinn Law Firm and its silicosis practice. First, to the best of my knowledge and at no time since I arrived at The O'Quinn Law Firm, did it engage in the practice of rethreading old asbestos cases into new silicosis cases. In fact, the O'Quinn firm did not have an asbestos docket. When an asbestos case did come to the firm, these cases were immediately referred to another law firm that handled asbestos claims.

Second, the overwhelming majority, as much as 98 percent, of the O'Quinn firm's silicosis cases came to it by referrals from other law firms. Between its seasoned litigators and experience at handling complex toxic tort litigations, smaller firms often referred such cases to O'Quinn for prosecution.

Third, because so many of its silicosis cases were referred from other law firms, the O'Quinn firm relied heavily upon the informational gathering process that occurred before the referral. This process is done to determine if the individual has a legal claim of silicosis or mixed stats, not to obtain medical treatment. To that end, it is important to remember that this process was never intended to substitute for a more in-depth medical evaluation or treatment; rather, the primary purpose of this early detection process is to protect the legal rights of persons whose ability to obtain relief can be completely shut out by statutes of limitations.

Fourth, pursuant to testimony already received by the subcommittee, the O'Quinn firm paid for all services rendered to it, regardless of whether the results were positive or negative.

Fifth, the O'Quinn firm has a policy of notifying and reminding all of its clients about the importance of consulting their personal physicians if the client was found to have positive medical readings for silicosis and other ailments. These communications were done in letters and phone calls.

Sixth, in its silicosis cases, as in all cases, the O'Quinn firm relies on the representations of all parties with whom it is engaged, including the screening companies, the physicians, referring attorneys, and clients that the O'Quinn firm represented and currently represents.

With that, I would like to thank you for your consideration and I look forward to answering any questions the members of the subcommittee may have.

[The prepared statement of Abel K. Manji follows:]

PREPARED STATEMENT OF ABEL K. MANJI, ESQ., THE O'QUINN LAW FIRM

Chairman Whitfield, Ranking Member Stupak, and Members of the

Subcommittee, my name is Abel Manji and I am currently an attorney with the O'Quinn Law Firm located in Houston, Texas formerly known as O'QuinnLaminack and Pirtle. I am testifllng today as a representative of the O'Quinn Law Firm. However, it is important that I state at the outset, that while I am here representing the O'Quinn firm, my direct and personal knowledge of a number of the issues raised by the Subcommittee in its investigation is limited, as I first joined O'Quinn, Laminack, and Pirtle in May of 2005 - one month prior to Judge Janis Jack's June 2005 Opinion and Order. It was at that time I took over the Firm's remaining silica cases. With that said, I am, however, familiar with the documents produced to the Subcommittee, almost all of which precede my arrival and subsequent practice at the Firm. With these constraints, I will certainly attempt to answer your questions to the best of my ability and knowledge.

Mr. Chairman, prior to addressing some of the public health issues that the Subcommittee has raised regarding silicosis and the findings and actions of Judge Jack, I'd like to thank you and the Subcommittee staff for its continued cooperation in accommodating the O'Quinn firm. As a result of the sheer volume and logistical challenges connected with reviewing over three thousand one hundred separate case files in connection with the Subcommittee's inquiry, the Subcommittee agreed that it made sense for our firm to provide copies of a representative sample of thirty (30) randomly-selected client files, equally drawn from its Mississippi and Texas silicosis case portfolios - all the while respecting accepted categories of privilege. The O'Quinn firm cooperated with the Subcommittee in providing these case files and other documents. Again, we appreciate these accommodations.

Additionally Mr. Chairman, I would like to briefly give the Subcommittee an overview of my trial experience. I have been a trial attorney for the last 13 years. In that time period I have litigated hundreds of cases to successful conclusion. I am experienced in both criminal and civil litigation, and I have represented defendants as well as plaintiffs. My experience also includes personal injury and toxic tort litigation.

I think it is important to remember that silicosis is a devastating and incurable disease, and that accurate exposure statistics are not available as the federal agency charged with compiling that data, the Occupational Health and Safety Administration, has not reevaluated its silica exposure standards in over decade. This is striking, and from my experience in handling workers injury claims due to silica exposure, I am confident that such exposure is much more widespread than people think. In fact, I believe the Department of Labor in the 1990s suggested that silicosis is one of the most underreported and diagnosed occupational diseases in the United States. Silicosis is a real disease that has killed and will continue to kill hundreds, if not thousands of hardworking men and women for years to come, and as an attorney it is my job to help those men and women, should they choose, to seek a measure of justice for an illness that is 100% preventable.

I understand that the Subcommittee has focused extensively on Judge Jack's opinion in the multidistrict litigation that was pending in the Federal District Court in Corpus Christi, Texas, and especially the concerns raised in that opinion about screening companies, doctors, and lawyers. I think it is important to point out that the O'Quinn firm responded to Judge Jack's opinion by no longer using those screening companies and B readers, and by having clients re-examined by different doctors. As a result, many of those clients still have active, pending silicosis claims today.

At this point Mr. Chairman, I would like to use the remainder of my statement to briefly discuss and convey a few very important points as they relate to the O'Quinn law firm and its silicosis practice.

First - to the best of my knowledge, and at no time since I arrived at the O'Quinn law firm, did it engage in the practice of "re-treading" old asbestos cases into new silicosis cases. In fact, the O'Quinn firm never had an asbestos docket. Rather, when an asbestos case did come to the Firm, these cases were immediately referred to another law firm that handled asbestos claims. While I cannot speak for other law firms, the O'Quinn firm did not knowingly engage in re-treading any asbestos cases.

Second - the overwhelming majority, as much as 98% of the O'Quinn firm's silicosis cases - came to it by referrals from other law firms. The O'Quinn firm does not advertise to attract silicosis cases, nor does the O'Quinn firm "hunt" for silicosis cases. Rather, the O'Quinn firm has, and continues to be, recognized as one of the premier plaintiff trial firms in the country. Between its seasoned litigators and experience in handling complex toxic tort litigation, smaller firms often refer such cases to O'Quinn for prosecution. This is how the O'Quinn firm became involved in the silicosis cases that were before Judge Jack.

Third - because so many of its silicosis cases were referred from other law firms, the O'Quinn firm relied heavily upon the referring attorney(s) and the initial screening process that occurred before the referral. The "screening process" is done to determine if an individual has a "legal" claim of silicosis or mixed dust, not to obtain medical treatment for clients. The Subcommittee has heard testimony regarding this distinction and I look forward to answering any questions you may have about it.

To that end, it is important to remember that the screening process was never intended to substitute for a more in-depth medical evaluations or treatment, and that one of the primary purposes of doing early screenings is to protect the rights of persons suffering from an occupational disease - ordinary people whose ability to obtain relief can be completely shut out by statutes of limitation.

Fourth - pursuant to testimony already received by the Subcommittee, the O'Quinn firm paid for all services rendered to it regardless of result. This is a direct reference to the Subcommittee's inquiry regarding the "screening process" and the payment of law firms to screening companies for positive screening results only. I can't speak to what other law firms may have done, but the O'Quinn firm paid the same fees to screening companies, regardless of whether the results were negative or positive.

Fifth - the O'Quinn firm has a policy of notifying and reminding all of its clients about the importance of consulting their personal physicians if the client was found to have positive medical readings for silicosis or other aliments. These communications were done in letters and phone calls. Some of those letters were provided to the Subcommittee in the documents the O'Quinn firm submitted to the Subcommittee.

Sixth - at all times, the O'Quinn firm relies on the representations of all parties with whom it communicates about these silicosis cases. This includes the screening companies, physicians, referring attorneys, and clients that the O'Quinn firm represented and currently represents. My understanding is that the O'Quinn firm was not aware of the concerns raised in Judge Jack's opinion until the hearing in her courtroom. I was personally involved in making sure that all of Judge Jack's concerns were addressed; and I firmly believe that we have done that to the best of our ability.

The O'Quinn firm is very interested in securing recovery for people who suffer from occupational diseases like silicosis, but like this Subcommittee and Judge Jack, the Firm has no interest in pursuing claims that have no merit, or claims that fail to meet whatever standards are set by the courts or the government.

With that, I would like to thank you for your consideration; and I look forward to answering any questions you and Members of the Subcommittee may have.

MR. WHITFIELD. Thank you very much. Mr. Gibson, you are recognized for 5 minutes.

MR. GIBSON. Thank you. Mr. Chairman, members of the subcommittee, ladies and gentlemen, my name is Joseph Gibson and I am an attorney in private practice in Houston, Texas. I was previously employed at the law firm of O'Quinn, Laminack, and Pirtle, one of the law firms in the silicosis litigation that is the subject of the hearing today.

I appreciate the opportunity to appear before this committee today to address as best I can questions surrounding the silicosis litigation, including my involvement and that of my former employer.

First, I would like to say that silicosis is a real and terrible disease. Litigation related to silicosis is not new. It has been around since the mid-1980s in Texas. The litigation has resulted in millions of dollars being paid in settlement to people suffering from silicosis, many of whom are very sick. There are a number of other people who suffer from this disease as a result of overexposure to silica on their jobs and who deserve compensation. Dr. Laura Welch, one of the initial witnesses before the subcommittee, pointed out that silicosis is a real public health problem, and there may be thousands of new cases of silicosis that appear each year, even without active screening.

I am 35 years old. I graduated from law school in 1998. I spent a year at a law firm in Houston and then joined the O'Quinn firm. I was initially hired as a staff attorney and subsequently became an associate at the firm. I have never been a partner and my compensation was not tied to the money that was made on the cases I handled. As a lawyer with the O'Quinn firm, I was assigned to work on the silicosis cases being handled by the firm. I was pleased to represent the people I thought deserved help, and I have no interest in manufacturing claims for undeserving persons.

I reported to two partners in the firm, Rick Laminack and Tom Pirtle. The two of them, primarily Mr. Laminack, were in charge of everything I worked on, including the firm's silicosis docket. My role was to assist them and manage the cases on a daily basis. This was entirely appropriate, given my status as a junior attorney at the firm.

At the time I worked at the O'Quinn firm, I had no trial experience of my own. My responsibilities included getting silicosis cases set for trial, getting case management orders in place, drafting and sending discovery requests, gathering documents and preparing outlines and exhibits for depositions of defense witnesses, and taking some depositions. Part of my duties also included coordinating communications among the principal law firms involved in the silicosis litigation and between those firms in the MDL court, hence my title as

lead counsel for the plaintiff's firms. These communications were primarily administrative and logistical in nature.

While I was pleased to be assigned with this responsibility and to play this role, my title did not signify that I was in charge of the plaintiff's side of the litigation. As you can see, each principal plaintiff's firms were responsible for the prosecution of their claims.

An issue has arisen about the competence or integrity about the diagnoses made by certain of the doctors whom the plaintiffs' firms employed in these cases. They were part of the MDL litigation before Judge Jack. Some of these doctors, such as Dr. George Martindale, were never employed by the O'Quinn firm.

The O'Quinn firm used several different doctors in connection with its cases. The work of some of them was not questioned by Judge Jack. Substantial questions were raised by Judge Jack about the work of one doctor, Dr. Ray Harron, who had the X-rays and/or made diagnoses in many of the cases handled not only by the O'Quinn firm, but also by other plaintiffs' firms, both inside and outside of the MDL.

I was not involved in the original selection of Dr. Harron, and as far as I know, nobody else from the O'Quinn firm was either. Instead, we inherited Dr. Harron with a number of the cases that were additionally referred to the firm. Evidently, Dr. Harron was brought into the cases through the screening company N&M, Inc., that was employed by the referring law firm. Dr. Harron had the requisite credentials to perform the X-ray diagnostic work. He had been a certified B-reader for many years. I met him on a number of occasions and he appeared to be competent in his work. He also had a great deal of litigation experience and he had testified on a number of occasions, which also appeared to be an asset.

Shortly before the February 2005 court hearing before Judge Jack, I learned that Dr. Harron had been engaged by another firm to review over 4,000 of its X-rays from its previous asbestosis cases and had diagnosed the presence of silicosis as well. This caused me significant concern and I promptly reported this to Richard Laminack. He directed me to bring Dr. Harron in for a face-to-face meeting. I did so and Mr. Laminack spoke to Dr. Harron at length. Dr. Harron assured us that he stood by the results of all of his work. At the end of the meeting, Mr. Laminack decided that we could go forward with him.

I was very surprised and upset by Dr. Harron's testimony at the hearing, where it developed that his very large number of dual diagnoses of asbestosis and silicosis in the same individuals was highly questionable and gave the appearance that his diagnosis changed to suit the convenience of the case. This testimony made me wish we had dug

deeper. We would have never knowingly trusted the fate of our clients and our cases to what now appear to be unreliable diagnoses.

Finally, I would note that many of the silicosis cases before Judge Jack came from Mississippi and were remanded by her to the Mississippi State courts. After being remanded, 12 of the 73 defendants in the case sought to have sanctions imposed on the O'Quinn firm for having filed these cases in the first place. The Mississippi court refused to impose sanctions. It found that the O'Quinn firm had relied in good faith on accepted patient screening practices for mass tort cases to locate potential plaintiffs and develop the silicosis litigation.

At this point, I am prepared to answer, to the best of my ability, any questions the subcommittee may have.

[The prepared statement of Joseph V. Gibson follows:]

PREPARED STATEMENT OF JOSEPH V. GIBSON, ESQ., LAW OFFICE OF JOSEPH V. GIBSON, P.C.

Mr. Chairman, Members of the Committee, Ladies and Gentlemen:

Good morning. My name is Joseph Gibson, and I am an attorney in private practice in Houston, Texas. I was previously employed at the law firm of O'Quinn, Laminack & Pirtle, one of the law firms in the silicosis litigation that is subject of the hearings today.

I appreciate the opportunity to appear before the Committee today to address, as best I can, questions surrounding the silicosis litigation, including my involvement and that of my former employer.

First, I'd like to say that silicosis is a real and terrible disease. Litigation related to silicosis is not new; it's been around since the mid-1980s in Texas. This litigation has resulted in millions of dollars being paid in settlement to people suffering from silicosis, many of whom are very sick.

There are a number of other people who suffer from this disease as a result of overexposure to silica on their jobs and who deserve compensation. Dr. Laura Welch, one of the initial witnesses before this Subcommittee, pointed out that silicosis is a real public health problem and there may be thousands of new cases of silicosis that appear each year even without active screening.

I am 35 years old. I graduated from law school in 1998. I spent a year at another law firm in Houston and then joined the firm of O'Quinn, Laminack & Pirtle (the "O'Quinn firm"). I was hired as a staff attorney and subsequently became an associate at the firm. I was never a partner. My compensation was not tied to the money that was made on the cases I handled.

As a young lawyer with the O'Quinn firm, I was assigned to work on the silicosis cases being handled by the firm. I was pleased to represent people I thought deserved help. I had no interest in manufacturing claims for undeserving persons.

I reported to two of the partners in the firm, Rick Laminack and Tom Pirtle. The two of them, primarily Mr. Laminack, were in charge of everything I worked on, including the firm's silicosis docket. My role was to assist them and manage the cases on a day-to-day basis. This was entirely appropriate given my status as a junior attorney in the firm. At the time I was working at the O'Quinn firm, I had no trial experience of my own.

My responsibilities included getting silicosis cases set for trial, getting case management orders in place, drafting and sending discovery requests, gathering documents and preparing outlines and exhibits for depositions of defense witnesses and

taking some depositions. I primarily took secondary depositions and helped prepare Tom Pirtle for primary depositions, such as corporate representatives. I also negotiated settlements in some of the cases.

Part of my duties included coordinating communications among the principal law firms involved in the silicosis litigation and between those firms and the multi-district litigation ("MDL") court, hence my title as "lead counsel" for the plaintiffs' firms. These communications were primarily administrative and logistical in nature. While I was pleased to be assigned this responsibility and to play this role, my title certainly did not signify that I was in charge of the plaintiffs' side of the litigation. Each of the principal plaintiffs' firms was responsible for the prosecution of its claims.

An issue has arisen about competence and/or integrity of the diagnoses made by certain of the doctors whom the plaintiffs' firms employed in the cases that were part of the MDL litigation before Judge Jack. Some of these doctors, such as Dr. George Martindale, were never employed by the O'Quinn firm.

The O'Quinn firm used several different doctors in connection with its cases. The work of some of them was not questioned by Judge Jack. Substantial questions were raised by Judge Jack about the work of one doctor, Dr. Ray Harron, who read the x-rays and/or made diagnoses in many of the cases handled not only by the O'Quinn firm but also by other plaintiffs' law firms both inside and outside of the MDL.

I was not involved in the original selection of Dr. Harron and, so far as I know, neither was anyone else at the O'Quinn firm. Instead, we inherited Dr. Harron with a number of the cases that were referred to the firm. Evidently, Dr. Harron was brought into the cases through a screening company, N & M, Inc., that was employed by the referring law firm. Dr. Harron had the requisite credentials to perform the x-ray diagnostic work – he had been a certified B-reader for many years. I met him on a number of occasions and he appeared to me to be competent at his work. He also had a great deal of litigation experience and had testified on a number of occasions, which also appeared to be an asset.

Shortly before the February 2005 court hearing before Judge Jack, I learned that Dr. Harron had been engaged by another firm to review over 4,000 of the x-rays from its previous asbestosis cases and had diagnosed the presence of silicosis as well. This caused me significant concern and I promptly reported this development to Rick Laminack. He directed me to bring in Dr. Harron for a face-to-face meeting. I did so and Mr. Laminack spoke to Dr. Harron at some length. Dr. Harron assured us that he stood by the results of all his work. At the end of the meeting, Mr. Laminack decided that he was satisfied with Dr. Harron's answers and that we should go forward with him.

I was very surprised and upset by Dr. Harron's testimony at the hearing, where it developed that his very large number of dual diagnoses of asbestosis and silicosis in the same individuals was highly questionable and gave the appearance that his diagnoses changed to suit the convenience of the case. This testimony made me wish that we had dug deeper and discovered these problems before the hearing. We would never have knowingly trusted the fate of our clients and our cases to what now appear to be unreliable diagnoses.

Finally, I note that many of the silicosis cases before Judge Jack came from Mississippi and were remanded by her to the Mississippi state courts. After being remanded, 12 of the 73 defendants sought to have sanctions imposed on the O'Quinn firm for having filed these cases in the first place. The Mississippi court refused to impose sanctions. It found that the O'Quinn firm had relied in good faith on accepted patient screening practices for mass tort cases to locate potential plaintiffs and develop the silicosis litigation.

At this point, I am prepared to answer, to the best of my ability, any questions the Subcommittee may have.

MR. WHITFIELD. Thank you very much. Mr. Zadeh, you are recognized for 5 minutes.

MR. ZADEH. No opening statement, Mr. Chairman.

MR. WHITFIELD. Mr. Fabry.

MR. FABRY. No opening statement, thank you.

MR. WHITFIELD. Mr. Mullins.

MR. MULLINS. Mr. Luckey will be making our opening statement.

MR. WHITFIELD. Mr. Luckey.

MR. LUCKEY. Thank you, Mr. Chairman. My name is Alwyn Luckey. I am here on behalf of the law firm of Luckey and Mullins. This is my law partner, Mr. Steve Mullins. I am also here on behalf of the firm of Barton and Williams of Pascagoula, Mississippi. Together, we joint ventured representation of silica clients. Each of our firms are mutually responsible for the representation of our silica clients.

Our firms, particularly over the past year, have been particularly hard hit by the affects of Hurricane Katrina. The Barton & Williams firm suffered a complete loss of two of their three office buildings, and a partial loss of the third. They had complete damage: the files, records, and computer systems. In addition, lawyers and staff members from their firm left the area after the hurricane. They are extremely short staffed in trying to rebuild their law firm.

My law firm was not flooded like many of the areas on the Gulf Coast, but we did have substantial damage to the roof of the office. We lost files, damage to the computer system. In an almost unbelievable event, in November my office caught fire as a result of water leaks from the hurricane and we were without power for an additional couple of weeks. We have tried our best to comply with the committee's requests and believe we have done so to the best of our abilities. I do think it is important to note that documents and information that were provided to the MDL proceeding probably only exist there at this point, as many of our documents were lost in the storm.

On a personal note, I would like to thank the committee's staff for giving Mr. Mullins and I the option for one or the other of us to testify, in consideration of my wife's illness. She is doing well and I am here today because of that. I appreciate the consideration.

As far as mass medical screenings for our firms are concerned, the Barton & Williams firm primarily utilized the services of Respiratory Testing Services. Our firm primarily used the services of Occupational Diagnostics, a Mississippi company. It is our belief that the only N&M Screening Company cases we had, or in the case of Dr. Harron, were referred to us from other law firms that we had no control over the screening of those cases.

Our firm had attorneys and staff present at all or almost all of the medical screenings that were done by our firm. This was done to ensure that our clients who were sent to be screened, in fact had the proper work history and exposure to silica in order to qualify for screening. We used a restrictive criteria for accepting cases, 5 years or more of exposure to occupational silica in a trade and at a job site where silica was being used.

I am mindful of the committee's interest in notification and follow-up to claimants who were diagnosed with a silica-related disease at these screenings. In cases in our firm and the firm of Barton & Williams, where the onsite physician at the medical screening found a silica-related disease, the doctor at the screening told the clients about his interpretation of their disease. In the event of a diagnosis of silicosis, the clients should have been told at least three times about their disease, in the event of a more serious disease, lung cancer, schleroderma or what is known as complicated silicosis, at least five times would either the medical company or our firms have followed up with the clients. The clients should have been told by the doctor on site. In the event of a severe or complicated case, a medical report should have been sent to them by certified mail by the screening company. If the person was diagnosed with a silica related disease and chose to hire our law firm or meet with our law firm to pursue a case, the attorney at the screening would have reminded the client of the disease he had been diagnosed with or found to have. Finally, when the medical report was received at our office, we would have mailed a letter with an additional copy of that medical report to the client, urging them to see their family physician or a local physician to check into the disease. And in the event of a serious case, a similar letter, but one that utilized the doctor's language of what the serious condition was about and again, enclosing the doctor's report. In the event of a serious case, our firm also followed up with those clients to be sure they had found medical care or to recommend a place they could go in the event they had not. In addition, during our normal course of representation, we spoke to our clients many times, and frequently our staff knew them by their names and we followed up with their case, as we would anyone's lawsuit that we were handling.

It was natural that the Barton & Williams firm and my firm were hired by many of these claimants. Our offices in Pascagoula, Mississippi, and Ocean Springs, Mississippi, are very close to the Northrop Grumman, formerly known as Ingall Shipyard, in Pascagoula, Mississippi, one of the largest in the world. We are additionally near New Orleans, with many shipbuilding and other industries. These are our clients. These are local people who hired our firm. In addition, due to our experience in representing clients in industry, many cases were

referred to us by other lawyers who knew we had experience in these types of cases.

One of the unfortunate results of the criticism of doctors and the medical screening practice has been that in some cases, plaintiffs who don't even have a medical report from a doctor that was questioned in Corpus Christi have been held up, and in the case of some of our clients filed in Mississippi, possibly are not able to go forward due to the criticism of the screening practices and the doctors. This is an unfortunate result for otherwise deserving claimants that, at this point, our firm and that of Mr. Barton, have been unable to rectify due to certain complexities in Mississippi law, but unfortunately, the pale that has been cast over many of these clients due to the nature of their expert medical reports.

[The prepared statement of Alwyn H. Luckey follows:]

PREPARED STATEMENT OF ALWYN H. LUCKEY, ESQ., LUCKEY & MULINS PLLC

United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
July 26, 2006

Written Statement of
Alwyn H. Luckey and Stephen W. Mullins

Thank you for the opportunity to come and speak with you, members of The Committee on Energy and Commerce and Subcommittee on Oversight and Investigation in reference to Silica Litigation screenings. For purposes of simplicity, there will be one spokesperson for the law firms of Luckey & Mullins, PLLC and Barton & Williams. Our firms' joint ventured representation of silica clients and each firm is mutually responsible for their representation.

This has been a difficult year for our law firms, as we were both located on the Gulf Coast of Mississippi, and were directly in the path of Hurricane Katrina. Our lives and families have been deeply and severely affected by Hurricane Katrina.

Luckey & Mullins, PLLC

While the Luckey & Mullins firm, located in Ocean Springs, Mississippi was spared from the rising water which afflicted much of the region, the firm sustained significant damage as a result of the storm. The office roof was partially destroyed which caused leaking in the main office, adjoining warehouse and mezzanine. The leaking caused damage to the structure, furniture, equipment and files throughout the office. On November 1, 2005, the Luckey & Mullins office caught fire during an electric storm and was without power in a majority of its offices for 17 days.

In addition to the problems Hurricane Katrina created for the law firms of Barton and Williams and Luckey & Mullins, the storm destroyed many of the homes of the lawyers associated with these firms. Also, Mr. Luckey's wife was seriously injured in a car accident which occurred during the family's evacuation.

Although our professional and personal recovery efforts continue, we have worked diligently to continue service to our clients, many of whom were similarly affected by the Hurricane. Likewise, we have been, and will continue to be, fully cooperative to your requests throughout this process. This response, together with our previous submissions, represents our good faith and best efforts to address the questions and concerns raised by the Committee.

Barton and Williams Law Firm

Located 2 miles from the former home of United States Senator Trent Lott in Pascagoula, Mississippi, the law firm of Barton and Williams, suffered complete losses to documents and computers contained in two (2) of its three (3) office buildings. The first floor of the main office building was similarly flooded and damaged. In addition to these losses to documents and property, Barton and Williams lost the service of three (3) of its five (5) attorneys and one (1) staff member, all of whom chose to move outside of the area following the Hurricane.

The Committee's Investigation

The Medical Screening Process

On February 17, 2006, our two firms received a letter from the Committee detailing its interest in the findings of Janis Jack, presiding Judge of MDL No. 1553. There exists an interest in the role lawyers played in the medical screening process.

Firm participation at screenings

Medical testing companies were responsible for providing space and access to the client necessary for the attending physician to provide a reasonable medical evaluation, without any interference or influence of our firms. Findings were solely those of the attending physician.

Our screenings were primarily through RTS (Respiratory Testing Services) and a fewer number of clients were screened by a Mississippi licensed physician through a Mississippi testing company. Registered nurses employed by the screening companies were present at many screenings to assist the physician during the physical examinations.

Staff members from our law firms were present to ensure that individuals who presented for testing met our firms' restrictive criteria for testing. This was achieved primarily through the completion of work history questionnaires that would provide information helpful to our evaluation of a possible claim. Some of the requested information included the age of the individual tested, the individual's work history and the individual's job title and responsibilities. This information is gathered in order to view a broad spectrum of the case and not one solely based upon exposure or medical screening.

Abnormal medical findings

We are aware of the Committee's concern regarding individuals who received abnormal x-ray readings. It is our understanding, that if an individual had an abnormal x-ray finding, he or she would promptly be informed by the doctor at the screening site and recommend that he or she see their local physician immediately. He would also be given an abnormal x-ray finding report at that time. A copy of these findings and a recommendation that he see a local physician immediately would also be mailed to the individual by certified mail by RTS.

At the medical screening, if the individual was found to have a silica related disease he would be seen by a lawyer of our firm or a paralegal of our firm where we would, again, stress the significance and seriousness of the abnormal x-ray finding.

Later, when any abnormal x-ray finding was received in our respective law offices, it was our custom and practice that another letter went out to the individual reiterating the doctor's concern and stressing the significance of the abnormal x-ray finding and the importance of seeking a local physician for further diagnosis and treatment.

In the event that a life threatening or serious medical condition was discovered, a more detailed letter explaining the serious condition, using the doctor's language from the medical report, was mailed to the client while additionally enclosing another copy of the same medical report previously provided to him at the time of the screening.

Finally, it was our firms' custom and practice that the silica department attorney, or in their absence, a paralegal employee, would call these individuals to discuss the

abnormal x-ray finding report to so that they fully understood it and urged that they need to be seen by a local physician promptly.

Other screening criteria

Before agreeing to represent any client, generally our firm mailed Questionnaires or met with prospective clients to fill out detailed Questionnaires in order to determine the veracity of someone who claimed they were exposure to silica. We researched numerous publications including literally thousands of pages of documentation from OSHA and NIOSH. We also read numerous depositions and trial transcripts before beginning our silica litigation endeavor. In doing so, our firms set up one of the most restrictive criteria of anyone accepting cases of silica related disease. We took generally accepted criteria and made it more stringent[1]. We generally verified the information by

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[1] On February 18, 2005, Charlie Foster, a representative of Respiratory Testing Services, provided the following testimony:

Q: [by Plaintiffs' Counsel]: Okay. For example, the Barton & Williams law firm, Alwyn Luckey law firm group, do you recall what the criteria is for the people that we want you to test for us?

A: [by Charlie Foster]: Yes sir. We've had a couple, but starting off right there with five years prior to 1985 exposure, either sandblaster, sandblaster helper or sandblasting crew that wore a mask or respirator or a hood.

Q: And so being prior to 1985, that would give you at least, at that point, a ten-year latency period, wouldn't it?

A: Yes, sir.

Q: And you knew that the criteria that my firm was establishing was, we want sandblasters or immediate helpers, somebody that worked with sandblasting. Correct?

A: Yes, sir.

Q: And we also made it as a part of the criteria that they had at least five years exposure. Do you agree?

A: Yes, sir.

Q: Do you recall that that corresponds somewhat with what – well, you weren't here when Dr. Levy testified were you?

A: No, sir.

Q: Do you what Dr. Levy's criteria is for making a silicosis diagnosis?

A: No. But I know I work for other law firms, it's a lot less. We go from '90 to '92 at least two years of exposure. And I've even talked to Mr. Lynch about easing up on the criteria, and he never would. He stayed right with what-

Q: Okay. So consistently, my firm has stuck with a five-year criteria.

A: Yes.

ordering social security earnings reports records and other information from the initial stage of litigation. Additionally, we conducted physical work site inspections and document production projects requiring documents and information be provided by the work site owner/entity. Hence, this would allow us to know, with relative certainty, that there was substantial silica exposure to these workers (our client), before we engaged in any screening.

It should be noted that our respective law firms are only a few miles from the Northrop Grumman (fka Ingalls) Shipbuilding facility which is the one of the world's largest shipbuilders, our County is considered as one with industries known to create many, varied occupational hazards, including heavy silica exposure.

To our immediate West is the Avondale Shipyard and the industrial corridor North of the Gulf Coast, roughly located between Baton Rouge and New Orleans. This geographic area is sometimes referred to as "cancer alley". According to leading health and occupational organizations, both of these areas display elevated rates of silicosis.

We believed that, in this immediate geographic area, there were individuals with silicosis who needed representation. With this knowledge, together with requests for representation on a regular basis from individuals in this County, we embarked in good faith into this project.

We believe that our rate of findings of a silica related injury versus no silica related injury was low, and was generally in the vicinity of approximately 25-35%. [2]

In Re: Silica Products Liability Litigation, MDL No. 1553, Daubert Hrg. Transcr. 193:20-194:23 (Feb. 18, 2005).

[2] The information necessary to fully calculate this figure is partially found in documents previously submitted to the MDL. Other documents were also destroyed by Hurricane Katrina.

Our aforementioned protocol relates solely to screenings initiated by our offices. We cannot make any assertions regarding the screening process as it relates to those clients who were referred to us by other attorneys who performed independent screenings.

Screening date/Findings date discrepancy

It has been pointed out to us in meetings with Congressional staff members that there was at least one occasion that a silica reading initiated by our firm in 2004 or 2005 was from x-rays that are dated 1999. We intend to make clear to the Committee that this was not a policy of our firm and was an aberration or mistake. To explain, in the process of providing the x-rays to a physician for review, our staff made a mistake by not including all of the client's x-rays. They simply took the first x-ray from the cabinets and provided those to the physician without including any other x-rays that belonged to that particular individual.

As of today, we are not able to confirm further information surrounding these x-rays as they are in the possession of the Clerk of the MDL.

Request for consideration

One of our primary concerns is the effect that the criticisms of Janis Jack, the Judge presiding over the MDL, and other sources will have upon people with a silicosis disease. Today, the result is that questioned medical reports are adversely affecting cases with reports from physicians that are not at issue. For example, we are involved a situation with Dr. Freidman (the silica defendants' expert designated in the MDL) who issued an IME report of silicosis of a plaintiff represented by our firm, with accompanying biopsy also confirming silica induced disease. This particular case is

'stuck in legal limbo' in the Texas MDL only because it was part of the same case where certain medical reports are now being questioned.

Our firm represents several victims of silica induced disease where their exposure occurred in Alabama. They are adversely affected by Judge Jack's criticism of the screening process. For reasons related to the criticism of certain medical doctors, no Alabama law firm will assist these claimants.

CONCLUSION

Litigation procedures provide vehicles for discovering the complete information necessary to determine whether a case should be withdrawn, tried, settled or dismissed. In other words, to piece together 'the whole story'. The medical screening process is one of various methods utilized by the firms to determine our confidence in an individual's silica related matter. Our participation in information gathering, whether medical or otherwise, was to evaluate the prospective client's claim and to obtain same without any interference with or influence upon the information gathered.

Thank you again as we await your questions.

MR. WHITFIELD. Thank you very much. At this time, I recognize Mr. Laminack for his opening statement.

MR. LAMINACK. Thank you, Chairman Whitfield, Ranking Member Stupak, and members of the subcommittee.

My name is Richard Laminack. I am a principal member of the law firm of Laminack, Pirtle, and Martines in Houston, Texas. I want to especially thank the subcommittee for allowing me to appear today by video from M.D. Anderson Cancer Center in Houston. I am appearing by video because I have been diagnosed with leukemia and am currently being treated by chemotherapy. My doctors advise that I should not travel or appear in public gatherings due to my treatment, so I want to especially thank the committee for accommodating my condition.

The testimony I am providing today relates to my professional responsibilities and duties at my former law firm, O'Quinn, Laminack and Pirtle, and the administration and prosecution of certain silica claims handled by the firm. I am here to voluntarily and readily answer your questions.

I have been a trial attorney for 19 years and have exclusively represented individuals and their families who have sustained personal injury. The people who have and do suffer from silicosis have had a profound impact on me. Their cases are that severe and that troubling.

My first experience with silicosis was in the late '80s when I represented a small group of 12 workers against their employer, claiming that they had been exposed to silica on the job. It took a number of years to bring those cases to final resolution. What really bothered me about those cases is that the workers had been seen by the company doctor and at no time did that physician tell these workers that they had scarring or that their lungs--taking their lungs or even if there had symptoms consistent with silicosis. Every single one of them has since died of silicosis, and it upsets me to this day.

I tell you this, Mr. Chairman, not because I am looking for some kind of redemption, but rather, to let you know that I know firsthand what silicosis can do to a person and to their family. Because I know this, I would never knowingly bring a silicosis claim on behalf of an individual that does not have the fundamental proof of such a claim.

I would like to take this opportunity to share my views about the O'Quinn firm's silicosis practices during my tenure. As I stated earlier, I handled my first silicosis case almost 15 years ago. For several years, that was our last substantial involvement in silicosis. It was not until early 2000 that O'Quinn, Laminack and Pirtle became more involved in silicosis cases again. Around that time, other law firms began to approach our firm about referring their silicosis cases. These inquiries were directed at us because of our reputation for successfully handling complex toxic tort litigation involving large numbers of plaintiffs and defendants.

Some of these silicosis cases, namely a class of cases called the Alexander Class, that landed in Judge Jack's courtroom in Corpus Christi as part of the MDL, caused the spotlight to be shown on the O'Quinn firm, a spotlight that should have been extinguished when Judge Jack ruled that she never had jurisdiction over the Alexander Class to begin with. After Judge Jack decided that the Federal courts lacked jurisdiction, the local court of proper jurisdiction found that the O'Quinn firm had handled itself and the cases in compliance with the law.

There are some basic elements that I would like the subcommittee to keep in mind about how the O'Quinn firm managed its silicosis cases. First, the O'Quinn firm and myself personally have always taken our clients' health issues seriously. Throughout the course of the O'Quinn firm's representation of its clients, it had a policy of advising clients that any initial screenings that they had participated in for the purposes of filing a legal claim and protecting their legal rights, and that any and all medical issues that may have arisen from any results of the screening process should be addressed to the client's personal physician.

Second, because the overwhelming majority of the O'Quinn firm's cases were referrals, we relied on screening companies, screening physicians, B-readers, the referring attorney, and the client when we moved forward with the case. While I was not personally involved in any aspects of the screening process, I did understand that most of O'Quinn's clients had already been screened and diagnosed before the clients were referred. I was not personally aware of any problems with screening diagnoses or B-reads by doctors or screening companies of the O'Quinn clients until one fateful day in Corpus Christi when Dr. Ray Harron asserted his Fifth Amendment rights and refused to testify in Judge Jack's courtroom. Had I or anyone else at the O'Quinn firm been aware of problems with doctors or screening companies, we wouldn't have used them and we would have brought in different screeners and doctors, which is exactly how the O'Quinn firm responded to the hearings and rulings by Judge Jack.

As I told Judge Jack during one of the several hearings in front of her, that there are cases that don't belong here, then I don't want them here either. Subsequent to the proceedings in Judge Jack's court, the O'Quinn firm had every client in the Alexander Class rescreened. The substantial majority retested positive for silicosis and still have active claims today.

Finally, I think the committee needs to consider the role that screening plays in silicosis and other mass tort litigation. Screening is done at a very early stage, before a lawsuit is even filed. It is intended to identify indications that a person may have silicosis to allow lawyers to determine whether there is enough evidence to proceed with further

testing, and to file and pursue a claim. Screening is never intended to determine how ill a person is, what the person's medical treatment should be, or to provide a thorough scientific basis for actually trying a claim. A positive screening would justify a lawsuit, but also would always lead to much more comprehensive medical testing and examinations. The defendants that choose to settle these cases have always demanded comprehensive medical proof of this type before they agree to pay any person's claim. It is important to point out that our efforts as attorneys were to protect people's legal rights. That was our foremost objective as attorneys in this process.

In conclusion, I again want to thank the subcommittee for accommodating my medical condition. Thank you.

[The prepared statement of Richard N. Laminack follows:]

PREPARED STATEMENT OF RICHARD N. LAMINACK, ESQ., LAMINACK, PIRTLE AND MARTINES

Chairman Whitfield, ranking member Stupak, and members of the Subcommittee, my name is Richard Laminack, and I am principal member of the law firm of Laminack, Pirtle and Martinez in Houston, Texas. I want to thank the Subcommittee for allowing me to appear today by video from M.D. Anderson Cancer Center in Houston, Texas. I am appearing by videoconference because I have been diagnosed with leukemia and am currently being treated by chemotherapy. My doctor has advised that I should not travel or appear in large, public gatherings due to my treatment. Again, I want to thank the Subcommittee for accommodating my current conditions.

The testimony I am providing today relates to my responsibilities and duties at my former law firm, O'Quinn, Laminack & Pirtle ("OLP") in the administration and prosecution of certain silica claims handled by the firm. I am here voluntarily and ready to answer your questions.

I have been a trial attorney for the last nineteen years and have exclusively represented individuals and their families who have sustained personal injury. The people who have and do suffer from silicosis have had a profound impact on me - their cases are that severe and that troubling. As this Subcommittee has heard over the course of its investigation, silicosis is a lung disease caused by inhaling silica dust, which in turn causes lung damage and scarring. Silica dust is a byproduct of several industries, including, but not limited to, sandblasting, manufacturing, and construction. Silicosis exposure is more prevalent in the South due primarily to active shipping, shipbuilding, and refining industries. Silicosis is a deadly, incurable disease, and it can take decades for the full effects of silicosis to show up in a person.

My first experience with silicosis was in the late 1980s when I represented a small group of workers -- 12 I recall -- against their employer claiming they had been exposed to silica on the job. It took a number of years to bring those cases to final resolution. What really bothered me about that case is that the workers had been seeing the company doctor and at no time did that physician tell these workers that they had scarring on their lungs even though they had symptoms that were consistent with silicosis. Every single one of them has since died of silicosis and it upsets me to this day. I tell you this Mr. Chairman not because I am looking for some kind of redemption, but rather I know first hand what silicosis can do to a person and their family. Because I know this, I would never knowingly bring a silicosis claim on behalf of an individual that does not have the fundamental proof of such a claim.

I would like to take this opportunity to share my views about the O'Quinn law firm's silicosis practice during my tenure at the firm.

As I stated earlier, I handled my first silicosis cases almost fifteen years ago as young attorney with the O'Quinn law firm. Silicosis cases are complex and require certain elements of proof and require a commitment of resources that not all firms and attorneys want to take on. Since the disposition of those early cases the O'Quinn firm moved away from silicosis work and concentrated its time and resources elsewhere for the better part of the late 1980s and 1990s. This did not include asbestos work.

It was not until early 2000 that OLP became more involved in silicosis cases again. Around that time, other law firms began approaching OLP and offering to refer silicosis cases. These inquiries were directed at O'Quinn because of our reputation for successfully handling complex toxic tort litigation involving large numbers of plaintiffs and defendants. What was not done at any time, and I can't stress this enough, was the "re-treading" of old asbestos cases into new silicosis cases. When I refer to "re-treading" I mean the practice of taking any and all of your firm's asbestos claims and converting them into new silicosis claims with or without the benefit of new medical testing of the alleged claimant. The O'Quinn firm never had an asbestos docket and therefore could not and did not re-tread those cases. Rather, on a referral basis the O'Quinn firm began taking on silicosis cases. Some of these cases, namely a class of cases called the Alexander class that landed in Judge Jack's court room in Corpus Chsti as part of the federal MDL, caused the spotlight to be shown on the O'Quinn firm. A spotlight that should have been extinguished when Judge Jack ruled that she never had subject-matter jurisdiction over the Alexander case to begin with. After Judge Jack decided the Federal Courts lacked jurisdiction, a local court of original jurisdiction found that the O'Quinn firm handled itself and the cases in compliance with the law.

There are some basic elements that I would the Subcommittee to keep in mind about how the O'Quinn firm managed its silicosis cases.

First, the O'Quinn firm and myself personally have always taken our clients' health issues seriously. Throughout the course the O'Quinn firm's representation of its clients it had a policy of advising clients that any initial screenings that they participated in were for the purposes of filing a legal claim only, and that any and all medical issues that may have arisen from any results of the screening process should be addressed to clients' personal physicians.

Second, because the overwhelming majority of the O'Quinn firm's cases were referrals, we relied on screening companies, screening physicians and B-readers, the referring attorney, and the client when we moved forward with a case. While I was not personally involved in any aspects of the screening process, I did understand that most of O'Quinn's clients had already been screened and diagnosed before the clients were referred. I was not personally aware of any problems with screening diagnoses or B-reads by doctors or screening companies for O'Quinn clients until one fateful day in Corpus Christi when Dr. Ray Harron asserted his *5th*Amendment rights and refused to testify in Judge Jack's courtroom.

Had I or anyone else at the O'Quinn firm been aware of problems with doctors or screening companies, we would not have used them and would have brought in different screeners and doctors, which is exactly how the O'Quinn firm responded to the hearing held by Judge Jack. As I told Judge Jack during one of the many hearings in front of her, if there are cases that don't belong here then I don't want them here either. Subsequent to the proceedings in Judge Jack's court, the O'Quinn firm had every client in the Alexander class re-screened. The substantial majority re-tested positive for silicosis and still have active silicosis claims today.

Finally, I think the Committee needs to consider the role that screening plays in silicosis and other mass tort litigation. Screening is done at a very early stage, before a lawsuit is even filed, and is intended to identify indications that a person may have

silicosis, to allow lawyers to determine whether there is enough evidence to file and pursue a claim. Screening is never intended to determine how ill a person may be, what the person's medical treatment should be, or to provide a thorough scientific basis for pursuing a claim. A positive screening would not only justify a lawsuit, but also would always lead to much more comprehensive medical testing and examinations. Believe me, the Defendants that choose to settle the cases demand that comprehensive medical proof before they agree to pay any money for a person's claim.

In conclusion, I again would like to thank the Subcommittee for accommodating my medical condition today.

MR. WHITFIELD. Thank you very much for your testimony, Mr. Laminack, and that concludes the opening statements. We will go to questions now.

One of the concerns of this subcommittee was the fact that we are talking about patients here, or clients who supposedly have some rather significant diseases. As all of you have said in your testimony or submission of documents, in this whole process you use B-readers, you use diagnosing physicians, and as you say, you are representing the clients and helping them to obtain a judgment in the event that they suffer one of these illnesses.

It seems that this process, the way it works does not really pay much attention to the individual receiving treatment from a physician to take care of his long-term medical needs. I know many of you said, well, that is the diagnosing physician's responsibility, but I get the impression in these hearings that we have had that these diagnosing physicians are really sort of professional physicians who look at and sign documents to use in a pleading in a lawsuit. I don't get the impression that many of them are in the business of following up with these clients for their long-term medical needs.

Would you agree that the system, the way it is operating now, is that a problem or is that not a problem, just from the perspective of the individual's long-term health needs? Does anybody have any thoughts on that? You feel like the patient or your client's long-term health needs are being taken care of within the system as it is now? Is that correct? So none of you are concerned about their long-term healthcare treatment at all? Mr. Luckey?

MR. LUCKEY. Speaking for our firm, obviously we are concerned about our clients' health, present and long term. I may not address your entire question, Mr. Chairman, but I will try to address the part that struck me.

MR. WHITFIELD. What I am trying to get at here is you have one avenue you go down to file a lawsuit and collect damages, and the way the legal system seems to work with these B-readers and diagnosing physicians, everything seems to be oriented in that result. There doesn't

seem to be any concern that I have seen for the long-term healthcare of the patient and/or client.

MR. LUCKEY. I would disagree as far as our firms are concerned. Concern over the client's health is something that we have always had. It is something we have because we know our clients personally.

In addition, I would like to say that as far as I know, every screening which our firm participated in or sponsored had a doctor--was supposed to have a doctor on site who met with the people as they were tested. That doctor would have explained their condition to them. In the event of a serious or life-threatening condition, would have suggested that that person see either their family doctor, or in the absence of that, a place where they could be seen. I know several clients were sent to the University Medical Center in Jackson, Mississippi, where they could get free care.

So yes, sir, that is a very important issue for us.

MR. WHITFIELD. And with that, do you have any comment on that, Mr. Davis?

MR. DAVIS. We believe that every one of our clients was advised by the diagnosing physician of his condition and the type of diseases that could be developed based on silicosis, and they were advised and acknowledged that they were advised to see their treating physicians and follow up on their condition.

MR. WHITFIELD. Now, did you use N&M Screening Company, your firm?

MR. DAVIS. Yes, sir.

MR. WHITFIELD. And were you aware that they were not licensed to conduct heaving heart screen in Mississippi or in Texas?

MR. DAVIS. I was not aware.

MR. WHITFIELD. Were you aware? Did you represent some Mississippi clients as well as Texas clients?

MR. DAVIS. Our clients were primarily from Mississippi and Alabama. We had no Texas clients.

MR. WHITFIELD. Okay. Were you aware that the Mississippi State Department of Health cited N&M for conducting screening programs without the Agency's approval?

MR. DAVIS. I have seen that document as a result of meeting with majority counsel, and that was done subsequent to their performing services for us.

MR. WHITFIELD. I was just curious, in the firm, when you were sending out 18,000 to 20,000 letters to existing asbestosis clients, and from the information that I have received and in looking at some of the testimony and Judge Jack's decision, it is extremely rare that someone would have asbestosis and silicosis. Did you all have any discussion

within your firm that you are now sending out letters about silicosis to 18,000 to 20,000 people that had asbestosis?

MR. DAVIS. We disagree that it is extremely rare. NIOSH says that you can have exposure to both silica and asbestos at any number of industries that we mentioned. Many of our clients worked in these industries. We simply notified our clients that if they felt like they had exposure to silica and if they wanted to get tested for that, we simply provided them an avenue to do that.

MR. WHITFIELD. So you are saying that it is not rare to have asbestosis and silicosis? Is that correct?

MR. DAVIS. I am saying that there is literature out there that says it is not rare. One of the doctors that testified for the defendants in Judge Jack's court 6 months later admitted that he had made numerous diagnoses of people with both silicosis and asbestosis.

MR. WHITFIELD. Who was that? Do you remember his name?

MR. DAVIS. Dr. Friedman, Dr. Gary Friedman. I also for years in the asbestos litigation have seen these same defendants have defended asbestos litigation by stating that these people, these asbestos plaintiffs, were exposed to silica. That has been an affirmative defense of many of the asbestos defendants.

So now when the silica claims get filed, they say they cannot have asbestos and silicosis both. They can't have it both ways. I am fearful that Judge Jack relied upon some information that was incomplete.

MR. WHITFIELD. Now, what about the rest of you? Do you agree with Mr. Davis's comment there on this asbestos/silicosis issue or not? Mr. Zadeh, what do you think?

MR. ZADEH. I believe there is literature on both sides, Mr. Chairman.

MR. WHITFIELD. Okay. Mr. Luckey?

MR. LUCKEY. I understand there is literature on both sides too,--

MR. WHITFIELD. Okay.

MR. LUCKEY. --Mr. Chairman, but we rely on the medical profession for that.

MR. WHITFIELD. Okay. Now, Mr. Davis, did your firm pay N&M only for positive silicosis screenings?

MR. DAVIS. We paid N&M--once a person went to N&M and once he satisfied the exposure criteria of 2 years, prior to 1980, and if he received a positive X-ray finding and we obtained a physical exam and a medical history, and a diagnosis, and if that person then asked us to represent them and we accepted them as a client, then we advanced their medical screening costs to N&M.

If a person went through that entire process and didn't ask us to represent them or we refused to represent them, we paid no fee to anyone. We reimbursed no one's medical expense.

MR. WHITFIELD. You used Dr. Harron some as a diagnosing physician, didn't you?

MR. DAVIS. He was--yes.

MR. WHITFIELD. And so you were quite surprised, I guess, when he decided to make the comment that he did not mean to be diagnosing anyone?

MR. DAVIS. I don't believe Dr. Harron made that comment. In fact, I believe Dr. Harron stated, at least as to our plaintiffs, that he stood behind every diagnosis that he made.

MR. WHITFIELD. Did he say diagnosis or B-reads?

MR. DAVIS. Diagnosis.

MR. WHITFIELD. Diagnosis.

Mr. Laminack, I think maybe you have the exhibit book with you on the table there. Evidently, you do not have it, but I am referring to Exhibit 18, Footnote 3, which describes statements that you made during a hearing on August 22, 2005, and what reasons did you have to doubt the legitimacy of the prior asbestos diagnoses and claims?

MR. LAMINACK. I am very familiar with what you are talking about, Mr. Chairman. The situation in the courtroom that day was we were trying to persuade the judge that a group of our plaintiffs, the Alexander Group, had legitimate, provable silicosis cases. The defendants took the position that you couldn't have both asbestos and silicosis, and they further took the position that almost all of the Alexander plaintiffs had previously been diagnosed with asbestos. Judge Jack then directed a question to me to which my response was I doubt what the defendants are saying is true. I doubt that they made asbestos claims. I doubt that they had an asbestos diagnosis. So my statement was directed at the silicosis defendants who were trying to persuade Judge Jack that all these people had asbestos diagnoses, and that is what I was referring to.

We had researched, at Judge Jack's request, and determined that a small number of the Alexander plaintiffs had asbestos, but we never found any proof or any evidence that what the defendants were saying was true. So my statement was directed to the defendants, and I said I doubt that the asbestos diagnoses are real.

MR. WHITFIELD. My time is expired, but were you aware that Dr. Harron, who did virtually all of the silicosis diagnoses in the Alexander case, also did several of the suspect asbestos diagnoses?

MR. LAMINACK. I subsequently became aware, yes.

MR. WHITFIELD. Okay.

Mr. Stupak.

MR. STUPAK. Well, thank you.

Mr. Luckey, if I could, I want to ask a question. You mentioned--you are from Mississippi, right?

MR. LUCKEY. Yes, sir, I am.

MR. STUPAK. And the Mississippi cases in Judge Jack--in Mississippi, your statute of limitations or your statute of limitations tolls when the person first learns of the injury, not when there is a definite diagnosis. Is that right?

MR. LUCKEY. I believe it is knew or should have known they had the disease.

MR. STUPAK. Okay. What is that period of time when you knew or should have known? How much time do they have to file a claim?

MR. LUCKEY. Three years currently.

MR. STUPAK. Three years, okay. So would it be--not necessarily in this case, but in cases in Mississippi, do you file cases before you have a definite diagnosis?

MR. LUCKEY. Speaking from our firm, the Mississippi law and Code of Ethics requires that lawyers have to have a good faith belief in their client's claim before a case is filed. We did not file a claim without a written medical report. I can't think of an exception.

MR. STUPAK. Okay. Does Mississippi have a requirement that you have a specialist in the area that you are making a claim under certify your claim or anything like that?

MR. LUCKEY. Not at the time these cases were filed. I believe a very current medical malpractice amendment may call for that now.

MR. STUPAK. Okay. So would it be, let us say medical malpractice in certain cases if you wait for a definite diagnosis of silicosis before filing a claim?

MR. LUCKEY. I am sorry?

MR. STUPAK. Would it be malpractice on the part of the lawyer in certain cases for you to wait until there is a definite diagnosis of silicosis before filing a claim?

MR. LUCKEY. In the event evidence that the client knew or should have known he had the disease was present and 3 years passed, then yes, the lawyer would have failed to file his client's case on time.

MR. STUPAK. Are you aware of a medical doctor employed by defense counsel in the silica cases that refuses to acknowledge X-ray evidence on silicosis?

MR. LUCKEY. I am aware of many defense experts who have never agreed that a client had silicosis or perhaps never agreed that the case was as severe.

MR. STUPAK. How do you diagnose it then if they don't believe the X-rays?

MR. LUCKEY. How do the defense experts diagnose it?

MR. STUPAK. Right.

MR. LUCKEY. Well, in my experience they attribute the disease to another cause.

MR. STUPAK. Okay. Is there a doctor or two that will only accept--defense doctor that only accepts biopsy is the only way to diagnose silicosis?

MR. LUCKEY. I have heard of that anecdotally. I don't know that he has appeared in any of my cases.

MR. STUPAK. Okay.

MR. LUCKEY. But you know, in general it is common, if not the rule, that experts on either side of the case disagree completely.

MR. STUPAK. True. That is for the trier of fact to determine, then.

MR. LUCKEY. That is for the jury to decide.

MR. STUPAK. In your cases--or for anyone, are the defense doctors pretty much the same? Do you see them in the same cases, much like we see Dr. Harron and some of these others on the plaintiff sides?

MR. LUCKEY. Certainly. Different lawyers seem to prefer different defense experts, and we see them regularly.

MR. STUPAK. Let me ask all of you, if I can, this question. Much has been made of the quality of the B-readers and lack of responsibility of medical doctors in the mass screening process. We have heard little or nothing about the quality of the B-readers by doctors paid by the defense and the responsibility that company doctors owe to their patients.

So I would like to ask each of you the following questions, if I may. I will start with you, Mr. Davis. During the course of your practice, have you ever become aware of B-readers or other radiologists employed by defense lawyers that seldom, if ever, acknowledge health problems of the victims of exposure to asbestosis, to silica, or other toxic materials in the workplace or the environment?

MR. DAVIS. Congressman, this was our initial entry into the silicosis litigation, and because of the delays that we experienced in the MDL, we never got to the point of deposing or having discovery with any of the defendant experts.

MR. STUPAK. Okay. Mr. Manji?

MR. MANJI. Congressman, in my practice I come across defense doctors who absolutely categorically state that they have seen 200,000 X-rays in their lifetime of workers and have never seen one case of silicosis, so yes, that is true.

MR. STUPAK. Mr. Gibson?

MR. GIBSON. The same for me, Congressman. I can recall taking a deposition of a Dr. Harrison, who made the statement that as a B-reader retained by the defendants, in five cases that we were working toward

trial, he made the statement that he had reviewed over 200,000 films while working as a B-reader, and that during the entire time that he had been in Mississippi he had never seen a single silicosis case.

MR. STUPAK. Mr. Zadeh?

MR. ZADEH. Same answer.

MR. STUPAK. Same. Mr. Fabry.

MR. FABRY. It has been my universal experience that the doctors employed by the companies that my clients work for and the doctors hired by the defendants do not see silicosis or other lung disease.

MR. STUPAK. Mr. Mullins or Mr. Luckey, do either want to comment to that?

MR. LUCKEY. I would stand on my previous answer.

MR. STUPAK. Okay.

In your testimony, and I had mentioned in my opening statement from Dr. Welch challenging the adequacy of the OSHA protection of workers exposed to silica, the Agency itself acknowledged their silica standard is too weak; that the measurement criteria are outdated, and that many workplaces do not even meet the inadequate standard. Please tell us what you have learned from your practice regarding the extent to which workers are currently being protected from fatal diseases occasioned by the exposure of silica. Mr. Davis?

MR. DAVIS. Most of the time there is no protection offered at all, and I believe OSHA has stated that even at permissible levels, a worker exposed will develop silicosis. I believe the CDC said back in the '70s that the only way to get rid of silicosis is to get rid of silica in the workplace.

MR. STUPAK. Mr. Manji?

MR. MANJI. Congressman, the requirements by OSHA are not binding on the employers, which means that when the workers are exposed to silica on the jobs, they eventually will develop silicosis. There is a real simple way to get rid of silicosis, and that is to replace silica with an alternate abrasive, which was proposed in the early 1970s but was never carried through by OSHA or NIOSH or anyone else.

MR. STUPAK. Let me ask this question then. It seems to me there are some of these patients that had to be exposed for at least 2 years. Is that sort of when you started seeing problems, after 2 years? It seems like that was a minimum exposure time.

MR. MANJI. That is not exactly correct. You could have an exposure, a very specific high exposure for a very short period of time, as little as 3 or 4 weeks, even 5 weeks, which could develop into serious acute silicosis.

MR. STUPAK. Okay. Mr. Gibson.

MR. GIBSON. My answers are consistent with theirs. One thing I would say that it seems like as time had gone on, some companies have done a better job of protection. It could always be better. I could tell you I worked on a case with one unfortunate guy who is in his early 30s diagnosed with acute silicosis and his exposure started in the late '80s, so it seems like removing silica from the workplace is the ultimate answer.

MR. STUPAK. Mr. Zadeh.

MR. ZADEH. The workers were heavily exposed, especially back in the '60s and '70s. There was less protection then.

MR. STUPAK. Mr. Fabry.

MR. FABRY. From everything I have read, significant silica exposures continue to occur in the workplace.

MR. STUPAK. Mr. Luckey, anything you want to add to that, or Mr. Mullins?

MR. MULLINS. Throughout all the, I would say hundreds of depositions that I have taken regarding workers, I think we have found evidence of one OSHA investigation which the individual being deposed indicated they knew in advance and the problems were resolved. I am aware of another case that is currently pending that there may have been some OSHA involvement or some NIOSH involvement with a particular foundry where at least from the workers' perspective they believe that the facility was shut down and I believe maybe moved to Mexico. But for the most part, particularly in Mississippi and the rural areas, worker safety is dependent upon a benevolent employer. It is just not a staffing situation or I think someone has testified about that before, but that is not OSHA and NIOSH enforced. It is not a real viable threat to have an employer protect worker safety in these areas.

MR. STUPAK. In the MDL, Judge Jack ordered the cases removed from the MDL and returned to the original jurisdiction. Some States, such as Mississippi, required the cases be refiled. Can you tell this panel here whether or not the MDL caused the statute to make it impossible to try the cases, regardless of the individual merit?

Mr. Davis, you said you did some discovery but you never had a chance to try it. After they were dismissed in MDL, did you lose your right to file in district court?

MR. DAVIS. Because of procedural changes in Mississippi law that occurred between the time that we filed the cases in 2002 and the time that Judge Jack sent them back in 2005--many of our plaintiffs were out of State plaintiffs. Those people's cases were required to be dismissed, so they have no cause of action on their silica claims.

MR. STUPAK. So out of State, out of Mississippi, you mean? Other than Mississippi?

MR. DAVIS. Other than Mississippi.

MR. STUPAK. Okay. Mr. Manji.

MR. MANJI. Same answer.

MR. STUPAK. Same. Mr. Gibson?

MR. GIBSON. Same answer.

MR. ZADEH. Same.

MR. STUPAK. Mr. Fabry.

MR. FABRY. My five clients who participated in the MDL were from Missouri, and although there was a significant delay in their cases while they were sitting in the MDL and while Judge Jack was conducting her investigation of the ongoings in Mississippi, they have been transferred back to Missouri and I am continuing to pursue actions on behalf of those five.

MR. STUPAK. Mr. Mullins or Mr. Luckey?

MR. LUCKEY. I alluded to this earlier. My firm represents a fair number of very serious cases that have residents and exposure in Alabama. Due to changes in Mississippi law, those claimants are out of court in Mississippi, and in the event they still have a viable case in Alabama, which is very questionable, we have still been unable to find Alabama counsel willing to take them on due to the criticism of the doctors in the testing.

MR. STUPAK. Thank you, Mr. Chairman. It looks like my time is up.

MR. WHITFIELD. Mrs. Blackburn, you are recognized for 10 minutes.

MRS. BLACKBURN. Thank you, Mr. Chairman.

Mr. Davis, I think I would like to come to you first, if I may, please, sir.

Following back up on the Chairman's questions, or kind of coming in behind it, I want to be sure that I am following basically the timeline that I was hearing you say of how you went about securing your clients.

First of all, you had inquiries from clients, and then B would be you sent a letter to current and former clients about silicosis. C, you had N&M test the clients. D, if that individual had a silica injury, then the firm accepted the representation of that client, and then after that you would advance the cost, that client's cost for testing to N&M. Am I correct in that timeline?

MR. DAVIS. Yes.

MRS. BLACKBURN. Okay. Is there any addition that you would make to that timeline?

MR. DAVIS. Well, that probably doesn't give every detail of every thing that happened, but that is a decent synopsis or timeline.

MRS. BLACKBURN. Okay, great.

Now let me ask you this. Did you refer any of your former clients to N&M for medical screenings?

MR. DAVIS. We sent three or 400 clients. We notified N&M of about 300 or 400 clients that said they wanted to be tested, and we asked N&M to follow up and see if they could get them scheduled.

MRS. BLACKBURN. Okay, so 300 or 400 out of how many did you mail to? What was the size of the universe you mailed to?

MR. DAVIS. We mailed approximately 17,000, 18,000 letters.

MRS. BLACKBURN. Okay, so 17,000 to 18,000 letters, that is your universe. All right.

Did you refuse to represent anybody? Were there any reasons that you refused to represent anybody that had--you said you chose--you made a statement in answering the Chairman that you would choose to represent people. So did you refuse to represent any people?

MR. DAVIS. I would anticipate that we did.

MRS. BLACKBURN. Could you verify that for us? You can do that in writing if you would like for the sake of time.

MR. DAVIS. If we refused to accept them, then they never got on any part of our system. They never became a client, so if that happened, it happened probably at the time the client came and asked us to represent them. So we would not have any record of who we refused or anything like that.

MRS. BLACKBURN. Okay. So you would have no record of the number of people that you declined to represent, or the reasons?

MR. DAVIS. I believe that is correct.

MRS. BLACKBURN. So you couldn't verify to us that you refused to represent any people?

MR. DAVIS. I can't furnish you any written evidence of that.

MRS. BLACKBURN. Okay. All right.

I want to go back to this use of the term "understanding" in your testimony, because you said in the testimony that you only paid N&M for people who were diagnosed with silicosis and accepted your representation, and you can't substantiate that you refused to represent anybody. And in your testimony, you also said that it was your "understanding" that N&M paid its physicians the same dollar amount paid for every X-ray read. So here is my problem. How can N&M pay this if they were only screening your clients at a particular location and they didn't get compensated for negative readings, only for positive ones? So talk to me about this "understanding" and kind of how you walked through that.

MR. DAVIS. Every one of the doctors testified that they were paid for every either physical exam they made or every X-ray they made, whether it was positive or negative, and they were paid by N&M. So it

is my understanding as based upon their testimony before Judge Jack in her court.

MRS. BLACKBURN. So then their total number of people tested--okay. So maybe we could go to them and get the number that you refused to represent.

Let me move on. You stated in your testimony that a qualified physician on site would take a medical history and perform a target physical exam. Were you or any of your staff aware of any times that that did not occur, that there was not a qualified physician on site or that they did not perform a target physical exam?

MR. DAVIS. No, we believe that in every instance the physician was there on site and did the physical exam.

MRS. BLACKBURN. Okay. What documentation did N&M furnish to you that this physician was on site and that the physician performed the exam?

MR. DAVIS. The doctor's report--

MRS. BLACKBURN. Okay.

MR. DAVIS. --which State that he met with the client and--he would give a report that was a result of those meetings.

MRS. BLACKBURN. And you are talking about a physician's report and not the B-reader?

MR. DAVIS. That is correct.

MRS. BLACKBURN. Okay. So in your opinion, a B-reader never made the diagnosis--

MR. DAVIS. No, that is not--

MRS. BLACKBURN. --or any of your clients that you chose to represent?

MR. DAVIS. No, that is not correct.

MRS. BLACKBURN. That is not correct? So there were times the B-reader made the diagnosis?

MR. DAVIS. In every instance a B-reader made the diagnosis.

MRS. BLACKBURN. Okay.

MR. DAVIS. The B-reader may have also been the physical exam attorney or they may have been more than one doctor at the screening.

MRS. BLACKBURN. Okay. Thank you.

Mr. Gibson.

MR. GIBSON. Yes, Congresswoman.

MRS. BLACKBURN. Okay. I want to ask you just a couple of quick things.

You say that you were given the title of lead counsel for the plaintiffs' firms?

MR. GIBSON. Correct.

MRS. BLACKBURN. Okay, and who gave you that title?

MR. GIBSON. Initially when the MDL was set up, the different plaintiffs' firms that had cases in the MDL met and we determined to create a steering committee out of those firms and then the steering committee selected me as lead.

MRS. BLACKBURN. Okay. But in your opinion, that term of lead counsel is strictly for administrative work and not for litigation?

MR. GIBSON. I would say that my role was more of a coordinating role. I guess what I am saying is I wasn't lead attorney or trial counsel on any of these cases.

MRS. BLACKBURN. Okay. So it was a coordinator? Is that the general understanding to most attorneys and judges of what a lead counsel would be?

MR. GIBSON. Well, initially I guess I would consider it more of a liaison role, and we hired local counsel in Corpus Christi and they took the designation of liaison, and I took the designation of lead, but I would say that they were similar roles.

MRS. BLACKBURN. Similar roles, okay.

We have had a series of hearings, and we have had doctors and in some instances they were also lawyers that agreed with academic and legal scholar articles that claimed that the way mass tort screenings are used violate medical ethics and the model rules of professional conduct. I would like to know your opinion on that. We have had an article we have looked at a couple times, read a couple times, Lester Brickman from Academic Radiology. Are you familiar with the article?

MR. DAVIS. I am not.

MRS. BLACKBURN. You are not. Well, then tell me what your opinion is on the issue.

MR. DAVIS. I am sorry, I guess I don't understand the question exactly.

MRS. BLACKBURN. Well, looking at the violation of medical ethics and your rules of professional conduct with how some of these mass tort screenings are carried out with the questions that come up, both from the medical end and the legal end, the lack of substantiation, the unusual occurrences, I guess you will, of the number of cases that seem to appear. Does that not cause you any angst?

MR. DAVIS. My opinion has always been that medical screenings are a good thing. They do a lot of good, and in this instance or in other instances, the screenings that we followed and that other attorneys followed have been traditionally accepted.

MRS. BLACKBURN. Does anyone else from the panel have anything they would like to add for that before my time is up, that question? No one? Mr. Chairman, I yield back.

MR. WHITFIELD. Thank you.

Ms. DeGette, you are recognized for 10 minutes.

MS. DEGETTE. Thank you very much, Mr. Chairman.

In sitting here thinking about your role here today and the committee's role, I have some specific questions about the conduct of this particular silicosis litigation, but I think there is an overall question I would like each one of you to answer, because we have heard about the role of the physicians here, we have heard the role about the screening physicians. I know myself and some of you all testified about what defense physicians, screening physicians do and how they always come up with an opinion. In my practice, they always came up with an opinion that there was no negligence involved.

And so the question that some scholars are asking, and Griffin Bell, of course, has posited this, is the question about is there some better way we can do screening of victims in these mass tort cases, and is there something that State and Federal courts can be doing to better ensure reliability of medical screening? And so the question is should State and Federal courts consider the use of neutral physician panels to ensure the reliability of medical evidence in mass tort lawsuits? And I am sure each one of you, as an experienced professional on the plaintiff's side, has given some thought to whether or not this would improve the mass tort system, and I am wondering if you could just each tell me your opinion, starting with Mr. Davis.

MR. DAVIS. If you are able to obtain the truly independent or the acceptable to both sides then yes, I think that would be a mechanism to at least gett the medical issue of the case resolved. So you then go on to who is involved and what are the damages.

MS. DEGETTE. Mr. Manji.

MR. MANJI. Congresswoman, I believe that there are adequate checks and balances in place today with State regulations and Federal regulations which oversee and regulate things like X-ray screenings and other types of screenings where the worker is protected. Now, in terms of an independent medical board, yes, but my concern would be again, at some point they may not be as neutral or as independent as one would hope them to be.

MS. DEGETTE. Mr. Gibson.

MR. GIBSON. My answer is largely the same, and I would have the same concerns as Mr. Manji, but I can tell you, it is already in the process, but the one thing I have noticed lately, a lot of the cases that are being diagnosed positive by plaintiffs, at least in Texas, some of the cases being diagnosed as positive by the plaintiff expert are being confirmed by the defense expert where we didn't see that as much in the past.

MS. DEGETTE. Well, and if you had an independent board, chances are the same would happen, I would think.

MR. GIBSON. If it was truly independent and I would be in favor of it, sure.

MS. DEGETTE. Mr. Zadeh.

MR. ZADEH. Same answer. The independence is the issue.

MS. DEGETTE. Mr. Fabry.

MR. FABRY. Although I believe independence is--if you can find someone truly independent that would be good. I am also a firm believer in the power of judges to initially evaluate credibility of expert witnesses who appear in their courts and exclude testimony that is not credible or reliable, and I am also a firm believer in the jury system and the ability of juries to discern when a doctor and his opinions are not credible and reliable.

MS. DEGETTE. Mr. Luckey.

MR. LUCKEY. The committee may be aware that in the MDL certain plaintiffs, in fact, suggested an impartial panel, and speaking from my firm, we have in the past agreed with defendants to send disputed cases to an impartial panel. Obviously, the devil is in the details on who comprises the panel.

MS. DEGETTE. Right, and I mean, you can do it in some ways you do it now when you send cases to arbitration or mediation. You might pick an expert, the other side picks one, and they jointly pick a third one, correct?

MR. LUCKEY. That has been done by our firm, yes.

MS. DEGETTE. Mr. Laminack.

MR. LAMINACK. I certainly agree with Mr. Luckey's comment. We did suggest to Judge Jack that a court-appointed or agreed upon experts to look at the X-rays. I do have a little bit different take than most people on your question, though. In an industry that exposes people to silica and asbestos for years and years and years without protection, I think it is an absolute shame that the first time anybody ever offers a screening for those diseases to a citizen be from a lawyer. I think the companies have abdicated their responsibilities. I think the employers have abdicated their responsibilities. I think the healthcare system has abdicated its responsibility. I do think it is a shame that the first time a 20-year sandblaster ever did screen for silicosis is when some lawyer comes along interested in protecting his legal rights. I think that is a crime.

MS. DEGETTE. Well, you make a really good point, Mr. Laminack, because we had Dr. Laura Welch who came and testified before this committee, and one of the great concerns that she articulated is by the focus on this litigation, what it did was it moved our focus--and as I said,

in my opinion, and you probably all disagree with me in some ways, but you know the details of this case better than I do. In my opinion, this case was dealt with by the legal system and when Judge Jack found there were problems, she remanded the case and so on. I mean, I think that end worked, from my perspective, and I think that what happened was our focus on the details of the litigation took our focus off of the fact that silicosis is really a problem for a lot of these workers and we need to figure out ways to eliminate silicosis from the workplace. That is really where I think we should be putting our attention. So thank you for adding that.

Mr. Davis, I want to ask you a question as to why your law firm contacted former clients to suggest that they be medically examined for silicosis.

MR. DAVIS. We had received calls from clients asking about it, and we knew that many of our clients had worked in the industries that were affected. So we were giving them an opportunity to determine if, in fact, they had the disease or had the exposure and then find out if they had the disease, with no obligation at all that they hire us as the attorney; simply let them be aware of the screening and give them the opportunity to go have themselves tested.

MS. DEGETTE. So it was really basically because you were contacted by former clients and asked to look at this, or did you have some other medical evidence or some other reason why you contacted?

MR. DAVIS. We had numerous clients contacting us asking us if we were going to be involved in silica litigation, and our letters and responses stemmed from those inquiries.

MS. DEGETTE. Mr. Luckey, how did your firm obtain the clients for the silicosis claims that you pursued?

MR. LUCKEY. As I mentioned earlier, our firms are located near sites where there was heavy silica exposure. We obtained many of our clients from the local area because we had been involved in occupational disease cases for many years. We also had referrals from other attorneys who were perhaps not as experienced or did not want to focus on a certain type of case.

MS. DEGETTE. So your firm did not actually go out and solicit clients?

MR. LUCKEY. We certainly send newsletters, for lack of a better term, to all of our clients, and undoubtedly we mentioned that if you were exposed to silica and you believe you may have a disease, call us. I suppose that is a form of solicitation. We probably did that.

MS. DEGETTE. So you also send out newsletters to former clients?

MR. LUCKEY. I firmly believe that communicating with your clients as frequently as possible makes for a much happier relationship.

MS. DEGETTE. Mr. Manji, I wanted to ask you, in your prepared testimony you said--and you might have answered this and I didn't catch it--that you had the clients examined by screening companies and readers that were questioned in Judge Jack's opinion, reexamined by other people. What was the result of those reexaminations?

MR. MANJI. We are still in the process of reevaluating those X-rays that Judge Jack had in the repository. She didn't allow us access to the repository until December of 2005, at which time we started having all the X-rays reexamined. A substantial number of those came out positive, again, by a re-reader. The only statistics, hard statistics I have are on the Alexander group of 101 plaintiffs, which is what the case was for, in a court of regional jurisdiction, and out of those we had all of the X-rays re-read. We had all the plaintiffs reexamined by a new set of doctors. I think there were 87 of those that came out positive again with silicosis.

MS. DEGETTE. How many cases did your firm have total involved in the multi-district litigation?

MR. MANJI. I think we had approximately 2,000.

MS. DEGETTE. And those are all being reexamined now?

MR. MANJI. They are all being re-read as we speak.

MS. DEGETTE. Thank you. Thank you, Mr. Chairman.

MR. WHITFIELD. Mr. Walden, you are recognized for 10 minutes.

MR. WALDEN. Thank you, Mr. Chairman.

I want to follow up on that point, Mr. Manji and Mr. Laminack, because you said, Mr. Manji, that 87 of the Alexander plaintiffs had--were rediagnosed, right?

MR. MANJI. Correct.

MR. WALDEN. And then I believe Mr. Laminack, before the Judge, you said the same thing?

MR. LAMINACK. Correct.

MR. WALDEN. All right.

MR. LAMINACK. That is correct.

MR. WALDEN. That those were solid proved diagnoses of silicosis, they have got it? Those, I think, are your words.

MR. LAMINACK. Those are my exact words.

MR. WALDEN. And then Judge Jack said "Some 70 percent of those also had apparently solid proved asbestosis diagnoses. Did you print off the document for them?" And you said "I doubt that" and the Judge said "Pardon?" And you said "I doubt that is true." And the judge asked about the asbestosis, and you said yes. And then the Judge said "Mr. Laminack, can you speak on behalf of your clients about that?" Do you remember what you told the Judge then?

MR. LAMINACK. I do.

MR. WALDEN. Can you share that with us, or would you like me to--

MR. LAMINACK. You can go ahead and read it. I don't have the document in front of me. This is an issue I addressed a moment ago to the previous question.

MR. WALDEN. I will quote you here, according to the text. "As I say, Your Honor, I doubt that. I doubt the numbers and I doubt the diagnoses." And the judge asked "You doubt that they had claims or you doubt that they actually had asbestosis?" And you said "Both." I think that was a little different than I thought I had with the response to the Chairman earlier.

MR. LAMINACK. No, Your Honor. The silica defendants had represented to the Judge that 70 percent of the Alexander plaintiffs had been diagnosed with asbestos. Our investigation indicated that that was not true, and the defendants could never offer us proof that that was true. We did uncover the fact that several of the Alexander plaintiffs had asbestos. Indeed, in our rescreening and reexamination, the doctors found that asbestos, but it was nowhere near like 70 percent. And so my comment was I don't believe the defendants when they are telling you 70 percent of these people have been diagnosed with asbestos.

MR. WALDEN. Okay.

MR. LAMINACK. And to this day, I don't believe that.

MR. WALDEN. You don't believe they had asbestosis?

MR. LAMINACK. I don't believe--

MR. WALDEN. Pardon me?

MR. LAMINACK. Pardon me?

MR. WALDEN. I am sorry, you--

MR. LAMINACK. I don't believe they were ever diagnosed with asbestos.

MR. WALDEN. You don't believe they had asbestosis?

MR. LAMINACK. Correct.

MR. WALDEN. Okay, all right. But weren't you party to representing these people in those cases?

MR. LAMINACK. In the asbestos cases?

MR. WALDEN. Yeah.

MR. LAMINACK. No, no. I never represented anybody in an asbestos case.

MR. WALDEN. Do you have the exhibit book with you, or you didn't get that?

MR. LAMINACK. I have some exhibits. I am not sure what I have, Congressman.

MR. WALDEN. Okay. In our exhibit book, Exhibits 11 and 12, although these letters are undated, it appears that in each instance Dr. Harron is diagnosing the same individual with asbestosis and silicosis, based upon the same X-ray. Why are all the asbestos letters going to

Foster and Harcima firm while all the silicosis letters are going to O'Quinn?

MR. LAMINACK. I don't know the answer, I can guess, and my guess is I had given instruction to our staff if during the screening process it is ever determined that a client or potential client has both asbestos and silicosis or only asbestos, then the asbestos part of the case or the asbestos case is to be referred to the law firm of Foster and Harcima.

MR. WALDEN. And is that because you had a joint venture agreement with them?

MR. LAMINACK. Well, we certainly had a referral arrangement with them, and the O'Quinn firm initially financed the startup of that law firm several years ago.

MR. WALDEN. So can you explain why the asbestos letters don't mention silicosis, and vice versa? Isn't that a fairly significant fact to leave out of a diagnosis letter?

MR. LAMINACK. Well, with all due respect, Congressman, what you are looking at is a partial document. The letter you are looking at was attached to a package of four documents that included the exact findings from the B-read and the exact medical history, and in the case where there was dual diagnosis, that information was clearly stated in the B-read information and in the medical history. So if the implication is somebody was trying to hide the fact, that is simply not true. That letter contained in the package contained all the details of the dual diagnosis.

MR. WALDEN. I understand those are the diagnosis letters, is that correct?

MR. LAMINACK. Yes.

MR. WALDEN. And didn't Dr. Harron insist on separating the asbestosis and silicosis?

MR. LAMINACK. In the cover letter that went with the package he separated them.

MR. WALDEN. Why?

MR. LAMINACK. Frankly, we insisted that it be separate too because our firm doesn't handle asbestos cases, so if a person had a dual diagnosis, then the asbestos part of the case would go to one firm, the silica part of the case would go to another firm, would go to our firm.

MR. WALDEN. Okay, so if a patient had both an asbestosis diagnosis, and a silicosis diagnosis, you referred the asbestosis claim to the Foster firm and you kept the silicosis claim, correct? Am I understanding that correctly?

MR. LAMINACK. Yes, you are.

MR. WALDEN. And you had some sort of joint venture referral agreement with the other firm?

MR. LAMINACK. Correct.

MR. WALDEN. Was there remuneration in that agreement?

MR. LAMINACK. We got paid a referral fee, if that is what you are asking.

MR. WALDEN. That is what I am asking.

MR. LAMINACK. If the case was successful.

MR. WALDEN. If the case is successful you got a referral fee paid to you?

MR. LAMINACK. Sure.

MR. WALDEN. And are you an officer or director, or have you ever been at the Foster law firm?

MR. LAMINACK. Well, when it was originally set up, it was set up to have three managers. I was designated, along with Mr. O'Quinn, as a non-member manager. My understanding is that was done primarily to ensure--since Mr. O'Quinn had provided the money for the startup of that firm, that Mr. Foster couldn't spend or borrow money without Mr. O'Quinn's approval, if you will, so I got elected to be one of the managers to ensure that the vote was always 2 to 1.

MR. WALDEN. So you had a fiduciary responsibility over that firm?

MR. LAMINACK. Yes--

MR. WALDEN. I mean, you were director?

MR. LAMINACK. I wasn't a director, it was kind of a manager under Texas law--

MR. WALDEN. Well, then why on the Texas franchise tax public information report did they list you as the director? It says "yes" under director.

MR. LAMINACK. I have never seen a document that lists me as a director.

MR. WALDEN. Well--

MR. LAMINACK. My understanding is that it was manager.

MR. WALDEN. Well, it details you as, at one point, a non-member manager, but then also says you are director, so in 2005 it is checked yes. Did you get a fee for being manager, I mean, on the board?

MR. LAMINACK. No.

MR. WALDEN. No. So you did that pro bono?

MR. LAMINACK. I guess you could say I did.

MR. WALDEN. All right.

Mr. Davis, can you turn to Exhibit #7, please? And I would ask you, what is the date of this letter and why did you need Dr. Harron to include the physical exam language in the diagnosing letters?

MR. DAVIS. Dr. Harron had made a physical exam and it was omitted from a few, maybe 200 or 300, I think, of his examining reports, and since he made the physical exam we asked him to put that in the report.

MR. WALDEN. But are you aware that Dr. Harron testified during the Dobbert hearing that he did not agree with the language about him relying on the results of the physical exam in making his diagnosis, but N&M asked him to include it and he "capitulated"?

MR. DAVIS. I do not recall that.

MR. WALDEN. So you are not aware that he testified to that?

MR. DAVIS. I don't recall that he testified to that.

MR. WALDEN. And this wasn't language that was required by a particular bankruptcy trustee?

MR. DAVIS. On silica, no, and this is, as far as I am aware, there is not any silica bankruptcy trustees.

MR. WALDEN. Okay. Did Campbell & Cherry also provide a reasonable degree of medical certainty language to N&M?

MR. DAVIS. Yes.

MR. WALDEN. Why?

MR. DAVIS. Because under the Mississippi standard, a diagnosis is not given probated effect, not allowed in the courtroom unless a diagnosis is made within a reasonable degree of medical certainty.

MR. WALDEN. And is that something Dr. Harron--why wouldn't he have included that to begin with?

MR. DAVIS. He probably was unaware that that was a legal standard instead of a medical standard.

MR. WALDEN. All right. That is my time.

MR. WHITFIELD. The gentleman from Texas is recognized for 10 minutes.

MR. BURGESS. Thank you, Mr. Chairman.

Mr. Davis, do you have the evidence book that has been provided to us?

MR. DAVIS. I do.

MR. BURGESS. On Exhibit 8, the documents relate to asbestosis diagnosis for a particular individual back in 1997. For reasons related to privacy, we have redacted the name, but the committee staff recently informed your counsel as to this person's name. Do you know whether this individual was an asbestos client of Campbell Cherry?

MR. DAVIS. If this relates to Mr. Pierce, yes, he was an asbestos client.

MR. BURGESS. On the next page--the last page of this exhibit, Dr. Harron's signature is on the page but it is on the letterhead of a Leo Castilioni--I think I have pronounced that name right. Is there a reason that Dr. Harron would have signed Dr. Castilioni's--

MR. DAVIS. I have no idea.

MR. BURGESS. --report? Okay. Going forward, then, one exhibit to Exhibit 9, and this is the same individual 5 years later. The first exam

was done in August of '97, the second exam was done January of 2002. And this time, 5 years later, 1997 he was diagnosed with asbestosis and in 2002 he is diagnosed with silicosis. On pages two and three are Xeroxes of the B-reads done by Ray and Andrew Harron, respectively. On these B-reads by the Drs. Harron show a film quality of 1 and a profusion of 1/0. Pages four and five are B-read by Dr. Martindale of the same X-ray which showed a film quality of 3 and a profusion of 0/1, which would be a lower probability that this individual had silicosis. In other words, the reader thought the likelihood was 0, but it could be read as a 1. Then the last two pages appear to be a diagnosis and a B-read by a Dr. Allen Oaks. Now, in testimony that you provided to us, you state that Campbell Cherry had a conservative practice of having two diagnoses for each client before filing suit. This didn't include going from doctor to doctor until you got the diagnosis you required?

MR. DAVIS. It did not.

MR. BURGESS. Did Campbell Cherry have Dr. Oaks do an additional B-read because Dr. Martindale failed to diagnose the client with silicosis?

MR. DAVIS. To the best of my knowledge, we never received the information here from Dr. Martindale.

MR. BURGESS. So Dr. Martindale's B-read, that was not done for your law firm?

MR. DAVIS. I am not sure who it was done for. I am just telling you this is the first time I have been made aware that Dr. Martindale reviewed anything on Mr. Pierce.

MR. BURGESS. Just out of curiosity, did Dr. Martindale diagnose for your firm?

MR. DAVIS. Yes.

MR. BURGESS. Approximately what number?

MR. DAVIS. About 3,700 people.

MR. BURGESS. Okay. I might not remember if there were 3,700. That is a significant amount.

Going back to Exhibit 6 in the book, and staying with Dr. Martindale for just a moment. Exhibit 6 is Dr. Martindale's letter of March 25 of '05. In this letter, Dr. Martindale states that he never intended to be a diagnosing physician in any lawsuits and that he was merely asked to review X-rays and confirm the diagnosis of the examining physician, usually Dr. Ray Harron. Why then did Campbell Cherry elect to list Dr. Martindale as diagnosing physician for so many of its plaintiffs?

MR. DAVIS. He issued a diagnosing report.

MR. BURGESS. Of those 3,700 that you just mentioned, what percentage of those do you think, in your recollection, did he issue a diagnosing report?

MR. DAVIS. We have diagnosing reports on 3,700 people from Dr. Martindale.

MR. BURGESS. The diagnosis is a fairly crucial element of the lawsuit. Did Campbell Cherry have any discussions with Dr. Martindale about what it needed for the litigation and what he was willing to provide?

MR. DAVIS. No.

MR. BURGESS. In this letter, Dr. Martindale complains that he was never made aware that some of the individuals that he diagnosed with silicosis had previously been diagnosed with asbestosis. Do you know why that important factor was not disclosed to the doctor, Dr. Martindale?

MR. DAVIS. I don't know who would have had that information.

MR. BURGESS. On the second page of the same letter, Dr. Martindale quotes you as saying "I certainly would hate to hear you say that at your deposition." Were you trying to get him to change his testimony that he would give before the deposition?

MR. DAVIS. No, sir. I was finding it difficult to believe that 2 years after he issued diagnosing reports on 3,700 people that he was now saying he did not intend to do that, 2 years after we filed lawsuits based on his diagnoses.

MR. BURGESS. Of these 3,700 people, because of the status of the litigation in Corpus Christi, out of those 3,700 people, have any of them received any compensation for their alleged injury?

MR. DAVIS. Yes.

MR. BURGESS. Has there been a payout? What has been the average payout per patient?

MR. DAVIS. I don't know. It has not been much. The silica litigation did not go very far.

MR. BURGESS. Just--and we probably asked Dr. Martindale the same question, but I honestly can't remember his answer to it. How much did Dr. Martindale receive in compensation for each of these 3,700 films that he read?

MR. DAVIS. My memory on what he testified to was he received $140,000 or $170,000 total, somewhere in that range, for the work that he did.

MR. BURGESS. Mr. Chairman, it has been a long day for all of us. I am going to yield back my time.

MR. WHITFIELD. Thank you. I want to ask one other question here. We have heard a lot of testimony throughout all these hearings that the plaintiff physicians will generally come up with well, asbestos is there, silicosis is there, so there is a positive reading. The defense physicians say well, I have never seen a silicosis case or asbestosis case. So you

fellows are all experienced in the trial law and you do a lot of cases and try a lot of cases. Would you support the use of a neutral physician's panel to ensure the reliability of medical evidence in these mass tort lawsuits?

MR. DAVIS. I believe Congresswoman DeGette asked us that. I believe pretty unanimously we thought that if truly independent panel we thought would be a productive thing.

MR. WHITFIELD. So all of you would agree with that? Is there anyone that would disagree with it?

I agree with Diana DeGette that I think it would improve our judicial system because plaintiffs have their doctors and defendants have their doctors, and then you go to a jury and they have got to try and figure it out some way. It would be a great improvement, I believe, if we did have a neutral physician panel. So I appreciate all of your comments on that.

Mr. Stupak, do you have anything else?

MR. STUPAK. That is why we have the jury system, Mr. Chairman, to make the determination of fact. We shouldn't leave it to Congress. God help us if we do.

MR. WHITFIELD. All right. Mr. Walden, do you have anything else?

MR. WALDEN. I do, Mr. Chairman. Thank you, Mr. Chairman.

I have a couple of questions for Mr. Zadeh and Mr. Fabry. Both of you required subpoenas from this committee to produce responsive documents, and both of you have produced privilege laws that are wholly inadequate to permit the committee to make determinations to whether you are asserting privilege in an overly broad fashion.

Mr. Zadeh, please turn to Exhibit 19. Do you have that in front of you there? The July 19 cover letter and the attached privilege law are rather confusing. Do you or do you not have specific responsive documents that you are refusing to turn over to the committee, based upon claims privilege?

MR. ZADEH. Yes, I have attorney/client documents that I am not turning over on the basis of privilege.

MR. WALDEN. Can you tell us how many?

MR. ZADEH. Numerous.

MR. WALDEN. Okay. Is that 50, 100, 1,000?

MR. ZADEH. Thousands.

MR. WALDEN. Thousands of documents?

MR. ZADEH. That I communicate with my clients, yes. I have lots of communications with my clients, notes, all kinds of things.

MR. WALDEN. Specific to what we are requesting? I don't mean every client you have ever had, but relative to the work of this subcommittee?

MR. ZADEH. The subpoena was pretty broad and so with the broadness of the subpoena it could arguably come under it.

MR. WALDEN. Other firms with far more clients in the MDL have been able to review and produce their responsive documents. Why is it such a burden for you?

MR. ZADEH. I addressed that with Chairman Barton at the last hearing.

MR. WALDEN. Well, I couldn't be at the last hearing. Could you address it for me, too, please?

MR. ZADEH. Sure. I have a lot of documents on silicosis. We figured out it was about 16 million documents.

MR. WALDEN. How many?

MR. ZADEH. Sixteen million.

MR. WALDEN. Okay.

MR. ZADEH. I collected documents from the MDL, I have all the depositions, I have all the information, and so that is why.

MR. WALDEN. And how many clients do you have in the MDL?

MR. ZADEH. Twenty.

MR. WALDEN. Sixteen million documents on 20 clients?

MR. ZADEH. I have State court clients as well.

MR. WALDEN. I'm sorry?

MR. ZADEH. I have State court clients as well.

MR. WALDEN. Explain to me what that means.

MR. ZADEH. I have cases that aren't in the MDL.

MR. WALDEN. I see, that relate to silicosis?

MR. ZADEH. Yes, sir.

MR. WALDEN. All right.

Mr. Fabry, please turn to Exhibit 20. Can you explain why you declined to produce the specific documents listed in the privilege log pursuant to the committee's subpoena?

MR. FABRY. First, Mr. Walden, let me respectfully disagree with your characterization of our privilege log is inadequate. The--

MR. WALDEN. Could you get a little closer to the microphone, please?

MR. FABRY. The log is in the format specifically requested by the committee, and when we asserted privilege initially, we were advised by the committee that the format was not what the committee was looking for, and when I subsequently revised the privilege log and put it in exactly the format that the committee requested, and I have not heard anything since questioning the quality of the privilege log until this very minute.

MR. WALDEN. Can either of you provide legal justification for your position that a congressional committee is bound by judicially created privilege?

MR. ZADEH. You agreed to it last time.

MR. WALDEN. I am advised by our staff that we temporarily agreed to take a privileged log of the first cut.

MR. FABRY. Your subpoena specifically identifies privilege and the privilege log and acknowledges the existence of the privilege. Setting that aside, this privilege is the world to my clients. It is my obligation to assert those privileges on their behalf. It is not for me to give it away.

MR. WALDEN. You asked your clients if they are willing to waive privilege?

MR. FABRY. No, sir, I have not.

MR. WALDEN. Mr. Zadeh.

MR. ZADEH. No, sir.

MR. STUPAK. Mr. Chairman, if I may, it seems like Mr. Walden is-- Mr. Walden, invoking a privileged log that he says is temporary, I think that is for the determination of the committee and not just one member. I think we are getting a little far astray here of where we should be going. If there is an objection as to what these gentlemen provided this committee, the committee as a whole should take it up, not an individual member who is trying to push forth the subcommittee's position. Now, if this subcommittee has a problem as a whole with what Mr. Fabry and Mr. Zadeh put forth, then we should discuss it as a committee.

MR. WALDEN. Mr. Chairman, with all due respect, I believe the time is mine and I didn't yield.

MR. STUPAK. I would be happy to give you any time that I may consume.

MR. WALDEN. I don't--

MR. STUPAK. It is the position of this committee that no one member can go out and start asking for things that may or may not be privileged, either from the witness--

MR. WALDEN. Chairman--

MR. STUPAK. --or that may be in the documents of this committee.

MR. WHITFIELD. Okay. Mr. Stupak, you have made your point, and Mr. Walden does have the time. We do have a well-documented procedure when we come to questions of privilege, and you are right, the committee will have to make a decision as a whole on whether or not the documents have been produced that we requested and whether or not the attorney/client privilege is relevant or not relevant. But Mr. Walden does have the time and I will allow him to continue his questions.

MR. WALDEN. Thank you, Mr. Chairman. I appreciate that because clearly, I think I have every right to ask these questions, and they have

every right to respond. They can respond as they have, and so that is for the committee to decide.

MR. STUPAK. When there is a procedure that the subcommittee follows, I wish we would follow the procedure.

MR. WHITFIELD. I am allowing the gentleman to continue his questions, and then we have had long discussions with Chairman Dingell about this issue of client privilege, and the committee has its views on it. But Mr. Walden, you may continue your questions.

MR. STUPAK. Well, Mr. Chairman, the same courtesy will be extended to me--

MR. WALDEN. Mr. Chairman--

MR. STUPAK. --in the investigation.

MR. WALDEN. Mr. Chairman, if I might--

MR. WHITFIELD. Would you hold just one minute?

Mr. Stupak, you know I have not been the one that has been a difficulty on this Accutane hearing, and--

MR. STUPAK. Oh, I agree. That is on the jurisdiction of this subcommittee. So if we have one standard for one hearing, that standard has to apply to all the hearings. We don't pick and choose--

MR. WHITFIELD. I am not aware--

MR. STUPAK. --what regulations--

MR. WHITFIELD. I am not aware of the privilege client issue on the Accutane hearing because I just haven't been involved in that aspect of it. I know that Chairman Barton has taken a particular interest in that issue--

MR. STUPAK. Then you know I have, too, so I am very familiar with the rules we have been using. So all I am saying is to go down the slalom, but do it at each hearing, which is the proper jurisdiction of this subcommittee. If it is okay for Mr. Walden to ask those questions, then it be okay for me to ask those questions at the subcommittees when I feel appropriate.

MR. WHITFIELD. At this time, Mr. Walden, you may continue your questions.

MR. WALDEN. Thank you, Mr. Chairman. I would just say that I don't recall a time in my time on this subcommittee when anybody, any member was precluded from asking a question of a witness. That is all I have done today. I don't recall a time when I have crashed in on your time, Mr. Stupak, when you aggressively ask witnesses questions, even if I may have disagreed with your line of questioning.

MR. STUPAK. Well, let me aggressively crash in again.

MR. WALDEN. Mr. Chairman--

MR. STUPAK. As the Minority's side, I think it is our right--

MR. WALDEN. Can we have regular order?

MR. STUPAK. --that if the procedure of the committee has not been followed, it is our right as the Minority side to certainly bring it forward.

MR. WHITFIELD. I have made the determination, and Mr. Walden may continue to ask questions because I think he has every right to do so. Mr. Walden, you may continue.

MR. WALDEN. Actually, Mr. Chairman, I am going to yield back the time.

MR. WHITFIELD. Mr. Walden yields back time. We have concluded the--Mr. Inslee, do you have questions?

MR. INSLEE. Thank you. I just want to make sure Mr. Walden has had adequate time. I would yield some to him if he wanted any. Mr. Walden?

MR. WHITFIELD. Mr. Walden yielded back his time.

MR. WALDEN. I yielded back my time, Mr. Inslee, but I thank you for your deep courtesy on that.

MR. INSLEE. I think Mr. Fabry said that the subpoena makes reference to some privileges, and I wanted to make sure that the committee is on the straight arrow about this. The only thing I saw in the subpoena that made reference to a privilege was information regarding the medical information. I didn't see anything that would have protected an attorney/client privilege in this subpoena. Am I missing something, or--

MR. FABRY. I believe, Mr. Inslee, if you look at the listing of what should be done in the event of any documents are not produced in response to the subpoena, you will find a specific item that says that we should create a privilege log. And in my mind, that is an acknowledgment in the subpoena of the privilege. And as well as I believe you or the member who asked the question of Chairman Whitfield the first time I was here--

MR. INSLEE. Right.

MR. FABRY. --and it confirmed acknowledgment of privileges by this committee.

MR. INSLEE. I see that. That is #9 on the list. I appreciate that, because I just want to make sure that we follow some legitimate process here so that the privilege is recognized and respected to the extent it should. And I think it should be. I think the attorney/client privilege is an important thing in a congressional context, as well as a civil litigation context, as I do private health information. I think they are both legitimate privileges that should be respected. At some point, we apparently have to have further discussion on how to handle that. It sounds to me, from what I have heard, there is some apparent view by at least some on this committee that the claim of the privilege has been excessive by one or more of the respondents. I just ask the Chair, is that

a concern the Chair has at the moment? If so, I guess I just ask the question how we intend to resolve that?

MR. WHITFIELD. The committee obviously treads carefully with respect to any matter of privilege and confidentiality. And when there is a common law privilege, such as the attorney/client privilege, when that comes into conflict with Congress's inherent Constitutional prerogative to investigate, the precedents of the House establish that the acceptance of a claim of privilege rests in the discretion of the committee.

Now historically, this committee has only recognized certain Constitutionally based privileges, such as the Fifth Amendment, and this practice has been consistent, and I have had discussions with Mr. Dingell about that, who has been one of the staunchest defenders of the practice, and the committee will make a decision about the--it is at the discretion of the committee on this privilege. But Mr. Walden had every right, in my view, to ask questions about this as to why a party did not or did provide information, and if they did not, what was the basis of their privilege--of advocating attorney/client privilege.

MR. INSLEE. Thank you, Mr. Chairman.

Just a quick question. We would examine the use by plaintiffs' counsel of medical examiners extensively, and we have not done investigation of use by defense lawyers of medical professionals.

This is just a general question to any or all of you. Have you encountered situations where, through your observations, defense counsel has engaged the services of medical practitioners who come close to 100 percent conclusions that nobody ever got hurt by anything, no matter how much hemorrhaging, fractures, disaster were encountered. Have you ever run across that with certain physicians? Anybody can volunteer to answer that.

MR. LUCKEY. Congressman, I believe I touched on that earlier. It is very common in our law practice to find certain defense experts who never agree with a diagnosis of our plaintiff, or at least find it was caused by other means, or much less severe.

MR. INSLEE. I think someday if we continue looking at these issues, I think that would be useful for the committee to look and see whether there is abuse on the other side of the coin, and frankly, I think there are. I practiced law for some period of time, and every town has a special physician that is always there for the insurance industry. I don't think that is unique to the town I used to practice law in. It might be helpful for us to look in that issue as well, because I think the legal system is imperfect, as most mortal systems are on both sides of the fence, on occasion, and I think it would do well if we looked at both sides of the fence in this regard. Mr. Mullins?

MR. MULLINS. The committee is concerned, obviously, with certain medical testimony that has occurred in these cases, and I think it is important to--and I know you recognize as we have an adversarial system. One of the first things we learned in law school is that experts come in pairs. There is one that you can say is this and one that says something else. But I think that when you talk about creating a panel of independent physicians to review this, I think that the courts inherently have that power in most States as it is, that a judge can appoint an expert, and they do it in a lot of situations. In Mississippi and I think in Federal court they have that power. I don't think there is any need for any legislation in that event. I think the judiciary already has that ability and the power if they deem necessary to have court-appointed experts, and it is done all the time in various aspects of litigation, although it has not been done a lot in the past in mass tort system.

MR. INSLEE. Thank you very much.

MR. WHITFIELD. Mr. Inslee, I might say, before you came in I think it was stipulated defendants have their physicians, plaintiffs have their physicians, and we did have a discussion twice about the importance of neutral physician panels. So you were the third person to raise this issue about plaintiffs, defendants, and their physicians.

Are there any other questions for this panel?

MR. BURGESS. Mr. Chairman, you let me sit here too long.

MR. WHITFIELD. I am sorry.

MR. BURGESS. I would like to ask one follow-up question, if I could, of Mr. Gibson.

Just looking through the evidence book here, looking at Exhibit 16, page three of that document from your firm talks about assigning a traditional value for the case that would be a 1/0, that is the B-reader read it as 1, the lowest severity of disease, the 0 means that it could have been no evidence of disease as well. That is there recorded as $50,000 for a case that was read a 1/0. Is that correct that those cases were worth $50,000 each? Might as well let that run, it has got about five or six of those to give us.

MR. GIBSON. Okay.

MR. BURGESS. Please proceed.

MR. GIBSON. Okay. It is probably a range around there. There were a lot of discussions with defense lawyers and amongst ourselves, and there is no easy answer to that.

MR. BURGESS. Better wait on this one. Now proceed.

MR. GIBSON. I think there is a general agreement that that is probably a good average.

MR. BURGESS. On the next exhibit that we go to, which gets us from Steve Bryant Associates to you on the--I guess it is page two of that.

They come down with--they do a lot of calculations on those first two pages, then it says for $900 million you can settle every case in the multi-district litigation. This comes to an average settlement of $100,000 a piece. This is the historical value for 1/0, at least, that is what Jason Gibson has averaged. So we doubled the amount. Is that just to be on the safe side?

MR. GIBSON. Jason Gibson is not me, obviously. I am not familiar with his cases or what his values are, so I don't really know how to respond to that.

MR. BURGESS. Just the computations on these two pages, I don't know, Mr. Chairman, I just find them--and maybe it is because I haven't had that much experience with this type of math, but $900 million for the cases in multi-district litigation--there were 9,000 depositions, plaintiffs only, average time of 5 hours each, $78,750,000 for one insured. If 50 attorneys show up, the cost for the attorneys will be $393,850,000. My math is not that good, but that is right under half of the $900 million for every case in the multi-district litigation.

When looking at the motions, pleadings, and filings for the silicosis, paragraph 37, they are talking about a Dr. Ballard who apparently was one of the B-readers. Dr. Ballard's consistency is remarkable because it is in the area of profusion, that is that 1/0, which normally is the area where reader variability is most likely to occur. Dr. Parker, the former administrator of NIOSH's B-reader program, had this to say on the subject of the consistency of profusion. "What I find most stunning about the information I have seen in the last yesterday afternoon and this morning is the lack of reader variability, because the consistency with which these films are read as 1/0 defies all statistical logic and all medical and scientific evidence of what happens to the lung when it is exposed to workplace dust. What again is stunning to me is the lack of variability. This lack of variability suggests to me that the readers are not being intellectually and scientifically honest in their calculations." I mean, I don't know whether that is true or not, but if there is $100,000 payoff at the end, I guess I could see a motive if one were so inclined.

Again, Mr. Gibson.

MR. GIBSON. The only thing I wanted to point out is Mr. Bryant is a defense lawyer in the litigation, and the only purpose of this memo, I understand that he put together some calculations for what the cost of litigation would cost to follow along with the track that Judge Jack set, and I asked if he would share that information with me and he did.

MR. BURGESS. Mr. Chairman, I will yield back. Thanks very much for everyone's time today.

MR. WHITFIELD. The first panel is released.

At this time, I would like to call the second panel, and that is Dr. H. Todd Coulter, a medical doctor from Ocean Spring, Mississippi. Dr. Coulter, thank you for being here, and you understand that this is an Oversight and Investigations hearing, and we do take testimony under oath. Do you have any objection to testifying under oath?

[Witness sworn]

MR. WHITFIELD. And are you represented by legal counsel, Dr. Coulter?

DR. COULTER. I am, Congressman, Mr. William Michael Kulick, Attorney at Law in the State of Mississippi.

MR. WHITFIELD. Mr. William Michael Kulick?

DR. COULTER. Kulick.

MR. WHITFIELD. Okay, thank you.

Dr. Coulter, do you have an opening statement?

DR. COULTER. No opening statement.

MR. WHITFIELD. Okay. Then I would like to ask you a question.

In Exhibit 29 in the binder in front of you, contains two letters signed by you, each of which reveals a specific diagnosis of silicosis, and according to the testimony before this subcommittee back in June, the Mississippi Board of Medical Licensure adopted a policy with regards to public screenings on July 18, 2002, which reads in relative part, "It is the opinion of the Mississippi State Board of Medical Licensure that any medical act that results in a written or documented medical opinion, order, or recommendation that potentially affects the subsequent diagnosis or treatment of a patient constitutes the practice of medicine in this State. Further, any physician who renders such a medical opinion, order, or recommendation assumes a doctor/patient relationship with the patient and is responsible for continuity of care with that patient."

Dr. Coulter, what efforts did you make to ensure a continuity of care with each of the individuals that you diagnosed with silicosis?

DR. COULTER. With greatest respect, Mr. Chairman and members of the committee, upon the advice of counsel I must elect to invoke my Fifth Amendment rights to remain silent, as any answer I give may incriminate me.

MR. WHITFIELD. So you are refusing to answer this question and any other questions that we may have, based on your right against self-incrimination afforded to you under the Fifth Amendment of the Constitution. Is that correct?

DR. COULTER. That is correct, Congressman.

MR. WHITFIELD. Okay.

Are there any further questions from any of the other members?

Based on your invoking your Fifth Amendment right, we are going to dismiss you at this time, subject to the right of the subcommittee to recall you if necessary, and at this time, Dr. Coulter, you are excused.

DR. COULTER. Thank you, Congressman.

MR. WHITFIELD. I would like to, without objection, introduce into the record this hearing binder with exhibits, and without anything else, that concludes this hearing.

[The information follows:]

Ex. #	Description	Date	Bates #
1	Documents from the Mississippi Dept. of Health re: N&M, Inc.		
2	Documents from the Texas Dept. of Health re: N&M, Inc.		
3	Documents from the Mississippi Dept. of Health re: Respiratory Testing Services, Inc. (RTS)		
4	Documents from the Texas Dept. of Health re: RTS		
5	Letter from Billy Davis of Campbell Cherry to Dr. George Martindale re: asbestosis diagnoses	3/21/05	
6	Letter from Dr. Martindale to Billy Davis re: silicosis diagnoses	3/25/05	
7	Campbell Cherry documents re: addition of "physical examination" language to diagnosis letters		
8	Documents re: asbestosis diagnosis of Client C	8/13/97	MDL-1553-NandM-388414, 415, 423, and 426
9	Documents re: silicosis diagnosis of Client C	1/9/02	MDL-1553-NandM-534706, 705, 707, 703, and 687-689
10	Sample cover letter from O'Quinn to clients re: silicosis diagnoses	3/5/03	
11	Dr. Ray Harron asbestosis and silicosis diagnoses for Client A		MDL-1553-CRMC-0002380, MDL-1553-NASH-002898
12	Dr. Ray Harron asbestosis and silicosis diagnoses for Client B		MDL-1553-CRMC-0002104, MDL-1553-SHOWS-001340
13	Public records re: Foster & Harssema, PLLC		
14	Letters from Dr. Barry S. Levy to Richard Laminack re: Committee's investigation and request for documents	8/15/05, 1/13/06	OLPPB-09740-09745, OLPPB-09804-09805
15	Sample letter from O'Quinn to clients re: reversal of silicosis diagnoses	1/25/06	OLPPB-02914-02915
16	Settlement letter from Joseph Gibson (O'Quinn) to defense counsel in MDL 1553	4/16/04	
17	Memo from Steve Bryant to Joe Gibson re: O'Quinn's settlement proposal	4/12/04	
18	Order No. 31 in MDL 1553 (Judge Janis Graham Jack)	8/23/05	

19	Cover letters from the Brand Law Group to document productions by the Law Office of Jim Zadeh	3/30/06, 4/3/06, 4/13/06, 5/5/06, 7/19/06	
20	Cover letters from the Brand Law Group to document productions by the Williams Bailey Law Firm	4/3/06, 6/14/06	
21	Letter from Dr. Barry Levy to Jim Zadeh diagnosing Client D with silicosis	5/8/04	MDL 1553 WOODS-000686 - 000687
22	Email correspondence between Jim Zadeh and Bruce Thrall, "RE: Order on Motion to Quash"	12/6-9/04	
23	Sample letter sent by Gulf Coast Marketing promoting silicosis and asbestosis screening services	5/9/03	
24	Letter from Jim Zadeh to Dr. Barry Levy re: concerns about the Committee's request for records	8/23/05	00000003 Z - 00000004 Z
25	Letter from Jim Zadeh to Dr. Levy re: "Silica Cases"	10/28/05	00000015 Z
26	Letters from Jim Zadeh to Dr. James Ballard and Dr. Richard Levine re: review of x-rays from silicosis and asbestosis screenings	7/8/02, 8/22/02	JB004204, 00001026 Z - 00001037 Z
27	Documents re: asbestosis and silcosis diagnoses by Dr. James Ballard for Client E	2/14/00, 6/7/04	
28	Letter from Stacie Taylor to Steve Mullins of The Law Offices of Alwyn H. Luckey "RE: MDL SILICA CASES"	3/10/05	
29	Sample silicosis diagnoses issued by Dr. H. Todd Coulter	5/10/03, 6/7/03	
30	"Asbestosis Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis," by Griffin B. Bell (vol.6, no 6)	6/1/02	
31	U.S. Department of Labor, Ocuppational Safety and Health Admisnistration - Occupational Exposure to Crystalline Silica		

TAB 1

MISSISSIPPI STATE DEPARTMENT OF HEALTH

September 16, 2002

Ms. Molly Netherland
N & M, Inc.
2810 Andrews Avenue
Pascagoula, MS 39567

Dear Ms. Netherland:

This letter serves as "Notice of Investigational Findings" concerning the registered activities authorized under Registration Nos. 30-9-001 and 30-9-002. The investigation was conducted on September 4, 2002, by Herman Gaines and Jimmy Carson.

During the investigation, the following items were found to be in noncompliance with the Mississippi State Board of Health Regulations for Control of Radiation:

1) Section 801.F.3(a)(11) of the Mississippi State Board of Health Regulations for Control of Radiation states, in part, that "Any person proposing to conduct a healing arts screening program shall not initiate such a program without prior approval of the Agency. When requesting such approval, that person shall submit the information outlined in Appendix B of this section."

Section 801.F.2. of the Mississippi State Board of Health Regulations for Control of Radiation states, in part, that "Healing arts screening" means the testing of human beings using x-ray machines for the detection or evaluation of health indications when such tests are not specifically and individually ordered by a licensed practitioner of the healing arts legally authorized to prescribe such x-ray tests for the purpose of diagnosis or treatment.

Contrary to the above, the registrant conducted a healing arts screening program, as define in the Mississippi Regulations, without the Agency's approval. **This item is classified as a violation.**

2) Section 801.F.3(a)(13) of the Mississippi State Board of Health Regulations for Control of Radiation states, in part, that "Each facility shall maintain an x-ray log containing patient's name, type of examinations, and dates the examinations were performed."

F. E. Thompson, Jr., MD, MPH, State Health Officer
3150 Lawson Street • Post Office Box 1700 • Jackson, Mississippi 39215-1700
601/987-6893 • Fax 601/987-6887

Contrary to the above, the x-ray log did not contain the type of examinations performed. **This item is classified as a violation.**

Please respond to the above cited items within ten (10) days of your receipt of this Notice. In your response, state the corrective actions that have been taken and the date when full compliance is achieved. Should you disagree that violations occurred, describe the circumstance(s) and produce records substantiating such claim.

Section 801.J.11(d) of the Mississippi State Board of Health Regulations for Control of Radiation requires this letter and your response to be posted for a period of five (5) working days or until corrective actions is completed, whichever is later.

Should you have any questions or comments concerning this "Notice" or investigation, please contact Herman Gaines or Jimmy Carson at (601) 987-6893.

Sincerely,

Robert W. Goff

Robert W. Goff, Director
Division of Radiological Health

RWG:tsm

N & M
TESTING, INC.

2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

HEALING ARTS SCREENING

I. N & M, INC. is located at 2810 Andrew Ave., Pascagoula, MS.
II. X-ray's are being taken for evaluation of asbestosis or silicosis.
III. We will be performing a PA and Lateral chest x-ray.
IV. We will be evaluating people over the age of 40 and mainly males with the exception of some females with enough exposure.
V. There are no alternative methods that we know of for evaluating people for asbestosis and silicosis.
VI. The x-ray exposure will vary between people according to size. The chart for this procedure is posted in front of the x-ray technicians and is located in section VIII.
VII. We begin by reviewing the processor's temperature to make sure that it falls within the acceptable range. Second, the technician warms the tube. Then, the technician reviews the films for quality assurance. We also have a physician on staff that reviews the quality of every film.
VIII. A copy of the technique chart is posted in front of the technician. A photocopy is available upon request.
IX. Mississippi licensed x-ray technician.
X. Molly Netherland is the supervisor to the operators of the x-ray equipment. She also evaluates the work performance of technician and equipment. Her qualifications are mainly hands on experience for the last twelve years.
XI. Ray Harron Texas
Phillip Lucas Mississippi
Jay Segarra Mississippi
XII. The people will be advised of their results the same day.
XIII. All records and films are forwarded to the attorney.
XIV. We evaluate people between five and ten days a month.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

FAX COVER SHEET

DATE: 10-14-02

TO: Molly Wetherland

COMPANY: Nim Testing

PHONE:

FAX: 228-762-3330

FROM: Dale Tallman TITLE: B.S.R.T. (R), HPS

Mississippi State Department of Health
Division of Radiological Health
3150 Lawson Street (39213)
P. O. Box 1700
Jackson, Mississippi 39215-1700
Office: (601) 987-6893
Fax: (601) 987-6887

COMMENTS:

Number of Page(s) Including Cover Page: 3

[X] Please acknowledge receipt of this facsimile by contact the sender. Thank you.

N & M TESTING, INC.
2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703
0762-3330

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

HEALING ARTS SCREENING

I. N & M, INC. is located at 2810 Andrew Ave., Pascagoula, MS.
II. X-ray's are being taken for evaluation of asbestosis or silicosis.
III. We will be performing a PA and Lateral chest x-ray.
~~IV.~~ We will be evaluating people over the age of 40 and mainly males with the exception of some females with enough exposure. more info. what kind of exp.? who do you mail to get this info? etc.
V. There are no alternative methods that we know of for evaluating people for asbestosis and silicosis.
~~VI.~~ The x-ray exposure will vary between people according to size. The chart for this procedure is posted in front of the x-ray technicians and is located in section VIII. physician's survey
~~VII.~~ We begin by reviewing the processor's temperature to make sure that it falls within the acceptable range. Second, the technician warms the tube. Then, the technician reviews the films for quality assurance. We also have a physician on staff that reviews the quality of every film. how often is the processor cleaned? step wedge test screen cleaning darkroom clean etc.
VIII. A copy of the technique chart is posted in front of the technician. A photocopy is available upon request.
IX. Mississippi licensed x-ray technician.
~~X.~~ Molly Netherland is the supervisor to the operators of the x-ray equipment. She also evaluates the work performance of technician and equipment. Her qualifications are mainly hands on experience for the last twelve years.
~~XI.~~ Ray Harron Texas MD's (Radiologist?....)
Phillip Lucas Mississippi
Jay Segarra Mississippi
~~XII.~~ The people will be advised of their results the same day. buy letter about & a copy of your x-ray film mail?
XIII. All records and films are forwarded to the attorney.
XIV. We evaluate people between five and ten days a month.

what about neg. screens? where do the films go.?

A verbal approval was given upon submission of the corrected information

N & M TESTING, INC
2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

Received
JAN 0 6 2003
Radiological Health

HEALING ARTS SCREENING

I. N & M, INC. is located at 2810 Andrew Ave., Pascagoula, MS.
II. X-rays are being taken for evaluation of asbestosis or silicosis.
III. We will be performing a PA and Lateral chest x-ray.
IV. We will be evaluating people for asbestosis and silicosis. People are usually over the age of 40, mainly males, with the exception of females with adequate exposure. Exposure would result from jobsites, sandblasting, sheetrock work, automotive mechanic repair, textile work, and other sites as discovered with adequate exposure.
V. There are no alternative methods that we know of for evaluating people for asbestosis and silicosis.
VI. The x-ray exposure will vary between people according to size. The chart for this procedure is posted in front of the x-ray technologist and is located in section VIII. Barco X-ray Co., Mobile, AL evaluates all x-ray equipment every two years, meeting all of the State's requirements.
VII. We begin by reviewing the processor's temperature to make sure that it falls within the acceptable range. Second, the technologist warms the tube. There are five to seven films run through the processor to evaluate equipment performance. Then, the technologist reviews the films for quality assurance. When requested, we have a physician on staff that reviews the quality of every film. The physician compares each film to NIOSH standard film, in order to assure quality. Department meetings are held monthly. Repeat film assessments are also performed monthly. All processor repairs, maintenance and cleaning are performed as needed, with an average time of approximately every five weeks. Screens are cleaned monthly.
VIII. A copy of the technique chart is posted in front of the technologist. A photocopy is available upon request.

N & M TESTING, INC
2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

IX. Mississippi and American Registry of Radiologic Technologists. See attached credentials.

X. Molly Netherland is the supervisor to the operators of the x-ray equipment. She also evaluates the work performance of the technologist and equipment. Her qualifications are mainly hands on experience for the past twelve years. Mrs. Netherland also attends seminars to support her experience and to continue her education in x-ray screenings.

XI. Dr. Ray Harron
2437 Bay Area Blvd. PMB 47
Houston, TX 77058
(304) 842-6570

Dr. Phillip H. Lucas
220 Winged Foot Circle
Jackson, MS 39211
(601) 957-2262

Dr. Jay Segarra
2123 Government Street
Ocean Springs, MS 39564
(228) 872-2411

XII. The people will usually be advised of their results the same day. On some days of testing, the attorney will send the results to the individual. They will receive a copy of the results on the average of two to six months.

XIII. All records and films are forwarded to the attorney. The attorney keeps the records and films in perpetuity. The attorney determines the storage and location of records and films.

XIV. We evaluate people between five and ten days a month.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

July 8, 2003

Ms. Molly Netherland
N & M, Inc.
2810 Andrews Avenue
Pascagoula, MS 39567

Dear Ms. Netherland:

Thank you for your response received January 6, 2003 to our Notice of Investigational Findings issued on September ~~18, 2000~~ 16 2002 HG, concerning the activities under Registration 30-9-001 and 30-9-002.

My staff has evaluated the response and found that the corrective actions appear to be satisfactory. We will determine the implementation of the corrective actions during the next inspection.

If we can be of assistance to you, please contact me at (601) 987-6893.

Sincerely,

Herman B. Gaines

Herman B. Gaines, M.S.
Health Physicist Administrative
Division of Radiological Health

HBG/ccc

Brian W. Amy, MD, MHA, MPH, State Health Officer
570 East Woodrow Wilson • Post Office Box 1700 • Jackson, Mississippi 39215-1700
601/576-7634 • Fax 601/576-7931 • www.msdh.state.ms.us

Nancy Ivester F.F BC HW JO

COMPLAINT 1685

Tab 2

To: Royce Harmon
Subject: R22903, Complaint1685

Hi Royce,
I've been given a memo from complaint investigations with enclosures regarding chest x-ray screening. There is a narrative from you detailing findings from a visit conducted on 6/24/02. However, I don't have an actual report or anything that has come through compliance and been issued a compliance number.
Please let me know if you submitted a report or field activity for this complaint or if there is some info I'm missing. Thanks, Nancy

ROUTE

TEXAS DEPARTMENT OF HEALTH
Austin, Texas
INTEROFFICE MEMORANDUM

COMPLAINT 1685

THRU: Robert Free, Deputy Director
Thomas Cardwell, Deputy Director **ROUTE**

TO: Jack England, X-Ray Reviewer

FROM: James H. Ogden, Jr, Incident Investigator

DATE: August 16, 2002

SUBJECT: Recommended Notice of Violation for N & M Inc. dba N & M Testing, Inc.(Complaint 1685)

Violation:

The Registrant initiated a healing arts screening program without prior approval by this Agency, in violation of 25 TAC §289.226(j)(1).

This is a Severity Level I violation.

Note To Reviewer: The letter was provided by Kerry A. Jackson, in response to the question which firm was supporting their operation when Mr. Harmon discovered their operation at 1600 South University Drive, Fort Worth, Texas, on June 24, 2002. The information on the firm was provided by Facsimile. **The Registrant is R22903-000.**

Enclosures:

1. (Working Copy) Report, dated June 24, 2002, from Royce Harmon, PHR #3.
2. (Working Copy) Letter provided by Jackson Crane, P.C., August 16, 2002, Re: Asbestos Testing.

(Note To Reviewer: Please forward a completed copy of the Notice of Violation to the Incident Investigation Program, for completion of our files for Complaint 1685, Attn.: James H. Ogden, Jr.)

On June 24, 2002, I received a telephone call from Jenny Perez, Administrative Tech., Region 2 3 regarding a telephone call complaint from an anonymous individual. Ms. Perez asked me to investigate the circumstances of the alleged complaint.

The complainant stated that a group of people were conducting screening chest x-rays at 1660 S. University Drive, Fort Worth. He stated that there were several young women, standing on the sidewalk, holding up signs for passing traffic to see, indicating that "free" screening tests were being done at that location. The complainant requested that the Health Department check into this situation.

Later the same morning, Ms. Perez again telephoned me to provide an "update" as to another adjacent location, where she was told the same type of screening was also taking place. This second location was indicated to be the Marriott Hotel, also near S. University Drive.

I went to the scene arriving at approximately 12:20 p.m. at the first location, which is in front of the Staples Office Supply, at the 1600 block of S. University Drive and spoke with an elderly gentleman who was standing next to a card table in the parking lot. There were two young women standing at the entrance to the parking lot holding up signs. I asked the gentlemen if they were providing screening tests, what type and if they were providing chest x-ray exams. He replied that they were interviewing persons for asbestos and silica exposure, but denied that they were taking any chest x-ray studies. I then asked him what the disposition of the persons were that they were interviewing. He replied that they were just "interviewing". I then asked him if they had been taking chest x-ray studies at this location that morning and he answered, "They weren't taking any x-rays."
NOTE: I personally observed x-ray folders which are normally used to store or transport x-ray films on the card table next to him.

This same person then told me that they were taking x-ray studies just down the street at the Marriott Hotel. There was no further conversation and I went down S. University Drive to the second location at 3150 Riverfront Drive.

At the street entrance to Riverfront Drive from S. University Drive was a large sign indicating "Free Screening." As I drove into the side parking lot I observed a large white Chevrolet truck. On the side of the enclosed truck was written the following: Occupational Health Testing Unit, Respirator Medical Evaluations, Occupational Marketing, Inc., 1-800-869-6783, www.occupational.com. The truck also had an electrical generator on a small trailer hooked up at the rear.

I went into the Hotel, asked the hotel clerk how long the truck had been outside and she said since early that morning and that she was told that they might possibly be there another day. I thanked her, followed the signs and went into a room where I observed several persons seated at desks interviewing others.

I identified myself and asked to speak privately with whomever was in charge. A person, who identified himself as Mr. Dennis Jaminet, and I then went into another adjacent room where I asked him to explain what the type of screening they were conducting.

(2)

He stated that he was a representative of the Law Offices of Stuart & Lyle, L.L.P., Attorney & Counselor at Law, 1110 E. Weatherford Street, Fort Worth, Texas 76102. I asked him if he was an attorney and he replied, "No."
He explained that this Law Firm was advertising Chest X-Ray Screening for persons previously exposed to asbestos and or silica.
I explained that the Texas Department of Health has regulations governing procedures regarding screening and told him that our department's interpretation is "self referral." Since this was apparently what was occurring I asked him to provide me with additional information and asked to also see the inside of the Mobile X-ray truck parked outside. He explained that his Law Firm had hired the Mobile X-ray Company from Houston for this screening situation and that he had "checked" them out beforehand.
Mr. Jaminet was very cooperative and then escorted me outside to the truck.

As we entered the truck I was introduced to two x-ray technologists, Robinson Montero, L.M.R.T., TDH #200737 and Alvaro Mendez, N.C.T., TDH #NC0212. I explained my purpose for being there and I proceeded to review their records.

They showed me a copy of their Certificate of Registration, R-23138, and showed my the following records:

1. Operating and Safety Procedures
2. E.P.E. dated 1-2-2002, Robert Perry, Ph.D., MP 0114
3. Recent Personnel Monitoring reports.
4. Lead Apron tests
5. Darkroom Light leak tests.
6. T.A.C.
7. Technique chart

occupational
Mammography
R23138
Hollister
Bill Sullivan 12

Mr. Montero stated that they were averaging (4) patients a day....sometimes as many as (20) a day in their mobile unit. He stated that they had only done (4) so far, that day.

I thanked them for their cooperation and Mr. Jaminet and I returned to the Hotel. I told Mr. Jaminet that the persons down the street from them had notified my department the same morning, that his organization was conducting screening tests. His response was that he was aware of that and then told me that two of the women involved at the other scene were attorneys attempting to do the same type of screening.

He further stated that there had been a Mobile X-Ray unit at the other location early that morning but it was seen leaving approximately mid-morning. He asked if I had spoken with them and I told him that I had stopped by there, but was going to return immediately following the conclusion of my business with him.

He asked if there was anything else he needed to do. I told him that it is necessary for his Law Firm to submit the criteria for screening to the Bureau of Radiation Control for approval and that he should keep a copy of the same document with him if they again engage in this type of service. He stated that information was readily available. I further suggested that he contact Debbie Borden, B.R.C., Austin and provided him with her telephone number.

I then returned to the first location at 1000 S. University Drive, where I observed that there were now only two other young women adjacent to the card table on the parking lot.

I introduced myself and explained my reason for being there. The first lady identified herself as Leslie Crane. I then asked her if she was an attorney and she replied, "Yes."

I asked her what type of service they were providing and she said that they were just interviewing people. I mentioned that it had been reported earlier that a Mobile X-Ray Unit had been on this scene and asked her if that was true. She said that it had been there but they had sent it away, "because there weren't any patients."

I asked her if she could provide me with the name of the company. She became very evasive and said, "I'm not sure of the company name." She then said she believed it came from Mississippi and she wasn't sure who made the arrangements. She went on to say that she and her associate, Kerry, had met the mobile company's representatives at a convention at Fort Lauderdale before and that's how they got involved. I asked if she had a telephone number for the company and she denied that she did. She then said that I should speak with the Kerry, who at the time was interviewing another person. I agreed and Ms. Crane immediately walked over to Kerry and began talking with her.

After a few minutes I spoke with the second lady, who identified herself as Kerry Jackson. I also asked her if she was an attorney and she replied, "Yes." I introduced myself and told her my purpose for being there.

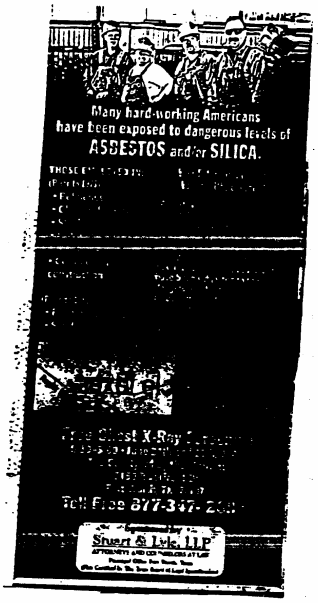
She was even more evasive in her conversation than the Ms. Crane. I explained to her that if they are going to engage in any screening activity that it will be necessary to contact the Bureau of Radiation Control before they set up anything. I provided Ms. Crane with Debbie Borden's telephone number and suggested that she contact her for additional information. Her response was, "We're just a couple of young attorneys trying to make a living."

I gave her my business card and asked her to contact me if she had any additional questions later. I left the scene approximately 2:30 p.m. and proceeded to the Regional Office.

Note: Review of additional information from a business card provided by Mr. Dennis Jaminet, indicates Kerry A. Jackson, Attorney, is officed at 2944 Portales, Fort Worth, 76116. Mobile Phone 214 505-7112, Fax: 817 244-5408. This same business card also lists Jackson Crane, P.C. as an Attorney and Counselor at Law.

Ms. Leslie Crane, whom I interviewed earlier provided me two telephone numbers: Office number (817) 244-5408 and her Cell. Phone (817) 929-9732.

Note: Attachment with this report is a copy of the ad placed in the June 24th edition of the Fort Worth Star Telegram Newspaper.


Many hard-working Americans
have been exposed to dangerous levels of
ASBESTOS and/or SILICA.
Stuart & Lyle, LLP

No.: _____

TEXAS DEPARTMENT OF HEALTH
BUREAU OF RADIATION CONTROL
COMPLAINT/TECHNICAL ASSISTANCE REQUEST FORM

Compl. & Insp.: X Litt., Reg., & Stan.: ___ T/A or Complaint No: 1685

Form of T/A Request\Complaint: X Telephone ___ Written ___ Visit
Referral From: _____

Complainant\Requestor: Anonymous
Address: _____ Telephone: _____
City: _____ State: _____ Zip: _____

T/A Request\Complaint Site: Unknown
Address: 1660 South University Drive Telephone: _____
City: Fort Worth Zip: _____ Co.: _____
Region: 03 License/Registration/Permit No.: _____

Description of T/A Request\Complaint: A company was flagging people in off the street to take x-rays at the above location. Individual was concerned about the legality and safety of this procedure.

T/A Request\Complaint Received By: Bradley Caskey Date: 06/24/0
Referred to: Earlon Shirley Date: 06/24/0
Investigated by: Royce Harmon, X-Ray Inspector, Reg. 2/3 Date: 6-24-02

Notice Of Violation? _____ Follow-up Inspection? _____ When? _____

Signed: _____ Title: _____

Reviewed by: _____ Title: _____

Disposition and Action Taken: (SEE ATTACHED NARRATIVE AND SCREENING AD.)

TEXAS DEPARTMENT OF HEALTH
Bureau of Radiation Control

FIELD ACTIVITY REPORT

Page 1

Name & Address of Licensee/Registrant	Date of Activity	
	Type of Activity (Investigation, Close-out Survey, Etc.)	
Address Where Activity Conducted:	Lic./Reg. No. Lic.# Reg.#	
	Compliance Letter To:	
Person(s) Contacted (Titles):	Telephone Number	Insp. Region 04

Report Date _____ Date Reviewed _____

~~RF RC HW JO~~ COMPLAINT 1685

JACKSON CRANE, P.C.
ATTORNEYS AND COUNSELORS AT LAW
2944 Portales
Fort Worth, TX 76116
Fax: 817-244-5408
Telephone: 817-244-6886

August 16, 2002

ROUTE

FACSIMILE COVER SHEET

TO: *Facsimile Only #1-512-834-6654*
JIM OGDEN
Texas Department of Health

FROM: Kerry Jackson

RE: Information Requested

PAGES: 2

N & M
TESTING, INC.

2810 Andrews Ave., Pascagoula, MS 39567
Fax: 228-474-7703

ASBESTOSIS TESTING
1-800-334-2327
Local: 228-762-5553

SILICOSIS TESTING
1-866-745-4221
Local: 228-474-7773

R22913

Please allow me to introduce myself. My name is Heath Mason. I am presently working with N & M, Inc. We have been testing people for asbestosis and silicosis for over five years and are very aware of the latest criteria. We simply want to offer you a quicker service combined with a competitive price.

Our equipment is able to meet your local as well as your out of town needs. We have mobile x-ray units that enable us to travel around and test clients no matter where they may be. If the need is strong enough, we also have x-ray units that can be setup inside of a testing facility. This allows us to serve you in any type situation.

Not only do we offer out of town x-ray services, but we offer pulmonary function test as well. These test are all done to meet NIOSH qualifications as well as the ATS standards. Respiratory therapist and NIOSH certified technicians who have had plenty of hands on experience administer them.

We have one more advantage to using our service. Not only do we provide you with an excellent quality x-ray and pulmonary function test, we also provide you with a reading of the x-ray and physical by well-known and respected B-reader's.

I look forward to discussing this with you personally in the near future. Thank you in advance for you further consideration.

Thanks again,

Heath Mason
VP

RF BC HW JØ

TEXAS DEPARTMENT OF HEALTH
Bureau of Radiation Control
Division of Compliance and Inspection
1100 West 49th Street
Austin, Texas 78756-3189
phone: 512-834-6688/FAX: 512-834-6622

COPY EE 1685

*** NOTICE OF VIOLATION *** COMPLAINT

ROUTE

July 10, 2002

COMPLIANCE NO. R022454
REGISTRATION NO. R23138-000
COMPLAINT NO. 1685

REGISTRANT

Occupational Marketing, Incorporated
Attn: Bill Sullivan, R.S.O.
11211 Katy Freeway, Suite 420
Houston, Texas 77079

INVESTIGATION ADDRESS

Same

REGISTRANT REPRESENTATIVE

Bill Sullivan, R.S.O.

INVESTIGATOR

Royce Harmon

INVESTIGATION DATE

June 26, 2002

STAFF REVIEWER

Jack England

The following alleged violation was found during an investigation of operations under the registration number above.

1. The Registrant initiated a healing arts screening program without prior approval by this Agency, in violation of 25 TAC §289.226(j)(1).

   This is a Severity Level I violation.

You are required to initiate corrective action immediately and submit a written reply to the Agency within 30 days of receipt of this NOTICE. Use the enclosed guide for preparing your response. Include the above compliance and registration numbers in your response and retain this notice as a part of your records.

Item 1 is health related or potentially health related and should be corrected immediately. 25 Texas Administrative Code, Chapter 289 requires this notice to be posted or made available for employee review.

REVIEWER JChristen for Jack England

JE:sd

James H. Ogden, Jr.
Incident Investigation Program

COPY

BRC Use Only
F C R 06

rev1.0m

MISSISSIPPI STATE DEPARTMENT OF HEALTH

Tab 3

Certified Mail

June 14, 2005

Mr. Charles E. Foster, President
Respiratory Testing Services, Inc.
4362-A Midmost Drive
Mobile, AL 36609

Dear Mr. Foster:

I have tried on several occasions to contact you concerning your Registration No. 99-9-044 and possible violations of the Mississippi State Board of Health Regulations for Control of Radiation. Also, the registration fees have not been paid for this fiscal year.

If you would like to continue your registration, please contact us at (601) 987-6893.

Sincerely,

Herman B. Gaines

Herman B. Gaines, M.S.
Health Physicist Administrative
Mississippi State Department of Health
Division of Radiological Health
X-Ray Branch

HBG: ssf

MISSISSIPPI STATE DEPARTMENT OF HEALTH

June 30, 2005 CERTIFIED MAIL

Charles E. Foster, President
Respiratory Testing Services, Inc., (RTSI)
4362-A Midmost Drive
Mobile, AL 36609

Dear Mr. Foster:

This letter serves as "Official Notice of Violation" concerning the activities conducted under Registration No. 99-9-044. The following items are in noncompliance with the Mississippi Department of Health Regulations for Control of Radiation. Herman Gaines discussed these items with you by telephone on June 30, 2005.

1. Section 801.B.13 of the Mississippi Department of Health Regulations for Control of Radiation states, in part, that "whenever any radiation machine is to be brought into the state for temporary use, the person proposing to bring such a machine into the state shall give written notice to the Agency at least three (3) days before such a machine is to be used in the state.

   Item No. 2 of the RTSI's application for Registration No. 99-9-044 signed by Charles Foster states, in part, that "the Agency will be notified in accordance with Section 801.B.13.

   Contrary to the above, on numerous occasions, RTSI's personnel conducted registered activities in the state of Mississippi without notifying this office. **This item is classified as a violation.**

2. Section 801.F.3(a)(11) of the Mississippi Department of Health Regulations for Control of Radiation states, in part, that "Any person proposing to conduct a healing arts screening program shall not initiate such a program without prior approval of the Agency. When requesting such approval, that person shall submit the information outlined in Appendix B of this section.

   Contrary to the above, RTSI conducted healing arts screening program without the Agency's approval. **This item is classified as a violation.**

Brian W. Amy, MD, MHA, MPH, State Health Officer
570 East Woodrow Wilson • Post Office Box 1700 • Jackson, Mississippi 39215-1700
1-800-489-7670 • Fax 601/576-7931 • www.msdh.state.ms.us

3. Section 801.F.3(a)(7) of the Mississippi Department of Health Regulations states, in part, that individuals shall not be exposed to the useful beam except for healing arts purpose and unless such exposure has been authorized by a licensed practitioner of the healing arts.

Contrary to the above, RTSI's personnel conducted x-ray examinations without the authorization of a licensed practitioner of the healing arts. **This item is classified as a violation.**

In addition to the above, Mississippi Registration No. 99-9-044 has expired. **RTSI must not conduct registered activities in the state of Mississippi until such time a new Registration is issued.** A completed application and the required registration fee for fiscal year 2006 may be submitted to this office for consideration.

Please respond to the above cited items within ten (10) days of your receipt of this Notice. In your response, state the corrective actions that have been taken, and the date when full compliance is achieved. Should you disagree that the violations occurred, describe the circumstance(s) and produce records substantiating such claims.

Section 801.J.11.(d) of the Mississippi State Board of Health Regulations for Control of Radiation requires this letter and your response to be posted for a period of five (5) working days or until corrective actions are completed, whichever is later.

Should you have any questions or comments concerning this "Notice", please contact Herman Gaines at (601) 987-6893.

Sincerely,

Robert W. Goff

Robert W. Goff, Director
Division of Radiological Health

RWG: ssf

Mississippi Department of Health
Radiological Health
3150 Lawson Street
Jackson, Ms. 39215-1700

Dear Mr. Goff:

We are writing this letter in response to the letter we received from your office on July 12, 2005, relating to the "Official Notice of Violation". The following items below are written in response to the letter that we received. Please accept our response along with statements of corrective actions for the violations you have us listed for.

In response to #1-

Pertaining to (Section 801.b.13). R.T.S. Inc. has never received any correspondence from the state of Mississippi about giving notice as to when our company was coming into the state of Mississippi. Had we known to submit notice at least (3) days prior to coming to the state we would have gladly done so.

Item No. 2 – After checking for past licenses or paperwork where Mr. Foster would have signed, we found no forms stating that we would need to send written notification of when we would be traveling in the state of Mississippi. In our research we found several forms titled (Radiological Health Form RH-17). This form states nothing pertaining to the written notification aspect. Other forms found during our search have either Mr. Charlie Foster or Mr. Guy Foster's signature yet still nothing about providing written notification. We ask that you grant us mercy along with a chance to make corrections for not having any information pertaining to this in our records.

If in fact there was information pertaining to notifying the state in past licenses, it would have been a complete oversight of Mr. Foster or our bookkeeping staff for not keeping such important forms and/or by not remembering the stipulation of the license contract. We plan to make it right as of July 20, 2005, in respect to the Mississippi State Department of Health.

In response to #2-

On the contrary to what is stated in item # 2, paragraph 1 & 2 by the Mississippi Department of Health, our company is not performing "healing arts". We are a consulting firm doing consulting work.

In response to #3-

Pertaining to Section (801.F.3(a)(7)), please explain to me if a chiropractor falls under the "healing arts" category. This will clear up any confusion as to whether our company should be classified as violating the regulations set forth in above stated Section.

This letter is our response within (10) days of having received the previous letter by the Mississippi State Department of Health on July 12, 2005. We are trying to understand more clearly the rules set forth by the Department in order to make sure we have in fact performed acts of violation with regards to regulations set forth by the Department. If in fact we have made such violations, we do plan to take the necessary steps to correct our process in order to fall within complete compliance with the state of Mississippi and its regulations set forth by the Department of Health.

Thank you for taking time to read this response. If you have any questions please call us at 251-341-0206.

Sincerely,

Charlie Foster
Owner/President
Respiratory Testing Services Inc.

MISSISSIPPI STATE DEPARTMENT OF HEALTH

July 26, 2005 CERTIFIED MAIL

Charles E. Foster, President
Respiratory Testing Services, Inc., (RTSI)
4362-A Midmost Drive
Mobile, AL 36609

Dear Mr. Foster:

This letter is concerning your response to the "Official Notice of Violation" received July 25, 2005. Your response to this "Notice of Violation" was not acceptable; therefore, you must meet with us to discuss this matter. You must not conduct registered activities in the State of Mississippi until this matter has been resolved.

Please contact Robert W. Goff at (601) 987-6893 to set up an appointment.

Sincerely,

Herman B. Gaines

Herman B. Gaines, MS
Mississippi State Department of Health
Division of Radiological Health
X-Ray Division

HBG: ssf

MISSISSIPPI
STATE DEPARTMENT OF HEALTH

570 East Woodrow Wilson
Post Office Box 1700
Jackson, Mississippi
39215-1700

Brian W. Amy, MD, MHA, MPH
State Health Officer

July 14, 2003

MEMORANDUM

TO: Out-of-State Registrants

FROM: Herman B. Gaines, M.S.
Health Physicist Administrative
Division of Radiological Health
X-Ray Branch

RE: Notification of X-ray Machine(s) Brought Into The State of Mississippi

Pursuant to Section 801.B.13, of Section B, "Registrations of Radiation Machines, Facilities and Services" of the Mississippi State Board of Health Regulations for Control of Radiation, you are required to notify this Office prior to conducting registered activities in the State of Mississippi.

If you do not plan to continue your radiation program in the State of Mississippi, please inform this Office in writing.

Should you have any questions, please contact me at (601) 987-6893.

HBG:tsm

601/576-7634
601/576-7931 FAX
www.msdh.state.ms.us

MAY.17.2005 3:25PM NO.867 P.1

MISSISSIPPI STATE DEPARTMENT OF HEALTH

Received
MAY 17 2005
Radiological Health

May 3, 2005

Respiratory Testing Services, Inc.
4362-A Midmost Drive
Mobile, AL 36609

Dear Owner(s):

This is to notify you that your Registration No. 28-0-044 issued by the Mississippi State Department of Health, authorizing your possession and use of radiation machine(s) expires on July 1, 2005.

Pursuant to 801.B.1, 801.B.8, 801.B.10 and 801.B.13, of Section B, "Registration of Radistion Machines, Facilities and Services" of the Mississippi State Board of Health Regulations for Control of Radiation, you are required to apply for renewal and/or amendment of your registration if you plan to continue the possession and use or radiation machine(s).

In order to prevent your registration from expiring and, therefore, possessing radiation machine(s) without a valid registration, you must request renewal. If you plan to actively continue your radiation program and wish to have your registration renewed, please check Bland No. 1 below, and sign in the space provided or have an authorized individual to sign on behalf of the registration.

1) V PLEASE RENEW

Authorized By: _____
(Signature)

(Print Name and Title) Charles E. Foster, President

IF YOU WISH TO CONTINUE YOUR RADIATION PROGRAM, BUT INTEND TO HAVE YOU REGISTRATION AMENDED, (i.e., changes regarding name, address, and/or individuals(s) responsible for radiation protection, new and/or additional x-ray machines, etc), THEN CHECK BLANK NO. 2; AND SUBMIT IN WRITING A FORMAL REQUEST FOR THE AMENDMENT.

2) ____ AMEND

If you do not plan to continue your radiation program in the State of Mississippi, please inform this Office in writing. Please mail this information to: Division of Radiological Health, Mississippi State Dept. of Health, P. O. Box 1700, Jackson, MS 39215-1700, or fax to (601) 987-6887.

Sincerely,

Herman B. Gaines

Herman B. Gaines, MS
Health Physicist Administrative
MSDH-Division of Radiological Health

HBG:cbc

Mississippi State Department of Health
Division of Radiological Health

REGISTRATION
OF
HEALING ARTS OR VETERINARY X-RAY TUBES AND FACILITIES

Pursuant to the Mississippi Radiation Control Act and Mississippi State Board of Health Environmental Regulations, "Regulations for Control of Radiation in Mississippi," and in reliance on statements and representations heretofore made by the registrant, a notice of registration is hereby issued. This registration is subject to all applicable rules and regulations of the State Board of Health and to any conditions specified below.

Amendment No. 7

REGISTRANT

1. Name: Respiratory Testing Services, Inc.
2. Address: 4362-A Midmost Drive, Mobile, AL 36609
3. Registration Number: 99-9-044
4. Expiration Date: July 1, 2005

5. Classification	6. Type	7. Manufacturer	8. Model Number	9. Serial Number
Mobile Van	Chest	Summit Ind.	E7239FX	70248

CONDITIONS

10. Unless otherwise specified, the authorized place of use is the registrant's address stated in 2 above. Pursuant to Section 801.B.13 of the Mississippi State Board of Health Regulations, the registered x-ray device may be used at temporary locations in Mississippi.

FOR THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

Date: June 21, 2004

by: Robert M. Buff

Mississippi State Department of Health — Revised 10-90 — Radiological Health Form No. RH–17

RTS00389

MAY.17.2005 3:25PM NO.867 P.1

MISSISSIPPI STATE DEPARTMENT OF HEALTH

Received
MAY 17 2005
Radiological Health

May 3, 2005

Respiratory Testing Services, Inc.
4362-A Midmost Drive
Mobile, AL 36609

Dear Owner(s):

This is to notify you that your Registration No. 29-4-044 issued by the Mississippi State Department of Health, authorizing your possession and use of radiation machine(s) expires on July 1, 2005.

Pursuant to 801.B.1, 801.B.8, 801.B.10 and 801.B.13, of Section B, "Registration of Radiation Machines, Facilities and Services" of the Mississippi State Board of Health Regulations for Control of Radiation, you are required to apply for renewal and/or amendment of your registration if you plan to continue the possession and use or radiation machine(s).

In order to prevent your registration from expiring and, therefore, possessing radiation machine(s) without a valid registration, you must request renewal. If you plan to actively continue your radiation program and wish to have your registration renewed, please check Blank No. 1 below, and sign in the space provided or have an authorized individual to sign on behalf of the registration.

1) ✓ PLEASE RENEW

Authorized By: _____
(Signature)

(Print Name and Title) Charles E. Foster, President

IF YOU WISH TO CONTINUE YOUR RADIATION PROGRAM, BUT INTEND TO HAVE YOU REGISTRATION AMENDED, (i.e., changes regarding name, address, and/or individuals(s) responsible for radiation protection, new and/or additional x-ray machines, etc), THEN CHECK BLANK NO. 2; AND SUBMIT IN WRITING A FORMAL REQUEST FOR THE AMENDMENT.

2) ____ AMEND

If you do not plan to continue your radiation program in the State of Mississippi, please inform this Office in writing. Please mail this information to: Division of Radiological Health, Mississippi State Dept. of Health, P. O. Box 1700, Jackson, MS 39215-1700, or fax to (601) 987-6887.

Sincerely,

Herman B. Gaines

Herman B. Gaines, MS
Health Physicist Administrative
MSDH-Division of Radiological Health

HBG:cbc

Mississippi State Department of Health
Division of Radiological Health

REGISTRATION
OF
HEALING ARTS OR VETERINARY X-RAY TUBES AND FACILITIES

Pursuant to the Mississippi Radiation Control Act and Mississippi State Board of Health Environmental Regulations, "Regulations for Control of Radiation in Mississippi," and in reliance on statements and representations heretofore made by the registrant, a notice of registration is hereby issued. This registration is subject to all applicable rules and regulations of the State Board of Health and to any conditions specified below.

Amendment No. 7

REGISTRANT

1. Name: Respiratory Testing Services, Inc.
2. Address: 4362-A Midmost Drive, Mobile, AL 36609
3. Registration Number: 99-9-044
4. Expiration Date: July 1, 2005

5. Classification	6. Type	7. Manufacturer	8. Model Number	9. Serial Number
Mobile Van	Chest	Summit Ind.	E7239FX	70248

CONDITIONS

10. Unless otherwise specified, the authorized place of use is the registrant's address stated in 2 above. Pursuant to Section 801.B.13 of the Mississippi State Board of Health Regulations, the registered x-ray device may be used at temporary locations in Mississippi.

FOR THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

Date: June 21, 2004

by: Robert M. Goff

Mississippi State Department of Health — Revised 10-90 — Radiological Health Form No. RH-17

RTS00389

(1)

7DT/5-100

TEXAS DEPARTMENT OF HEALTH
BUREAU OF RADIATION CONTROL
REGISTRATION APPLICATION FOR USERS OF RADIATION MACHINES
IN HEALING ARTS, VETERINARY MEDICINE AND ACADEMIC FACILITIES

INSTRUCTIONS - Complete ALL ITEMS of the application. Mail original(s) to the Texas Department of Health, Bureau of Radiation Control(BRC), 1100 West 49th Street, Austin, Texas 78756-3189. Upon approval of the application, the applicant will receive a Certificate of Registration. Submit the appropriate fee with an application for NEW REGISTRATIONS ONLY. If there are any questions, contact the BRC at (512)834-6688.

PRIVACY NOTIFICATION: If you are applying as an individual, with few exceptions, you have the right to request and be informed about information that the State of Texas collects about you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is determined to be incorrect. See http://www.idh.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021, 552.023, 559.003 and 559.004).

Tab 4

1.a. Legal name of business, facility or individual:*
RESPIRATORY TESTING SERVICES, INC

b. Business mailing address:
4362 MIDMOST DRIVE, SUITE A
MOBILE, AL 36609

2. Physical address where radiation machines will be used: (Submit separate application forms for each additional use location under this registration.)
MOBILE UNIT
VARIOUS LOCATIONS

M8301128
$165.00
4-3-03

3. County of Use: VARIOUS

4. Telephone No.: 251 341 0206

5. Fax No.: 251 341 0213

6. E-mail Address: RESPIRATORY TESTING SERVICES @ INTERBOL.COM

7. Type of Action: (Check all that apply)
X New registration (Attach appropriate fee)
___ Renewal of registration no. _____
___ Amendment to registration no. _____
___ Name change ___ Address change
___ RSO change ___ Equipment change*
___ Additional use location

8. Radiation Safety Officer(RSO)* (Submit qualifications)
RICHARD C MEASE SR RT

9. Machine data for this location. Complete inventory must be submitted for new, renewal and address changes.

Manufacturer	Use Code* (see table on back)	Control Panel: Model No.	Control Panel: Serial No.
SEDECAL	D104	SHF 310	C13367

RECEIVED
TDH
APR 09 2003
BUREAU OF
RADIATION CONTROL

b. Total number of radiation machines (control panels) now possessed: 3 (including any in storage that are operable)

c. Number of radiation machines (control panels) at this use location: 1

d. If mobile services are used, indicate name and registration number of the "Provider of Equipment":
Provider: DIAGNOSTIC IMAGING Provider's Registration No. _____

10. As a licensed practitioner, I do hereby affirm that I am associated with this applicant and provide supervision to non-practitioners administering radiation to human beings or animals.

Signature of Licensed Practitioner* Date Typed or Printed Name Licensing Board No.

12. I do hereby accept the responsibilities of radiation safety officer.

E/C Mease Sr RT 3-26-03 RICHARD C MEASE SR RT 333534
Signature of Radiation Safety Officer* Date Typed or Printed Name Licensing Board No.

I certify that the administration of radiation to human beings or animals in association with this application shall be under the supervision of an appropriately licensed practitioner. Furthermore, I attest that the information contained in this application is true and correct to the best of my knowledge.

Signature of Applicant Date Typed or Printed Name

Signature of Owner or Partner* Date Typed or Printed Name Driver's License No.

*SEE REVERSE FOR INSTRUCTIONS

BRC Form 236-2 (rev02/02)

2

Veterinary

Veterinarian
Texas Veterinary License Board No._____

Non Veterinarians
2 years experience

Academic and/or Research and Development

Faculty or staff member in radiation protection, radiation engineering or related discipline must submit evidence of the following:
Educational course(s) on radiation safety
Experience with x-ray equipment
Knowledge of potential radiation hazards

Certification

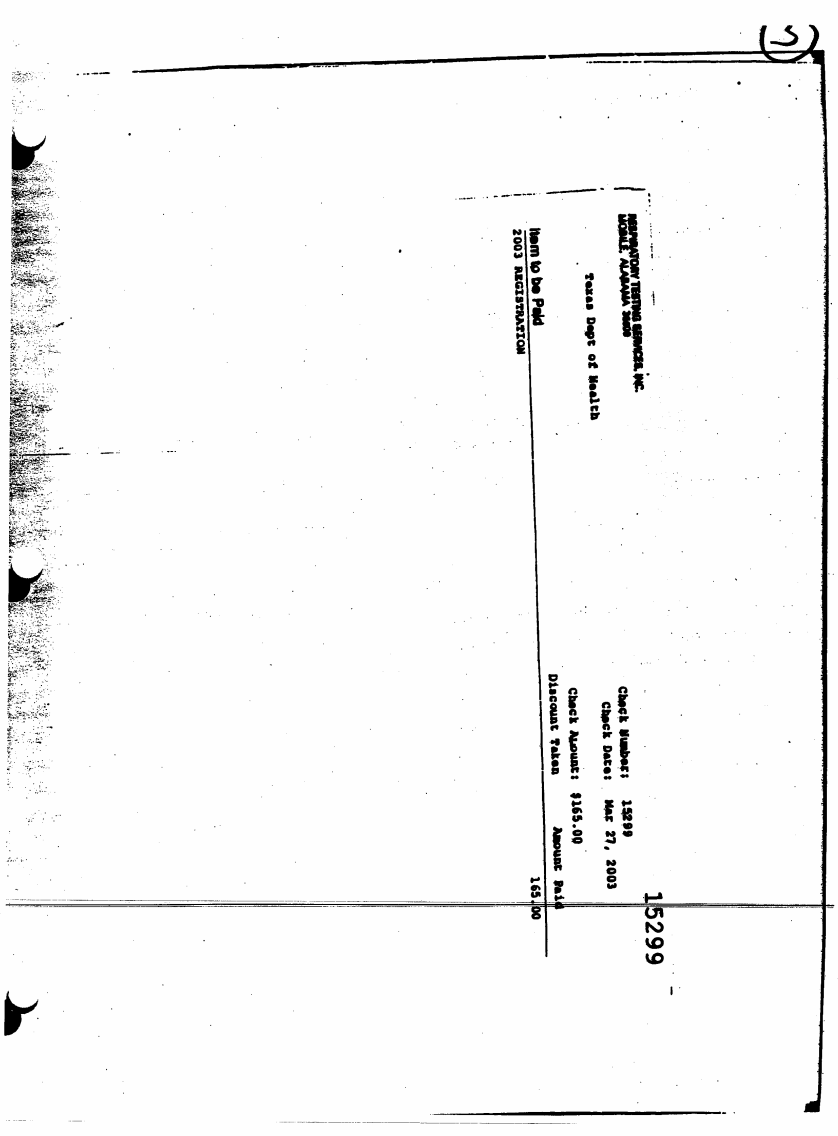
I hereby certify that I will fulfill the duties and responsibilities of RSO.

Signature of designated Radiation Safety Officer

Documentation of radiation machine experience:

Name of Facility	Date of Employment (from - to)	Type of Radiation Equipment Operated
RESPIRATORY TESTING SVC	8-99 TO PRESENT	VARIOUS

A complete listings of the requirements which the RSO must meet are located in 25 Texas Administrative Code (TAC) §289.226(w)(1).



REGENCY TESTING SERVICES, INC.
MOBILE, ALABAMA 36609

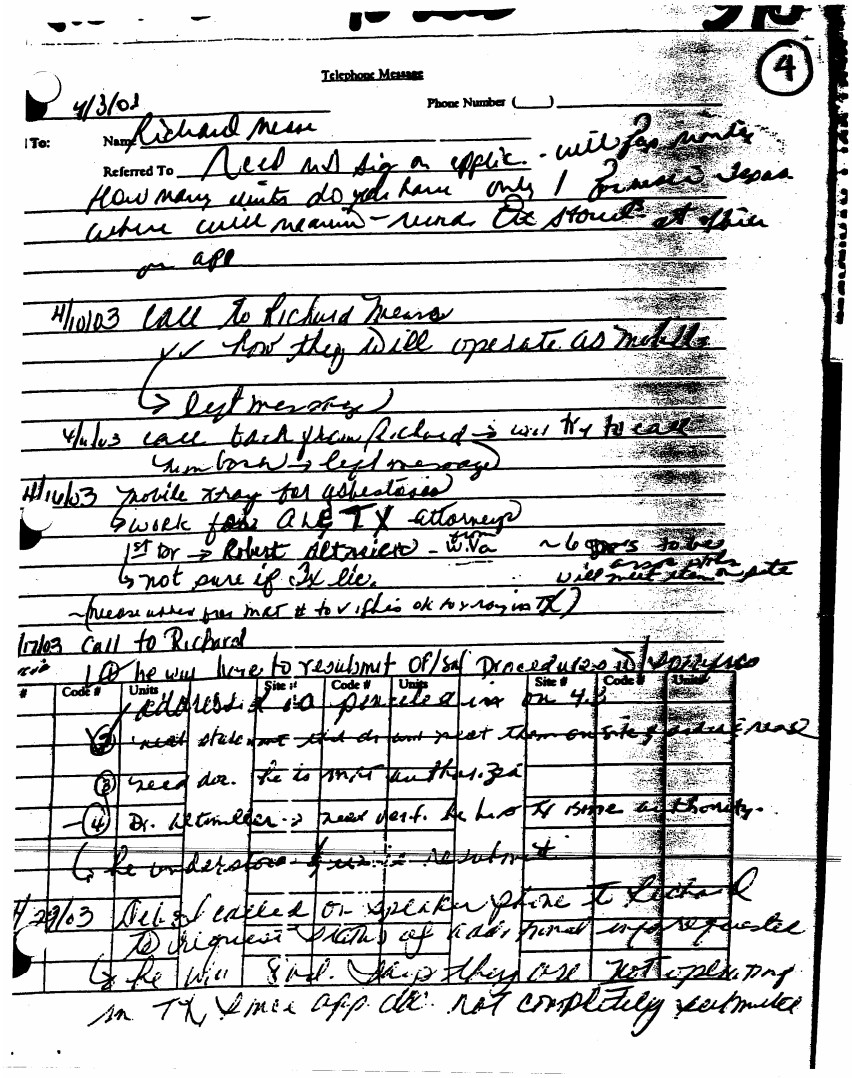
Texas Dept of Health

Check Number: 15299
Check Date: Mar 27, 2003
Check Amount: $165.00
Discount Taken
Amount Paid

15299

Item to be Paid
2003 REGISTRATION

165.00



Telephone Message

4

4/3/03

Phone Number (___)

To: Name Richard Means

Referred To Need md sig on applic. - will fax monday

How many units do you have only 1 formaldehyde where will meaning - need the hours at office on app

4/10/03 Call to Richard Means
re how they will operate as mobile
(left message)

4/14/03 call back from Richard → will try to call tomorrow → left message

4/16/03 mobile xray for asbestosis
& work for ARCTX attorneys
1st Dr → Robert Altsuler - W.Va ~6 pts to be exposed with asbestosis
not sure if he lic. in state
(need name for next pt to verify he ok to xray in TX)

4/17/03 Call to Richard
left he will have to resubmit Of/Sx Procedures to Approved

#	Code #	Units	Site #	Code #	Units	Site #	Code #	Units
		addressed # 1-3						
(2)		need state ~~not~~ ~~did~~ dont not have on site						
(3)		need dr. fax to me						
(4)		Dr. Altsuler - need Dept. he has to have authority.						
		~~he understood~~						
4/29/03		Rec'd called Dr. Spieler phone to Richard						
		Diagnosis Victims of radiation need exposed						
		Re will find. they are not operating in TX since Offs. dr. not completely resubmitted						

04/07/2003 13:28 3343410213 RESPIRATORY TESTING PAGE 01

(5)

RESPIRATORY TESTING SERVICES, INC.
4362 MIDMOST DRIVE
MOBILE, AL 36609
(251) 341-0206

THIS FAX IS TO: Pat

LOCATION:

FAX NUMBER: 512-834-6716

NUMBER OF PAGES INCLUDING COVER SHEET: 2

THIS FAX IS FROM: JENNIFER F. SEIBERT / Richard Mease

LOCATION: R.T.S.

FAX NUMBER : (251) 341-0213

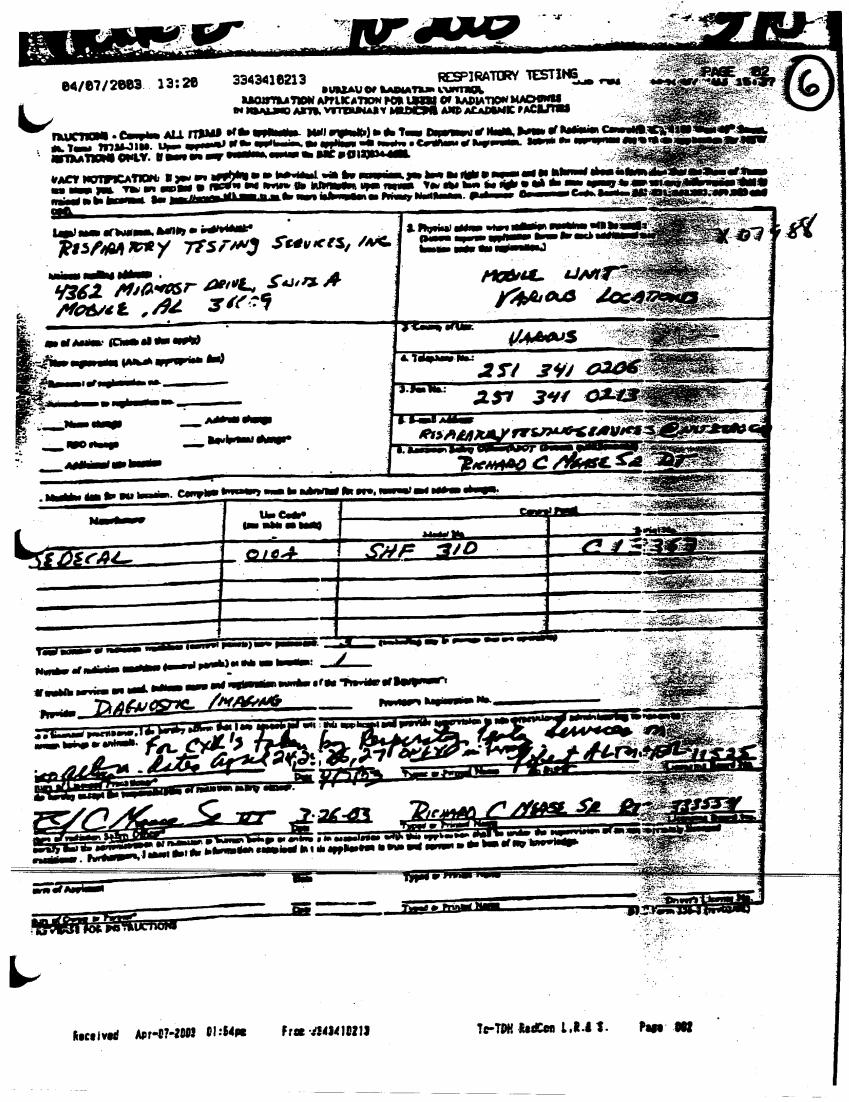
COMMENTS:

any questions you can call Mr. Mease at 251-591-9001

Thanks,

Jennifer

Received Apr-07-2003 01:54pm From-3343410213 To-TDH RadCon L.R.& S. Page 001



04/07/2003 13:20 3343410213 RESPIRATORY TESTING PAGE 02

BUREAU OF RADIATION CONTROL

REGISTRATION APPLICATION FOR USERS OF RADIATION MACHINES IN HEALING ARTS, VETERINARY MEDICINE AND ACADEMIC FACILITIES

(6)

INSTRUCTIONS - Complete ALL ITEMS of the application. Mail original(s) to the Texas Department of Health, Bureau of Radiation Control, 1100 West 49th Street, Austin, Texas 78756-3189. Upon approval of the application, the applicant will receive a Certificate of Registration. Submit the appropriate fee to TDH as specified on the TDH REGISTRATIONS ONLY. If there are any questions, contact the RAC at (512)834-6688.

PRIVACY NOTIFICATION: If you are applying as an individual, with the exception, you have the right to request and be informed about information that the State of Texas can assess you. You are entitled to receive and review the information upon request. You also have the right to ask the state agency to correct any information that is received to be incorrect. See http://www.oag.state.tx.us for more information on Privacy Notification. (Reference: Government Code, Section 552.021 and 552.023)

1. Legal name of business, facility or individual: RESPIRATORY TESTING SERVICES, INC

Business mailing address: 4362 MIDWEST DRIVE, SUITE A MOBILE, AL 36609

2. Physical address where radiation machines will be used: (Submit separate application forms for each additional site location under this registration.) MOBILE UNIT VARIOUS LOCATIONS

3. County of Use: VARIOUS

4. Telephone No.: 251 341 0206

5. Fax No.: 251 341 0213

6. E-mail Address: RESPIRATORYTESTINGSERVICES@MSN.COM

7. Radiation Safety Officer (RSO) (Person responsible): RICHARD C MABLE SR RT

Type of Action: (Check all that apply)

___ New registration (Attach appropriate fee)

___ Renewal of registration no. _____

___ Amendment to registration no. _____

___ Name change ___ Address change

___ RSO change ___ Equipment change*

___ Additional use location

*Mobile data for any location. Complete inventory must be submitted for new, renewal and address changes.

Manufacturer	Use Code* (see table on back)	Model No.	Serial No.
SEDECAL	0104	SHF 310	C1-383

Total number of radiation machines (control panels) now possessed: 1 (including any in storage that are operable)

Number of radiation machines (control panels) at this new location: 1

If mobile services are used, indicate name and registration number of the "Provider of Equipment":

Provider: DIAGNOSTIC IMAGING Provider's Registration No. _____

As a licensed practitioner, I do hereby affirm that I am familiar with this equipment and provide supervision to the operator(s) administering the ionizing radiation to human beings or animals. For CHL's Tech by Respiratory Tech Services on Mobile Unit at various locations

Name of Licensed Practitioner (Type or Print) _____ Date 4/7/03 Signature _____ License No. _____

As the facility accept the responsibilities of radiation safety officer.

Signature of Applicant: R/C Mable Sr RT Date 7-26-03 Typed or Printed Name: RICHARD C MABLE SR RT Driver's License No. 7355374

Name of Owner or Person Authorized to Sign for Applicant (Type or Print) _____ Date _____ Typed or Printed Name _____ Driver's License No. _____

I certify that the information in this application is true and correct to the best of my knowledge.

SEE REVERSE FOR INSTRUCTIONS

Received Apr-07-2003 01:54pm From +3343410213 To-TDH RadCon L.R.& S. Page 002

(7)

TDH

Texas Department of Health

Eduardo J. Sanchez, M.D., M.P.H.
Commissioner of Health

1100 West 49th Street
Austin, Texas 78756-3199

Bureau of Radiation Control
(512) 834-6688

Ben Delgado
Chief Operating Officer

Nick Curry, M.D., M.P.H.
Executive Deputy Commissioner

23 SEPTEMBER 2003

RESPIRATORY TESTING SERVICES INC
ATTN PRESIDENT
4362 MIDMOST DR STE A
MOBILE AL 36609

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Application No.: R27605

7000 0520 0024 5456 7045

Dear PRESIDENT:

Your application for a Certificate of Registration has been denied. The Agency notified you of the intent to deny on 07/18/03 and advised you of your opportunity to request a hearing as provided by the Texas Radiation Control Act. No request to that effect was submitted within the specified 30 day time period.

Operation of x-ray equipment without being registered is in violation of the Act. Failure to comply may result in this Agency seeking legal remedies as authorized by the Act. You are advised that civil penalties are available in such cases.

If you have questions regarding the denial of your application, do not hesitate to contact us.

Sincerely,

Ruth E. McBurney, C.H.P., Director
Division of Licensing, Registration and Standards
Bureau of Radiation Control

Enclosures
cc: Division of Compliance and Inspection

Tab 5

CAMPBELL~CHERRY~HARRISON~DAVIS~DOVE

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

BILLY H. DAVIS, JR.
bhdavis@TheTrialLawyers.com

5 Ritchie Road
Waco, Texas 76712
P.O Drawer 21387
Waco, Texas 76702-1387
(254) 761-3200
Fax (254) 761-3301
www.TheTrialLawyers.com

March 21, 2005

Via fed ex 251.343.0040, and
Via certified mail, return receipt requested, and
Via first class mail, and
Via fax 251.343.0069

George H. Martindale, M.D.
6576 Airport Blvd.
Building C, Suite 2
Mobile, AL 36608

Dear Dr. Martindale:

Our firm represents approximately 3288 individuals diagnosed by you in 2000 and 2001 with asbestosis. These diagnosing reports were provided to us by N&M, Inc.. For these clients, we have relied on these reports in filing their asbestos lawsuits, in making claims against bankrupt defendants, and in making settlements with various defendants. An example of one of your reports is enclosed for your review.

As a result of your deposition testimony regarding your silicosis diagnosis, we need to determine if you intend to stand behind your asbestosis diagnosis for our clients. Please confirm to us in writing as soon as possible whether you intend to stand behind your asbestosis diagnosis so we will know if we have a reliable diagnosis from you to support the lawsuit and claims of these clients.

It is important that we immediately hear from you on this.

Sincerely,

Billy H. Davis Jr.

GEORGE H. MARTINDALE, M.D.
Certified - American Board of Radiology
Member American College of Radiology

65 Kingsway
Mobile, AL 36608

(334) 344-8255

173168

DATE: 12-17-01

RE: [redacted] (SS# [redacted])

The medical records, work history, physical exam, and chest radiograph were reviewed.

CHEST:

There are increased interstitial markings throughout both lungs consistent with ILO classification s/s, 1/0. The cardiac silhouette and mediastinal contours are unremarkable. There is mild thickening of the minor fissure.

IMPRESSION:

On the basis of the medical history review, which is inclusive of a significant occupational exposure to asbestos dust, physical exam and the chest radiograph, the diagnosis of asbestosis is established within a reasonable degree of medical certainty.

George H. Martindale, M.D.

GHM/mts

Date film read: 1-08-02

********** -COMM. JOURNAL- ********** DATE MAR-21-2005 ***** TIME 10:51 *** P.01

MODE = MEMORY TRANSMISSION START=MAR-21 10:49 END=MAR-21 10:51

FILE NO.= 042

STN NO.	COM	ABBR NO.	STATION NAME/TEL.NO.	PAGES	DURATION
001	OK	#	912513430069	003/003	00:01'02"

-CCHDD -

********** - - ***** - 254 761 3301- *********

CAMPBELL~CHERRY~HARRISON~DAVIS~DOVE

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW..

Billy H. Davis, Jr.
bhdavis@TheTrialLawyers.com

P.O. Drawer 21387
Waco TX 76702 1387
5 Riverside Road
Waco, TX 76712
(254) 761-3300
Fax (254) 761-3301

FAX SENT

DATE: 3/21/05 TIME TRANSMITTED: 10:49Am NO. OF PAGES INCLUDING COVER: 3

TO: George H. Martindale, M.D. FAX NO. 251.343.0069

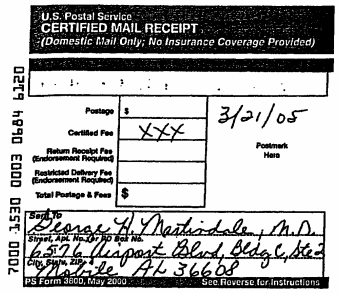
FROM: Billy H. Davis, Jr. FAX NO. 254-761-3301

RE: Asbestosis diagnoses

Please see accompanying letter.

COPY TO FOLLOW BY MAIL: NO OR HAND / OVERNIGHT DELIVERY: NO

IF YOU EXPERIENCE ANY PROBLEMS WITH RECEPTION, PLEASE CALL 254/756-5545, AND ASK FOR JoAnn Zerkle


U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

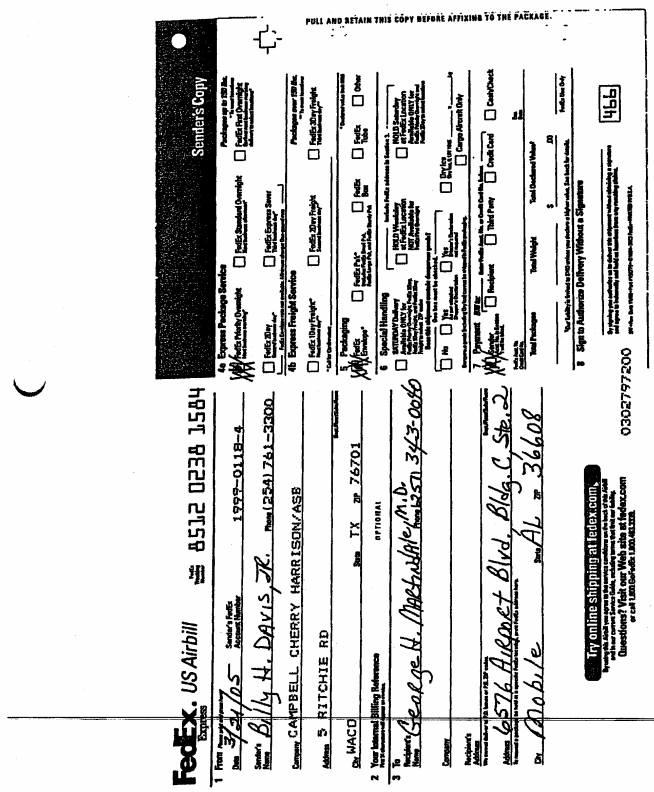
7000 1530 0003 0684 6120

Postage $
Certified Fee XXX
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

3/21/05
Postmark Here

Sent To
George A. Martindale, M.D.
Street, Apt. No.; or PO Box No.
6576 Airport Blvd, Bldg C, Ste 2
City, State, ZIP+4
Mobile AL 36608

PS Form 3800, May 2000 See Reverse for Instructions


FedEx. US Airbill
Express
8512 0238 1584
Sender's Copy
PULL AND RETAIN THIS COPY BEFORE AFFIXING TO THE PACKAGE.
1 From
Date 3/4/05
Sender's Name Billy H. DAVIS, JR.
Phone (254) 761-3300
Company CAMPBELL CHERRY HARRISON/ASB
Address 5 RITCHIE RD
Dept/Floor HACD
City TX ZIP 76701
2 Your Internal Billing Reference
3 To
Recipient's Name George H. Mashburn, M.D.
Phone (251) 343-0060
Company
Recipient's Address 6576 Airport Blvd, Bldg C, Ste 2
City Mobile State AL ZIP 36608
4a Express Package Service
4b Express Freight Service
5 Packaging
6 Special Handling
7 Payment
8 Sign to Authorize Delivery Without a Signature
466
Try online shipping at fedex.com.
Questions? Visit our Web site at fedex.com or call 1.800.GO.FEDEX (1.800.463.3339).
0302797200

GEORGE H. MARTINDALE, M.D.
6576 Airport Boulevard, Building C-2
Mobile, Alabama 36608

3/25/2005

Tab 6

VIA FACSIMILE – 254/761-3301

Billy H. Davis Jr., Esq.
Campbell Cherry Harris Davis and Dove
P. O. Drawer 21387
Waco, TX 76702-1387

Dear Mr. Davis:

I received your letter of March 21, 2005. I am pleased that you have sought to communicate with me, something that did not occur in the silicosis suit. My testimony concerning an "asbestosis diagnosis" would be much the same as my deposition testimony regarding your silicosis claims. The background for and scope of my providing B-reader services at the request of N&M, Inc. was discussed in that deposition, and your firm should have been made aware of that when you obtained my reports from N&M, Inc. However, since you have written, I will again explain.

In 2001 and 2002 (one year), I was hired by N&M, Inc., an industrial testing company, to review x-rays of workers who I was told had been clinically diagnosed as having either asbestosis or silicosis. I was asked to review the x-rays and state whether my "read" was consistent with the diagnosis made by the examining physician, Dr. Harron. I was told that Dr. Harron was a specialist in the field and that he had performed a medical and occupational history, physical examination, pulmonary function test, and chest x-ray on each patient, and that each case I would be asked to review involved a positive diagnosis by him. With each x-ray, I was provided an abbreviated occupational exposure history and physical exam. It was explained to me that a B-reader was needed to validate the findings of the examining physician. Apparently, other B-readers were told the same thing. I was never hired by or consulted with any attorney. I never participated in any on-site screening or testing.

A portion of my "reads" were reported as "negative," but most were consistent with the diagnosis. I was not made aware that any individual had also been diagnosed with other similar lung diseases, i.e., both asbestosis and silicosis. Do you know why that important factor was not provided to me by the examining physician and/or the testing company? If so, please explain so I will understand going forward.

During the first few months, my dictated reports contained my impressions in my own words stating that the x-ray read was consistent with the diagnosed disease. Later, the testing company asked me to use standard language for the positive reports. At the time, I did not appreciate that the standard wording may have had greater legal significance than I intended to convey. The

report you sent me (I retained no copies) states that "the diagnosis of asbestosis is established." That meant to me that I had confirmed the diagnosis made by the examining physician. Perhaps the positive reports should have said that my review "supported or confirmed the diagnosis." I did not diagnose the disease upon review of the chest x-ray. The clinical diagnosis was established by the examining physician who, I was told, did the clinical work necessary to diagnose a pulmonary disease of this sort. The testing company was well aware of this.

There has been a suggestion that my review of the x-rays was "cursory." To some extent (time-wise), that is correct because reviewing the film and the examining physician's assessment is all I did. When a B-reader reviews x-rays, it does not take a great deal of time. In taking the federal exam to become a certified B-reader, we read 125 x-rays in a 6-hour period, or 21 per hour. Experienced B-readers may be more proficient.

I never discussed my work with any attorneys (Plaintiff or Defendant) prior to October 2004. It was never my expectation that I would be identified as the "diagnosing physician" in lawsuits. In October 2004, I received a subpoena for my records from a defense attorney. I informed him that all records had been returned to the testing company. A few weeks later, he asked to take my deposition saying it should not take over an hour or so. I was soon contacted by you. You said you wanted to retain me as an expert witness before the deposition. I declined. During this conversation, I learned that you had cited me as the diagnosing physician in certain silicosis cases. I told you that I personally had made no diagnoses, that I had not examined any of the patients, and that I had only determined whether the readings were consistent with the disease previously diagnosed. Your response was "I certainly would hate to hear you say that at your deposition." I did so testify because it was the truth. I never "retracted" or "withdrew" my determinations; I just put them into a proper and accurate context.

Please do not cite me as the "diagnosing physician" in your asbestosis cases. You may cite me as reading the x-rays and confirming consistency (or not) with the disease diagnosed by the examining physician.

Very truly yours,

GEORGE H. MARTINDALE, M.D.

GM/mj

304111

RAY A. HARRON, M.D.
Diplomate American Board of Radiology
Diplomate American Board of Nuclear Medicine

2437 Bay Area Blvd. #47
Houston, TX 77058
(409) 933-1264

7 North Flamingo
La Marque, TX 7568
(409) 789-1319

SILICA

Tab 7

RE: [redacted]
SSN: [redacted]
DOB: [redacted]

I certify that on 09/04/03, I examined the above client in Columbus, MS, and reviewed a reading of the chest x-ray dated 09/04/03.

The work history provided to me indicates that Mr. [redacted] had an occupational exposure to silica from 1964 to 1979, while working at McWayne Cast Iron Pipe in Birmingham, AL as a grinding and melting department worker. The chest x-ray reveals an enlarged heart, for which he was advised to see a doctor. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are no abnormal breath sounds. The client denies having cancer. The client denies having tuberculosis. The client denies having a connective tissue disease. This individual reports smoking one and one-half pack of cigarettes per day for one year. Mr. [redacted] was advised to stop smoking for his health and the health of those with whom he lives. The reading of the chest x-ray reveals bilateral interstitial fibrosis consistent with silicosis.

On the basis of this individual's history of occupational exposure to silica and my physical examination of this individual and my B-reading of his chest x-ray, within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incident of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue disease such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by a physician for possible early detection and treatment of these processes.

Pulmonary Function: See attached.

Ray A. Harron, M.D.

Ray A. Harron, M.D.

RAH/mdh

CAMPBELL~CHERRY~HARRISON~DAVIS~DOVE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

BILLY H. DAVIS, JR.
bhdavis@TheTrialLawyers.com

5 Ritchie Road
Waco, Texas 76712
P. O. Drawer 21387
Waco, Texas 76702-1387
(254) 761-3300
Fax (254) 761-3301
www.TheTrialLawyers.com

June 1, 2004

Via fed ex 304.622.3900

Ray A. Harron, M.D.
901 West Main Street
Bridgeport, WV 26330

Dear Dr. Harron:

Per our phone conversation of today, I am enclosing the list of 427 silica clients who need the diagnosing paragraph to include that it is in part based on your physical examination of the individual. The list provides you the name of the client, ssn, and date of diagnosis.

I am also enclosing a copy of my May 21, 2004 letter to Heath Mason that addresses these clients and a few other items that I believe Heath is working on. The letter further explains the deadlines for obtaining these letters.

Thank you for your cooperation on getting these issues addressed. Please contact me or Kathy Atkins in our office if you have any questions or need any additional information.

Sincerely,

Billy H. Davis, Jr.

CAMPBELL~CHERRY~HARRISON~DAVIS~DOVE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

P. O. Drawer 21387
Waco, Texas 76702-1387
5 Ritchie Road
Waco, Texas 76712
(254) 761-3300
Fax (254) 761-3301

BILLY H. DAVIS, JR.
bhdavis@TheTrialLawyers.com

May 21, 2004

Via fax 228.474.7703
And email

Mr. Heath Mason
N&M, Inc.
2810 Andrew Ave.
Pascagoula, MS 39567

Dear Heath:

This letter is pursuant to our phone conversation earlier today between you, Maurice and me regarding some outstanding issues on silica medicals and asbestos medicals. All of these issues have been raised before, but have not yet been resolved. As I mentioned to you, if the silica medicals are not cleared up by June 17, 2004, the Silica MDL Judge has indicated that she may dismiss their cases, so it is urgent that those be immediately addressed and resolved.

The Silica issues are as follows:

1. We have no physical exam from Dr. Ray Harron on the following 7 clients:

Name	SSN	Date of X-Ray
[redacted]	[redacted]	4/19/02
		4/15/02
		4/16/02
		4/16/02
		4/16/02
		4/19/02
		4/19/02

2. We also need a diagnosis letter from Dr. Martindale for [redacted] listed above.
3. For [redacted] ssn [redacted] date of testing 5/15/02, Dr. Martindale's states his reading is on 6/4/02, yet the ILO shows 6/9/02, so this needs to be corrected.

4. I am sending you an attachment containing a list of 427 silica clients. The attachment includes the name of client, ssn, date of diagnosis, name of doctor, and a "notes" column which describes what is needed. For all of these 427 clients, we need the diagnosing letter to indicate in the paragraph diagnosing silicosis that it was based in part on the physical exam, as that has been declared important by the Court. I am faxing you a copy of the letter with the location where we believe the additional information should be included. There are 5 clients on the attachment that have additional problems that need to be corrected which are as follows:

   a. [redacted] needs to have his middle initial corrected from K to R on Dr. Harron's reports.
   b. For each of [redacted] and [redacted] the diagnosing letters with the same language needs to be from Dr. Andrew Harron, and we do not have x-rays for these 3 clients.
   c. For [redacted] Item 1C was not marked on the ILO, and it has been previously returned to you for that correction.

For the asbestos issues, I am sending you an attachment containing a list of 623 asbestos clients. The attachment includes the name of the client, ssn, and date information was previously sent to you on these clients, and a "notes" column indicating the information needed. For each of these clients, we need an exam and causation letter from Dr. Andrew Harron. We have a letter from Dr. Ray Harron, but it is based on the exam of Dr. Andrew Harron. The letter needs to be from Dr. Andrew Harron and in the form previously provided by him, but with the inclusion of the reference to a physical exam in the paragraph diagnosing asbestosis. This is similar to the silica issue. I am faxing to you a copy of Dr. Andrew Harron's letter with the additional language inserted on it. These are the letters that we have agreed to pay and have been paying $65 for. The lack of these letters are keeping these clients from receiving some of their settlements.

As mentioned above, we need all of the silica issues resolved no later than June 17, 2004. The asbestos issues need to be resolved as soon as possible after that.

Heath, we appreciate your commitment to getting these issues resolved. Our clients' claims are contingent upon this, so it is very important to both of us that we do all that is necessary to preserve and protect their claims.

As we discussed, please call me on May 25, 2004 once you have reviewed this so we can determine if you have any questions.

Sincerely,

Billy H. Davis, Jr.

08/13/97

[redacted]

SS#
DOB: [redacted]

Records dated 08/13/97 and physical exam report that this person has or is:

DATES OF EXPOSURE: 1963 to 1992 McWayne Ind. M & H Valve Anniston, AL

CHIEF COMPLAINT: A white male 60 years of age, 76 inches tall, weighing 247 lbs., BP:190/100 , Pulse:62.

PRESENT ILLNESS: He has a cough. He takes Lopid, Prilosec, Tenex, Procardia, Elavil , Indocin and Cytotic.

PHYSICAL EXAM: Reveals no pertinent findings. He was informed of the elevated blood pressure and told to have it checked again.

OCCUPATIONAL EXPOSURE HISTORY: He states that he worked for the companies listed in Dates of Exposure. Job type: wood working shop, foundry, super., core rm. super.

PAST HISTORY: No history of diabetes, tuberculosis or cancer. Appendectomy reported. Positive for hypertension.

FAMILY HISTORY: No history of hypertension, diabetes or tuberculosis. Mother positive for lung disease.

SOCIAL HISTORY: He is married. He smoked 1 pack per day for 20 years, quit 1977.

REVIEW OF SYSTEMS: No history of cancer chemotherapy, pulmonary toxic drugs or lung irradiation. Positive for rheumatoid arthritis, ankylosing spondylitis.

PULMONARY FUNCTION TESTS: Pulmonary function test performed, results are attached.

CHEST X-RAY: see attached sheets.

On the basis of the work history and my B-reading of the chest x-ray , I can make the diagnosis of asbestosis, within a reasonable degree of medical certainty.

The *diagnosis* " Pulmonary asbestosis " means that this individual is suffering from an abnormality of the parenchymal lung tissue as a result of exposure to asbestos products. Because of the increased incidence of bronchogenic carcinoma and mesothelioma and other malignancies in asbestos exposed persons careful follow up of this person is suggested.

Ray A. Harron, M.D.

Tab 8

RAY A. HARRON, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

P. O. BOX 400
BRIDGEPORT, WV 26330

NAME [redacted]

ADDRESS

CITY & STATE

DATE 8/13/97

UNIT NO. | PHYSICIAN | AGE | PHONE NUMBER | BIRTH DATE | POLICY NO.

RESPONSIBLE PARTY | S.S. # | INSURANCE CO.

ADDRESS | STREET-ROUTE-BOX | TOWN-CITY-STATE | ZIP | CONTRACT OF

PATIENT HISTORY

EXAMINATION

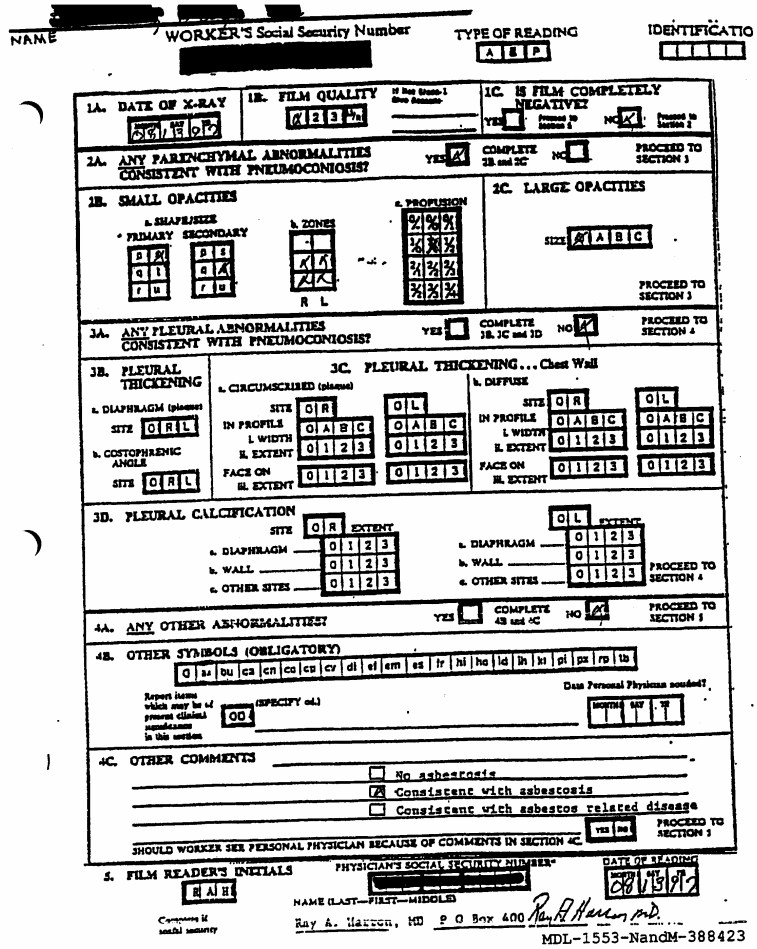
CHEST DATED 8/13/97: There are primary s, secondary t sized opacities involving four lower lung fields, profusion 1/1.

IMPRESSION:
1. Consistent with asbestosis.

RAH/kc

RAY A. HARRON, M.D.
DIPLOMATE OF THE AMERICAN
BOARD OF RADIOLOGY

Form No. 102



NAME [redacted] WORKER'S Social Security Number [redacted] TYPE OF READING A B P IDENTIFICATIO

1A. DATE OF X-RAY 05/15/79 | 1B. FILM QUALITY 1 2 3 4 | 1C. IS FILM COMPLETELY NEGATIVE? YES NO X

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES X COMPLETE 2B and 2C NO PROCEED TO SECTION 3

2B. SMALL OPACITIES
a. SHAPE/SIZE — PRIMARY: p X, q t, r u; SECONDARY: p s, q X, r u
b. ZONES: R X, L X
c. PROFUSION: 0/- 0/0 0/1 1/0 1/1 1/2 2/1 2/2 2/3 3/2 3/3 3/4

2C. LARGE OPACITIES
SIZE A X B C
PROCEED TO SECTION 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES COMPLETE 3B, 3C and 3D NO X PROCEED TO SECTION 4

3B. PLEURAL THICKENING
a. DIAPHRAGM (placard) SITE O R L
b. COSTOPHRENIC ANGLE SITE O R L

3C. PLEURAL THICKENING ... Chest Wall
a. CIRCUMSCRIBED (placard)
SITE O R / O L
IN PROFILE O A B C / O A B C
I. WIDTH 0 1 2 3 / 0 1 2 3
II. EXTENT 0 1 2 3 / 0 1 2 3
FACE ON III. EXTENT 0 1 2 3 / 0 1 2 3
b. DIFFUSE
SITE O R / O L
IN PROFILE O A B C / O A B C
I. WIDTH 0 1 2 3 / 0 1 2 3
II. EXTENT 0 1 2 3 / 0 1 2 3
FACE ON III. EXTENT 0 1 2 3 / 0 1 2 3

3D. PLEURAL CALCIFICATION
SITE O R EXTENT / O L EXTENT
a. DIAPHRAGM 0 1 2 3 / 0 1 2 3
b. WALL 0 1 2 3 / 0 1 2 3
c. OTHER SITES 0 1 2 3 / 0 1 2 3
PROCEED TO SECTION 4

4A. ANY OTHER ABNORMALITIES? YES COMPLETE 4B and 4C NO X PROCEED TO SECTION 5

4B. OTHER SYMBOLS (OBLIGATORY)
0 ax bu ca cn co cp cv di ef em es fr hi ho id in kl pi px ro th
Report items which may be of present clinical significance in this section: 00 (SPECIFY etc.)
Date Personal Physician consulted? MONTH DAY YR

4C. OTHER COMMENTS
☐ No asbestosis
☒ Consistent with asbestosis
☐ Consistent with asbestos related disease
SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C? YES NO PROCEED TO SECTION 5

5. FILM READER'S INITIALS RAH
PHYSICIAN'S SOCIAL SECURITY NUMBER* [redacted]
DATE OF READING MONTH 08 DAY 13 YR 79
NAME (LAST—FIRST—MIDDLE)
Ray A. Harron, MD P O Box 400 Ray A Harron MD

MDL-1553-NandM-388423

LEO J. CASTIGLIONI, M.D.
Diplomate American Board of
Internal Medicine

6813 Golf Crest
Galveston, TX 77551

409-744-6690

Re: [redacted]

I am a board certified internist and I have examined records on the above named individual.

On the basis of the recorded occupational history and the B-reading of the chest x-ray I think , within a reasonable degree of medical certainty, this individual has asbestosis.

Sincerely,

Leo J. Castiglioni, M.D.

01/09/02

[redacted]

SS# [redacted]
DOB: [redacted]

Records dated 01/09/02 and physical exam report that this person has or is:

DATES OF EXPOSURE:	1962 to 1992	M & H Valve	Anniston, AL
	1960 to 1962	South Wire Co.	Carrolton, GA
	1956 to 1960	US Navy	

Tab 9

CHIEF COMPLAINT: A white male 64 years of age, 76 inches tall, weighing 280 lbs., complains of shortness of breath with walking or on one flight of stairs.

PRESENT ILLNESS: He has a cough. He takes blood pressure, diabetes, arthritis and sleep medications and uses an inhaler.

PHYSICAL EXAM: Negative for clubbing or cyanosis. Negative for rales or crackles. Negative for ankle edema. He was informed of the possible cancer on the chest x-ray and told to see his doctor.

OCCUPATIONAL EXPOSURE HISTORY: He states that he worked for the companies listed in Dates of Exposure during which time he had occupational exposure to silica. Job type: grinder, molder, supervisor

PAST HISTORY: No history of tuberculosis. Positive for skin cancer.

SOCIAL HISTORY: He is married. He smoked 1 pack per day for 20 years, quit 1980.

REVIEW OF SYSTEMS: No history of connective tissue disease, cancer chemotherapy or lung irradiation.

PULMONARY FUNCTION TESTS: Pulmonary function test performed, results are attached.

CHEST X-RAY: see attached sheets.

Ray A. Harron, M.D.

Ray A. Harron, M.D.

TYPE OF READING: A M P | IDENTIFICATI

WORKER'S Social Security Number: [redacted]

1A. DATE OF X-RAY: 01-09-02

1B. FILM QUALITY: 1 X 2 3 U/R — If Not Grade 1 Give Reason:

1C. IS FILM COMPLETELY NEGATIVE? YES [ ] Proceed to Section 5 NO [X] Proceed to Section 2

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] COMPLETE 2B and 2C NO [ ] PROCEED TO SECTION 3

2B. SMALL OPACITIES

a. SHAPE/SIZE

PRIMARY		SECONDARY	
p	[X]	[X]	s
q	t	q	t
r	u	r	u

b. ZONES

R	L
[X]	[X]
[X]	[X]
[X]	[X]

c. PROFUSION

0/-	0/0	0/1
[X]	1/1	1/2
2/1	2/2	2/3
3/2	3/3	3/4

2C. LARGE OPACITIES SIZE A [X] B C

PROCEED TO SECTION 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [ ] COMPLETE 3B, 3C and 3D NO [X] PROCEED TO SECTION 4

3B. PLEURAL THICKENING

a. DIAPHRAGM (plaque) SITE O R L

b. COSTOPHRENIC ANGLE SITE O R L

a. CIRCUMSCRIBED (plaque)

	SITE O R	SITE O L
i. WIDTH IN PROFILE	O A B C	O A B C
ii. EXTENT	0 1 2 3	0 1 2 3
iii. EXTENT FACE ON	0 1 2 3	0 1 2 3

b. DIFFUSE

	SITE O R	SITE O L
i. WIDTH IN PROFILE	O A B C	O A B
ii. EXTENT	0 1 2 3	0 1 2
iii. EXTENT FACE ON	0 1 2 3	0 1 2

3C. PLEURAL THICKENING...Chest Wall

3D. PLEURAL CALCIFICATION

	SITE O R — EXTENT	SITE O L — EXTENT
a. DIAPHRAGM.....	0 1 2 3	0 1 2 3
b. WALL.....	0 1 2 3	0 1 2 3
c. OTHER SITES.....	0 1 2 3	0 1 2 3

PROCEED TO SECTION 4

4A. ANY OTHER ABNORMALITIES? YES [X] COMPLETE 4B and 4C NO [ ] PROCEED TO SECTION 5

4B. OTHER SYMBOLS (OBLIGATORY)

0	ax	bn	[X]	cn	cb	cp	cv	di	ef	em	es	fr	hi	ho	id	ih	kl	pi	px	rp	tb

Report items which may be of present clinical significance in this section: OD (Specify od.) Left Lobe Lo Ca

DATE CLAIMANT NOTIFIED VERBALLY: 1 [ ] 9 0 2

4C. OTHER COMMENTS?

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C. YES [X] NO [ ] PROCEED TO SECTION 5

5. FILM READER'S INITIALS: R A H

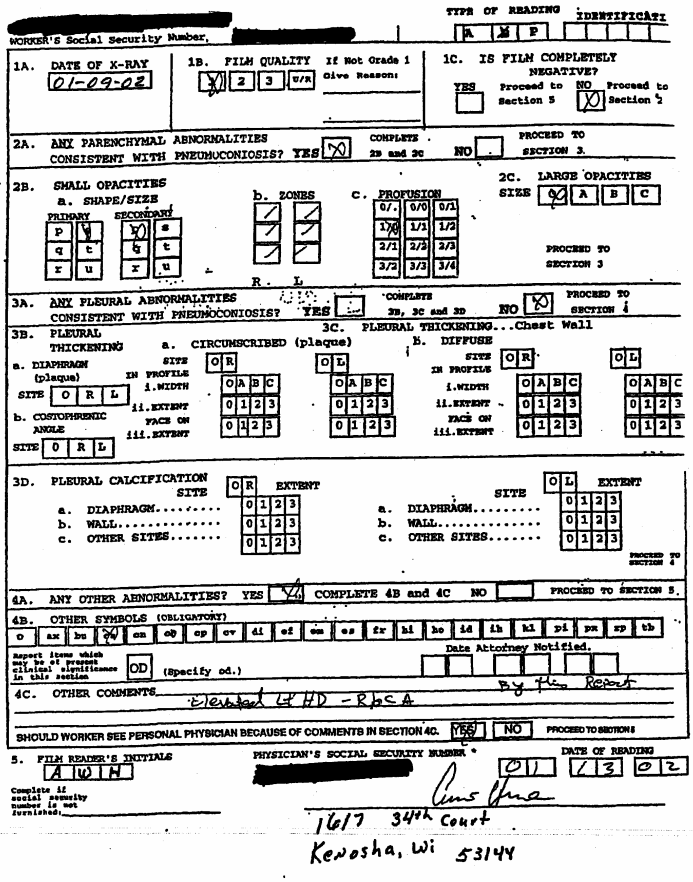
Complete if social security number is not furnished:

PHYSICIAN'S SOCIAL SECURITY NUMBER * [redacted]

DATE OF READING: 0 1 | 0 9 | 0 2

Ray A. Harron MD

Harron, Ray A., M.D.
901 West Main Street, Bridgeport, WV 26330



TYPE OF READING: A M P — IDENTIFICATION

WORKER'S Social Security Number: [redacted]

1A. DATE OF X-RAY: 01-09-02

1B. FILM QUALITY: 1 [X] 2 3 U/R — If Not Grade 1 Give Reason:

1C. IS FILM COMPLETELY NEGATIVE? YES — Proceed to Section 5; NO [X] — Proceed to Section 2

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] — COMPLETE 2B and 2C; NO — PROCEED TO SECTION 3.

2B. SMALL OPACITIES
a. SHAPE/SIZE — PRIMARY: p [X] q t r u; SECONDARY: s [X] t u
b. ZONES — R: [✓] [✓] [✓]; L: [✓] [✓] [✓]
c. PROFUSION: 0/- 0/0 0/1; 1/0 1/1 1/2; 2/1 2/2 2/3; 3/2 3/3 3/4

2C. LARGE OPACITIES — SIZE [X] A B C — PROCEED TO SECTION 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES — COMPLETE 3B, 3C and 3D; NO [X] — PROCEED TO SECTION 4

3B. PLEURAL THICKENING
a. DIAPHRAGM (plaque) SITE O R L
b. COSTOPHRENIC ANGLE SITE O R L
a. CIRCUMSCRIBED (plaque) — SITE O R / O L; IN PROFILE i. WIDTH O A B C; ii. EXTENT 0 1 2 3; FACE ON iii. EXTENT 0 1 2 3
b. DIFFUSE — SITE O R / O L; IN PROFILE i. WIDTH O A B C; ii. EXTENT 0 1 2 3; FACE ON iii. EXTENT 0 1 2 3

3C. PLEURAL THICKENING...Chest Wall

3D. PLEURAL CALCIFICATION

SITE	O R EXTENT	O L EXTENT
a. DIAPHRAGM	0 1 2 3	0 1 2 3
b. WALL	0 1 2 3	0 1 2 3
c. OTHER SITES	0 1 2 3	0 1 2 3

PROCEED TO SECTION 4

4A. ANY OTHER ABNORMALITIES? YES [X] COMPLETE 4B and 4C NO — PROCEED TO SECTION 5.

4B. OTHER SYMBOLS (OBLIGATORY)
o ax bu [X] en ob op cv di ef em es fr hi ho id ih ki pi px ep vb

Report items which may be of present clinical significance in this section: OD (Specify od.)

Date Attorney Notified.

4C. OTHER COMMENTS: Elevated HHD - RbC A — By this Report

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C. YES [X] NO — PROCEED TO SECTION 5

5. FILM READER'S INITIALS: A W H

Complete if social security number is not furnished.

PHYSICIAN'S SOCIAL SECURITY NUMBER: [redacted]

DATE OF READING: 01 13 02

[redacted]
1617 34th Court
Kenosha, WI 53144

GEORGE H. MARTINDALE, M.D.
Certified - American Board of Radiology
Member American College of Radiology

65 Kingsway
Mobile, AL 36608

(334) 344-8255

DATE: 1-09-02

RE: [redacted] (SS# [redacted]

The medical records, work history, physical exam, and chest radiograph were reviewed.

CHEST:

There are increased parenchymal markings throughout both lungs consistent with ILO classification s/p, 0/1. The heart and mediastinum are unremarkable. The film is significantly underexposed.

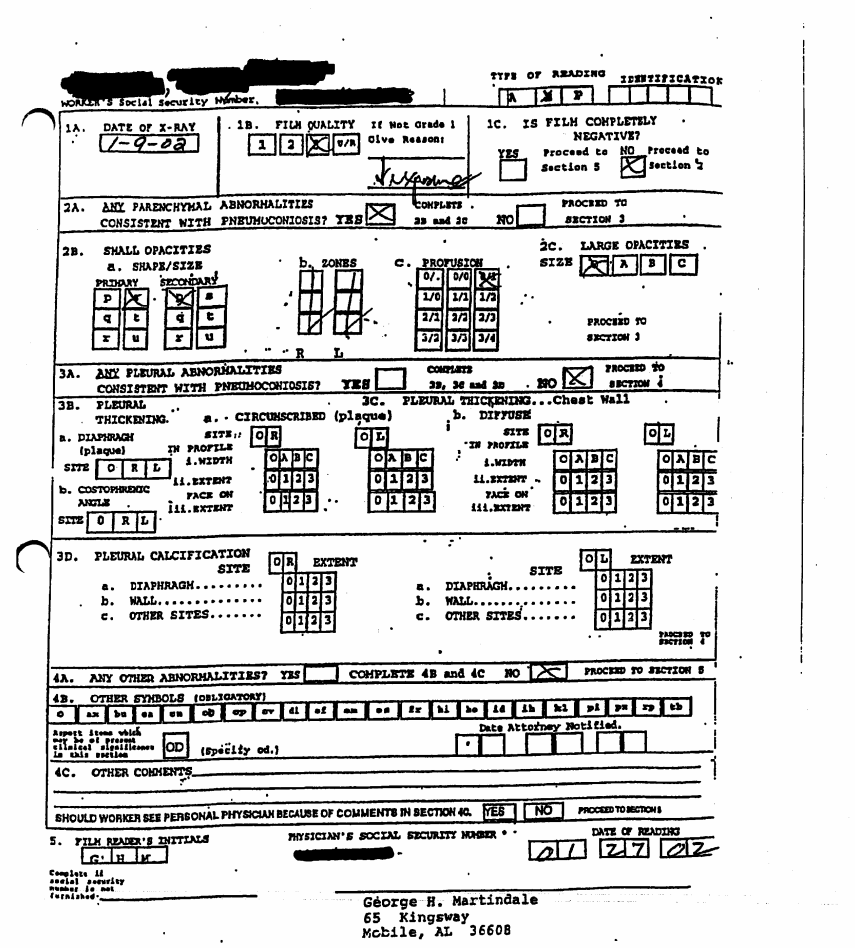
IMPRESSION:

1. ILO classification s/p, 0/1.
2. Underexposure of the film.

George H. Martindale, M.D.

GHM/mts

Date film read: 1-27-02



WORKER'S Social Security Number [redacted]

TYPE OF READING: A [X] B — IDENTIFICATION

1A. DATE OF X-RAY: 1-9-02

1B. FILM QUALITY: 1 2 [X] U/R — If Not Grade 1 Give Reason:

1C. IS FILM COMPLETELY NEGATIVE? YES [ ] Proceed to Section 5 — NO [X] Proceed to Section 2

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] COMPLETE 2B and 2C — NO [ ] PROCEED TO SECTION 3

2B. SMALL OPACITIES
a. SHAPE/SIZE — PRIMARY: p [X], q, r; q, t, u — SECONDARY: p [X], q, r; s, t, u
b. ZONES — R, L
c. PROFUSION: 0/- [X], 0/0, 0/1, 1/0, 1/1, 1/2, 2/1, 2/2, 2/3, 3/2, 3/3, 3/4

2C. LARGE OPACITIES — SIZE [X] A B C — PROCEED TO SECTION 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [ ] COMPLETE 3B, 3C and 3D — NO [X] PROCEED TO SECTION 4

3B. PLEURAL THICKENING.
a. CIRCUMSCRIBED (plaque)
a. DIAPHRAGH (plaque) SITE: O R
IN PROFILE i.WIDTH: O A B C
ii.EXTENT: 0 1 2 3
FACE ON iii.EXTENT: 0 1 2 3
b. COSTOPHRENIC ANGLE SITE: O R L
b. DIFFUSE
SITE: O R / O L
IN PROFILE i.WIDTH: O A B C / O A B C
ii.EXTENT: 0 1 2 3 / 0 1 2 3
FACE ON iii.EXTENT: 0 1 2 3 / 0 1 2 3

3C. PLEURAL THICKENING...Chest Wall

3D. PLEURAL CALCIFICATION

SITE	O R EXTENT	O L EXTENT
a. DIAPHRAGH.....	0 1 2 3	0 1 2 3
b. WALL.....	0 1 2 3	0 1 2 3
c. OTHER SITES.....	0 1 2 3	0 1 2 3

PROCEED TO SECTION 4

4A. ANY OTHER ABNORMALITIES? YES [ ] COMPLETE 4B and 4C — NO [X] PROCEED TO SECTION 5

4B. OTHER SYMBOLS (OBLIGATORY)
0 ax bu ca cn cb cp cv di ef em es fr hl ho id ih hi pi ps rp sh
Report items which may be of present clinical significance in this section: OD (Specify od.)
Date Attorney Notified.

4C. OTHER COMMENTS

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C. YES [ ] NO [ ] PROCEED TO SECTION 5

5. FILM READER'S INITIALS: G H M
PHYSICIAN'S SOCIAL SECURITY NUMBER [redacted]
DATE OF READING: 01 27 02

Complete if social security number is not furnished.

George H. Martindale
65 Kingsway
Mobile, AL 36608

W. Allen Oaks, M.D.
NIOSH Certified B-Reader
111 Pinebrook Drive, East
Mobile, Alabama 36608

X-RAY EVALUATION

February 1, 2002

Re: [redacted] SSN: [redacted]

Chest radiograph(s) dated 01/09/02 are examined for the presence of, and classification of pneumoconiosis according to the ILO (1980) classification.

Film quality is grade 1. Inspection of the lung parenchyma reveals interstitial changes in all six lung zones consisting of small rounded opacities of size and shape s/p, profusion 1/0.

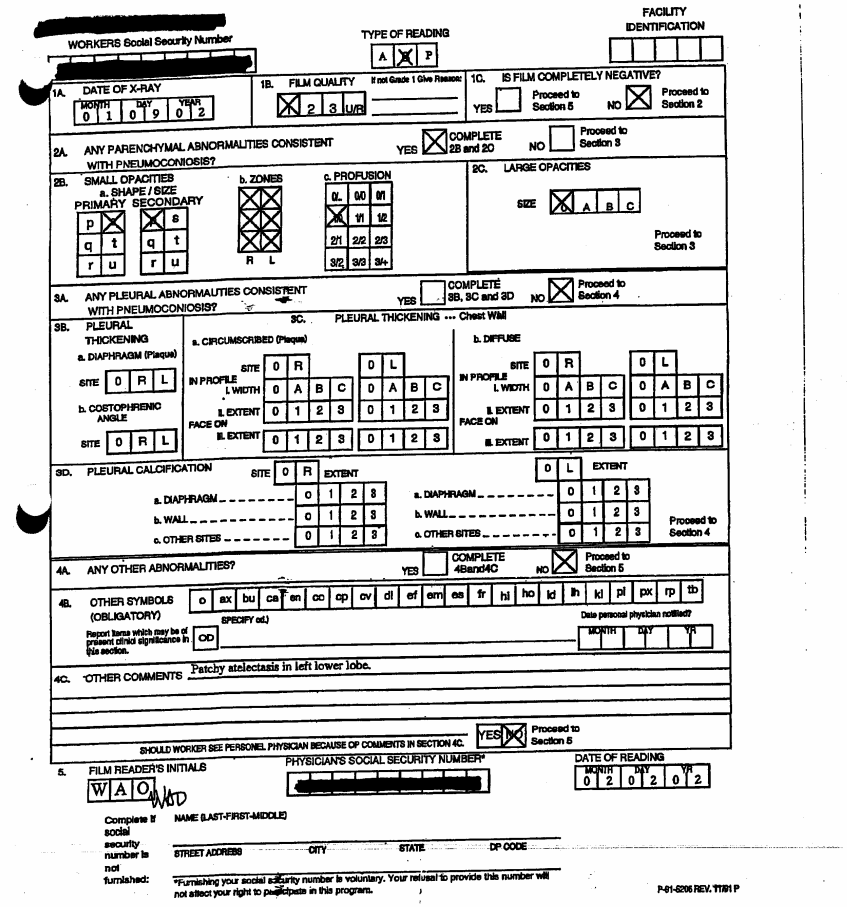
There is no pleural plaque or pleural calcification. No parenchymal nodule, or mass is seen. Patchy atelectasis is seen in the left lower lobe. The heart is of normal size and the mediastinal structures are unremarkable.

CONCLUSION: On the basis of the medical history, which is inclusive of a significant occupational exposure to silica dust, physical exam and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty.

W. Allen Oaks, M.D.

W. Allen Oaks, M.D.

020102.nm[acb/o]



WORKERS Social Security Number [redacted]

TYPE OF READING: A [X] P

FACILITY IDENTIFICATION

1A. DATE OF X-RAY: MONTH 01 DAY 09 YEAR 02

1B. FILM QUALITY: [X] 2 3 U/R — If not Grade 1 Give Reason:

1C. IS FILM COMPLETELY NEGATIVE? YES [ ] Proceed to Section 5 NO [X] Proceed to Section 2

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] COMPLETE 2B and 2C NO [ ] Proceed to Section 3

2B. SMALL OPACITIES
a. SHAPE / SIZE — PRIMARY: p [X] q t r u; SECONDARY: [X] s q t r u
b. ZONES: [X] R L
c. PROFUSION: 0/- 0/0 0/1 [X] 1/0 1/1 1/2 2/1 2/2 2/3 3/2 3/3 3/+

2C. LARGE OPACITIES: SIZE [X] A B C — Proceed to Section 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [ ] COMPLETE 3B, 3C and 3D NO [X] Proceed to Section 4

3B. PLEURAL THICKENING
a. DIAPHRAGM (Plaque) SITE 0 R L
b. COSTOPHRENIC ANGLE SITE 0 R L

3C. PLEURAL THICKENING — Chest Wall

a. CIRCUMSCRIBED (Plaque)

	SITE R	SITE L
IN PROFILE I. WIDTH	0 A B C	0 A B C
II. EXTENT	0 1 2 3	0 1 2 3
FACE ON III. EXTENT	0 1 2 3	0 1 2 3

b. DIFFUSE

	SITE R	SITE L
IN PROFILE I. WIDTH	0 A B C	0 A B C
II. EXTENT	0 1 2 3	0 1 2 3
FACE ON III. EXTENT	0 1 2 3	0 1 2 3

3D. PLEURAL CALCIFICATION

	SITE 0 R EXTENT	SITE 0 L EXTENT
a. DIAPHRAGM	0 1 2 3	0 1 2 3
b. WALL	0 1 2 3	0 1 2 3
c. OTHER SITES	0 1 2 3	0 1 2 3

Proceed to Section 4

4A. ANY OTHER ABNORMALITIES? YES [ ] COMPLETE 4B and 4C NO [X] Proceed to Section 5

4B. OTHER SYMBOLS (OBLIGATORY): o ax bu ca en cc cp cv di ef em es fr hi ho id ih ki pi px rp tb
(SPECIFY ot.)
Report items which may be of present clinical significance in this section. OD [redacted]
Date personal physician notified? MONTH DAY YR

4C. OTHER COMMENTS: Patchy atelectasis in left lower lobe.

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C. YES [X] Proceed to Section 5

5. FILM READER'S INITIALS: WAO WAD

PHYSICIAN'S SOCIAL SECURITY NUMBER* [redacted]

DATE OF READING: MONTH 02 DAY 02 YR 02

Complete if social security number is not furnished: NAME (LAST-FIRST-MIDDLE)

STREET ADDRESS CITY STATE ZIP CODE

*Furnishing your social security number is voluntary. Your refusal to provide this number will not affect your right to participate in this program.

P-61-6206 REV. 11/81 P

QUINN, LAMINACK & PIRTLE

Richard N. Laminack
Thomas W. Pirtle
Dana A. Morris
Traci L. Melter
Arturo J. Gonzales
Joseph V. Gibson, IV
Anna Dess Farmer

Attorneys at Law

March 5, 2003

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Tab 10

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear

Enclosed is a copy of your chest x-ray screening results and exam report. **This is a preliminary screening that was done for purposes of evaluating your legal claims only.**

This preliminary screening was requested by your attorneys to better assess your legal case. As any person with a medical concern should do, if you have any questions or concerns regarding this screening information, **consult your personal doctor**.

We want to thank you for your cooperation in our Silicosis screening procedure. Please understand that this is a law firm composed of attorneys, not doctors. This chest x-ray screening does not represent any medical advice. It was done strictly for legal (not medical) purposes. For any medical diagnosis, advice or follow-up, *you should see your doctor*. For any and all medical questions and care, *you should see your doctor*. If you do not have a physician, it is your personal responsibility to seek out any medical care you may need or desire. This office will not be responsible for your ongoing health care, and we encourage you to take the ordinary steps any reasonable individual would to ensure you are receiving the proper medical attention.

This letter, like all letters sent to you from this office, is privileged and not to be shared with any other person.

This does not apply to your chest x-ray screening results that you may share with your doctor.

Be assured that O'Quinn, Laminack & Pirtle will continue to thoroughly investigate your legal claims with respect to any potential silicosis damage. As this litigation develops, additional information may be required by this office or the court. We will contact you as these requirements are determined.

Sincerely,

O'QUINN, LAMINACK & PIRTLE

Richard N. Laminack

RNL/lp
Enclosure

OLPPB-02808

Tab 11

Ray A. Harron, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

P.O. Box 400
Bridgeport, WV 26330

Wednesday, June 20, 2002

Foster & Harsema
440 Louisiana Ave.
Houston, TX 77002

POC 121726

RE: [redacted]

DOB: [redacted]

I certify that on 04/12/2002 I examined the above client in Hattiesburg, MS and reviewed a B-reading of the chest x-ray dated 08/07/2001.

The client's work history reveals an occupational exposure to various asbestos containing products from 1957-1994, while working for the U.S. Army as a Laborer. This individual complains of shortness of breath. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are abnormal breath sounds, described as: expiratory wheezes in both bases. The client has cancer and the type is cer. The client denies having tuberculosis. The client denies having connective tissue disease. The B-reading of this client's chest x-ray reveals findings consistent with asbestosis.

On the basis of this client's history of occupational exposure to asbestos and the B-reading of the client's chest x-ray, within a reasonable degree of medical certainty, [redacted] has asbestosis.

Since asbestos exposure leads to increased incidence of lung cancer, upper respiratory tract cancer, stomach cancer, colon cancer, upper GI tract cancer, lymphoma, pleural and peritoneal mesotheliomas, kidney cancer, pancreatic cancer as well as other types of cancer, this person should be examined frequently for possible early detection and treatment of these cancers.

Sincerely,

Ray A. Harron, M.D.

Ray A. Harron, M.D.

RAY A. HARRON, M.D.
Diplomate American Board of Radiology
Diplomate American Board of Nuclear Medicine

2437 Bay Area Blvd. #47
Houston, TX 77058
(409) 933-1264

7 North Flamingo
La Marque, TX 77568
(409) 789-1319

O'Quinn, Laminack & Pirtle
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]
SSN:
DOB: [redacted]

At your request, I have reviewed the occupational history, exposure and medical history as provided to me and a B-reading of a chest x-ray dated 08/07/01 on Mr. [redacted].

His work history reveals an occupational exposure to silica while he was working as a painter for Ingalls from 1965-1968. My B-reading of the chest x-ray dated 07/27/01, reveals bilateral interstitial fibrosis consistent with silicosis.

On the basis of this individual's history of occupational exposure to silica and my reading of his chest x-ray, I feel within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incident of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue diseases such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by a physician for possible early detection and treatment of these processes.

Sincerely,

Ray A. Harron, M.D.

Ray A. Harron, M.D.

RAH/ajg

Tab 12

Ray A. Harron, M.D.
DIPLOMATE AMERICAN BOARD OF RADIOLOGY
DIPLOMATE AMERICAN BOARD OF NUCLEAR MEDICINE

P.O. Box 400
Bridgeport, WV 26330

Wednesday, June 26, 2002

Foster & Herssens
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

I certify that on 5/17/2002 I examined the above client in Pascagoula, MS and reviewed a B-reading of the chest x-ray dated 7/27/2001.

The client's work history reveals an occupational exposure to various asbestos containing products from 1974-1975, one of the job sites was Avondale Shipyard in Avondale, LA and one of the trades was Laborer. This individual complains of shortness of breath. My physical exam reveals there is no clubbing or cyanosis of the fingers. There is no ankle edema. There are no abnormal breath sounds. The client denies having cancer. The client denies having tuberculosis. The client denies having connective tissue disease. The B-reading of this client's chest x-ray reveals findings consistent with asbestosis.

On the basis of this client's history of occupational exposure to asbestos and the B-reading of the client's chest x-ray, within a reasonable degree of medical certainty, [redacted] has asbestosis.

Since asbestos exposure leads to increased incidence of lung cancer, upper respiratory tract cancer, stomach cancer, colon cancer, upper GI tract cancer, lymphoma, pleural and peritoneal mesothelioma, kidney cancer, pancreatic cancer as well as other types of cancer, this person should be examined frequently for possible early detection and treatment of these cancers.

Sincerely,

Ray A. Harron, M.D.

Ray A. Harron, M.D.

RAY A. HARRON, M.D.
Diplomate American Board of Radiology
Diplomate American Board of Nuclear Medicine

2437 Bay Area Blvd. #47
Houston, TX 77058
(409) 933-1264

7 North Flamingo
La Marque, TX 77568
(409) 789-1319

O'Quinn, Laminack & Pirtle
440 Louisiana Avenue
Houston, TX 77002

RE: [redacted]

DOB: [redacted]

At your request, I have reviewed the occupational history, exposure and medical history as provided to me and a B-reading of a chest x-ray dated 07-27-01 on Mr. [redacted].

The work history reveals an occupational exposure to silica while Mr. [redacted] was working as a sandblaster and painter at Environmental Construction Company, Avondale, Mid-South Offshore, and other job sites from 1973-2002. My B-reading of the chest x-ray dated 07-27-02, reveals bilateral interstitial fibrosis consistent with silicosis.

On the basis of this individual's history of occupational exposure to silica and my reading of his chest x-ray, I feel within a reasonable degree of medical certainty, [redacted] has silicosis.

Since silica exposure is associated with an increased incident of cor pulmonale, progressive pulmonary fibrosis, spontaneous pneumothorax, autoimmune connective tissue diseases such as scleroderma, rheumatoid arthritis, systemic lupus erythematosus and others, tuberculosis, renal complications and lung cancer, this person should be examined frequently by a physician for possible early detection and treatment of these processes.

Sincerely,

Ray A. Harron, M.D.

RAH/ajg

Tab 13

Comprehensive Business Report
Date: 06/20/06

Subject Information:
Company Name: FOSTER HARSSEMA , PLLC
Address: 440 LOUISIANA ST, HOUSTON TX 77002-4206
Phone: (713) 236-2900
FEIN:

Company Information:
Company Name: FOSTER & HARSSEMA, PLLC
Address: 440 LOUISIANA ST STE 2100, HOUSTON TX 77002-4206
Phone: (713) 236-2900
FEIN:

Name Variations:
[None Found]

Business Filings:

Bankruptcies:
[None Found]

Liens & Judgments:
[None Found]

Corporation Filings:
[None Found]

Business Registration:
[None Found]

UCC Filings for Business:
Filing Number: 20010850834
Filing Type: UCC STANDARD
Status: ACTIVE
Expiration Date: 11/27/2006

Event 1
Event: UCC STANDARD **Document Number:** 20010850834
Date Filed: 11/26/2001

Debtor Party(s):
Debtor: FOSTER & HARSSEMA, PLLC
Debtor Address: 440 LOUISIANA ST STE 1720, HOUSTON TX 77002-1638
Debtor Status:

Debtor: RYAN A. FOSTER
Debtor Address: 12831 DOVE BROOK CT, HOUSTON TX 77041-6811
Debtor Status:

Debtor: MICHAEL EDWARD HARSSEMA
Debtor Address: 3415 HAVENBROOK DR APT 101, KINGWOOD TX 77339-2868
Debtor Status:

Secured Party(s):
Secured: JOHN M. O'QUINN & ASSOCIATES, L.L.P.
Secured Address: 440 LOUISIANA ST STE 2300, HOUSTON TX 77002-4205
Secured Status:

Filing Number: 40073455593
Filing Type: UCC STANDARD
Status: ACTIVE
Expiration Date: 07/01/2009

Event 1
Event: UCC STANDARD Document Number: 40073455593
Date Filed: 07/01/2004

Debtor Party(s):
Debtor: FOSTER & HARSSEMA, PLLC
Debtor Address: 440 LOUISIANA ST STE 2100, HOUSTON TX 77002-4206
Debtor Status:

Secured Party(s):
Secured: IOS CAPITAL
Secured Address: 1738 BASS RD, MACON GA 31210-1043
Secured Status:

Associated Businesses:
[None Found]

Other Businesses at Address:
More than 50 businesses at this address, no businesses shown

Associated People:

Business Contacts:
[None Found]

Individuals at Address:
More than 50 individuals at this address, no individuals shown

Assets at Address:

Current Motor Vehicles:
[None Found]

Properties:
Current Ownership:
[None Found]

Previous Ownership:
[None Found]

Internet Domain Names Registered to Business:
[None Found]

Business Information from Dun & Bradstreet:

Business Name:	Foster & Harssema , Pllc	Duns Number:	033129953
Trade Name:			
Address:	440 LOUISIANA ST STE 2100, HOUSTON TX 77002-4206		
Phone:	(713) 236-2900		
Year Started:	2001		
Date of Incorporation:		Incorporation State:	
Annual Sales:	$510,000	Sales Revision Date:	12/16/2005
Employees Total:	7	Employees Here:	7
Net Worth:			

Comptroller of Public Accounts FORM 05-102 (Rev. 8-00/19) 3333

a T Code [X] 13196 Franchise [ ] 18196 Bank

b. 022182 10493 Do not write in the space above

TEXAS FRANCHISE TAX
PUBLIC INFORMATION REPORT

MUST be filed with your Corporation Franchise Tax Report

Corporation name and address

The Foster Law Firm PLLC
3518 Travis, Suite 200
Houston TX 77002

c. Taxpayer identification number 17606796591

d. Report year 2002

e. PIR / NO [ ] 1,2,3,4

Secretary of State file number or, if none, Comptroller unchartered number

Item k on Franchise Tax Report form, Page 1 0708901422

The following information MUST be provided for the Secretary of State (S.O.S.) by each corporation or limited liability company that files a Texas Corporation Franchise Tax Report. The information will be available for public inspection.

"SECTION A" MUST BE COMPLETE AND ACCURATE.
If preprinted information is not correct, please type or print the correct information.

Please sign below!

[ ] Check here if there are currently no changes to the information preprinted in Sections A, B, and C of this report.

Corporation's principal office: 440 Louisiana, Suite 2100 Houston TX 77002

Principal place of business: 440 Louisiana, Suite 2100 Houston TX 77002

SECTION A. Name, title and mailing address of each officer and director. Use additional sheets, if necessary.

NAME	TITLE	DIRECTOR	Social Security No. (Optional)
Ryan Foster	Managing Member	[ ] YES	
MAILING ADDRESS: 440 Louisiana, Suite 2100 Houston, TX			Expiration date (mm-dd-yyyy)
NAME: Richard Laminack	TITLE: Non Member Manager	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			Expiration date (mm-dd-yyyy)
NAME: Tom Pirtle	TITLE: Non Member Manager	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			Expiration date (mm-dd-yyyy)
NAME	TITLE	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS			Expiration date (mm-dd-yyyy)
NAME	TITLE	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS			Expiration date (mm-dd-yyyy)

SECTION B. List each corporation or limited liability company, if any, in which this reporting corporation or limited liability company owns an interest of ten percent (10%) or more. Enter the information requested for each corp. Use additional sheets, if necessary.

Name of owned (subsidiary) corporation	State of incorporation	Texas S.O.S. file number	Percentage interest
None			
Name of owned (subsidiary) corporation	State of incorporation	Texas S.O.S. file number	Percentage interest

SECTION C. List each corporation or limited liability company, if any, that owns an interest of ten percent (10%) or more in this reporting corporation or limited liability company. Enter the information requested for each corporation or limited liability company. Use additional sheets, if necessary.

Name of owning (parent) corporation	State of incorporation	Texas S.O.S. file number	Percentage interest
None			

Registered agent and registered office currently on file. (Changes must be filed separately with the Secretary of State.)

Agent: Ryan Foster
Office: 440 Louisiana, Suite 2100 Houston TX 77002

[ ] Check here if you need forms to change this information.

I declare that the information in this document & any attachments is true & correct to the best of my knowledge & belief & that a copy of this report has been mailed to each person named in this report who is an officer or director & who is not currently employed by this corporation or limited liability company or a related corporation.

sign here ▶ Officer, director, or other authorized person	Title	Date	Daytime phone (Area code & number)
	Managing Member	7-23-02	713-236-2900

Creative Solutions

Comptroller of Public Accounts FORM 05-102 (Rev. 2-02/20) 3333

a. T Code [X] 13196 Franchise [ ] 18196 Bank

b. 03170132013 Do not write in the space above

TEXAS FRANCHISE TAX
PUBLIC INFORMATION REPORT
MUST be filed with your Corporation Franchise Tax Report

c. Taxpayer identification number: 17606796591
d. Report year: 2003

Corporation name and address:
Ryan A Foster & Associates, PLLC
3518 Travis, Suite 200
Houston TX 77002

e. PIR / IND [ ] 1, 2, 3, 4

Secretary of State file number or, if none, Comptroller unchartered number

Item k on Franchise Tax Report form, Page 1: 0708901422

The following information MUST be provided for the Secretary of State (S.O.S.) by each corporation or limited liability company that files a Texas Corporation Franchise Tax Report. The information will be available for public inspection.

"SECTION A" MUST BE COMPLETE AND ACCURATE.
If preprinted information is not correct, please type or print the correct information.

Please sign below!

[ ] Check here if there are currently no changes to the information preprinted in Sections A, B, and C of this report.

Corporation's principal office: 440 Louisiana, Suite 2100 Houston TX 77002

Principal place of business: 440 Louisiana, Suite 2100 Houston TX 77002

SECTION A. Name, title and mailing address of each officer and director. Use additional sheets, if necessary.

NAME	TITLE	DIRECTOR	Social Security No. (Optional)
Ryan Foster	Managing Member	[ ] YES	
MAILING ADDRESS: 440 Louisiana, Suite 2100 Houston, TX			Expiration date (mm-dd-yyyy)
NAME: Richard Laminack	TITLE: Manager	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			Expiration date (mm-dd-yyyy)
NAME: Tom Pirtle	TITLE: Manager	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			Expiration date (mm-dd-yyyy)
NAME	TITLE	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS			Expiration date (mm-dd-yyyy)
NAME	TITLE	DIRECTOR [ ] YES	Social Security No. (Optional)
MAILING ADDRESS			Expiration date (mm-dd-yyyy)

SECTION B. List each corporation or limited liability company, if any, in which this reporting corporation or limited liability company owns an interest of ten percent (10%) or more. Enter the information requested for each corp. Use additional sheets, if necessary.

Name of owned (subsidiary) corporation	State of incorporation	Texas S.O.S. file number	Percentage interest
None			
Name of owned (subsidiary) corporation	State of incorporation	Texas S.O.S. file number	Percentage interest

SECTION C. List each corporation or limited liability company, if any, that owns an interest of ten percent (10%) or more in this reporting corporation or limited liability company. Enter the information requested for each corporation or limited liability company. Use additional sheets, if necessary.

Name of owning (parent) corporation	State of incorporation	Texas S.O.S. file number	Percentage interest
None			

Registered agent and registered office currently on file. (Changes must be filed separately with the Secretary of State.)

Agent: Ryan Foster
Office: 440 Louisiana, Suite 2100 Houston TX 77002

[ ] Check here if you need forms to change this information.

I declare that the information in this document & any attachments is true & correct to the best of my knowledge & belief & that a copy of this report has been mailed to each person named in the report who is an officer or director & who is not currently employed by this corporation or limited liability company or a related corporation.

sign here ▶ Officer, director, or other authorized person: Ryan Foster, Manager | Title: Managing Member | Date | Daytime phone (Area code & number): 713-236-2900

Creative Solutions

Comptroller of Public Accounts FORM 05-102 (Rev. 7-03/22) 3333

a. T Code [X] 13196 Franchise [ ] 16196 Bank

b. 04161160538 Do not write in the space above

TEXAS FRANCHISE TAX PUBLIC INFORMATION REPORT

MUST be filed to satisfy franchise tax requirements

c. Taxpayer identification number 17606796591

d. Report year 2004

Corporation name and address

Ryan A Foster & Associates, PLLC
3518 Travis, Suite 200
Houston TX 77002

e. PIR / IND [ ] 1, 2, 3, 4

Secretary of State file number or, if none, Comptroller unchartered number

Item 1 on Franchise Tax Report, Form 05-142 g. 0708901422

If the preprinted information is not correct, please type or print the correct information.

The following information MUST be provided for the Secretary of State (SOS) by each corporation or limited liability company that files a Texas Corporation Franchise Tax Report. Use additional sheets for Sections A, B, and C, if necessary. The information will be available for public inspection.

[ ] Check here if there are currently no changes to the information preprinted in Section A of this report. Then, complete Sections B and C.

Please sign below!

Officer and director information is reported as of the date a Public Information Report is completed. The information is updated annually as part of the franchise tax report. There is no requirement or procedure for supplementing the information as officers and directors change throughout the year.

Corporation's principal office: 440 Louisiana, Suite 2100 Houston TX 77002

Principal place of business: 440 Louisiana, Suite 2100 Houston TX 77002

SECTION A. Name, title, and mailing address of each officer and director.

NAME	TITLE	DIRECTOR	Term expiration (mm-dd-yyyy)
Ryan Foster	Managing Member	[ ] YES	
MAILING ADDRESS: 440 Louisiana, Suite 2100 Houston, TX			
Richard Laminack	Manager	[ ] YES	
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			
John M. O'Quinn	Manager	[ ] YES	
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			
		[ ] YES	
MAILING ADDRESS			
		[ ] YES	
MAILING ADDRESS			

SECTION B. List each corporation or limited liability company, if any, in which this reporting corporation or limited liability company owns an interest of ten percent (10%) or more. Enter the information requested for each corporation or limited liability company.

Name of owned (subsidiary) corporation	State of incorporation	Texas SOS file number	Percentage interest
None			
Name of owned (subsidiary) corporation	State of incorporation	Texas SOS file number	Percentage interest

SECTION C. List each corporation or limited liability company, if any, that owns an interest of ten percent (10%) or more in this reporting corporation or limited liability company. Enter the information requested for each corporation or limited liability company.

Name of owning (parent) corporation	State of incorporation	Texas SOS file number	Percentage interest
None			

Registered agent and registered office currently on file. (See instructions if you need to make changes.)

Agent: Ryan Foster
Office: 440 Louisiana, Suite 2100
Houston TX 77002

[ ] Check here if you need forms to change this information. Changes can also be made on-line at http://www.sos.state.tx.us/corp/sosda/index.shtml

I declare that the info. in this document and any attachments is true and correct to the best of my knowledge and belief, as of the date below, and that a copy of this report has been mailed to each person named in this report who is an officer or director and who is not currently employed by this corp. or limited liab. company or a related corporation.

Sign here ▶ Officer, director, or other authorized person RAF as manager Title: Managing Member Date: 6/1/04 Daytime phone (Area code & number): 713-236-2900

Creative Solutions

Comptroller of Public Accounts FORM 05-102 (Rev. 9-04/23)

3333

Filing Number: 708901422

a. T Code [redacted]

b. [redacted]

Do not write in this space 05110140509

TEXAS FRANCHISE TAX
PUBLIC INFORMATION REPORT

MUST be filed to satisfy franchise tax requirements

c. Taxpayer identification number	d. Report year
[redacted] 17606796591	[redacted] 2005

Corporation name and address

Ryan A Foster & Associates, PLLC
3518 Travis, Suite 200
Houston TX 77002

e. PIR / IND [redacted] ☐ 1, 2, 3, 4

Secretary of State file number or, if none, Comptroller unchartered number

Item k on Franchise Tax Report, Form 05-142: g [redacted] 0708901422

If the preprinted information is not correct, please type or print the correct information.

The following information MUST be provided for the Secretary of State (SOS) by each corporation or limited liability company that files a Texas Corporation Franchise Tax Report. Use additional sheets for Sections A, B, and C, if necessary. The information will be available for public inspection.

☒ Check here if there are currently no changes to the information preprinted in Section A of this report. Then, complete Sections B and C.

Please sign below!
Officer and director information is reported as of the date a Public Information Report is completed. The information is updated annually as part of the franchise tax report. There is no requirement or procedure for supplementing the information as officers and directors change throughout the year.

Corporation's principal office: 440 Louisiana, Suite 2100 Houston TX 77002

Principal place of business: 440 Louisiana, Suite 2100 Houston TX 77002

SECTION A. Name, title, and mailing address of each officer and director.

NAME	TITLE	DIRECTOR	Term expiration (mm-dd-yyyy)
Ryan Foster	Managing Member	☐ YES	
MAILING ADDRESS: 440 Louisiana, Suite 2100 Houston, TX			
NAME: Richard Laminack	TITLE: Manager	DIRECTOR ☐ YES	Term expiration (mm-dd-yyyy)
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			
NAME: John M. O'Quinn	TITLE: Manager	DIRECTOR ☐ YES	Term expiration (mm-dd-yyyy)
MAILING ADDRESS: 440 Louisiana, Suite 2300 Houston, TX			
NAME	TITLE	DIRECTOR ☐ YES	Term expiration (mm-dd-yyyy)
MAILING ADDRESS			
NAME	TITLE	DIRECTOR ☐ YES	Term expiration (mm-dd-yyyy)
MAILING ADDRESS			

SECTION B. List each corporation or limited liability company, if any, in which this reporting corporation or limited liability company owns an interest of ten percent (10%) or more. Enter the information requested for each corporation or limited liability company.

Name of owned (subsidiary) corporation	State of incorporation	Texas SOS file number	Percentage interest
None			
Name of owned (subsidiary) corporation	State of incorporation	Texas SOS file number	Percentage interest

SECTION C. List each corporation or limited liability company, if any, that owns an interest of ten percent (10%) or more in this reporting corporation or limited liability company. Enter the information requested for each corporation or limited liability company.

Name of owning (parent) corporation	State of incorporation	Texas SOS file number	Percentage interest
None			

Registered agent and registered office currently on file (See instructions if you need to make changes.)

Agent: Ryan Foster
Office: 440 Louisiana, Suite 2100 Houston TX 77002

☐ Check here if you need forms to change this information. Changes can also be made on-line at http://www.sos.state.tx.us/corp/sosda/index.shtml

I declare that the info. in this document and any attachments is true and correct to the best of my knowledge and belief, as of the date below, and that a copy of this report has been mailed to each person named in this report who is an officer or director and who is not currently employed by this corp or limited liab company or a related corporation.

sign here ▶ Officer, director, or other authorized person	Title	Date	Daytime phone (Area code & number)
Managing Member	Managing Member	04/27/05	713-236-2900

Creative Solutions

ARTICLES OF ORGANIZATION
OF
FOSTER & HARSSEMA, PLLC

FILED
In the Office of the
Secretary of State of Texas
MAY 10 2001
Corporations Section

Michael Harssema, a natural person of the age of eighteen (18) years or older, hereby adopts the following Articles of Organization for a professional limited liability company under the Texas Limited Liability Company Act:

ARTICLE ONE

The name of the limited liability company, referred to in these Articles of Organization as the "Company," is **FOSTER & HARSSEMA, PLLC.**

ARTICLE TWO

The period of duration of the Company is perpetual.

ARTICLE THREE

The purpose for which the Company is organized is to render professional legal services and services ancillary thereto.

ARTICLE FOUR

The address of the Company's registered office is 3415 HavenBrook Suite 100, Houston, Texas 77339 and the name of the Company's initial registered agent at that address is Michael Edward Harssema.

ARTICLE FIVE

The Company is to be managed, in whole or in part, by managers, as that term is used in the Texas Limited Liability Company Act. There are three initial managers of the Company and the initial managers shall serve as managers until their successors are duly elected. The initial managers are:

Michael Harssema
3415 Havenbrook, #101
Houston, Texas 77339

Ryan A. Foster
12831 Dove Brook Court
Houston, Texas 77041

Richard N. Laminack
440 Louisiana, Suite 2300
Houston, Texas 77002

ARTICLE SIX

The power to adopt the initial regulations of the Company is vested entirely in the managers named in Article Five hereof. The initial regulations may be adopted only with the unanimous consent of the managers named in Article Five hereof. The power to alter, amend, repeal, or restate the regulations of the Company is vested in the members of the Company. The regulations may be altered, amended, repealed, or restated only with the unanimous consent of the then members.

ARTICLE SEVEN

To the maximum extent permitted by the Texas Limited Liability Company Act or other applicable law, the manager or managers may authorize the Company to indemnify any present or former manager, officer, employee, or agent of the Company against judgments, penalties (including excise and similar taxes), fines, settlements, and reasonable expenses actually incurred by such manager, officer, employee, or agent of the Company (hereinafter, the "person") in connection with a proceeding in which the person was, is, or is threatened to be made a named defendant or respondent because the person is or was a manager, officer, employee, or agent of the Company.

ARTICLE EIGHT

The name and address of the organizer is.

Michael Harssema
3415 Havenbrook, # 101
Houston, Texas 77339

IN WITNESS WHEREOF, the undersigned has executed these Articles of Organization on behalf of the Company, on this 10TH day of May, 2001

MICHAEL EDWARD HARSSEMA

A:\00182344.wpd

JEFFREY S. RYDER
NOTARY PUBLIC
State of Texas
Comm Exp. 06-09-2001

JEFFREY S RYDER
10 MAY 2001

BARRY S. LEVY, M.D., M.P.H., P.C.
20 NORTH MAIN STREET, SUITE 200
POST OFFICE BOX 1230
SHERBORN, MASSACHUSETTS 01770
TELEPHONE: (508) 650-1039
FAX: (508) 655-4811
ELECTRONIC MAIL: BLEVY@IGC.ORG

Tab 14

August 15, 2005

Richard Laminack
O'Quinn, Laminack & Pirtle
2300 Lyric Centre
440 Louisiana
Houston, TX 77002

Dear Attorney Laminack:

On August 2, 2005, the U.S. House of Representatives Committee on Energy and Commerce requested records from my professional corporation, Barry S. Levy, M.D., M.P.H., P.C. ("BSL"). I previously forwarded to you a copy of the request, and have also attached a copy to this letter. As it always does, BSL will honor all reasonable, lawful document requests. You will note that this particular request is very broad, and that many of the records requested by the Committee relate to your clients and documents that you have sent me in conjunction with the Silica MDL.

We are writing for two reasons: first, to confirm the status of certain records, because many of the documents belong to you and/or your clients; second, to confirm the status of the pending litigation, including our understanding that BSL is not designated as an expert in any matter and is not performing work for you on any silica cases -- in other words, as to our involvement, this matter is closed. (The sole exception is that we are complying with the current records request that arose out of the Silica MDL.) Obviously, it is important that I confirm BSL will perform no additional work on this matter, and therefore will not generate any additional documents, which means the response to the Committee's request is finite.

The following background explains which of your clients' records are in our possession.

Your firm first approached BSL in early 2002 and retained us to assist your firm in evaluating a relatively large number of cases involving alleged exposure to silica. This was before the Silica MDL, and the purpose of my work was to assist you in evaluating these cases in the context of on-going settlement discussions between the parties. Your firm specifically asked me to evaluate whether or not each one of this large group of potential claims met the threshold to file a case, or alternatively would not meet the three basic requirements to opine that a plaintiff was exposed to silica and therefore would be dismissed from any legal case. I answered this question for each individual and I understand that my opinion assisted your firm in the settlement process. As you know, I was not a treating physician for any patient and was never asked to reach a comprehensive set of diagnoses for any individual.

After much of this work was done, your firm approached us to complete the same review and evaluation for a second group of plaintiffs, who are part of the Silica MDL. For this group, your firm asked me to determine (a) if these 156 individuals had silicosis, and (b) if other medical conditions they had (such as lung cancer, tuberculosis, and rheumatoid arthritis) were related to their silica exposure. As I did with the first group, my work on these issues for this second group of individuals involved the following several steps.

I reviewed the report or reports of a radiologist or pulmonologist. Each of these physicians had the unique qualification of certification by the federal government to read and interpret chest x-rays for dust diseases of the lungs, including silicosis. The certification is generally described as a "B reading" certification and the physician who conducts the x-ray analysis with this increased training and certification is referred to as a "B reader." Although it is not necessary to have a B reader review the x-ray in order to diagnose silicosis, the additional training and certification is intended to provide additional confidence in the conclusions contained in the radiological record.

Then, I did additional work, which included reviewing a detailed occupational history that was attested to by the individual. Often such histories are not even signed by the patient, but here each record was attested to by the plaintiff. I also considered other plausible reasons for the x-ray abnormalities.

In addition, for each individual I reviewed the report of another physician who had obtained a medical history and performed a physical examination. I reviewed information concerning other medical conditions that these individuals had (such as lung cancer, tuberculosis, and rheumatoid arthritis) and determined if these other medical conditions were related to their silica exposure.

For 128 of the 156 individuals, I determined that, to a reasonable degree of medical probability, the individual (a) had silicosis, and (b) another medical condition related to silica exposure; for the other 28, I did not reach this conclusion.

Given this records review, I have in my possession:

- Reports of the physician specialists (each being a radiologist and/or pulmonologist) who read the x-rays (the B readings);
- Individuals' work histories; and
- Medical records and reports of physicians.

At the conclusion of this records review, your firm and I understood that substantial additional work would need to be done to complete a full evaluation of each individual. I anticipated receiving further information as the legal case progressed in order to further develop my assessment. I had only limited information relevant to the issue of severity. For example, based on the B reading, most individuals had a profusion of 1/0 on their B readings and they did not appear to have severe silicosis.

As you know, on February 16, 2005, I testified in a hearing in the Silicosis MDL. The hearing (and the requirement that I and other experts testify at that proceeding) resulted from defendants' allegations that screening companies and certain plaintiffs' lawyers had concocted claims and plaintiffs' experts had not properly read certain x-rays. At the hearing, it was undisputed that I had read no x-rays; I am not a radiologist or a pulmonologist and therefore not qualified to read an x-ray. Put simply, my records review is only as good as the records upon which I rely. It was also undisputed that I had no dealings with any screening company. (I did not know screening companies were

in any way involved until the hearing.) As you know, I also had no direct communications with any other expert but only received records, as I described above.

My testimony on February 16 concluded with the Court refusing the defendants' request to disqualify me. The Court rejected the defendants' challenge to my qualifications, and the Court did not require or permit plaintiffs' counsel to rebut any of the points made by the defendants. Most importantly, at the conclusion of the hearing, I was one of the few physicians who had been qualified by the Court.

Because of the serious issues that were raised at the hearing, several weeks after the hearing I contacted you and outlined additional work (Supplemental Methodology) that I believed was appropriate to further evaluate these individuals and resolve the questions raised by Judge Jack. This additional work, by any reasonable measure, would be viewed as a very conservative verification of the plaintiffs' diagnoses. Under this Supplemental Methodology, I requested:

1. Independent Reading of All X-rays: All x-rays would be reviewed by an independent B reader of my choosing. I would select the B reader to assure that there was no involvement in the process by any plaintiff or plaintiffs' law firm. In preparing this plan, I evaluated a number of independent physician specialists who are certified B readers, and received a preliminary commitment from a well-respected B reader associated with Harvard Medical School and Massachusetts General Hospital. As we discussed, this is the most important step, given the concerns raised at the hearing, and I have repeatedly requested the x-rays to commence this separate radiological evaluation. You explained that the x-rays were not available because they were being held by Judge Jack, but understood my request for an independent radiological analysis.

2. CT Scan: If necessary, I would require CT scans of the chest to eliminate any ambiguity in the radiological record.

3. Work History: I would obtain detailed work histories to supplement the original work histories, through interviews performed by trained interviewers hired and supervised by me. Work histories would be correlated

with Social Security records obtained for each individual.

4. Alternative Diseases: Where necessary, I would also obtain additional information, including medical records, on other diseases that could cause a similar pattern on the chest x-ray.

5. Supplemental Report: Once all of this empirical evidence was gathered, I would review each complete record and supplement each of my reports.

Thus, in addition to the patient records described above that form my preliminary review of records and preliminary reports, I have my notes on this additional work that I proposed.

We discussed this additional work with you in May. Soon after, you decided that I should not do this additional work because you were pursuing alternative mechanisms to complete a similar methodology. At your request, I have continued to retain the records described above.

I understand that the Court recently reversed itself and disqualified me in eight of the more than 1,000 pending silica claims. (For the remainder of the claims, the Court decided it did not have jurisdiction and returned the various cases to the state courts.) Obviously, this is troubling given that the Court initially qualified me, and told plaintiffs' counsel at the hearing that they did not need to address any of the defendants' points related to my work. I am profoundly disappointed by the Court's clear misunderstanding of my involvement in this litigation and my work.

I had no involvement with any screening company. I did not read any x-rays. I did not conduct any physical examinations. I did not communicate with any patients, which is generally the province of the treating physicians. I did not conduct myself in any way differently than I would have in addressing any other medical, public health, or epidemiological issue. Despite all this and despite Judge Jack qualifying me after hearing my testimony, I find myself caught up in a larger concern.

Nonetheless, with respect to the Committee's request for records, the main point is that I am neither currently designated as an expert in any case for any of your clients, nor am I performing any work for you. Thus, the documents in my possession currently

represent the entire body of information responsive to the request.

We would appreciate your confirming in writing that the records in our possession are not subject to any confidentiality strictures and that you have no reason to request that we limit our response to the Committee's request. Also, we would appreciate your confirming that we are not presently involved in any pending silica case for your firm or for any of your clients (past or present). Because the response to the U.S. House of Representatives Committee on Energy and Commerce is presently due on September 2, I would appreciate your responding to me by August 19.

Sincerely,

Barry S. Levy

Barry S. Levy, M.D., M.P.H.

BARRY S. LEVY, M.D., M.P.H., P.C.
20 NORTH MAIN STREET, SUITE 200
POST OFFICE BOX 1230
SHERBORN, MASSACHUSETTS 01770
TELEPHONE: (508) 650-1039
FAX: (508) 655-4811
ELECTRONIC MAIL: BLEVY@IGC.ORG

January 13, 2006

Richard Laminack
O'Quinn, Laminack & Pirtle
2300 Lyric Centre Building
440 Louisiana
Houston, TX 77002

Dear Attorney Laminack:

As you know, a few weeks after I appeared at a hearing in the Silica MDL in February of last year, I spoke with you and expressed my view that my methodology in all silica cases needed to be supplemented. Given various unanswered questions and new issues presented at the hearing, it was clear to me that additional work (Supplemental Methodology) needed to be performed. This additional work would have allowed me, or another physician, to confirm or reject my preliminary determinations in the silica litigation. In other words, when the litigation reports were rendered, based on the information available at that time, my reports were accurate; however, new issues raised by the Court warranted further medical analysis of each plaintiff's case.

Soon after our initial discussion, you decided that I should not do this additional work because you were pursuing alternative mechanisms to complete a similar methodology and you were addressing various procedural uncertainties about silica litigation. (My longer letter on this topic, dated August 15, 2005, is attached for your reference.) Your decision for me not to proceed with the Supplemental Methodology was consistent with the decision of other law firms to which I had consulted on silica litigation. As part of the process of concluding this engagement, I returned to your law firm voluminous records in my possession of silica cases that I had worked on for your firm prior to the Silica MDL.

Given my correspondence and communications with you, I understand that I am not actively involved in any capacity for your firm in silica-related litigation and that you have taken, or will take, all necessary steps to inform the appropriate parties and courts of this fact.

I have enjoyed working with you and respect the steps you have taken to pursue your clients' rights. As I have looked back on the February hearing, it has troubled me that Judge Jack declined to hear the plaintiffs' counsel response to the points made by defense counsel. (In fact, at that time, Judge Jack said that she did not need a response because she qualified me.) It has also troubled me that the Court's far-reaching conclusions were made when the these silica cases were just beginning. The people who have met the criteria for silicosis or other silica-related diseases deserve a fair trial, and I appreciate your on-going efforts to give these people their day in court.

Sincerely,

Barry S. Levy, M.D., M.P.H.

xc: Abel Manji

O'QUINN, LAMINACK & PIRTLE

Richard N. Laminack
Thomas W. Pirtle
Dana A. Morris
Buffy K. Martines
Abel Manji
Attorneys at Law

Tab 15

January 25, 2006

Dear Client:

We had previously sent you a letter outlining important developments impacting all Mississippi silicosis cases. Since that time we have had your x-ray re-read. The doctor who re-read your x-ray found it to be negative for silicosis.

A positive radiological (x-ray) finding is one piece of evidence required to prosecute a claim for silicosis. Based on the negative finding in your case, there is no one to testify you have silicosis and we would recommend your case be dismissed. However, if you have a personal doctor who has told you that you have silicosis, please let us know immediately.

We think you have three choices at this stage. You can do one of the following:

a) Agree to dismiss your case and take no further action;
b) Ask us to preserve your rights so you can hire another attorney; or
c) Inform us of the diagnosis of silicosis rendered by your personal doctor so we can proceed with your case.

Please inform us of your choice immediately as we are required by the judge to resolve the matter or proceed with the case.

PLEASE COMPLETE, SIGN AND RETURN THE ATTACHED SHEET WITHIN TWO (2) WEEKS OF RECEIPT OF THIS LETTER. IF WE DO NOT HEAR FROM YOU, WE WILL HAVE NO CHOICE BUT TO DISMISS YOUR CLAIM.

Please be advised that if you ask us to dismiss your claim this may result in your claim for silicosis being barred by the statute of limitations with the result that you may likely forever lose your rights to bring a claim for silicosis related injuries.

Sincerely,

O'QUINN, LAMINACK & PIRTLE

Richard N. Laminack

OLPPB-02914

2300 Lyric Centre Building • 440 Louisiana • Houston, Texas 77002 • Telephone (713) 236-2677 • Telecopier (713) 222-...

Please make one of the following choices and return in the self addressed stamped envelope. Time is of the essence. **IF WE HAVE NOT HEARD FROM YOU, WE WILL HAVE NO CHOICE BUT TO DISMISS YOUR CASE.**

Please check one:

___ 1. I agree to dismiss my claim. I do not want you to take any action on my case and I do not want you to forward with any pending settlements. Do not take any further actions on my behalf other than dismissing my case.

___ 2. I want to try and hire another lawyer. Please maintain my rights while I look for another lawyer.

___ 3. I have been diagnosed with silicosis by my own doctor. He told me that I have silicosis. The doctor's name, address and phone number is:

_____

_____

_____

_____

_____

Comments:

_____

_____

_____

_____

O'QUINN, LAMINACK & PIRTLE

Richard N. Laminack
Thomas W. Pirtle
Dana A. Morris
Toni L. Maier
Arturo J. Gonzalez
Joseph V. Gibson, IV
Anna Dan Farmer
Betty K. Martinez
Attorneys at Law

Tab 16

April 16, 2004

To:		
	Jim Ware	- Via Facsimile - 713/951-1199
	Pam Williams	- Via Facsimile - 972/506-6620
	John Argento	- Via Facsimile - 713/953-0917
	Jerry Kacal	- Via Facsimile - 713/529-8161
	Barbara Barron	- Via Facsimile - 409/835-5177
	J.D. Bashline	- Via Facsimile - 281/486-4888
	Steve Bryant	- Via Facsimile - 713/526-7720
	Pat Buchanan	- Via Facsimile - 228/762-0299
	Bill Crampton	- Via Facsimile - 816/421-2708
	Ellen Reynard	- Via Facsimile - 409/838-6950
	Ryan Beason	- Via Facsimile - 713/333-7601
	Steve Russell	- Via Facsimile - 214/237-4340
	Dean Barth	- Via Facsimile - 713/224-5055
	Martin Street	- Via Facsimile - 601/420-0033
	John Hooper	- Via Facsimile - 212/308-4844
	Meade Mitchell	- Via Facsimile - 601/985-4500
	Walter Morrison	- Via Facsimile - 601/933-2050
	George Pappas	- Via Facsimile - 713/951-1199
	Chaney Nichols	- Via Facsimile - 601/607-4801
	Chip Wilbanks	- Via Facsimile - 601/355-5850
	Bob Arentson	- Via Facsimile - 601/974-8931
	Andy Oretsky	- Via Facsimile - 713/659-1122
	Katrina Hall	- Via Facsimile - 601/583-2677
	Bruce Bannon	- Via Facsimile - 504/525-2456
	Roy Atwood	- Via Facsimile - 214/969-5100
	Al Hopkins	- Via Facsimile - 228/868-9358
	Bubba Wyly	- Via Facsimile - 228/863-5278
	Cheri Gatlin	- Via Facsimile - 601/960-6902
	Rick Norton	- Via Facsimile - 601/261-4106
	Martin Mayo	- Via Facsimile - 713/520-6363
	Richard Salloum	- Via Facsimile - 228/868-7090
	Robert Spinelli	- Via Facsimile - 215/854-8434
	Jim Bullock	- Via Facsimile - 601/932-4860
	Robert Wilkinson	- Via Facsimile -228/762-3223
	Tom Taylor	- Via Facsimile - 713/658-1885
	Mike Dodson	- Via Facsimile - 409/861-0033
	Joe Basenberg	- Via Facsimile - 251/694-6375
	James Dukes	- Via Facsimile - 228/868-9077
	Michael Watts	- Via Facsimile - 662/234-8775
	William Allen	- Via Facsimile - 601/833-6647
	Mark Edwards	- Via Facsimile - 228/432-5539

David McMullan	- Via Facsimile - 662/834-4024
Richmond Culp	- Via Facsimile - 662/842-8450
Bruce Williams	- Via Facsimile - 432/684-3173
Tom Vaughn	- Via Facsimile - 228/864-8962
David Barfield	- Via Facsimile - 601/968-9425
Tony Pletcher	- Via Facsimile - 361/883-0210

Re: MDL 1553

Dear Counsel:

As Lead Plaintiffs' Counsel in Silica MDL 1553, and on behalf of the Plaintiffs' Executive Committee, I have been authorized to provide you with a statement of Plaintiffs' position prior to mediation and convey an offer of settlement.

Between now and May 17, 2004, the Plaintiffs' Executive committee is prepared to discuss resolving our silica cases. To that end, we are working on scheduling conference calls, meetings and mediations with a number of defendants. We further plan to begin providing you information concerning our cases as early as this afternoon.

Now is clearly the time for both sides to consider resolving these cases.

The case against all defendants participating in the MDL is currently being developed. Once the case has been worked up and formulated, they will be there for anyone to obtain because, as you are well aware, the MDL streamlines the litigation process. Once a lawyer files a silica case against certain defendants, regardless of venue, all he/she will need to do is go to the MDL document repository and retrieve the information necessary to put on his/her case against those defendants.

The cases in the MDL were filed prior to change in the tort law in Mississippi and represent the majority of the pre-tort reform silica cases currently pending against you.

We estimate litigating the Silica MDL will collectively cost the defendants a over $1,500,000,000 just for the following:

- Depose plaintiffs
- Obtain records (medical, employment, social security, disability)
- Drafting reports
- Deposing corporate representatives
- Deposing doctors
- Deposing co-workers
- Deposing fact witnesses
- Deposing experts
- IMEs
- Hotel and travel expenses
- Motion practice

This estimate does not include the expenses that will be incurred once the cases go back to Mississippi. After the cases are worked up and transferred or remanded, they will need to be resolved, either through settlement or trial. The foregoing estimate does not include the cost to try each of these cases.

Assuming the cases are resolved for "traditional values", they will be settled as follows:

1/0 $50,000 average
1/1 $100,000 average
1/2 or ^ $150,000 to $750,000
Complicated $250,000 to $2,000,000

Average per case based on traditional values = $100,000

All parties are fortunate that Judge Jack has made us go through the disclosure exercise and, at the same time, allowed us to seal the disclosures, take a time out and mediate. Plaintiffs' disclosures contain what you really need to evaluate these cases. As previously indicated, our disclosures and additional information concerning our cases will be forwarded to you beginning as early as this afternoon.

At this time, the Plaintiffs' Executive Committee is prepared to resolve their cases with you for traditional values, in exchange for a full and final release. Demands from the Plaintiffs for each specific Defendant that has agreed to seal and mediate will follow.

We look forward to receiving your acceptance, rejection and/or counter offer to either this demand or, alternatively, the individual demands to each of the Defendants.

Your consideration is appreciated.

Very truly yours,

Joseph Gibson

cc: Plaintiffs Executive Committee

STEVE A. BRYANT & ASSOCIATES
A Professional Corporation
Attorneys at Law

Tab 17

MEMORANDUM

TO: Joe Gibson

FROM: Steve Bryant

DATE: April 12, 2004

9,000 depositions (plaintiffs only) at an average time of 5 hrs/each = $78,750,000 for one insured (one attorney)

If 50 attorneys show up, the costs for attorneys will be 50x or $393,850,000.

Medical records – on average most people will have seen three (3) doctors and/or confined to a hospital. The average costs for medical records will be $500 per plaintiff. Thus, the costs of medical records on 9,000 plaintiffs can be estimated to be $4,500,000.00. If only twenty of the defendants order copies of the records the costs will be $90,000,000.

In addition, defendants will order copies of employment records, workers compensation records, social security records, and military records. These costs will probably average the same as medical records. So, add another $90,000,000 in costs.

There will be summarize and review time on all the records. If you average only two (2) hours to review and provide a report on all records on each plaintiff, you are looking at 18,000 hours. If you multiply this by $175/hr, we have $3,150,000.00 for one lawyer. Multiplied by 50 lawyers in the case we have a total summarize and review time of $157,500,000 in fees.

While we discussed earlier the legal time involved in taking plaintiffs depositions, we did not factor in the costs. If each deposition costs $300 the cost for one copy of each plaintiff's deposition will be $2,700,000. Multiply this by 50 attorneys and the cost will be $135,000,000.

There will also be "summarize deposition" charges at an average of 3 hours per deposition per lawyer. This equates to 27,000 hours per lawyer x 50 lawyers = 1,350,000 hours x $175/hr = $236,250,000.

The totals above equal $1,102,600,000. Yes, that's over $1 billion.

But we have paralegals who will be doing a lot of this summary work and only 30 lawyers typically show up at the depositions.

Response: True, but there are a lot of expenses and time not calculated. For example,

a) Receipt and review time probably averages 25% of an attorney's total bill – add $250,000,000.00.

b) There will be depositions of doctors, co-workers, employers, expert witnesses and corporate representatives.

c) No IME costs were factored into these numbers. An IME will cost $2,000 - $2,500 per plaintiff x 9000 = $18,000,000 - $22,500,000.

d) There will be hotel and travel expenses for all the attorneys taking 9000+ depositions.

e) There will be charges for drafting and arguing all sorts of motions.

No, I believe the actual cost for "nuts and bolts" I itemized are below the real costs you'll see.

For $900,000,000 you can settle every case in the MDL.

This comes to an average settlement of $100,000 a piece.

This is historical value for a 1/0 – at least that is what Jason Gibson has averaged.

And for the historical 1/0 settlement you get out of all the confirmed 1/1, 2/2 and 3/3 which represents _____ percent of the total.

Insurance Company Rebuttal:

That may be true but you have to spend that much as well.

No true. There will only be one lawyer from my office at depositions – not 30-50.

Everything I do will be a minimum of 1/30 and probably 1/50 of insurer's cost.

I will only have at most 50 depositions that I take – thus, I will only be paying for an original on 50 depositions, not 9000+.

I do not receive an hourly rate as the defense lawyers – my compensation is a contingent fee.

We could go on but that's sufficient to let you know that my client's costs will be a fraction of the insurers.

Furthermore, as you know we run our practice like a business. The more your defense lawyers make us incur in time and expenses, the higher our settlement demands will be to cover the overhead.

But I do recognize there will be considerable expense.

That is why I am making this proposal – to save your projected expenses and my foreseeable, although much lower, still significant expenses.

3618 Mt. Vernon, Suite A, Houston, Texas 77006-4238
(713) 526-7474 (800) 394-2007 FAX (713) 526-7720

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

18

In Re:	§	
	§	
SILICA PRODUCTS LIABILITY	§	MDL Docket No. 1553
LITIGATION	§	
	§	

ORDER NO. 31

The following rulings were made at the status conference on Monday, August 22, 2005. IT IS HEREBY ORDERED:

1. In Wilson v. 3M Co., S.D. Mississippi Cause No. 3:05-cv-185,[1] Plaintiff's Motion to Remand is GRANTED without objection by any party. Wilson is hereby REMANDED pursuant to 28 U.S.C. § 1447(c) to the Circuit Court of Copiah County, Mississippi, where it was originally filed and assigned Cause Number 2002-0451-H.

2. All other pending Motions to Remand will be carried forward for 60 days from the date of this Order.

3. For each case transferred to this MDL after December 5, 2004 which has a pending Motion to Remand, all Orders requiring Defendants to provide disclosures are STAYED for 30 days from the date of this Order, during which time Defendants may depose each remaining Plaintiff. Plaintiffs must follow Amended Order No. 14 ¶ 8, requiring each Plaintiff to notify

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[1] Wilson has not yet been received by the Clerk of this Court, and therefore has not yet been assigned a Southern District of Texas Cause Number.

all Defendants against whom that Plaintiff has a cause of action prior to the Plaintiff's deposition.[2]

4. In Nix v. Pulmosan Safety Equipment Co., S.D. Tex. Cause No. 2:05-337, Douglas v. Pulmosan Safety Equipment Co., S.D. Tex. Cause No. 2:05-371, Green, Jr. v. Pulmosan Safety Equipment Corp., S.D. Tex. Cause No. 2:05-388, and Jackson v. Pulmosan Safety Equipment Corp., S.D. Tex. Cause No. 2:05-389, Plaintiffs shall file with the Court a clarification of the citizenship of each Plaintiff and each Defendant (including the state of incorporation and the principal place of business of each corporate party) no later than September 6, 2005.

5. In Alexander v. Air Liquide America Corp., 2:03-cv-533, all pending motions will be carried forward. As agreed to by Plaintiff's counsel, no later than September 6, 2005, Plaintiffs in Alexander shall file with the document depository and/or x-ray repository all documentation (including but not limited to diagnosing reports and x-rays) related to Plaintiffs' prior asbestosis claims and/or asbestosis diagnoses.[3] Also, no later than September 6, 2005,

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[2] In light of the currently expedited nature of discovery, the 30-day notice requirement stated in Amended Order No. 14 ¶ 8 is hereby shortened to 14 days.

[3] During the status conference, Defendants represented that of the 82 Alexander Plaintiffs who recently submitted new diagnosing reports, 60 have previously filed claims for asbestosis. Plaintiffs' counsel in Alexander, Richard Laminack, stated that his firm has "never, never represented an asbestosis

the Alexander Plaintiffs shall file with the Court a notice certifying that they have complied with this Order. Finally, no later than September 6, 2005, the Alexander Plaintiffs shall amend their Complaint in order to make a complete statement of the basis for federal diversity jurisdiction. Plaintiffs shall specifically allege both the (1) place of incorporation, and (2) the principal place of business, of each corporate Defendant.

6. In Adams v. Pulmosan Safety Equipment Co., S.D. Tex. Cause No. 2:05-cv-183, the parties represented that they will file with the Court an agreed order of dismissal without prejudice of the more than 300 Plaintiffs who have submitted Fact Sheets.

7. In McManus v. Dependable Abrasives, S.D. Tex. Cause No. 2:05-cv-121, Plaintiffs shall submit, no later than August 29, 2005, signed Fact Sheets which fully comply with this Court's prior Orders.

8. As agreed to by Attorney Scott Hooper during the status conference, Mr. Hooper shall fully comply with Order No. 25 (including but not limited to filing affidavits from each

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claimant and then turned around and 'retreaded' as a silicosis claimant." Mr. Laminack further stated: "I think the explanation in a lot of the cases is that the asbestos diagnosis is wrong." Later, Mr. Laminack reiterated that "I doubt the diagnoses" underlying his clients' previous as asbestosis claims. If indeed these Plaintiffs have made asbestosis claims that are now suspect, Defendants are ordered to notify the appropriate court where such claim was made or settled.

diagnosing physician, as well as Innervisions, stating that all ordered documents/items have been supplied to counsel for placement in the document depository and/or x-ray repository) no later than September 6, 2005.

9. In light of the Court's ruling in Order No. 29 that it lacks subject-matter jurisdiction in Bland v. Lone Star, S.D. Tex. Cause No. 2:04-cv-002, the Court hereby VACATES Order No. 10 ¶ 13, wherein the Court granted Defendants' Motion for Partial Summary Judgment in Bland. Defendants may reassert their Motion for Partial Summary Judgment before the appropriate state court.

10. The following motions have been WITHDRAWN by the moving parties: Omni Litigation Support Services' Opposed Motion for Reimbursement (d.e. 1927-1928) and Plaintiffs' Motion for Withdrawal and Substitution of Counsel (d.e. 1936-1937).

11. Except as otherwise ordered herein, the following motions are DENIED: Motion to Dismiss (d.e. 1880) and Motion to Compel Screening Companies' Compliance with Order No. 25 (d.e. 1935).

12. The Motion to Preserve Plaintiffs' Original X-Rays (d.e. 1930) is GRANTED. All parties are ORDERED not to remove any x-rays, documents or other items from the x-ray repository maintained by the Watts Law Firm or the document depository maintained by

Omni Litigation Support Services until otherwise ordered by this Court.[4]

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[4] On July 10, 2005, this Court entered an "Order Denying 'Plaintiffs' Agreed Motion to Withdraw X-Rays from the MDL Repository,'" wherein the Court denied Attorney Scott Hooper's request to allow Plaintiffs to remove their x-rays from the x-ray repository (currently maintained by Plaintiffs' Liaison Counsel). The Court denied this request for two reasons. First, contrary to the styling of Mr. Hooper's Motion, the Motion was opposed by certain Defendants. (See Opposition to the Motion, d.e. 1905.) Second, on June 30, 2005, the Court received an ex parte communication from Kenneth Cusick, an Assistant United States Attorney for the Southern District of Texas, on behalf of the United States Attorney's Office for the Southern District of New York. Mr. Cusick asked the Court for access to items in the MDL document depository/x-ray repository for use in grand jury proceedings in New York. The Court informed Mr. Cusick that his communication was improper, and any such request would need to be made with the knowledge of counsel for both sides. On June 30, 2005, the Court conducted a telephone conference with Liaison Counsel for Plaintiffs and Defendants, informing them of Mr. Cusick's ex parte request and of the importance of preserving the items in the depository/repository because of the ongoing criminal proceedings in New York. Liaison Counsel informed all counsel of this.

On approximately August 1, 2005, with knowledge of the United States Attorney's request and in direct contravention of this Court's Order denying his Motion, Mr. Hooper removed in excess of 1,000 x-rays from the repository. His purported justification for this removal was his belief the Court no longer had jurisdiction over the repository because he believed the remand of certain cases announced in Order No. 29 had been effectuated. However, it is well-settled that "[a] § 1447(c) order of remand is not self-executing.... [T]he federal court is not divested of jurisdiction until the remand order, citing the proper basis under § 1447(c), is certified and mailed by the clerk of the district court." Arnold v. Garlock, Inc., 278 F.3d 426, 437-38 (5th Cir. 2001) (citing 28 U.S.C. § 1447(c); McClelland v. Gronwaldt, 155 F.3d 507, 514 n.5 (5th Cir. 1998); Browning v. Navarro, 743 F.2d 1069, 1078-79 (5th Cir. 1984)). No remand order had been certified and mailed by the Clerk of this Court at the time Mr. Hooper removed the x-rays, just as no remand order has been certified and mailed as of the date of this Order. At the status conference on the morning of August 22, 2005, the Court ordered Mr. Hooper to return all x-rays and any other items he removed from the repository/depository by 5:00

13. Pursuant to an agreement between Liaison Counsel for each side (announced at a hearing conducted at 4:50 p.m. on August 22, 2005), no later than September 2, 2005, the parties shall jointly file with the Court an indexed list of all x-rays in the x-ray repository and/or document depository.

14. The next status conference is scheduled for Monday, September 26, 2005 at 9:00 a.m. No later than September 16, 2005, Liaison Counsel for each side shall file with the Court all items to be included on the Court's agenda for this conference including a list of all pending motions that they wish to have addressed by the Court (identified by party name, name of motion, date filed, and relevant cause numbers).

SIGNED and ENTERED this 23rd day of August, 2005.

Janis Graham Jack
United States District Judge

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p.m. Before 5:00 p.m., Mr. Hooper represented to the Court that he had returned all removed items to the repository. Subsequently, Plaintiffs' Liaison Counsel reported that on August 1, 2005, Mr. Hooper had represented to the Watts Law Firm (the repository custodian) that an "agreement" had been reached to allow him to remove all of his clients' x-rays from the repository. At the time he removed the x-rays, Mr. Hooper signed a document representing that he was removing 1,342 x-rays. As of 5:00 p.m. on August 22, 2005, the Watts Law Firm counted the x-rays returned by Mr. Hooper and found only 1,219. This matter will be heard at the next status conference.

In the future, the Court would like Mr. Hooper to form a closer relationship with the law.

BRAND LAW GROUP
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

Tab 19

March 30, 2006

VIA FACSIMILIE AND FIRST-CLASS MAIL

The Honorable Joe Barton
Chairman
U.S. House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Subpoena to Produce Documents Issued to the Law Office of Jim Zadeh, P.C.

Dear Mr. Barton:

We represent the Law Office of Jim Zadeh, P.C., in matters connected with the Energy and Commerce Committee's March 24, 2006, subpoena for documents and testimony. We received the subpoena – which carried a return date of 10 a.m., March 31, 2006 – on Friday evening, March 24, 2006.

We have a number of concerns about the Committee's subpoena. Our client informs us that compliance with the document subpoena requires that his small firm review millions of documents in its files. As such, compliance with the document subpoena at this time would be unreasonable, burdensome and oppressive for the law firm. *See United States v. R. Enterprises Inc.,* 498 U.S. 292, 300 (1991). Review of these documents will also require assessment of the attorney-client and work-product privileges, redaction to ensure compliance with the Health Insurance Portability and Accountability Act and other privacy requirements, and analysis of statutory pertinency claims pursuant to 2 U.S.C. § 192.

Accordingly, while we are working to assess what documents may be responsive to the subpoena, the huge number of documents requested and short period of time provided by the Committee prevents us from producing any materials at this time.

Sincerely,

Andrew D. Herman

BRAND LAW GROUP
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

April 3, 2006

VIA HAND DELIVERY

The Honorable Ed Whitfield
Chairman
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Document Production from the Law Office of Jim Zadeh, P.C.

Dear Mr. Whitfield:

We represent the Law Office of Jim Zadeh, P.C., in matters connected with the March 24, 2006, subpoena for documents and testimony issued by the Energy and Commerce Committee, Subcommittee on Oversight and Investigation.

As he discussed with Chairman Barton at the hearing on Friday, March 31, 2006, Mr. Zadeh is producing over 500 relevant documents responsive to the subpoena. These documents have been redacted in a manner consistent with both the Committee's instructions and all privacy requirements. Mr. Zadeh has not withheld any responsive documents on the basis of privilege. He will continue to review his records and expects to produce many additional responsive documents within the next week.

Finally, based upon the statements articulated at Friday's hearing by Chairman Barton and members of the Subcommittee, we now consider Mr. Zadeh to be in compliance with his obligations as set forth by the subpoena.

Sincerely,

Andrew D. Herman

ADH;mob

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April 13, 2006

HAND DELIVERED

The Honorable Ed Whitfield
Chairman
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Document Production from the Law Office of Jim Zadeh, PC

Dear Mr. Whitfield:

We represent the Law Office of Jim Zadeh, PC, in matters connected with the March 24, 2006, subpoena for documents and testimony issued by the Energy and Commerce Committee, Subcommittee on Oversight and Investigation.

These documents have been redacted in a manner consistent with both the Committee's instructions and all privacy requirements. As discussed at the Friday, March 31, 2006, hearing, the Law Firm would like to inform the Committee that it is withholding documents based on attorney-client privilege, work product privilege, consulting expert privilege or other constitutionally privileged information.

Sincerely,

Andrew D. Herman

ADH;mob

Enclosures

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May 5, 2006

VIA HAND DELIVERY

The Honorable Ed Whitfield
Chairman
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Document Production from the Law Office of Jim Zadeh, PC

Dear Mr. Whitfield:

We represent the Law Office of Jim Zadeh, PC, in matters connected with the March 24, 2006, subpoena for documents and testimony issued by the Energy and Commerce Committee, Subcommittee on Oversight and Investigation. Accompanying this letter is an additional production of responsive documents.

These documents have been redacted in a manner consistent with both the Committee's instructions and all privacy requirements. As discussed at the Friday, March 31, 2006, hearing, the Law Firm would like to inform the Committee that it is withholding documents based on attorney-client privilege, work product privilege, consulting expert privilege or other constitutionally privileged information.

Sincerely,

Andrew D. Herman

ADH;lls

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WASHINGTON, D.C. 20005

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July 19, 2006

VIA FACSIMILE & FIRST CLASS MAIL

Andrew Snowdon, Esq., Counsel
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Document Production from the Law Office of Jim Zadeh, P.C.

Dear Mr. Snowdon:

We represent the Law Office of Jim Zadeh, P.C., in matters connected with the subpoenas for documents and testimony issued by the Energy and Commerce Committee, Subcommittee on Oversight and Investigation. On Tuesday, July 18, 2006, you called me to inquire whether Mr. Zadeh had provided a privilege log to the Committee when he submitted documents responsive to its subpoena.

While we did not initially provide a privilege log, we noted in our April 13 and May 5, 2006, letters accompanying the over 5000 documents produced to the Committee, that Mr. Zadeh has – to the best of his ability and knowledge – produced all documents directly relating to the subject of the Committee's investigation, "Mass Tort Screening and the Public Health," with the exception of those documents covered by attorney-client privilege, attorney work product privilege, or other, related privileges.

As Mr. Zadeh informed the Committee at the initial hearing on this matter, the subpoena as written would require a review of literally millions of documents. He noted that reviewing every document would present a burdensome and oppressive task for Mr. Zadeh's small law office. Chairman Barton and members of the Committee asked Mr. Zadeh to produce the truly relevant and most pertinent documents subject to any constitutional privileges as quickly as possible; which Mr. Zadeh did. Mr. Zadeh was also asked to return to the committee for a hearing on April 4 to discuss the status of his production. That hearing did not go forward and – other then to appear again on July 26

BRAND LAW GROUP

and yesterday's inquiry – we have not heard anything further from the Committee since that time.

Although we were under the impression that all document issues have been resolved, in the spirit of continued cooperation please see the attached privilege log.

Sincerely,

Andrew D. Herman

ADH;mob

Enclosure

Privilege log

Attorney-client	All communications between the following persons: lawyer, representatives of the lawyer, clients and representatives of the clients	Numerous, including but not limited to, correspondence, notes, graphic materials, depictions, opinions, studies, questionnaires, photographs, charts, and recordings	2001-2006 - too numerous to list each and every such date, author and addressee	Attorney-client
Work product/attorney-client	All work product of an attorney or an attorney's representative that contains the attorneys or attorney's representatives mental impressions, opinions, conclusions or legal theories	Numerous, including but limited to, correspondence, messages, notes, opinions, studies, questionnaires, recordings, trial prepation, summaries, bills, accounts, estimates, mail, analysis, transcripts, photographs, depictions, product exemplars	2001-2006 - too numerous to list each and every such date, author and addressee	Numerous relationships, including but not limited to attorney-client, attorney-client representatives, attorney-attorney, consulting experts, attorney-attorney representatives, common interests counsel
Work product/attorney-client	All work product material by an attorney or attorney's representative made regarding a client's case	Numerous, including but limited to, summaries, bills, accounts, estimates, messages, correspondence. notes, opinions, studies, questionnaires, recordings, trial prepation, mail, analysis, transcripts, photographs, depictions, product exemplars	2001-2006 - too numerous to list each and every such date, author and addressee	Numerous relationships, including but not limited to attorney-client, attorney-client representatives, attorney-attorney, consulting experts, attorney-attorney representatives, common interests counsel
Work product/attorney-client	All communications by a lawyer or a lawyer's representative to a client about a client's case	Numerous, including but not limited to, correspondence, notes, graphic materials, depictions, opinions, studies, questionnaires, photographs, charts, and recordings	2001-2006 - too numerous to list each and every such date, author and addressee	Numerous relationships, including but not limited to attorney-client, attorney-client representatives, attorney-attorney, consulting experts, attorney-attorney representatives, common interests counsel
Work product/attorney-client	All analysis of a client's case by an attorney or an attorney's representative	Numerous, including but limited to, correspondence, messages, notes, opinions, studies, questionnaires, recordings, trial prepation, summaries, bills, accounts, estimates, mail, analysis, transcripts, photographs, depictions, product exemplars	2001-2006 - too numerous to list each and every such date, author and addressee	Numerous relationships, including but not limited to attorney-client, attorney-client representatives, attorney-attorney, consulting experts, attorney-attorney representatives, common interests counsel

Work product/attorney-ent	All communications by a lawyer or a lawyer's representative to the lawyer or a lawyer's representative regarding the client	Numerous, including but limited to, correspondence, messages, notes, opinions, studies, questionnaires, recordings, trial prepation, summaries, bills, accounts, estimates, mail, analysis, transcripts, photographs, depictions, product exemplars	2001-2006 - too numerous to list each and every such date, author and addressee	Numerous relationships, including but not limited to attorney-client, attorney-client representatives, attorney-attorney, consulting experts, attorney-attorney representatives, common interests counsel
Health Information Portability and Accountability Act 45 CFR Sec. 164	All protected health information - this includes the redacted health information in documents previously produced	Numerous, including but not limited to correspondence, notes, medical records, transcripts, radiographs, tests, opinions, studies, questionnaires, photographs, recordings, summaries, bills, accounts, mail, histories	2001-2006 - too numerous to list each and every such date, author and addressee	Numerous relationships, including but not limited to doctor-patient, doctor representative and patient, patient representative and doctor, health care provider and patient or patient representative, mental health care provider-client
The Law Office of Jim Zadeh, P.C. reserves the right to amend this privilege log if additional privileged documents are ·ncated				

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Tab 20

April 3, 2006

VIA HAND DELIVERY

The Honorable Ed Whitfield
Chairman
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Document Production from the Williams Bailey Law Firm, LLP

Dear Mr. Whitfield:

We represent the Law Office of the Williams Bailey Law Firm, LLP, in matters connected with the March 24, 2006, subpoena for documents and testimony issued by the Energy and Commerce Committee, Subcommittee on Oversight and Investigation. I am enclosing a few additional documents from the firm that are responsive to the subpoena. The firm is not certain that these checks relate to silicosis medical evaluations, but, in the interest of full compliance, the firm has elected to produce them to the Committee.

As requested by the Committee at the Friday, March 31, 2006, hearing, Williams Bailey would like to inform the Committee that it is withholding a limited number of documents based on privilege. First, the firm has not produced 15 International Labor Organization Reports by a doctor listed on the subpoena. These documents are being withheld because they relate to pending state cases and have not been produced in those cases pursuant to the consulting expert privilege. Second, the firm has not produced letters sent to clients and prospective clients communicating information regarding x-ray and full pulmonary examination results. These documents are protected by the attorney-client privilege.

Finally, based upon the statements articulated at Friday's hearing by Chairman Barton and members of the Subcommittee, we now consider Williams Bailey to be in compliance with its obligations as set forth by the subpoena.

Sincerely,

Andrew D. Herman

ADH;mob

BRAND LAW GROUP
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

June 14, 2006

VIA FACSIMILIE & FIRST CLASS MAIL

The Honorable Ed Whitfield,
Chairman
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Privilege Log from the Williams Bailey Law Firm, LLP

Dear Mr. Whitfield:

We represent the Williams Bailey Law Firm, LLP, in matters connected with the March 24, 2006, subpoena for documents and testimony issued by the Energy and Commerce Committee, Subcommittee on Oversight and Investigation.

As requested by your staff, enclosed please find a privilege log from the Firm. This log relates to all documents that the Firm has been able to locate at this time. If additional documents are found, the Firm will either produce those to the Committee or submit an additional privilege log if warranted.

Sincerely,

Andrew D. Herman

Enclosure

ADH:mob

Privilege Log from the Williams Bailey Law Firm, LLP

Note: Pursuant to item 9 of the March 26, 2006, subpoena issued to the Williams Bailey Law Firm, the following information is provided for each record withheld: (a) privilege asserted; (b) type of document; (c) general subject matter; (d) date, author and addressee; and (e) relationship of author and addressee.[1]

Documents 1 – 14: a. T.C.R.P. 192 attorney work product (consulting expert) privilege;

b. X-Ray Reviews / I.L.O. "B" reader report;

c. chest x-ray interpretation;

d. 12/27/2005; Jay T. Segarra; Addressee – none;

e. Not applicable.

Document 15: a. T.R.E. 503(b), attorney client privilege;

b. letter;

c. transmitting medical report;

d. 11/7/01; John E. Williams; Cecil Ware;

e. Attorney and Client.

Document 16: a. T.R.E. 503(b), attorney client privilege;

b. letter;

c. transmitting medical report;

d. 11/7/01; John E. Williams; Vivian Gilstrap;

e. Attorney and Client.

[1] Pursuant to item 10 of the March 26, 2006 subpoena, please note that additional letters substantially identical to the ones listed in the log have been sent to other clients but are no longer in the possession or control of the Firm.

Tab 21

BARRY S. LEVY, M.D., M.P.H., P.C.
20 NORTH MAIN STREET, SUITE 200
POST OFFICE BOX 1230
SHERBORN, MASSACHUSETTS 01770
TELEPHONE: (508) 650-1039
FAX: (508) 655-4811
ELECTRONIC MAIL: BLEVY@IGC.ORG

May 8, 2004

Jim M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West 2nd Street, Suite 501
Fort Worth, TX 76102

Re: Cause No. CI2003-17; *Maxine Woods, Ind. & As Rep. Of the Estate of John Woods, et al vs. Pulmosan Safety Equipment, et al*

PLAINTIFF: [redacted]

Dear Attorney Zadeh:

The following represents my preliminary report on [redacted].

My Background and Experience:
I have worked as a medical doctor in the field of occupational and environmental health for more than 25 years. My work in occupational and environmental health has included education, research, clinical work, consulting, and program direction. I have much experience concerning a wide range of workplace hazards, including silica and other dusts, and their adverse health effects. I am Board-certified in Internal Medicine, Preventive Medicine, and Occupational Medicine. I am a physician licensed to practice in the states of Massachusetts and Connecticut. Further details of my background and experience are described in Appendix A.

Methodology:
I reviewed the following documents: (1) Report and ILO of Richard B. Levine, M.D. in connection with the chest x-rays taken 2/17/2003; and (2) The Detailed Earnings Record from Social Security Administration.

In addition, I reviewed the pertinent medical and scientific literature concerning silica exposure and its adverse health effects. I applied the Bradford Hill principles in reviewing this body of literature.

In coming to my opinions in this case concerning this individual, I examined all pertinent information and considered alternative diagnoses and causes for his medical conditions. I also considered latency.

Case Summary:
Mr. [redacted] was exposed to free crystalline silica while working with and around silica-containing products for a period of 17 years while employed by the Town of Forkland, Alabama, as a laborer. In addition, he did welding and painting, and worked with cement, clay, ceramic materials and asphalt paving during this period.

A B-reading of a chest x-ray dated February 17, 2003, by Richard B. Levine, M.D., demonstrated mixed rounded and irregular interstitial fibrotic densities within the lungs consistent with previous occupational exposure to asbestosis and silica dust. ILO classification was q/s, 1/1. These changes were interpreted as being consistent with silicosis and asbestosis.

Illustrative Pertinent Medical and Scientific Literature:
The publications in Appendix B: Silicosis represent illustrative pertinent publications in the peer-reviewed medical and scientific literature concerning silica exposure, which includes but is not limited to these publications.

Opinion:
Based on my examination of materials relevant to this case, my review of the pertinent medical and scientific literature, and my extensive experience in occupational medicine, I believe to a reasonable degree of medical probability that [redacted] developed silicosis as a result of his occupational exposure to free crystalline silica while working for the Town of Forkland, Alabama, for a period of 17 years.

I reserve the right to modify this report should further pertinent information become available.

Sincerely,

Barry S. Levy, M.D., M.P.H.

Bruce Thall

From: Bruce Thall
Sent: Thursday, December 09, 2004 5:28 PM
To: 'Jim Zadeh'
Subject: RE: Order on Motion to Quash

Tab 22

FORGET ABOUT WHO STRUCK JOHN. What is important for your plaintiffs is that their diagnoses are not based upon Dr. Levine's B reads. Rather, that the reads are merely an indicator that can only be verified by a full examination conducted by and for the Dr. who will testify. That is true especially in view of your recitation of the events leading us to this point in time. Why do you not now say to me that for the 5 or 6 plaintifffs for which a physician is making a diagnosis based in part on Dr. Levine's B-read, you have arranged or will arrange for a full diagnostic evaluation on behalf of that plaintiff by a Doctor who will testify. Doesn't that strengthen the position of each of your plaintiffs precisely because none of them can be tarred by the defendants with the stigma they will try to create from reliance on B-reads?
Please answer that for me.
At worst, if you have Dr.s who made diagnoses who in five instances relied on Dr. Levine's B-reads, why can't you limit the depositions to the 5 reads?
Unless I am missing something, which is always possible, you should for your own clients do (1) and at the least should argue for (2).

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 5:09 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: I have not represented that. ... My understanding with Dr. Levine was that he would be my primary b-reader, that there would always be someone else testifying as to diagnosis but that if I needed him to give a deposition to back up a b-read, he would do that. Some of the testifying docs initially rely on Dr. Levine's reports and reference such in their reports. I have been operating under the assumption that this was OK. ... If I misunderstood the arrangement with Dr. Levine, please let me know.

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Thursday, December 09, 2004 3:21 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

Have you represented to the Judge that (1) Dr. Levine is not going to testify for any plaintiff and (2) Some other Doctor will be testifying for each plaintiff and (3) the testifying doctor will not be relying for his diagnoses on any read of Dr. Levine? If you have not, you should.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 3:59 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

I agree with you that forcing our doctors to come to Texas is foolish. Hopefully, the judge will think so too. ... As far as why am I allowing this to mushroom – this thing mushroomed the day we got removed to federal court with 10,000 other cases, the day the judge ordered production of all b-read reports over objection from all the plaintiffs' lawyers, and the day Martindale backed off his diagnosis. I have done everything possible to keep you and Dr. Levine informed of every step in the process and to protect Dr. Levine. The judge, sua sponte, set the motion to quash for hearing. There was nothing we could do. I do have several "hands on" physical exams in which another doctor reviewed the x-ray. Unfortunately, even if I had done everything perfectly, this judge would have forced the depo.

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Thursday, December 09, 2004 11:50 AM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

You avoid this mess by having physicians do the full diagnoses based only on their examinations and tests. I don't care what happened in the past. There is no reason to depose Dr. Levine as long as he is neither your expert nor had his report adopted uncritically by your physician. Since you need the physician in any event, why are you allowing this to mushroom? I must tell you that I am very doubtful that I can coerce Dr. Levine to go to Texas, nor do I think it is fair to make him do so, lose work time, pay for me and my time, etc., when he will not even be a trial witness.

GET REAL MEDICAL EXAMS and this foolishness evaporates.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 12:39 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Based on Dr. Martindale's deposition, the Defendants have filed numerous motions to strike our experts and appoint a technical advisory panel to, in essence, re-read all the x-rays. I think the Judge will ultimately deny those requests but before she does, she wants to make sure our medicals are sound and have the doctors "look her in the eyes" to back up their b-read/dx. That means she is probably going to require you and Dr. Levine to come to Corpus Christi, Texas where the judge is which means a much more difficult scheduling process. ... However, I just had a thought about possible video conferencing so the judge could sit it in remotely. I will discuss that with everyone else. ... I hope this makes sense.

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Thursday, December 09, 2004 11:36 AM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

Good. Just ask him in writing for five or six days in Jan so that you can clear them with your schedule, mine and the Dr. That way it is clear that you are not stalling.
What is this about Court Supervised Doctor Deps?

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Thursday, December 09, 2004 11:50 AM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: what do you think about sending this letter to the bad guys:

Daniel: I have been working to get you dates and locations for Dr. Levine's deposition per your request that we provide you dates on or before December 15, 2004. We had planned on offering Dr. Levine in Bruce Thall's office which would make it simple for Dr. Levine and Bruce Thall to attend. In light of the Court opening the possibility of court supervised doctor's depositions, I would propose we wait until we see if that is what she is going to do and how those are going to work. Obviously, the Court's ruling and the Court's schedule on this issue will impact our potential dates. ... Please let me know if you can agree to extend the December 15, 2004 deadline to provide dates for Dr. Levine's deposition.

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

> -----Original Message-----
> **From:** Bruce Thall [mailto:BThall@lawsgr.com]
> **Sent:** Tuesday, December 07, 2004 1:06 PM
> **To:** Jim Zadeh
> **Subject:** RE: Order on Motion to Quash
>
> Go for it
>
> ---
>
> **From:** Jim Zadeh [mailto:jim@zadehfirm.com]
> **Sent:** Tuesday, December 07, 2004 2:02 PM
> **To:** Bruce Thall
> **Subject:** RE: Order on Motion to Quash
>
> Sounds good. ... I would rather do it in January if that is OK with you and the doctor, so I can really get all our ducks in a row and possibly get him out of more of these cases.
>
> Jamshyd (Jim) M. Zadeh
> Law Office of Jim Zadeh, P.C.

115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 1:02 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

I did not send them dates. I wanted you to know the available dates so that you could then offer them what was convenient to you. I would never give them a date unless or until you had ok'd it. Moreover, I want to be out of the court processes, including scheduling. Your doing it makes you look good. I can take the heat for being the heavy. Ask them for five or six dates conveninent for them in January if they can't do the ones I've already sent you. Then we will review the five or six, isolate what is good for you, and then pick one that's good for us.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Tuesday, December 07, 2004 1:29 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: I am glad you wrote that last email. I thought you had already sent them the dates. Have you sent the dates yet because I haven't? Their letter says we don't have to even give them dates until the 15th. That is, we need to tell them which dates we have available no later then the 15th but the dates can be anytime, including January. There is another doctor going on December 20. We may want to go after him. Does that change your thoughts?

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 12:27 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

The important thing is that the bad guys have received notice that Dr. Levine was available and that they chose to extend it, and not you or Dr. Levine. Is your offer of dates to them in writing? I would not want them to lie about the offer. Remind them, too, preferably in writing, that you want them to produce in advance what they intend to show Dr. Levine at his deposition.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Tuesday, December 07, 2004 1:21 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Actually, I plan on going through the discovery responses and confirming the status of each of the 20 plaintiffs. At that point, I can represent that Dr. Levine is withdrawn as a testifying diagnosing doctor on certain plaintiffs (and file amended fact sheets reflecting same) and try and narrow the field as you suggest. I am just not sure the judge is going to let us limit the depo that way but it is worth the effort. ... The dates you provided were the 10th, 13th, 14th, 15th and 17th. I am no longer free the 10th as we have a meeting to get ready for the hearing on the 17th. I don't know if they can get prepared by next week and I suspect that they are going to contact you for additional dates. Dr. Levine would like it over earlier and I can get everything ready by next week, if necessary. If they call and say they can't do it next week, we are in a good position in that we can say on the 17th that we offered him for depo and they chose not to go forward on those dates. I say we just wait to hear from them and, in the meantime, I will get my stuff together.

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 12:02 PM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

I sent you an e-mail yesterday with dates. I don't remember them offhand. I appreciate the problems with which you are dealing. It seems to me however, that under the Judge's Order only the physician who is testifying at trial as to the diagnosis must be presented for deposition. This is after all precise what Rule 26(b)(4)(A) states. If Dr. Levine is not going to be your trial witness for any case, then why need he be deposed? All you need do is so represent. If for some reason, he must be deposed because his read was relied on by some physician who will testify in cases one, two and five only, isn't testimony of Dr. Levine limited to cases one, two and five?

Dr. Levine would prefer having the dep sooner than later. If you think the MDL hearing will shed some light on my inquires and enable you to know that you don't need Dr. Levine for any purpose since your experts will have done all they need to do on their own and without basing their diagnoses on Dr. Levine's B-reads, then put it off. The choice is yours.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Tuesday, December 07, 2004 12:40 PM
To: Bruce Thall
Subject: RE: Order on Motion to Quash

Bruce: Under Texas and Mississippi law, a cause of action for silicosis accrues on the date the client receives a positive b-read result. The course of practice has been to get full exams as quickly as possible after the b-read but, if necessary, you file a case with a b-read only (assuming the client does have silica exposure). ... The Woods case (the one in the MDL) was the last case I filed. It had 20 plaintiffs who came to me after the large screenings, of which I have positive silicosis b-reads on 12 of these folks from Dr. Levine and indications of lung cancer from Dr. Levine's b-read on two others.

The other 1,309 plaintiffs we represent were in front of these folks (as there cases were filed in 2002) and I was getting their full exams first when the Woods case was removed. The judge immediately ordered fact sheets in which she ordered us to list diagnosing doctors including b-readers and produce their reports. At the time, I had full exams on 6 of the 12 Dr. Levine had diagnosed. I did not have time to get a full "hands on" for the remaining 6 and sent Dr. Levine's b-read plus exposure information, etc. to a doctor who did a diagnosing letter relying on the b-read. 3 of those have come back positive, 1 came back negative, 1 we are waiting on and 1 shows we haven't done anything (my medical paralegal is out sick, so I won't know until tomorrow what the issue is with that case).

Dr. Levine is a listed as a diagnosing doctor on these 12. The hands on doctors plus the linking letter doctors are also listed as diagnosing doctors. Dr. Levine may also be listed as a diagnosing doctor on the two other cases where he noted lung cancer (but not silicosis), the patients have since died and we obtained a linking letter. (I will confirm).

I am concerned because the Defendants say they have 17 reports for Dr. Levine and they should only have 14. I am going to go back to my original production and find the reason for the discrepancy.

In that Dr. Levine was originally listed as a diagnosing doctor (the Court ordered us on two occasions to disclose our b-readers under the diagnosing doctor section of the fact sheet), I am uncertain as to whether withdrawing him will shield him from a deposition and, in those cases in which there has not been a "hands on" completed and the linking letter relies on his testimony, I think his testimony is still relevant. Nonetheless, I want to protect Dr. Levine as much as you do. I am going to go back and look at the productions and get as full a handle on what was produced when and see if we can, at least, narrow the cases he has to talk about.

One other thing: We have the big MDL hearing on the 17th. There will be significant developments at that hearing (as there always is) and it may make sense to have his depo after the hearing to get a sense of the direction in which the judge is going. On the other hand, if we just want it over with, we can do

it now. ... I will update you on the info I learn in my review of the production. Do you have a date for the depo yet?

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

-----Original Message-----
From: Bruce Thall [mailto:BThall@lawsgr.com]
Sent: Tuesday, December 07, 2004 8:18 AM
To: Jim Zadeh
Subject: RE: Order on Motion to Quash

If I am reading the Order correctly, the need for Dr. Levine to be deposed at all evaporates as soon as you demonstrate that your plaintiffs have retained a doctor who will testify as their condition other than Dr. Levine. I must assume that you never presented Dr. Levine as the sole physician diagnosing the injuries which form the bases of plaintiffs' suits. If I am correct, is not now the time for you to represent that Dr. Levine will not testify for your plaintiffs and that Dr. Levine is not the physician who will testify about the injuries forming the bases for your plaintiffs' suits? If I am missing something, please let me know.

From: Jim Zadeh [mailto:jim@zadehfirm.com]
Sent: Monday, December 06, 2004 3:56 PM
To: Bruce Thall
Subject: Order on Motion to Quash

Bruce: The Court just issued this order (actually it was issued Thursday but it was just sent to everyone this afternoon). It is as if she had just read my email to you, including the Federal Rule cite. ... Let me know if you have any questions.

Jamshyd (Jim) M. Zadeh
Law Office of Jim Zadeh, P.C.
115 West Second Street, Suite 201
Fort Worth, TX 76102
phone: 817-335-5100
fax: 817-335-3974
email: jim@zadehfirm.com

Tab 23

GULF COAST MARKETING

Lloyd Criss

2802 Rosadele
La Marque, Texas 77568
Phone: (409) 938-7642
Fax: (409) 935-8117

May 9, 2003

RE: Silicosis and Asbestos Screenings

Dear

Your client inventory of silicosis and asbestosis cases can be substantially increased through the development of a business relationship with Gulf Coast Marketing. Our marketing efforts have brought thousands of new cases to plaintiff law firms. We have conducted successful screenings in Texas, Louisiana, Arkansas, Mississippi, Oregon and Massachusetts. We would welcome the opportunity to come to the state of your choice to produce remarkable results for your law firm.

Enclosed, for your information, is a list of screening sites along with the numbers of qualified persons we have interviewed and X-rayed in 2001, 2002 and 2003. Check us out. (See pages 3 & 4) Compare our results to other marketing efforts you are familiar with. These screenings have turned up many serious cases of silicosis, mesothelomia and lung cancers that were caused by asbestosis.

Gulf Coast Marketing is committed to giving exposed senior workers an opportunity to find out about their health and to helping develop legitimate asbestos and silica cases for the plantiff law firms we work with.

Effective marketing does not have to be expensive. Remarkable results can be provided for little more than actual marketing costs.*

Here is what we propose:

For a reasonable up front investment, Gulf Coast Marketing will provide your law firm the following effective program:

1. Select a date and screening site in a city of your choice where a substantial number of previously exposed seniors reside.
2. Arrange for a licensed, certified and state of the art mobile X-ray unit and technician to be on site.

3. Design, print and mail an attractive, and proven effective advertisement to 15,000 to 20,000 qualified prospective clients, over age 50, who reside within a 50 mile radius of the screening site.
4. Receive calls on a toll free number (printed on the mailer) and make appointments for the screenings.
5. Send reminder post cards to those who call in and set up appointments, in order to increase participation on the screening days.
6. Hire and supervise interviewers (up to five, with at least one Spanish speaking person) to conduct interviews, complete questionnaires, and obtain signatures for medical-records, work-history and powers of attorney forms at screening.
7. Place a reminder advertisement in local newspapers prior to the screening.

Gulf Coast Marketing would pay printing and mailing costs, rental for screening site, newspaper advertisements, and wages for interviewers. You would pay, in addition to an agreed upon fee as described above, staff travel cost to site, meals, telephone costs and wages for person(s) answering appointment calls.

Again, we at Gulf Coast Marketing would be honored and would welcome a business relationship with your law firm. We respectfully request an appointment with you or your designee to discuss future possibilities. I can be reached at (409) 938-7642. Thank you for your time and consideration.

Sincerely,

Lloyd Criss

Lloyd Criss

*Gulf Coast Marketing can offer this complete marketing service at little more than actual cost due to our utilization and business relationship with U. S. Mobile X-ray. This mobile x-ray company will provide you class 1 X-rays at market prices.

ATTORNEYS & LAW FIRMS WHO HAVE UTILIZED GMC SERVICES:

Nix, Patterson & Roach, L.L.P. Daingerfield, TX	Danziger & DeLlano Houston, TX	Karon & Dalimonte Boston, Massachusetts
The Schmidt Firm L.L.P. Dallas, TX	The Law Office of Jim Zadeh Fort Worth, TX	LeBaron & Waddell, Baton Rouge, LA
Craig Biegel Daingerfield, TX	McGarland & Schmidt Jackson, MS	

RESULTS OF SCREENINGS IN 2000

In early 2000, Gulf Coast Marketing, in the Houston and Beaumont areas, screened in excess of 1,500 qualified people for a Houston Law firm.

In September 2000, G. C. M. screened 721 in Paris and Longview, Texas.

Prior to the year, 2000, Lloyd Criss was employed by the Foster and Sear law firm, and in a one year period, approximately 7,000 new cases were added to that firm's inventory.

RESULTS OF SCREENINGS IN 2001

	City	Screening Date	Number of Qualified Applicants Interviewed and X-rayed
1.	Corpus Christi, TX	February 2 - 3, 2001	540
2.	Magnolia & El Dorado, Ark.	February 15, 16, 17, 2001	747
3.	Lufkin, TX	February 23 - 24, 2001	493
4.	Groves, Beaumont, Orange, TX	March 7, 8, 9, 10, 2001	741
5.	Star Mall, Houston, TX	March 30 - 31, 2001	274
6.	Maxie Rd., Houston, TX	April 6 - 7, 2001	335
7.	Marianna & Jonesboro, Ark.	April 19 - 20, 2001	231
8.	Tyler, TX	April 26, 27, 28, 2001	433
9.	Baytown, TX	April 27 - 28, 2001	196
10.	Pasadena, TX	May 4 - 5, 2001	192
11.	Lake Charles, LA	May 11 - 12, 2001	240
12.	Westwego & Metairie, LA	May 17, 18 & 19, 2001	477
13.	Abilene & Midland, TX	May 24, 25 & 26, 2001	342
14.	Amarillo, TX	June 1 - 2, 2001	148
15.	Pine Bluff & Little Rock, Ark.	June 12, 13, 14, 15, & 16, 2001	864
16.	Dallas, TX	June 21, 22, & 23, 2001	167
17.	Ft. Worth, TX	June 29 & 30, 2001	245
18.	San Antonio, TX	July 12, 13 & 14, 2001	418
19.	Fort Smith, Ark.	August 17 & 18, 2001	250
20.	Worcester, Mass.	October 9 & 10, 2001	145
21.	Lynn, Mass.	October 11, 12 & 13, 2001	131
22.	Westport, Mass.	October 16 & 17, 2001	130
23.	Weymouth, Mass.	October 18, 19 & 20, 2001	235
24.	Lufkin, TX	October 26 & 27, 2001	267
25.	Corpus Christi, TX	November 2 & 3, 2001	338
26.	Lake Jackson, TX	November 8, 2001	146
27.	Galveston, TX	November 9, 2001	152
28.	Texas City, TX	November 10, 2001	145

RESULTS OF SCREENINGS IN 2002

	City	Screening Date	Number of Qualified Applicants Interviewed and X-rayed
1.	Tupelo, MS	January 11 & 12, 2002	361
2.	Biloxi, MS.	January 17, 2002	269
3.	Pascagoula, MS	January 18 & 19, 2002	617
4.	Vicksburg, MS	March 16, 2002	289
5.	Laurel, MS	March 19 & 20, 2002	644
6.	Jackson, MS	March 21 & 22, 2002	580
7.	Shreveport, LA.	May 1 & 2, 2002	433
8.	Texarkana, TX	May 3 & 4, 2002	438
9.	Portland, OR	May 13, 2002	134
10.	Albany, OR	May 14 & 15, 2002	460
11.	Gresham, OR	May 16, 2002	148
12.	Portland, OR	May 17, & 18, 2002	250
13.	Meridian, MS	May 31 & June 1, 2002	315
14.	Columbus, MS	June 3 & 4, 2002	547
15.	Grenada, MS.	June 6, 2002	234
16.	Greenville, MS	June 7 & 8, 2002	304
17.	Worcester, MA	June 25 & 26, 2002	147
18.	Braintree, MA	June 27 & 28, 2002	145
19.	Seekonk, MA.	June 29 & 30, 2002	87
20.	Texas City, TX	August 9 & 10, 2002	186
21.	Cleburne, TX	August 15, 2002	129
22.	Fort Worth, TX	August 16 & 17, 2002	165
23.	League City, TX	September 2, 2002	68
24.	Pascagoula, MS	November 4 & 5, 2002	301
25.	Laurel, MS	November 6 & 7, 2002	300
26.	Vicksburg, MS	November 8, 2002	165
27.	Natchez, MS	November 9 & 10, 2002	514
28.	Corinth, MS	November 18, 2002	278
29.	Oxford, MS	November 19, 2002	330
30.	Olive Branch, MS	November 20 & 21, 2002	382

RESULTS OF SCREENINGS IN 2003

	City	Screening Date	Number of Qualified Applicants Interviewed and X-rayed
1.	Plaquemine, LA	January 27, 2003	108
2.	Houma, LA.	January 28 & 29, 2003	269
3.	New Iberia, LA.	January 30 & 31, 2003	164
4.	Opelousas, LA.	February 1 & 2, 2003	218
5.	Lafayette, LA.	February 3 & 4, 2003	78
6.	Jennings, LA.	February 5, 2003	84

LAW OFFICE OF
JIM*ZADEH PC

115 WEST 2ND ST., SUITE 201 • FORT WORTH, TEXAS 76102
TELEPHONE 817-335-5100 • TELEFAX 817-335-3974
jim@zadehfirm.com

23 August 2005

Tab 24

VIA FACSIMILE TRANSMITTAL NO. 508-655-4811
and FIRST CLASS U.S. MAIL
Barry S. Levy, M.D., M.P.H., P.C.
20 North Main Street
Suite 200
Sherborn, MA 01770

Dear Dr. Levy:

This will acknowledge receipt of your correspondence dated August 15, 2005. In your correspondence you first ask for confirmation in writing that the records in your possession are not subject to any confidentiality strictures and that I have no reason to request that you limit your response to the Committee's request. Secondly, you ask that I confirm that you are not presently involved in any pending silica cases for our firm for any of our clients. I will respond to each request in kind.

With regard to the confidentiality issue, I am unsure as to whether there is any confidentiality strictures regarding to the records you have in your possession. As you know, this law firm asked you to review cases to determine whether there was a causal connection between silica exposure and a silica related disease other then silicosis, i.e., scleraderma, tuberculosis, rheumatoid arthritis, lung cancer or lupus ("silica related disease"). In many of those instances, we provided you with medical records from our clients, often including a silicosis diagnosis from another physician. In some instances, you found a causal connection between the silica related disease and the silica exposure and in other cases you did not. In virtually all of those cases, the medical records that we provided to you were obtained by and through a properly executed Health Insurance Portability and Accountability Act of 1996 ("HIPAA") release or from the clients themselves. However, those clients have not executed a HIPAA release to allow you to release such records. This law firm does not specialize in HIPAA issues and is unaware of their applicability to a congressional request. However, we feel it necessary to advise you of such possibilities before releasing any records. In addition, this law firm hired you as a consulting expert on those cases in which we were seeking to determine whether there was a causal connection between silica exposure and the silica related disease as set forth above. In those cases in which you found there was such a causal connection, you became a testifying expert and any consulting expert privilege no longer applied. However, in those instances where you found no causal connection, we maintain that you are a consulting expert. The federal rules of civil procedure and the case law interpreting such rules provide that generally no information about a

consulting-only expert is discoverable. The purpose of these rules is to allow a party to freely investigate the case and obtain honest opinions without fear that such an opinion has to be released if the opinion is adverse to the party's case. That is precisely the present situation in those cases in which you found no causal connection. Once again, we are unaware of the applicability of this rule of civil procedure and supporting law to the congressional request. However, we again feel it necessary to advise you of such possibilities before releasing such records.

With regards to the issue of whether you are currently an expert in any pending cases, the answer has two parts. We acknowledge that you are not going to be an expert in this law firm's one federal MDL No. 1553 case or any other pending silica claims with one exception. We still anticipate your limited involvement with this law firm in the restricted role of providing expert testimony concerning the causal connection of silica related diseases and silica exposure for approximately fifty (50) silicosis clients. We anticipate that limited role to be your sole charge in these cases and is the only remaining involvement you have with our law firm.

We thank you for your work and please let us know if there is anything additional we can provide to assist you with the pending request.

Very truly yours,

Jamshyd "Jim" M. Zaiden

JMZ/eag

LAW OFFICE OF
JIM*ZADEH P.C.

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jim@zadehfirm.com

Tab 25

28 October 2005

Barry S. Levy, M.D., M.P.H., P.C.
20 North Main Street, Suite 200
Post Office Box 1230
Sherborn, Massachusetts 01770

Re: Silica cases

Dear Dr. Levy:

This will acknowledge receipt of your correspondence to determine the status of individuals who are included in the federal silica MDL. Please be advised that all such plaintiffs listed in your letter of October 27, 2005 are pending with the sole exception of [redacted] who has been dismissed. The remaining plaintiffs are currently in the remand process of the MDL and the exact status is unknown. We are not continuing to rely on your preliminary opinion in any of those cases. We either have or are in the process of having other experts review these cases. We have listed you as a diagnosing doctor on the fact sheets and have attached your preliminary report to the fact sheets. We have not designated you as an expert as such designations have never been due. If you need any additional information, please feel free to let me know.

Very truly yours,

Jamshyd ("Jim") M. Zadeh

JMZ/eag

00000015 Z

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jim@zadehlirm.com

Copy

Tab 26

July 8, 2002

James W. Ballard, M.D.
4012 Greystone Drive
Birmingham, AL 35242

RE: June 2002 Mississippi Screening
Total of 78 x-rays

Dear Dr. Ballard:

Enclosed please find the following three groups of x-rays for your review:

Substantial silica exposure = 47 x-rays
Substantial silica & asbestos exposure = 19 x-rays; and
Substantial asbestos exposure = 12 x-rays

My firm check in the amount of $3,510 is enclosed for payment of your b-reading fee.

Upon completion of your review please return the x-rays, your reports and ILO's to me. I have enclosed a return Fed Ex label for your convenience.

Very truly yours,

Jamshyd (Jim) M. Zadeh

JMZ/km

(78) ILO Exam x 45.00/exam
= 3510.00

Billed 7/11/02
Statement # 202394
Pre-paid Ck# 1419
3,510.00 7/8/02

JB004204

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Mail Copies

August 22, 2002

Done! Pd!!
Thank you!!!
Dr Levine

Richard B. Levine, M.D.
Chairman Dept. of Diagnostic Imag.
108 South Somerset
Ventnor City, NJ 08406

RE:

@45⁰⁰/ea — $13,275

Dear Rick:

Enclosed please find x-rays for the above screening dates for your review. There are two boxes of x-rays - one for Cleburne and one for Fort Worth.

The first box consists of the following exposures for the screening done Cleburne, TX:

8-29 OT

A group of 5 x-rays has substantial silica and asbestos exposure;
A group of 14 x-rays has substantial asbestos exposure;
A group of 40 x-rays has substantial silica exposure; and
A group of 69 x-rays are of undetermined exposure.

The second box consists of the following exposures for the screening done in
or

8-24 OT

A group of 4 x-rays has substantial silica and asbestos exposure;
A group of 8 x-rays has substantial asbestos exposure;
A group of 29 x-rays has substantial silica exposure; and
A group of 42 x-rays are of undetermined exposure.

and for th screening done in Fort Worth o

8-29 OT

A group of 8 x-rays has substantial silica and asbestos exposure;
A group of 6 x-rays has substantial asbestos exposure;
A group of 27 x-rays has substantial silica exposure; and
A group of 42 x-rays are of undetermined exposure.

00001026 Z

Upon completion of your review please return the x-rays and ILO's to me. I have enclosed return Fed Ex labels for your convenience.

Very truly yours,

Jamshyd (Jim) M. Zadeh

JMZ/km
Enclosures

00001027 Z

Last	First	Pat SS#	BReader	Location	X-Ray	Exposure	Prc Cancer	Dis Notes
			Richard B. Levine			Unknown		
* S-S 1-0	(B)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* Q-S 1-1	(H)		Richard B. Levine			Unknown		
* Q-S 1-1	(J)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* Q-S 1-1	(B) SP CAP		Richard B. Levine			Unknown		
* Q-Q 1-2	(S)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* S-S 1-1	(D)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
R (6)	Suspect CA?		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* S-S 1-1	(A)		Richard B. Levine			Unknown		no other ...
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* Q-S 2-3	(H)		Richard B. Levine			Unknown		
* Q-S 1-2	(H)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* Q-Q 1-2	(S)		Richard B. Levine			Unknown		
* Q-S 1-2	(H)		Richard B. Levine			Unknown		
* Q-S 2-3	(B) 3cm Tumor L chest		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine		2	Unknown		
* Q-S 1-1	(H)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* S-S 1-1	(A)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* Q-Q 1-0	(S)		Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
* Q-S 2-2 T cor SIP	(B)		Richard B. Levine			Unknown		

00001028 Z

Last	First	Pac SS#	BReader	Location	X-Ray	Exposure	Prc Cancer	Dis Notes
*	[illegible]	(A)	Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
*	[illegible]	(A)	Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
*	[illegible]	(A)	Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
*	[illegible]	(A)	Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		
*	[illegible]	(A)	Richard B. Levine			Unknown		
			Richard B. Levine			Unknown		

Last	First	SS#	Pa	BReader	Location	X-Ray	Expos	Prc	Cancer	Di	Notes
				Richard B. Levine			S				
				Richard B. Levine			S				
				Richard B. Levine			S				
				Richard B. Levine			S				
				Richard B. Levine			S				
				Richard B. Levine			S				
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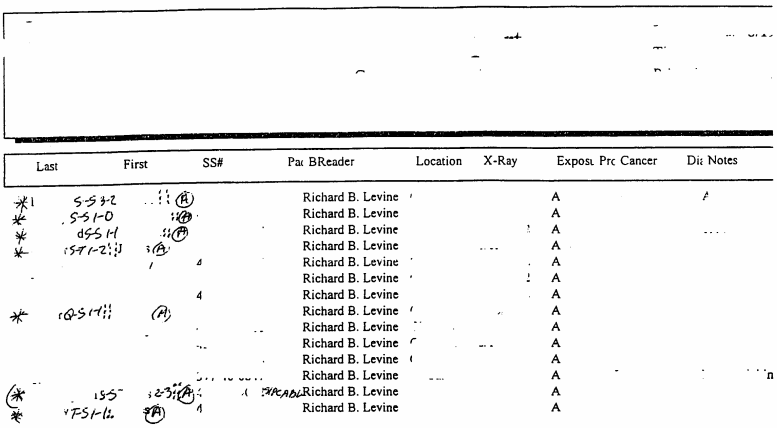
				Richard B. Levine			S				
				Richard B. Levine			S				



Last	First	SS#	Pat BReader	Location	X-Ray	Expos	Pro Cancer	Dia Notes
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		
			Richard B. Levine			A		

(95)

2

Last	First	SS#	Pat BReader	Location	X-Ray	Exposure	Pre Cancer	Dia Notes	B
			Richard B. Levine			A S			
on see ppt			Richard B. Levine			A S	I	3/1/2001	
1Q-5 1-0		M	Richard B. Levine			A S			
B-1-1 E-1			Richard B. Levine			A S			
			Richard B. Levine			A S			
			Richard B. Levine			A S			

00001032 Z

Last	First	SS#	DOB	BReader	Location	X-Ray	Exposure	Cancer
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	Prostate
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	Prostate
				Richard B. Levine			S	Prostate
				Richard B. Levine			S	
				Richard B. Levine			S	Cervical
				Richard B. Levine			S	
				Richard B Levine			S	
				Richard B Levine			S	
				Richard B. Levine			S	Colon
				Richard B. Levine			S	Prostate
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	

Last	First	SS#	DOB	BReader	Location	X-Ray	Exposure	Cancer
				Richard B. Levine			A S	
				Richard B. Levine			A S	
				Richard B. Levine			A S	
				Richard B. Levine			A S	

P-S 1-0 ; M.

Last	First	SS#	DOB	BReader	Location	X-Ray	Exposure	Cancer
				Richard B. Levine			Unknown	
				Richard B. Levine			Unknown	
				Richard B. Levine			Unknown	
				Richard B. Levine			Unknown	
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				Richard B. Levine			Unknown	S/P surgery
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				Richard B. Levine			Unknown	
				Richard B. Levine			Unknown	
				Richard B. Levine			Unknown	

Last	First	SS#	DOB	BReader	Location	X-Ray	Exposure	Cancer
*				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
*				Richard B. Levine			S	
*				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
*				Richard B. Levine			S	
*				Richard B. Levine			S	
*				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
*				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	
				Richard B. Levine			S	

James W. Ballard, M.D. NIOSH Certified B-Reader
3832 Knollwood Drive ● Birmingham, AL 35243
Phone (205) 967-1689

Tab 27

X-RAY EVALUATION
February 14, 2000

[redacted] - . RTS\LVM49

PA and lateral views of the chest dated 10/15/99 are reviewed for the presence of, and classification of pneumoconiosis according to the ILO (1980) classification.

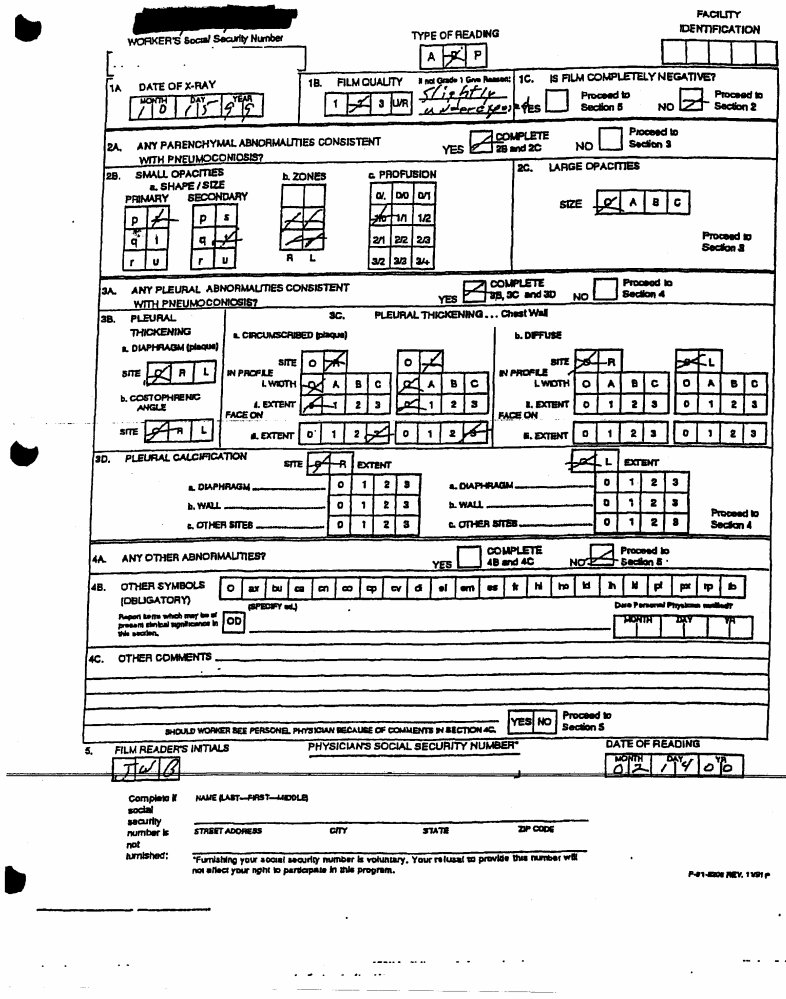
Film quality is grade 2 due to slight underexposure. Inspection of the lung parenchyma demonstrates interstitial changes in the mid and lower lung zones bilaterally, consisting of small and irregular opacities of size and shape S/T, profusion 1/0.

Pleural plaques are seen face on bilaterally, extent of 3 bilaterally. No parenchymal infiltrates, nodules or masses are seen. The heart is of normal size and the mediastinal structures are unremarkable.

CONCLUSION: The above parenchymal and pleural changes are consistent with asbestosis provided the subject's exposure history and period of latency are appropriate.

James W. Ballard, M.D.

021400.fos[acb]



WORKER'S Social Security Number [redacted]

TYPE OF READING: A [X] P

FACILITY IDENTIFICATION

1A DATE OF X-RAY: MONTH 10 DAY 15 YEAR 96

1B FILM QUALITY (If not Grade 1 Give Reason): 1 [X] 2 3 UR — Slightly underexpos

1C IS FILM COMPLETELY NEGATIVE? YES [ ] Proceed to Section 5 NO [X] Proceed to Section 2

2A ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] COMPLETE 2B and 2C NO [ ] Proceed to Section 3

2B SMALL OPACITIES
a. SHAPE / SIZE — PRIMARY: p [X] q [ ] r [ ]; SECONDARY: p [ ] q [X] r [ ]
b. ZONES: R [ ] L [ ]
c. PROFUSION: 0/- [ ] 0/0 [ ] 0/1 [ ] 1/0 [X] 1/1 [ ] 1/2 [ ] 2/1 [ ] 2/2 [ ] 2/3 [ ] 3/2 [ ] 3/3 [ ] 3/4 [ ]

2C LARGE OPACITIES: SIZE A [ ] B [ ] C [ ] — Proceed to Section 3

3A ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] COMPLETE 3B, 3C and 3D NO [ ] Proceed to Section 4

3B PLEURAL THICKENING
a. DIAPHRAGM (plaque) SITE R [X] L [ ]
b. COSTOPHRENIC ANGLE SITE R [X] L [ ]

3C PLEURAL THICKENING . . . Chest Wall

	a. CIRCUMSCRIBED (plaque) SITE O [X]		b. DIFFUSE SITE R [X]	
IN PROFILE i. WIDTH	A [X] B C	A [X] B C	A B C	A B C
i. EXTENT	1 [X] 2 3	1 [X] 2 3	0 1 2 3	0 1 2 3
FACE ON ii. EXTENT	0 1 2 [X]	0 1 2 [X]	0 1 2 3	0 1 2 3

3D PLEURAL CALCIFICATION

	SITE R [X] EXTENT	SITE L [X] EXTENT
a. DIAPHRAGM	0 1 2 3	0 1 2 3
b. WALL	0 1 2 3	0 1 2 3
c. OTHER SITES	0 1 2 3	0 1 2 3

Proceed to Section 4

4A ANY OTHER ABNORMALITIES? YES [ ] COMPLETE 4B and 4C NO [X] Proceed to Section 5

4B OTHER SYMBOLS (OBLIGATORY): o [X] ax bu ca cn co cp cv di ef em es fr hi ho id ih il pi px tp ib
(SPECIFY ot.)
Report items which may be of present clinical significance in this section. OD [ ]
Date Personal Physician notified? MONTH DAY YR

4C OTHER COMMENTS

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C. YES [ ] NO [ ] Proceed to Section 5

5. FILM READER'S INITIALS: JW [X]

PHYSICIAN'S SOCIAL SECURITY NUMBER*

DATE OF READING: MONTH 12 DAY 14 YR 96

Complete if social security number is not furnished: NAME (LAST—FIRST—MIDDLE)

STREET ADDRESS CITY STATE ZIP CODE

*Furnishing your social security number is voluntary. Your refusal to provide this number will not affect your right to participate in this program.

P-61-8908 REV. 1 1/91 P

03-938-5

James W. Ballard, M.D.
4812 Keystone Drive ● Birmingham, AL 35242
NIOSH Certified B-Reader
Licensed in Alabama and Florida

June 7, 2004

Asbestos Clerk
Law Offices of Alwyn H. Luckey
P. O. Box 724
2016 Bienville Blvd.
Ocean Springs, MS 39566-0724

Re: [redacted]

Chest radiograph(s) dated 10/15/99 is reviewed for the presence of and classification of pneumoconiosis (silicosis) according to the ILO 80 classification.

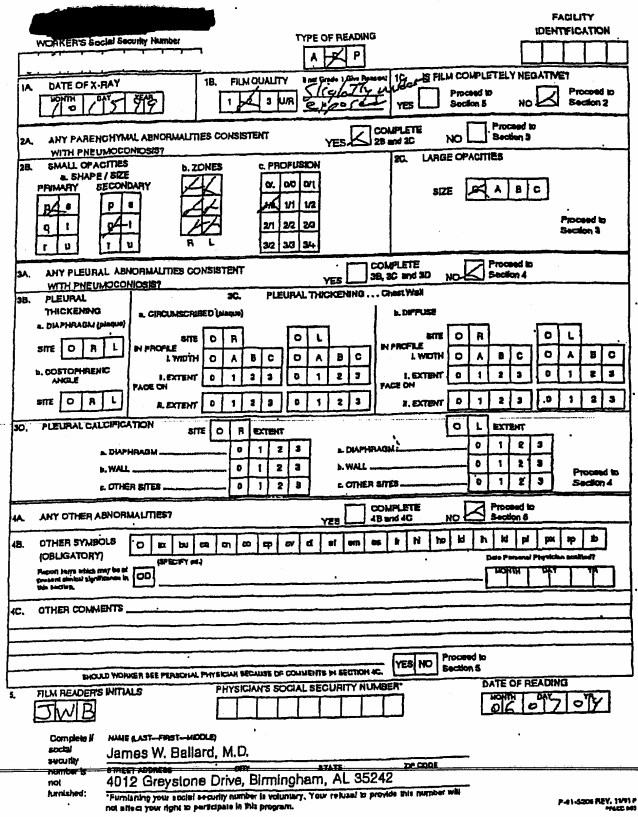
Film quality is grade 2 due to slight underexposure. Inspection of lung parenchyma demonstrates interstitial changes in all six lung zones, consisting of small rounded opacities of size and shape p/q, profusion 1/0.

There are no pleural plaques, pleural thickenings or pleural calcifications. No parenchymal infiltrates, nodules or masses are seen. The heart is of normal size and the mediastinal structures are unremarkable.

CONCLUSION: I have reviewed the occupational history and chest x-ray of the referenced individual. Based upon that history and the chest x-ray findings compatible with bilateral interstitial lung disease, it is my opinion, to a reasonable degree of medical certainty, that the x-ray changes are due to silicosis, acquired through occupational exposure to silica.

James W. Ballard, M.D.

60604.luk[acb/b]



WORKER'S Social Security Number [redacted]

TYPE OF READING: A [X] P

FACILITY IDENTIFICATION

1A. DATE OF X-RAY: MONTH 10 DAY 15 YEAR 79

1B. FILM QUALITY (1 [X] 2 3 UR) — Slightly underexposed

1C. IS FILM COMPLETELY NEGATIVE? YES [ ] Proceed to Section 5 NO [X] Proceed to Section 2

2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [X] COMPLETE 2B and 2C NO [ ] Proceed to Section 3

2B. SMALL OPACITIES — a. SHAPE / SIZE PRIMARY [p/q] SECONDARY [p/q]; b. ZONES [R/L]; c. PROFUSION (0/- 0/0 0/1 1/0 1/1 1/2 2/1 2/2 2/3 3/2 3/3 3/+)

2C. LARGE OPACITIES — SIZE [ ] A B C — Proceed to Section 3

3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS? YES [ ] COMPLETE 3B, 3C and 3D NO [X] Proceed to Section 4

3B. PLEURAL THICKENING — a. DIAPHRAGM (plaque) SITE O R L; b. COSTOPHRENIC ANGLE SITE O R L

3C. PLEURAL THICKENING ... Chest Wall — a. CIRCUMSCRIBED (plaque) SITE O R L; IN PROFILE I. WIDTH O A B C; I. EXTENT 0 1 2 3; FACE ON II. EXTENT 0 1 2 3; b. DIFFUSE SITE O R L; IN PROFILE I. WIDTH O A B C; I. EXTENT 0 1 2 3; FACE ON II. EXTENT 0 .1 2 3

3D. PLEURAL CALCIFICATION — SITE O R L; EXTENT 0 1 2 3; a. DIAPHRAGM; b. WALL; c. OTHER SITES — Proceed to Section 4

4A. ANY OTHER ABNORMALITIES? YES [ ] COMPLETE 4B and 4C NO [X] Proceed to Section 5

4B. OTHER SYMBOLS (OBLIGATORY) — O ax bu ca cn co cp ev ct ef em es s N ho id h id pl px ep ib; (SPECIFY #4) OO; Report many which may be of present clinical significance in this section. Date Personal Physician notified? MONTH DAY YR

4C. OTHER COMMENTS

SHOULD WORKER SEE PERSONAL PHYSICIAN BECAUSE OF COMMENTS IN SECTION 4C. YES [ ] NO [X] Proceed to Section 5

5. FILM READER'S INITIALS: JWB — PHYSICIAN'S SOCIAL SECURITY NUMBER* — DATE OF READING: MONTH 02 DAY 07 YR 04

Complete if social security number is not furnished:

NAME (LAST—FIRST—MIDDLE): James W. Ballard, M.D.

STREET ADDRESS: 4012 Greystone Drive, Birmingham, AL 35242 — CITY — STATE — ZIP CODE

*Furnishing your social security number is voluntary. Your refusal to provide this number will not affect your right to participate in this program.

P-61-5208 REV. 1991 P

Stacie F. Taylor
Attorney at Law
PO Box 91870
Mobile, AL 36691

Tab 28

March 10, 2005

Steve Mullins, Esq.
The Law Offices of Alwyn H. Luckey
2016 Bienville Boulevard
Ocean Springs, MS 39564

RE: MDL SILICA CASES

Dear Steve:

It has come to my attention that the Court is concerned with the nature of certain medicals performed by Dr. Harron, namely that these cases may have at some time been reviewed by another doctor. The Court should be advised that neither my office nor your office have, at any time, been aware of these cases being reviewed by any other doctor. Our knowledge is that these cases were diagnosed with an occupational disease by a certified B-reader, namely Dr. Harron in this instance, and that was the basis of acceptance of these cases at the outset to further investigate for a possible personal injury claim.

If you have any questions, please do not hesitate to call upon me. I remain,

Sincerely yours,

Stacie F. Taylor

tab 29

Occupational Diagnostics
P.O. Box 331
Ocean Springs, MS 39566-0331
228-875-1114

Silicosis Evaluation Summary - Monday, May 12, 2003
Test Results with hands on Medical Examination

L__ Test Date: May 10, 2003
SSN:

I had the pleasure of meeting and physically examining ? n May 10, 2003, to evaluate him for occupational lung disease. orts silica exposure while he worked in the decrease room at Spartus in Louisville, MS, from 1969 to 1970. A pump tester at Ford Motor Company in Detroit, MI, from 1970 to 1971. A machine operator at Taylor Forge in Ackerman, MS, from 1975 to 1977. A janitor at Georgia Pacific in Louisville, MS, from 1972 to 1974. A machinist at Taylor machine in Louisville, MS, from 1978 to present.

PA & lateral views of chest X-rays confirmed the presence of increased pulmonary parenchymal markings. Film quality grade 1. There is increased prepondurance of interstitial lung tracings in lower lobes bilaterally. On closer examination of the bilateral lobar markings, there are multiple enhanced lucent circular opacities. These are disparate, and are prominent in both PA and lateral films. There is moderate presence of bronchial cuffing. Chest X-ray findings in consort with the physical exam and exposure history revealed a diagnosis of primary silicosis.

The physical examination is hallmarked by audible but coarse rhonci with minimum to moderate rales on auscultation. Manual examination of the chest revealed both tactile and vocal fremitus.

Diagnosis: Based upon my review of the patient's work history, x-rays and physical exam, it is my opinion to a reasonable degree of medical certainty that this patient has silicosis related to his work exposure.

This report relates only to the diagnosis of occupational lung diseases including exposure to asbestos or silica, and is not intended to serve as a comprehensive medical evaluation.

H. Todd Coulter, M.D.

HTC/cjp

MIDWAY FAMILY CARE

2693 Hwy. 90, Ocean Springs, MS 39564 ■ (228) 875-7474

Todd H. Coulter, M.D.

Silicosis Evaluation Summary - Wednesday, June 11, 2003
Test Results with hands on Medical Examination

Test Date: June 7, 2003

SSN: -

I had the pleasure of meeting and physically examining [illegible] on June 7, 2003, to evaluate him for occupational lung disease. [illegible] s reports silica exposure while he worked as a machinist and in maintenance at Spartus in Louisville, MS, from 1972 to 1982. A group leader at Corner [illegible] orp. in Philadelphia, MS, from 1983 to current.

PA & lateral views of chest X-rays confirmed the presence of increased pulmonary parenchymal markings. Film quality grade 1. There is increased prepondurance of interstitial lung tracings in lower lobes bilaterally. On closer examination of the bilateral lobar markings, there are multiple enhanced lucent circular opacities. These are disparate, and are prominent in both P- and lateral films. There is moderate presence of bronchial cuffing. Chest X-ray findings in consort with the physical exam and exposure history revealed a diagnosis of primary silicosis.

The physical examination is hallmarked by audible but coarse rhonci with minimum to moderate rales on auscultation. Manual examination of the chest revealed both tactile and vocal fremitus.

Diagnosis: Based upon my review of the patient's work history, x-rays and physical exam, it is my opinion to a reasonable degree of medical certainty that this patient has silicosis related to his work exposure.

This report relates only to the diagnosis of occupational lung diseases including exposure to asbestos or silica, and is not intended to serve as a comprehensive medical evaluation.

H. Todd Coulter, M.D.

HTC/cjp

Tab 30

BRIEFLY . . .

Perspectives on Legislation, Regulation, and Litigation

Volume 6, Number 6
June 2002

ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL

National Legal Center
for the Public Interest

PREFACE

Nearly thirty years ago, the Fifth Circuit Court of Appeals in *Borel v. Fibreboard* affirmed a jury verdict that gave asbestos-exposed workers a new remedy beyond workers' compensation. The *Borel* decision marked the beginning of the asbestos litigation, which has become the largest area of product liability litigation in American history.

In 1982, approximately 20,000 asbestos claimants had filed lawsuits. Currently, more than 200,000 asbestos-related cases are pending in state and federal courts, and that number is growing at the rate of more than 50,000 new cases every year. According to a recent estimate, the total number of asbestos claims may reach 2.5 million, and the economic toll of asbestos litigation on businesses could reach $275 billion. Without question, asbestos litigation has become a crisis, flooding state and federal courts with thousands of claims, most of them filed by "unimpaired" claimants who are not sick.

In this article, Griffin B. Bell, former federal appeals court judge and Attorney General of the United States, examines the causes of the asbestos litigation crisis and argues that, because of Congress' failure to act, our legal system must do a dramatically better job of adjudicating and managing asbestos cases. According to Judge Bell, the sheer number of cases, unlike any type of previous litigation, has compelled some courts to value expediency in resolving claims at the expense of fairness and procedural safeguards designed to protect litigants' rights. Nonetheless, Judge Bell asserts that state and federal judges have the ability and resources to help solve the asbestos litigation crisis. He outlines several options for judges to consider when managing their asbestos dockets.

This report, like all of the monographs published by the National Legal Center, is presented to encourage greater understanding of legal issues. It is not intended to influence legislation but to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions or positions of the advisors, officers, or directors of the National Legal Center. This publication is presented purely as an educational public service.

Ernest B. Hueter
President
National Legal Center

Volume 6, Number 6
June 2002

ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL

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GRIFFIN B. BELL

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ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL*

I. INTRODUCTION

The Judicial System in the United States is unique. I cherish it. I have spent more than fifty years of my professional career attempting to protect its integrity and ensure its delivery of fairness and justice to our citizenry.

In large part, the Judicial System has functioned as intended, safeguarding the rights afforded by our federal and state constitutions, serving as a forum for individuals to seek redress for injuries, and providing individualized treatment of cases and controversies. Our federal and state judges form the most qualified and committed bench in the world. We are fortunate to live in a country where the rule of law prevails.

There is one respect, however, in which our Judicial System is falling short: the asbestos litigation.

---

* Griffin B. Bell was appointed by President Kennedy to the U.S. Court of Appeals for the Fifth Circuit in 1961. He served on that Court until 1976. In 1977, President Carter appointed Judge Bell to be Attorney General of the United States, and he served in that post until 1979. In 1985-86, he was President of the American College of Trial Lawyers. Judge Bell represented President George H.W. Bush in the Independent Counsel's investigation of the Iran-Contra Affair. Currently a partner at King & Spalding, Judge Bell is active in issues involving the country's Judicial System. A more detailed biography of Judge Bell can be found in the About the Author section on page 49.

Judge Bell acknowledges the co-authorship of this article by Wick Sollers and Mark Jensen. Mr. Sollers is a partner and Mr. Jensen is an associate at King & Spalding's Washington, D.C., office.

In asbestos litigation, the Judicial System fails to guarantee basic elements of justice that we take for granted in other disputes. Courts, understandably, struggle to adapt to and manage the unexpected and unprecedented volume of asbestos personal injury claims. Hundreds of thousands of cases—and counting—have overtaken and incapacitated certain courts since the 1970s, with no realistic end for several more decades. In the history of our legal system, no other type of litigation has been as profuse, long-standing, and difficult to resolve.

In my view, the judiciary must make a choice. Judges need not passively accept the asbestos litigation's debilitating effects on our Judicial System. They have at their disposal a number of judicial tools to help solve this crisis, not the least of which is their intellect and capacity to innovate when justice is compromised. The Supreme Court of the United States is no doubt correct in saying that national legislation may be the most effective means to ensure that sick claimants are compensated fairly and efficiently, but its pleas to Congress go unheeded. I submit that it is time for the judiciary to take bold steps to manage fairly those dockets that are inundated by the crushing load of asbestos cases.

II. THE TORT SYSTEM HAS FAILED TO COPE WITH THE EXPLOSION OF ASBESTOS LITIGATION

A. Asbestos Litigation Has Overwhelmed and Incapacitated Certain Courts

Federal and state courts should not be faulted for their management of the asbestos litigation deluge; it is like no other litigation they have experienced before in either size or longevity. In 1999, the Supreme Court acknowledged the intractable nature of the almost thirty-year-old asbestos litigation. The Court employed unusually strong language in an often-quoted passage, describing the litigation as an "elephantine mass of asbestos cases . . . [that] defies customary judicial administration and calls for national legislation."[1]

The crisis is worsening at a much more rapid pace than even the most pessimistic projections. For example, the RAND Institute for

Civil Justice has been studying asbestos litigation since 1984, when approximately 20,000 cases were pending.[2] RAND estimated, at that time, that the *total* number of cases against asbestos defendants could reach 200,000.[3] Today, there are in excess of 200,000 cases *pending*.[4] In its most recent 2001 study, RAND predicts that the asbestos litigation crisis will worsen,[5] estimating that 500,000 claims have been filed and that the number of claims has risen sharply in recent years.[6] The study concludes that the number of claims yet to be filed could range from 500,000 to 2.5 million.[7]

More than ten years ago, Chief Justice Rehnquist appointed a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, which drafted a report that forecast the crisis we now face. The Committee "concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."[8]

In its 1991 report, the Ad Hoc Committee stated a fact that has become even more apparent over the past decade:

> [T]he large volume of cases and the resulting delays and costs have resulted in a denial of justice and fundamental unfairness to litigants. Justice is denied because claims cannot be evaluated and either dismissed, paid, or litigated in a reasonable time frame. Unfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims.[9]

Furthermore, the Committee stated that the asbestos crisis affects not only the asbestos litigants, but also "impedes the resolution of other cases in the justice system."[10] The Committee correctly foreshadowed that "the worst is yet to come. . . . [U]nless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources for payment of these claims will be exhausted. . . ."[11]

In 1999, eight years later, Chief Justice Rehnquist again noted that the crisis had worsened in the absence of congressional action, writing that asbestos-related claims were having a "massive impact" on the court system.[12]

B. Bankruptcy

The inability of the tort system to manage asbestos cases fairly has resulted in an alarming number of bankruptcies. Some experts estimate that the total economic toll of asbestos liability on businesses will reach *$275 billion*, more than cost estimates for all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks.[13] More than fifty companies suffering from overwhelming asbestos costs have filed for bankruptcy, with North American Refractories Company (NARCO), Kaiser Aluminum, A.P. Green, Harbison-Walker, and Shook & Fletcher the latest to succumb in 2002.[14] As one journalist recently noted, "the prospects for all the remaining [solvent] companies worsen" with each successive bankruptcy.[15]

Bankruptcy courts currently may provide a rational and workable claims administration facility, but they ought not displace the tort system as the primary method for resolving asbestos cases. Bankruptcies have far-reaching, negative consequences for both truly sick claimants and innocent employees and shareholders. However, our incapacitated tort system leaves companies with no viable alternative to declaring bankruptcy.

Bankruptcy judges, and the federal district and appellate judges who review their decisions, find themselves in a unique position to control the asbestos litigation as more companies seek Chapter 11 protection. The varied and often competing interests of innocent employees and shareholders, sick claimants, unimpaireds, future claimants, and lawyers seeking attorney fees all converge within the bankruptcy court's jurisdiction. The expanding list of bankrupt companies is a constant reminder to bankruptcy jurists that they have an important role to play in fashioning comprehensive, innovative, and fair improvements to our failing Judicial System.

C. Most Asbestos Claimants Are Not Sick

The onslaught of asbestos cases is dominated by claims from the "Unimpaired"—plaintiffs without cancer who are not physically sick by any accepted medical standard. The *New York Times* recently reported that the latest surge in asbestos claims includes many healthy plaintiffs: "[v]ery few new plaintiffs have serious injuries."[16] Payment of only those claims filed by plaintiffs who are sick would represent a major step toward solving the litigation crisis.

Supreme Court and district court judges, plaintiff lawyers who represent truly sick claimants, physicians, and business analysts all have recognized the prevalence of unimpaired claimants.

Justice Breyer acknowledged in the 1990s that many modern asbestos cases do not involve claimants who are impaired, quoting one source who estimated that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment."[17] That situation has only grown worse.

Federal courts responsible for managing asbestos dockets likewise have expressed concern that limited asbestos funds are compensating claimants with less serious injuries. In November 2001, Judges Weinstein and Lifland, who preside over one of the oldest and most significant asbestos bankruptcy trusts, the Manville Trust, "took judicial notice of the continuing media and other campaigns encouraging a flood of new claims." They noted "that there is a continuing rise in the number of claims and that the amount paid pro rata on claims has been reduced from 10 percent to 5 percent of the original value." Judges Weinstein and Lifland observed that "there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries."[18]

Similarly, in January 2002, Judge Weiner, who manages the federal MDL asbestos litigation, observed that asbestos cases filed on the basis of mass litigation screenings "[o]ftentimes . . . are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future."[19]

Other experts and physicians have explained why modern asbestos cases frequently involve claimants who are not sick.

By 1991, it was estimated that more than 50% of pending asbestos claims against the Manville Trust were filed by claimants who alleged having a form of pleural plaques, a fibrosis of the pleural lining of the lung that in most cases does not cause any physical impairment.[20] According to a 1992 article by one legal scholar, pleural claims accounted for "sixty to seventy percent of new asbestos claims filed."[21] As two experts have summarized, "[t]he benign conditions of the pleura that are produced by asbestos are seldom of any lasting importance. . . . Diffuse pleural thickening, which may follow an effusion or may develop without an effusion ever having been detected, is usually asymptomatic. It may rarely cause constriction of the lungs with impairment of function and, in extreme cases, consequent disablement."[22] A federal district court also concluded that "[i]n virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring."[23]

The other type of noncancerous, asbestos-related condition is a scarring of the lung tissue known as "asbestosis," a type of interstitial fibrosis. Fibrosis has approximately 150 known causes, only one of which is asbestos exposure. Individuals can have various degrees of asbestosis and, like pleural plaques and thickening, claimants with less severe asbestosis can exhibit no functional impairment or sickness of any kind. In the early 1970s, the federal government, through OSHA, began reducing the acceptable levels of occupational exposure to asbestos. According to one leading asbestos pathologist, these OSHA standards have "markedly decreased the incidence and severity of asbestosis."[24]

Well-regarded experts have explained in simple terms why modern asbestosis cases are less likely to involve physical impairment: "[w]ith the reduction in the amount of exposure, the development of incapacitating fibrosis slows down and the reaction becomes so slight and its spread so slow that no person with otherwise healthy lungs would

develop significant disability before reaching an age when he was likely to die of other causes."[25]

A recent *Fortune* article concluded that "asbestos defendants are very likely now paying compensation for every occupational disease known to man. Incipient or marginal asbestosis, as picked up on an X-ray, bears at least a superficial resemblance to more than 130 other lung inflammations, including scores caused by various airborne particles."[26]

Business analysts have agreed with these assessments. In 2001, A.M. Best reported that "[t]o date, the vast majority of filed claims have been for nonmalignant type exposures, including a large number of asymptomatic claimants."[27] Similarly, in 2001, both the RAND Institute[28] and Tillinghast-Towers[29] accepted estimates that at least 90% of claims are filed by plaintiffs who do not have cancer.

Perhaps the most revealing insight into the nature of many modern asbestos cases comes from certain plaintiff lawyers who represent truly sick claimants. In December 2001, one such prominent plaintiff attorney concluded, in a court filing in the Manville bankruptcy, that many workers filing new claims do not have real asbestos exposure:

> The [Manville] Trust has reported that [] current projections beginning in 2002 call for somewhere between a million and a half and two and a half million future cases.
>
> Of course, none of this means that more people are really getting sick as a result of their asbestos exposure. Rather, we are seeing large numbers of cases from "new" industries where it seems clear that if there is any asbestos exposure at all it is very likely limited in intensity as well as scope, with relatively few workers having real exposure.[30]

This lawyer for sick claimants opined on the potential causes for new claims in an October 24, 2001, letter sent to other asbestos plaintiff lawyers:

> Call it intuition or naivete, but I simply cannot believe that there is significant asbestos exposure from asbestos insulation in situ within textile mills to produce the flood of claims that the [Manville] Trust is now receiving. Whether the explanation is fraud, physician incompetence, or failure of recollection by claimants, I do not know. What I do know is that this claimed epidemic of the 21st Century "asbestosis" cannot possibly be real.[31]

Regardless of the reason for the dramatic numbers of unimpaired claimants, courts have attempted the difficult task of managing them efficiently and fairly. Many courts have succeeded. But some courts have failed in dramatic fashion—and plaintiff lawyers have flocked to those venues. The following section contains an overview of the ways asbestos claims have gravitated to those courts that have relaxed or ignored traditional tort requirements and gatekeeping functions.

III. FAIRNESS HAS BEEN SACRIFICED BY SOME COURTS STRUGGLING TO MANAGE THE ASBESTOS LITIGATION

The most significant casualty of the asbestos litigation crisis is fairness itself. Some courts in which plaintiff lawyers have aggregated thousands of claimants into mass "inventories," consisting of many unimpaired claimants and relatively few sick claimants, have struggled to manage claims fairly.

The selective filing of inventories of nonsick claimants in courts that will not turn these claims away coerces defendants into settling unsubstantiated claims by the nonsick. Certain courts will not scrutinize the unsubstantiated claims, and plaintiff lawyers often will not settle the substantiated claims absent payment for their nonsick inventories. Defendants, on the other hand, often cannot afford the risk of trial—inadequate notice and discovery, unfair combinations of sick and nonsick trial plaintiffs, and the possibility of bet-the-company verdicts in unfriendly jurisdictions can be the stark reality—all of which may threaten not only the defendant's finances, but also its workforce, its share price, and even its viability.

Of course, defendants historically settled cases by the nonsick because they believed at that time (but incorrectly in hindsight) that massive inventory deals would substantially reduce their total asbestos liability. Eventually, each additional bankrupt company learned the same lesson: the inexhaustible pipeline of nonsick claimants refills each time it is purged by another settlement. In some cases, judges and defendants beset with this onslaught of claims have abandoned their roles as watchdogs in an adversarial system predicated on such checks and balances. Courts have become claims processing machines, more concerned with resolving massive numbers of cases than with ensuring integrity in the process or truth in the result.

As one professor has written, the result has been to encourage the filing of even more claims:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.[32]

These traffic jams of cases result, in large part, from the huge amount of money paid to plaintiff lawyers, who use the funds as seed money to recruit large replacement inventories of asbestos claimants. Lawyer advertising and mass screenings, which are most responsible for the proliferation of claims, are funded by the settlements. A new generation of plaintiff lawyers also is attracted by the wealth generated by their predecessors, which creates even more competitive pressure for lawyers to locate plaintiffs regardless of their health and to file claims on behalf of the nonsick.

A. Faced with Thousands of Claims, Certain Courts Have Relaxed Traditional Elements of Tort Claims

Legal principles that normally require proof of causation and injury as conditions of recovery have been suspended in some jurisdictions in the context of the asbestos litigation.

Take, for instance, the traditional tort requirement of "injury." Most jurists and citizens likely would assume that any plaintiff who receives millions of dollars in compensatory damages would suffer from a serious and debilitating medical condition. Not so in a recent Mississippi asbestos case, resulting in one of the largest asbestos awards ever, in which a jury awarded six plaintiffs $25 million each in compensatory damages alone.

None of the plaintiffs in this case claimed to have missed a day of work due to an alleged asbestos-related disease.[33] Not one claimed any prior medical expenses due to asbestos exposure.[34] None of the claimants had cancer; rather, each plaintiff either alleged a non-impairing pleural condition and/or slight asbestosis. One claimant even admitted at trial that he did not suffer from any shortness of breath and that he exercised by walking three to four miles per day. Nonetheless, the court allowed the jury to consider the "evidence" of injury, after which it returned a $150 million verdict (one of the ten highest jury awards in 2001) for a group of claimants who were not sick from asbestos exposure. The practical result of the award is not simply that the system now has $150 million less with which to compensate asbestos workers who are sick or who will become sick in the future. The verdict, returned in the very courtroom in which mass screening informational meetings had recently been held, also underscored the inability of defendants to resist even the most frivolous cases.

The Manville Trustees, who have the responsibility for monitoring millions of dollars in Trust payments to claimants, recently noted that nonsick claimants are receiving a significant share of the Trust's assets. The Trustees concluded in a letter to the bankruptcy court that the flood of new claims received by the Trust were filed on behalf of unimpaired claimants "whose daily life is unaffected by their past asbestos exposure. Indeed, a large share of the Trust's claimants now have 'injuries' which are imperceptible, even to themselves, without the aid of X-ray or other imaging technology."[35]

Like the element of "injury," some courts have relaxed the traditional tort requirement of "causation" in many asbestos cases. To prove that a defendant's product caused the plaintiff's alleged injury,

the plaintiff naturally must demonstrate that he or she was exposed to the defendant's product. Commonly referred to as obtaining "product identification," the plaintiff lawyer often must find a witness willing to testify that the plaintiff worked around the particular product and breathed its airborne particles.

In theory, the task is tremendously difficult. Predominately older claimants are asked to remember products to which they were allegedly exposed decades ago. Such necessary details include remembering the names of products, their locations at the worksites, and their physical descriptions, including small lettering on bags and packaging colors. In practice, however, plaintiffs invariably identify the product of solvent companies that have available funds to pay inventory settlements. The system rarely accommodates a determination of whether plaintiffs made valid product identification, one of the most basic elements of establishing an asbestos tort.

The harm from the absence of any real check and balance is substantial. Plaintiff lawyers frequently attempt, and succeed, in extracting large "inventory" settlements from defendants by filing an overwhelming number of claims against certain defendant targets. Plaintiff lawyers eventually may obtain product identification, but the mere filing of a large suit often prompts settlement regardless of the factual merits. Defendants are forced to incur the costs of defending cases that may not have a good-faith basis. Preferring not to incur such transaction costs, defendants routinely believe that it is cheaper to settle cases than to litigate, even though the cases may not have merit and have not been substantiated with any evidence, much less with reliable medical evidence. Bedrock tort principles of proof, causation, and damages become a casualty in a judicial process whose objective is to resolve cases above all else.

A federal bankruptcy court recently expressed concern that lawyers may abuse the litigation process by filing asbestos lawsuits without ensuring a reasonable basis for their cases. As an example of one court's attempt to question the plaintiff's prefiling causation investigation, bankruptcy Judge Burton Lifland engaged in the following

exchange with an asbestos plaintiff lawyer (the witness) about the basis for naming Kentile as an asbestos defendant:

Court: How does Kentile get to be a Defendant if the Plaintiff doesn't know he had been exposed to Kentile? Is that invented by the lawyer based upon an insurance coverage? What do you mean you wouldn't know of your own clients?

Witness: It's my understanding that –

Court: What do you know of your own knowledge? How does Kentile get to be a Defendant?

Witness: (No response.)

Court: We are here on a hourly basis. You used up the better part of a minute and a half [] to respond to the Court.

Witness: I am thinking, Your Honor.

Court: It should not be much of a thought here. This is your firm, right?

Witness: That is correct.

Court: This is your area of focus. How about answering the question?

Witness: I am thinking about it, Your Honor. Generally speaking, one would speak with the client and find out to what products he has been exposed to.

Court: So then the clients would know that they were exposed to Kentile in order to make Kentile the Defendant in the suit; is that right?

Witness: That is correct.

***

Q. [by different questioner]: What due diligence have you done to identify Kentile as a Defendant?

A: In the cases—I don't believe that I have spoken with my clients about Kentile in general.[36]

Even more disturbing than the lack of prefiling investigations are widespread allegations that the litigation is punctuated by improper witness coaching, possibly crossing the line into fraud. One prominent law firm inadvertently gave to the defense a memorandum that an employee of the plaintiff law firm had supposedly used to coach plaintiffs to answer questions only as instructed—without any admonition in the memorandum to tell the truth.[37] This same law firm is one of three being sued under RICO for, among other things, allegedly forging plaintiff signatures and manufacturing missing information on plaintiff affidavits, including work histories and product identification information.[38]

Whether it is this unacceptable, alleged behavior, the routine failure to conduct pre-filing investigation into causation, or the continued relaxation of such legal requirements as "injury," the result is the subordination of truth to the expediency of resolving asbestos cases. While this perverse result in the face of overcrowded dockets is understandable, it is not the appropriate balance that our Judicial System should accept.

B. Some State Courts Are Too Overwhelmed to Exercise Gatekeeping Functions and Monitor Medical Evidence

State and federal courts have the authority to assess the reliability and relevance of medical evidence and to monitor the integrity of the judicial process. This commitment, of course, requires judicial energy and time. More than 99% of asbestos cases settle, most commonly in the context of mass inventory deals. Accordingly, courts frequently manage the cases until settlement but believe that they cannot afford to invest the judicial resources to supervise such settlements or monitor medical evidence submitted by plaintiffs pursuant to settlement terms.

Two significant reviews of medical evidence in the asbestos litigation suggest that judicial monitoring of medical opinions is necessary to ensure accurate diagnoses of asbestos-related conditions in cases filed in the courts.

In mid-1996, the Manville Personal Injury Settlement Trust ("the Trust") retained neutral academics to evaluate the results of more than 6,400 audited claims of alleged asbestosis and pleural disease. Once the Trust received the X-rays allegedly supporting the randomly selected claims, those X-rays would be reviewed by up to two of five independent physicians (B-readers) retained by the Trust. The Trust intentionally designed the X-ray review process to operate in favor of confirming the disease allegedly suffered by the claimant and to afford the benefit of any doubt to the claimant.[39] Accordingly, *both* independent B-readers had to disagree with the plaintiff expert's diagnosis before a claim would "fail" the audit and be rejected (if no compensable disease) or reclassified (if a less severe, compensable disease). On the other hand, if either B-reader agreed with the plaintiff expert, or determined that the claimant had a more severe disease, the claim would be paid and, depending on the new diagnosis, paid at the higher level even if more than originally requested by the claimant. A review by the second Trust B-reader was not even conducted if the initial B-reader agreed with the plaintiff expert or diagnosed a more severe disease.

By early 1998, the experts had completed their analysis of the 1996 data and determined that, in approximately *41%* of the cases, both of the Trust's physicians disagreed with the plaintiff experts and found that the claimant either had no disease whatsoever or had a less severe disease than alleged (e.g., nonimpairing pleural disease instead of asbestosis).[40]

The Trust continued to audit medical evidence after 1996, concluding generally that plaintiff law firms disproportionately hired doctors who had consistently poor pass rates for interstitial fibrosis claims.[41] As an example of the over-utilization of doctors who were inclined to find an asbestos-related condition, the former executive director of the Manville Trust analyzed the Manville claims data from the first quarter of 1998.[42] Of more than nine thousand claims submitted by plaintiff lawyers, a mere ten doctors provided X-ray interpretations for 87% of the claims. The average failure rate for these doctors was a striking 59%. The highest volume doctor accounted for

over half of the total X-ray interpretations, failing the audit 57% of the time.[43]

An earlier, 1990 study published in the *Journal of Occupational Medicine* uncovered similar exaggerated medical diagnoses by certain plaintiff experts. A 1986 mass screening had generated legal claims of alleged asbestos-related diseases after 700 to 750 tire workers submitted to X-ray screening at their worksite.[44] Almost 60% (439) of the screened tire workers filed lawsuits claiming an asbestos-related disease, a prevalence of alleged disease that would prove grossly divergent from the study's results. In 1990, four respected radiologists and professors reported the results of a medical study involving these claims.

Overall, the study demonstrated that *only 16 of the 439 claimants that had filed lawsuits, or 3.6%*, exhibited chest abnormalities that may have been consistent with asbestos exposure. The authors concluded that more than half (265, or 60.4%) of the claimants had "what might be considered completely normal chests for their ages."[45] Of the remaining 174 claimants that had chest abnormalities, most of them (158, or 36.0% of the total claimants) had abnormalities that were "nonoccupational in origin and consisted of conditions one might expect in an aged population."[46] Put another way, although the claimants had irregularities on their chest X-rays that resemble asbestos disease, they were caused by something other than asbestos, such as "healed tuberculosis, histoplasmosis, emphysema, discoid stelectasis, effusions, healed rib fractures, scarring due to infection or old inflammatory disease, possible cancer, miscellaneous nonspecific linear markings consistent with cigarette smoking and aging, and heart and vascular diseases."[47]

The authors ultimately observed that "the data from this re-evaluation study suggest the prevalence of disease noted [by the plaintiffs' doctor(s)] is mistakenly high."[48]

Despite these studies, the surprising, practical reality is that defendants almost never have the opportunity or desire to arrange for neutral B-reader panels to conduct comprehensive medical reviews.

Plaintiff lawyers often avoid submitting X-rays by settling claims *en masse* with the leverage of their sick clients.

Many defendants are reluctant to demand X-rays and conduct such audits for fear that plaintiff lawyers will target the company, refuse to settle any claims, and try their most serious cancer cases in plaintiff-friendly jurisdictions. While serious cases are relatively few in number compared to cases filed by the unimpaired, the risk of even a handful of multimillion dollar verdicts often dissuades defendants from a high-profile, contentious fight that could bankrupt the company in the short term. One business analyst has observed, "[i]n a sense, the plaintiffs' attorneys have the asbestos defendants held hostage."[49] Defendants often conclude that rather than question this X-ray evidence, it is cheaper to treat the claims as administrative costs, regardless of merit, than to litigate. This strategy has failed for a number of defendants in the long run, as an endless supply of nonsick claimants have replenished the plaintiff lawyers' client base, leaving bankruptcy as the only realistic option for those companies.

The ultimate result is that potentially superficial and unreliable medical evidence justifies billions of dollars in settlement payments without any oversight or verification from an adversary or the court. It is difficult to conceive of any other compensation system that is more susceptible to abuse and less likely to arrive at accurate results.

C. Due Process Rights Are Sacrificed in the Asbestos Litigation

The axiom that every litigant has a right to prepare his or her case adequately seems so basic as to not require any explanation whatsoever. Unfortunately, in many asbestos cases, basic due process rights have been minimized in the name of resolving cases and clearing court dockets.

The procedural due process guaranteed by the United States Constitution and state constitutions requires that a litigant be afforded the right to prepare and present a full defense.[50] For this right to have any meaning, a party must have adequate notice of court proceedings and a meaningful opportunity to prepare. Similarly, it is impossible to

prepare an adequate defense without the chance to obtain information about the other side's claims and defenses. This concern is magnified in those state jurisdictions that generate the greatest number of litigant complaints about due process violations.

1. Certain Jurisdictions Are Magnets for Huge Numbers of Asbestos Cases

It is no coincidence that a few jurisdictions have become the favorite locations for plaintiff attorneys. A principal reason for this concentration is that juries in these jurisdictions have consistently awarded huge verdicts in favor of plaintiffs against corporations, especially out-of-state corporations. Perhaps the most notorious jurisdictions in this regard are a few Mississippi counties, in which litigation has seemingly become the counties' principal business. Jefferson County, for example, with 9,740 residents, had 21,000 plaintiffs file claims in the county courts from 1995 to 2000.[51] Mississippi juries have returned at least twenty verdicts of $9 million or more since 1995, including at least seven that exceeded $100 million each.[52] Plaintiff attorneys have learned that their chances of obtaining large jury verdicts, and, as a result, their chances of extracting favorable pretrial settlements from defendants, are much greater in jurisdictions that have plaintiff-friendly reputations. In addition to the Mississippi counties, other notoriously pro-plaintiff jurisdictions crowded with asbestos cases include certain locales in Texas, West Virginia, Louisiana, New York, and California.[53]

Not surprisingly, a 2002 Harris Poll found that senior corporate lawyers ranked Mississippi, West Virginia, Alabama, Louisiana, and Texas as the five worst states in the country in terms of the fairness of their tort liability systems.[54] Mississippi is ranked worst or next to worst on all criteria except treatment of class action suits, on which it was not rated because it does not have them. The average economic growth rate from 1995 to 1999 was substantially higher among the ten states ranked highest in the survey (4.8%) than in the bottom ten states (3.8%). Seventy-eight percent of the respondents confirmed that a state litigation environment could affect important business decisions such as where to locate or do business.[55] Obviously, it is in a state's self-

interest to insist that its courts afford fair treatment not only to its citizens, but to its businesses as well.

Large, well-publicized jury verdicts and out-of-court settlements attract additional plaintiff lawyers, both from inside and outside the jurisdictions. These lawyers file claims on behalf of out-of-state clients, relying on liberal rules concerning jurisdiction and venue. In Mississippi, for example, historically it has not mattered how many plaintiffs in a case live out of state, as long as one lives in state.[56] The fact that in-state plaintiffs may reside in different counties also is not an obstacle because venue is proper in a county as long as any plaintiff in the case resides there.[57] These rules attract plaintiff lawyers from other states seeking large verdicts or settlements, whose home states may have limits on punitive damages recovery or other procedural obstacles. It was recently reported that of the 403 plaintiffs involved in litigation filed in Jefferson County, Mississippi, against GAF Corporation, more than half were from Texas.[58]

2. Misuse of Joinder and Consolidation Rules Aggravates the Problem

The willingness of juries in certain jurisdictions to return large verdicts, coupled with the ease of filing suit even as a nonresident, has resulted in a substantial caseload of asbestos actions in these jurisdictions. Overwhelmed by massive numbers of cases, judges in these jurisdictions have liberally interpreted procedural rules regarding the joinder and consolidation of claims in an attempt to manage their dockets.

The result is that some judges permit the consolidation of massive numbers of cases, even involving plaintiffs with largely dissimilar claims. Trial judges exercise broad discretion in determining whether joinder is proper, and, when pressured by massive numbers of claims to resolve, they have used that discretion to permit the joinder of thousands of plaintiffs in a single action.[59] Once again, Mississippi is perhaps the best example of this practice.

Even if plaintiffs cannot meet Mississippi's relatively liberal joinder standards, judges have the option of consolidating separately filed cases for trial if there is a question of law or fact common to the parties.[60] As with joinder, a Mississippi trial court has broad discretion to consolidate actions for trial.[61] For defendants, the end result of such practices often is the prospect of an unfair trial involving numerous plaintiffs from different jurisdictions, who worked in different occupations, at different worksites over long periods of time, alleging injuries ranging from mesothelioma to asymptomatic chest X-ray anomalies.

The expansive interpretation by judges of joinder and consolidation rules stems mainly from well-meaning attempts to maintain control over dockets and dispose of cases efficiently. As former Chief Justice Mallett of the Supreme Court of Michigan stated in testimony before Congress:

> Think about a county circuit judge who has dropped on her 5,000 asbestos cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.[62]

Imagine Justice Mallett's scenario replicating itself many times over in pro-plaintiff jurisdictions as judges attempt to process thousands of new claims filed each year.

Plaintiff lawyers also have seized upon consolidation as a means of exerting greater leverage on defendants. By combining great numbers of plaintiffs, both sick and unimpaired, plaintiff lawyers create inventories of cases that are more amenable to huge, lucrative settlements. For this reason, plaintiff lawyers push judges, who are already disposed to combine cases in the name of efficiency, to exercise their discretion in consolidating cases.

Permitting large numbers of misjoined claims to proceed to trial jeopardizes defendants' due process rights. Aggregations of sick and nonsick claimants taint the nonsick with a type of "sympathy of association"[63] before the jury, which makes it "more likely that a defendant will be found liable and results in significantly higher damage awards."[64] Similarly, when the claims of numerous plaintiffs with dissimilar alleged injuries and factual situations are tried together, "the maelstrom of facts, figures, and witnesses" is likely to lead to jury confusion and an unfair trial.[65]

3. Some Judges Cede Case Management Decisions to Plaintiffs' Counsel

Other procedural decisions are also prejudicial to litigants. Whether in an attempt to move cases through the system, or for other unexplained reasons, some judges cede control over case management to plaintiff lawyers, prejudicing defendants in the process. For example, certain Texas courts routinely permit plaintiff counsel to select which cases and which plaintiffs will proceed to trial, often mere days before trial. Plaintiff counsel often include at least one serious, high-value case (e.g., the relatively rare sick claimant) in any trial group they choose, ensuring that they maintain the pressure to settle unimpaired cases, while maximizing the potential for a large jury verdict should the case proceed to trial. Indeed, defendants sometimes cannot obtain even basic discovery information about these plaintiffs until the eve of trial, if at all.

A recent opinion by a Texas appellate court illustrates just such a situation. More than 4,000 plaintiffs filed suit against NARCO in Orange County, Texas.[66] In November 2000, three trial settings were identified for fifty plaintiffs. While a group of fifty plaintiffs was severed from the rest in February 2001, four months before trial, it was not until *two weeks* before trial that plaintiff counsel unilaterally selected the specific ten plaintiffs who would go to trial, only then notifying defense counsel.[67]

Even two weeks before trial, fundamental discovery activities, such as obtaining the plaintiffs' medical reports and conducting independent

medical examinations, had not been completed. As a result, the defendants moved for a continuance, but the trial court denied the motion.[68] The appellate court concluded that two weeks' notice was not meaningful notice under the circumstances, and that NARCO's due process rights had been violated as a result.[69] Unfortunately, appellate review is the exception rather than the rule. Because of the pressure to settle, few of these cases go to trial and fewer still make it to an appellate court, making the practice of limiting discovery rights largely unremedied.

The recent *NARCO* case illustrates the confluence of events that can lead to due process violations. Plaintiff counsel files suit in a plaintiff-friendly jurisdiction, on behalf of thousands of plaintiffs. Claims with few, if any, common factual and legal issues are joined together for trial. The trial court permits plaintiff counsel to determine unilaterally which plaintiffs will proceed to trial, with notice provided to the defendants at the eleventh hour. The defendants do not have the opportunity to obtain even the most rudimentary information concerning the plaintiffs' work history, medical status, and the nature of their claims. Taken together, these actions operate to deny defendants the opportunity to prepare adequately for trial and test the particulars of the plaintiffs' claims. Without this opportunity, defendants do not receive the "fair trial in a fair tribunal" that is the basic requirement of due process.

D. Recoveries for the Unimpaired Jeopardize Future Recoveries for the Sick

Commentators have observed that the growth of unimpaired claims threatens recovery for impaired claimants by bankrupting defendants and exhausting asbestos reserves.[70] The bankruptcies can be devastating to current and future impaired claimants, as any recovery against a bankrupt entity can be greatly discounted.[71]

For example, impaired claimants recovering from Johns-Manville can expect to receive a mere 5% of the bankruptcy court's valuation of their claim.[72] "Tragically, the bankruptcy means that Johns-Manville claimants who have now developed serious asbestos-related injuries,

such as mesothelioma or lung cancer, may receive substantially less compensation than those with relatively trivial injuries, or even no injury, can obtain against those companies who are now solvent."[73]

According to a letter that Manville Trustees sent to Judges Weinstein and Lifland on December 5, 2001, a "disproportionate amount of Trust settlement dollars has gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."[74] Meanwhile, the Trust continues to struggle to meet its obligations to pay sick claimants. Because asbestos defendants have limited resources with which to compensate claimants, "the rush of non-impaired cases diverts the limited resources of defendants away from compensating the victims of asbestos related disease—including, tragically, cancer cases that will be with us well into the next century."[75]

Federal Judge Weiner also has expressed concern that payments to nonsick claimants may jeopardize future payments to workers who are truly ill. Judge Weiner, who manages the federal MDL asbestos litigation, ruled that he would begin giving priority "to the malignancy and other serious health cases over the asymptomatic claims."[76]

One plaintiff lawyer, who represents claimants that mainly have mesothelioma cancer, advocated in a letter to the court overseeing the Manville Trust that "claimants with no asbestos-related impairment or disability (whether 'pleural' or 'bilateral interstitial disease') should not get paid" so that funds are preserved for claimants who are truly sick.[77]

Even business analysts have recognized that future sick claimants will receive less in settlements as bankruptcy trusts continue to reduce payouts and deplete their funds by paying unimpaired claimants.[78]

E. Certain Plaintiff Lawyers May Allocate Settlement Funds without Full Disclosure to Their Clients and Delay Payment on Sick Claims to Leverage Their "Inventory"

Certain plaintiff lawyers may breach their fiduciary duty to their clients by failing to disclose basic information about the lawsuit and allocation of settlement monies to other plaintiffs in their "inventory." Sick plaintiffs often must wait for their settlement money while the plaintiff lawyer uses the sick claims to settle the nonsick claims. Some plaintiff lawyers will not consider settling the sick claims unless the defendant pays on the unimpaired claims. Whether the plaintiff lawyer, in the absence of a settlement offer for his unimpaired claims, actually presents the settlement offer to his sick client, as he is bound to do by lawyer ethics, is open to question.

In February of this year, a group of 2,645 asbestos plaintiffs from Pennsylvania, Ohio, and Indiana filed a class action in Pennsylvania federal court against a group of law firms and lawyers in Mississippi, Texas, and North Carolina alleging that the lawyers had defrauded them.[79] Specifically, the asbestos claimants contend that the lawyers and law firms recruited them for inclusion in "mass actions" in Mississippi and then "betrayed them."[80] According to the federal complaint, the lawyers "viewed their clients as mere inventory that could generate enormous legal fees with relatively little effort."[81]

The plaintiffs allege that the lawyers told them nothing about the lawsuits or the massive settlements, misallocated settlement funds based on undisclosed criteria such as geography, and paid them a few thousand dollars for their injuries while the lawyers amassed tens of millions of dollars in fees and inflated expenses.[82] As a dramatic example of the inequity of jumbo consolidations and settlements, the plaintiffs contend that they never would have approved the settlement had they known that their lawyers gave other similarly situated clients significantly more settlement money, as much as eighteen times more (e.g., $252,000 vs. $14,000), simply because the other clients lived or worked in Mississippi.[83]

The frequency of mass inventory settlements and the number of claimants involved make these allegations alarming, particularly since courts often do not routinely supervise inventory deals. Judges must consider carefully the extent to which they monitor the distribution of settlement funds associated with cases in their courts.

F. Peripheral Companies, Innocent Employees, and Shareholders Also Are Victims in the Asbestos Litigation

Workers that are sick from asbestos exposure clearly are the most needy and deserving of compensation. But other, indirect and less visible victims exist as well. Innocent employees and shareholders of companies only peripherally related to asbestos have been harmed significantly by the financial collapse of their businesses due to asbestos liability.

Virtually all of the original, "traditional" asbestos manufacturers are bankrupt. Counter-intuitively, the number of "nontraditional" asbestos defendants is increasing, even though asbestos and asbestos-containing products were largely removed from the workplace almost thirty years ago. Since the 1980s, the number of asbestos defendants has ballooned from approximately 300 to several thousand today.[84] Any company that manufactured an asbestos-containing product, even if it only contained a trace amount, or that had a small amount of asbestos on its premises in one or two isolated locations, is a potential target in this litigation. Some estimate that almost half the companies on the Dow Jones index will face some form of asbestos liability.[85]

The new wave of asbestos targets includes distributors who sold the products as middlemen between manufacturers and contractors, contractors who worked with asbestos-containing materials, businesses that had asbestos-containing products in their buildings, automobile manufacturers, telephone companies, computer makers, manufacturers of electrical wire and welding rods, consumer product retailers and even food and wine makers. Most of these defendants never manufactured asbestos; yet they are forced to reallocate funds to asbestos claims and away from job growth, research and development, and

other economic investments. Like asbestos payments by traditional defendants, most of the funds paid by newly targeted companies are consumed by lawyers and claimants who are not sick.

Today, it has become commonplace to hear household names involved in asbestos suits. In April 2000, a jury rendered a $34 million verdict against a division of Royal Dutch/Shell oil company. Shell never manufactured an asbestos-containing product, but, like other oil companies, used such a product in its refineries.[86]

Other companies like Campbell's Soup and Procter & Gamble are viewed as deep pockets as well. Both were added to a pending complaint in California Superior Court in San Francisco, alleging that asbestos was found at company factory sites.[87] In another San Francisco court, a former insulator has sued Dow Jones & Company, publisher of the *Wall Street Journal*, claiming asbestos exposure at a *Journal* printing plant.[88]

Sears, Roebuck & Company, one of the first major retailers to be named as a defendant in asbestos-related litigation, is being sued by a former salesman who claims that the floor tiles and roofing products he purchased from Sears in the 1940s caused his cancer.[89] Many of these peripheral defendants, like many of their employees and even the federal government, did not know that asbestos was a dangerous product when it was most commonly used. Yet they face asbestos liability because the most culpable companies who manufactured asbestos—those who allegedly knew the dangers of asbestos before the general public knew—have all declared bankruptcy.

The automobile industry also is not immune. Nontraditional asbestos defendants such as Ford Motor Company and Chrysler Corporation are alleged to have exposed workers to asbestos-containing automobile parts, such as brake pads and linings. Ford, for example, never manufactured or produced asbestos-containing materials; yet it faced $1.7 billion in asbestos liability as of December 2001, two-thirds more than its approximately $590 million in liability from the Firestone tire recall and rollovers of its Explorer sport utility vehicles.[90] Federal-Mogul, an auto parts maker who filed for bank-

ruptcy in October 2001, expects to pay $550 million in asbestos liability in 2004, up from an estimated $338 million in liability in 2000 and $89 million in 1990.[91]

Crown Cork & Seal is another example of a peripherally involved company that never manufactured asbestos-containing materials. It did not even use asbestos-containing materials in its business. This company's limited connection to the asbestos industry was its purchase of Mundet Corporation to supply its cork bottle caps in the early 1960s.[92] Unfortunately, Mundet Corporation also had an insulation business, which was sold 93 days after the purchase.[93] For the 93 days of ownership, Crown Cork & Seal expected to pay more than $100 million for asbestos litigation in 2001 alone.[94] The company recently cut 700 jobs in an attempt to reduce costs.[95]

The rate of new claims is partially dependent upon the number of new defendants sued to pay those claims.[96] Claims have surged as companies file for bankruptcy and plaintiff attorneys feel the pressure to accelerate the filing of claims against newly identified, solvent defendants. Some employees have lost jobs as businesses attempt to cut expenses to account for significant asbestos costs. Innocent shareholders' retirement funds have evaporated after their companies' stock prices plummeted from asbestos liability.

Take Federal Mogul. By the end of 1998, immediately after the 100-year-old company made the mistake of acquiring a company with asbestos liability, the value of Federal Mogul stock in the 401(k) accounts of its 22,000 U.S. employees reportedly was worth $85 million.[97] Then Federal Mogul was targeted as a major asbestos defendant. As bankruptcy threatened by August 2001 solely because of asbestos claims, the value of the stock in retirement accounts had fallen to $15 million, a $70 million decline.[98] Innocent workers, loyal to their company, lost millions of dollars of their hard-earned retirement savings to asbestos settlements that were largely allocated to unimpaired claimants and their lawyers.

In sum, claimants who are sick because of asbestos exposure are the most deserving of compensation for their injuries, although they are

not the only victims in the asbestos litigation. Employees and shareholders of companies that never made asbestos and are only peripherally related to asbestos have suffered as well. These citizens, both asbestos claimants and innocent third parties, rely upon our system of justice to produce rational results in asbestos litigation on the basis of an accurate assessment of the facts. While our Judicial System has failed in that goal, the judiciary has the authority and means to improve drastically its management of these asbestos cases.

IV. A JUDICIAL FIX: STATE AND FEDERAL COURTS HAVE TOOLS TO REMEDY THE BROKEN ASBESTOS LITIGATION SYSTEM

Judges must restore order and fairness to the asbestos litigation. While some courts have failed to manage asbestos cases effectively, I remain convinced that state and federal judges have the ability and resources to help stop the current perversion of the Judicial System. Indeed, I believe that it is the judge's *duty* to fashion judicial solutions when Congress fails to act and miscarriages of justice stand uncorrected. Then, and perhaps only then, will Congress recognize that it has abdicated its responsibility to implement meaningful reform and pass legislation to complement the judiciary's efforts.

The media frequently report on the asbestos litigation *crisis*—whether in the form of another asbestos-related bankruptcy of an otherwise healthy business, plummeting stock prices of companies threatened by more lawsuits, or million-dollar verdicts for healthy plaintiffs in certain jurisdictions. While this unstable and deteriorating situation qualifies as a crisis, it is not an *epidemic*—i.e., a widespread and expanding problem in every state and federal court. The distinction is important and helps determine precisely what type of judicial activity and oversight could be most effective. Many judges, such as Judge Weiner, have faced the problem of deciding asbestos cases fairly and efficiently and largely solved it. Fundamental rules of procedure and evidence do not require change, but they must be fairly and uniformly *enforced* across the country.

Failures of judicial administration in the asbestos litigation are localized failures in a limited number of jurisdictions. Because certain courts attract most of the cases, they have a disproportionate effect on the asbestos litigation as a whole. The concentration of asbestos plaintiffs in these jurisdictions will continue as long as such courts hear the claims of plaintiffs who are not sick and fail to enforce basic rules of fairness. Thus the crisis begins in a minority of courts, but the adverse economic effects spread nationwide.

Reform both from inside and outside these jurisdictions can remedy the problem. Reform may commence by judges applying the same rules to asbestos cases as to any other tort dispute—by way of example, insistence on proof of injury and causation, protection of litigants' due process rights, and recognition of the court's role to act as gatekeeper against illegitimate medical opinions. All courts, including both state and federal appellate courts, must scrutinize cases in problematic jurisdictions for violations of constitutional rights, rules, and procedures. Appellate courts should feel an obligation to act more forcefully and intervene in those problematic jurisdictions where trial courts repeatedly disregard litigants' rights.

The following options provide judges with various approaches to consider when managing their asbestos dockets. These alternatives, many of which have been implemented and/or tested in some manner, are designed to restore basic rights and normalcy to the asbestos litigation that are fundamental in other contexts. These suggestions are not meant to be mutually exclusive or exhaustive; it is hoped that they will stimulate judges to implement other pragmatic reforms that better ensure rationality and justice in the compensation of asbestos victims.

A. Return to Traditional Tort Principles: Insistence on Proof of Injury

Paying claimants who are not sick, an amount in the aggregate that totals hundreds of millions—if not billions—of dollars, is perhaps the most controversial and inequitable characteristic of the asbestos litigation. Traditionally, the tort system would turn away claimants with no

medically significant evidence of injury. The asbestos litigation is an exception, however.

Courts in some jurisdictions, such as in Pennsylvania,[99] Texas,[100] and other states,[101] have expressly limited claims in the absence of asbestos-related impairment. Similar to these courts, my own view is that without some objective, physical impairment, a person has not suffered legal injury and should not be entitled to maintain an asbestos lawsuit. Yet there remain some trial judges who allow workers who have been exposed to asbestos, but who are not sick and may never become sick because of asbestos exposure, to maintain actions for damages. The legal theory is that exposure to asbestos has caused changes in the lungs of these plaintiffs, and while these changes do not affect the ability of these plaintiffs to lead normal, healthy lives, the changes do amount to "legal injury." Accordingly, some claimants who otherwise would not sue unless they became sick may be compelled to file a lawsuit to avoid having their claims barred by the applicable statute of limitations.

In January 2002, Judge Weiner in the federal MDL litigation articulated a sensible strategy for directing compensation away from nonsick plaintiffs toward seriously ill individuals—while simultaneously protecting the rights of the nonsick to receive their day in court if and when they actually manifest some asbestos-related injury.

Judge Weiner alleviated the artificial pressure to file suit by tolling the statute of limitations for claimants who were not impaired. He placed the cases administratively on an inactive docket subject to reinstatement, but indicated that unimpaired claimants would have their day in court when and if they ever developed an asbestos-related disease. Judge Weiner's strategy protects the interests of unimpaired and impaired claimants alike by preserving funds for the truly sick while protecting potential future claims of individuals who may become severely symptomatic years from now. In this manner, if a person exposed to asbestos becomes ill in the future, money will more likely still be available to compensate him or her—rather than already having been exhausted on payments to masses of nonsick plaintiffs. Judge Weiner accepted his duty as a judicial officer by observing in his

ruling: "The Court has the responsibility to administratively manage these cases so as to protect the rights of all the parties, yet preserve and maintain any funds available for compensation to victims."[102]

He further noted that claims based solely on mass X-ray screenings often are brought on behalf of individuals who "are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future." Accordingly, Judge Weiner recognized that merely responding to such claims created "substantial transaction costs" that had the effect of "depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs." Ultimately, as a condition of case reinstatement, Judge Weiner placed the burden on plaintiffs to establish that asymptomatic claimants actually suffer from an asbestos-related disease.[103]

Judge Weiner's ruling requiring a minimum level of medical evidence before allowing cases to proceed is a new judicial tool in the asbestos litigation, but certainly not the first of its kind in the court system generally. In other mass toxic tort contexts, pragmatic judges have imposed deadlines, soon after case filing, by which plaintiffs must submit evidence reasonably supporting their allegations of injury and causation. These orders (known as "Lone Pine" orders, so named after the first case in which they were used) typically require plaintiffs to supply basic information that they should have obtained prior to filing suit, such as a reliable physician's diagnosis of the alleged injury and evidence that the defendant caused it.[104] Failure to comply with the order, or submission of insufficient or unreliable medical evidence, has been grounds for summary dismissal of mass toxic tort claims.[105]

Like Judge Weiner, these judges have exercised their inherent docket management authority to filter out frivolous cases and ensure that legal claims have an evidentiary basis before allowing significant and costly discovery. For example, in one such case involving alleged lead poisoning from construction activities, a Texas trial court ordered that certain plaintiffs submit expert medical reports within a ninety-day window. When the expert reports established only that the plaintiffs had conditions "consistent with lead poisoning" and failed to rule out alternative causes of injury, the court found the medical opinions

unreliable and dismissed the claims before close of discovery, a decision affirmed on appeal.[106] Judges should not allow the asbestos litigation to escape this type of evidentiary scrutiny that courts routinely require in other tort cases.

Similarly, in the medical malpractice context, a number of state legislatures require plaintiffs to file with their complaints expert medical affidavits attesting to the defendant's alleged malpractice. Georgia, for instance, requires the plaintiff's expert to set forth the alleged negligent acts and the specific factual bases for such claims. Connecticut, Florida, Michigan, Minnesota, Missouri, and Nevada all require the plaintiff to conduct similar prefiling due diligence and factual investigation into expert opinions before filing malpractice claims. Reliable medical evidence is essential to ensuring a fair system of compensation for asbestos victims, interested third parties, and defendants.

Judge Weiner's ruling also highlights the practical reality of the asbestos litigation: judges must prioritize cases if they intend to process them fairly and according to constitutional due process requirements. In 1997, the Supreme Court overturned an attempt to resolve large groups of asbestos cases by means of a class action, which effectively required such cases to be decided one-by-one, or at least in small groups of plaintiffs. Yet there could never be enough judges, courthouses, or juries to decide the claims made by the thousands of plaintiffs who are not sick. It is a physical impossibility.

Judge Weiner's ruling recognizes that courts must make difficult decisions about which cases are heard and in which order. His decision may be particularly helpful to state judges, who have the burdensome task of managing the vast majority of asbestos cases. Certain state courts in Illinois, Maryland, and Massachusetts have adopted similar case management strategies by prioritizing claims of sick plaintiffs and placing claims of the nonsick on inactive dockets until an actual impairment develops.[107] Even in those states where healthy plaintiffs are entitled to show "legal injury," courts still have the inherent authority to manage their dockets to hear the claims of sick plaintiffs first.

None of this is to say that these measures will resolve the asbestos litigation in the absence of broader judicial and legislative reform. As long as the same troublesome jurisdictions continue to accept groups of out-of-state cases by the nonsick and compromise basic due process rights, plaintiff lawyers will flock to them, perhaps even more so as additional courts adopt sensible case prioritization practices and adhere to traditional evidentiary requirements.

In sum, Judge Weiner's exercise of his inherent authority over the court's docket is a promising road map for state and other courts to re-establish the requirement of "injury" in asbestos cases—in such a manner that protects the rights of both unimpaired and sick claimants in the future. Widespread adoption of this strategy, especially in certain jurisdictions in Mississippi, Texas, and West Virginia, would be a significant improvement in judicial administration of asbestos cases.

B. Return to Traditional Tort Principles: Insistence on Proof of Causation

The traditional tort requirement of causation, like injury, has been disregarded in the asbestos litigation arena, exposing defendants to liability for asbestos claims unrelated to their operations. The *New York Times* recently noted that "many companies now facing asbestos lawsuits did not make asbestos or use it heavily in their products."[108] Some plaintiff lawyers sue hundreds of these peripheral defendants without first determining if each company exposed their clients to asbestos. The notion that a company should be liable for asbestos-related injuries that they did not cause is contrary to traditional tort law as well as fundamental fairness.

Judges have the authority to question litigants about why they file thousands of claims against thousands of defendants, and to require plaintiff counsel to support their complaints. Judges should expect and receive an evidenced answer that verifies that each plaintiff (or a co-worker) can identify each defendant's product before the court commits to expending judicial resources to manage these claims. By compelling litigants to fulfill their duty to ensure reasonable evidentiary support for their allegations when filing complaints, cases are

more likely to be meritorious and resolved rationally. While not a judicial panacea, a greater commitment to oversight at the time of filing likely would improve judicial economy in the long term and enhance the courts' ability to ensure fairness in the management of asbestos cases. Judicial use of "Lone Pine orders" (discussed *supra*) and similar case management tools would be an effective start. Currently, there are few enforced barriers to entry for even the most frivolous claim.

Without prefiling verification of product identification or other causation evidence, defendants, in a reversal of the way in which a normal tort case is resolved, must conduct costly discovery just to *disprove* causation. Federal Rule of Civil Procedure 11 and state analogues were designed to prevent the bringing of allegations that lack evidentiary support. Such rules work only if courts enforce them, which rarely occurs in asbestos litigation.

A recent case in Mississippi provides a good example of the results that can be accomplished by a pro-active judiciary.[109] In this case, Jasper County Circuit Court Judge Robert Evans appointed a Special Master, who ordered plaintiffs' counsel to provide core disclosure information for each of the 2,500 plaintiffs. This core disclosure was to include their names, social security number, work history, work-sites with years of exposure, disease, date of diagnosis, diagnosing physician, and a listing of the products to which each plaintiff allegedly was exposed. As a result of this order, one week later plaintiffs' counsel filed his/her own motion to dismiss approximately 2,200 of the 2,500 plaintiffs. In all likelihood, plaintiffs' counsel was ill prepared to substantiate the claims and was counting on an easy settlement.

C. Ensuring Reliable Medical Evidence of an Asbestos-Related Disease

1. The Court's Duty as Gatekeeper

The reliability of medical evidence in the asbestos litigation may be the single most important consideration in ensuring just and accurate

settlements and verdicts. In other contexts, courts have increasingly served as gatekeepers to assess the significance of medical testimony and evidence. The Supreme Court's decision in *Daubert* almost ten years ago confirmed the responsibility of trial judges to determine if expert testimony is reliable and helpful. It is especially important for courts to exercise this function in asbestos cases, given the wide variance in the amount and scope of medical evidence proffered in support of such claims.

a. "Consistent with" Diagnoses Are Insufficient

Large numbers of asbestos claims are settled on the basis of X-rays reviewed by "B-readers" who claim that the X-ray findings are "consistent with" asbestosis. Two physicians specializing in pulmonology and occupational lung disease recently attested in court pleadings filed before Judge Weiner that a statement that an X-ray is "consistent with" asbestosis is not a complete or reliable medical diagnosis. These experts have recognized that, in addition to X-ray findings, B-readers may make reliable diagnoses of asbestosis only if they physically examine the patient, conduct pulmonary function tests, review the patient's complete occupational and medical history, analyze latency periods, and eliminate more probable causes of chest abnormalities.

Otherwise, abnormalities on a patient's chest X-ray easily may be diagnosed improperly as interstitial fibrosis. Moreover, even if a patient does have interstitial fibrosis, there is not necessarily a reasonable medical certainty that the condition is asbestosis. Many other medical conditions may appear as interstitial fibrosis on an X-ray, a conclusion accepted by the medical community and by at least one federal court that has considered such medical evidence in detail.[110] A "diagnosis" based solely on a chest X-ray is incomplete; such abnormalities are just as consistent with old age, smoking, obesity, lupus, and other medical conditions.

In the nonasbestos arena, courts regularly—indeed uniformly—reject a "consistent with" diagnosis as a basis for showing medically cognizable injury.[111] Yet in the asbestos context, cases with this non-

diagnosis masquerading as a medical finding routinely go forward. There is no basis for such disparity.

Accordingly, medical opinions that an X-ray is "consistent with" asbestosis sounds like a diagnosis but is medically noncommittal. Even though courts possess gatekeeping authority to require parties to produce medically accurate and complete evidence of asbestos disease, they often approve settlements and Trust disbursements based solely on such limited medical statements and opinions.

b. Mass Litigation Screenings Must Be Discouraged

Many asbestos cases supported only with X-ray interpretations are generated through mass litigation screenings in mobile X-ray vans. The purpose of these screenings often is to generate lawsuits, not to provide screened claimants with medical treatment or advice. These mass screenings often are not attended or supervised by a physician, nor do physicians typically prescribe the X-rays for claimants or report the screening results to the claimant. Many screened workers never even speak with a doctor, much less meet one in person or benefit from a physical examination. The attorney's office, not the doctor, typically calls the claimant and informs him or her whether the screening was "positive."

These mass litigation screenings have been derided by the Association of Occupational and Environmental Clinics (AOEC) as "medically inadequate screening tests" that "do not conform to the necessary standards for screening programs conducted for patient care and protection." The AOEC believes that an "appropriate screening program for asbestos-related lung disease includes properly chosen and interpreted chest films, reviewed within one week of screening; a complete exposure history; symptom review; standardized spirometry; and physical examination." Other essential factors include, among other things, "timely physician disclosure of results to the patient, appropriate medical follow-up and patient education." According to the AOEC, omission of these preventive aspects in the clinical assessment of asbestos-related lung disease "falls short of the standard of care and ethical practice in occupational health."

The recruitment of plaintiffs through questionable mass litigation screenings is not new. In a case involving hundreds of tire worker claims against now-bankrupt Raymark generated by screenings in the mid-1980s (discussed *supra*), independent academic researchers concluded that "possibly 16, but more realistically 11, of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform mineral."[112] A Kansas federal judge, reviewing the same evidence, commented that screening procedures in that case had produced "a mockery of the practices of law and medicine."[113]

The increase in new asbestos cases results at least partially from these mass X-ray screenings. Yet there appears to be no medical purpose for these screenings even as thousands of potential claimants are subjected to X-ray radiation. I believe that X-rays are best left to the practice of medicine and that courts must carefully scrutinize any such medical "evidence" allegedly supportive of asbestos claims.

2. Use of Neutral Physician Panels to Review X-rays and Make Proper Medical Diagnoses

In asbestos cases, highly compensated experts often make pivotal, subjective interpretations of chest X-rays that, due to the nature of these mass suits, frequently are not subject to meaningful review by the court or an adversary. Notably, when scrutinized, the results of these mass X-ray readings often are shown to be erroneous. With billions of dollars at stake based on such expert opinions, the need for accuracy is essential to a proper distribution of limited asbestos funds.

An effective method to eliminate such bias and to ensure the accuracy and fairness of medical evidence is for courts to select neutral physician panels to review X-rays and render proper medical diagnoses. Judges have the authority to appoint neutral experts. Federal Rule of Evidence 706, for example, allows a federal court to appoint experts "on its own motion." In the late 1980s, the late federal Judge Carl Rubin, in an extremely rare but logical strategy, retained ten neutral experts to review the medical records of sixty-five asbestos claimants who had filed suit in his court.[114] The experts were subject to deposition on their opinions and testified at sixteen trials over a

three-year period. Judge Rubin adopted this approach after noticing definite trends in asbestos cases filed in his court: the plaintiffs' experts always diagnosed asbestosis, while the defendants' experts rarely if ever found the disease.

In 1991, Judge Rubin reported the results of the court's expert panel. The plaintiffs' experts had diagnosed all the claimants with non-malignant asbestos-related diseases. However, the court-appointed experts disagreed with the plaintiffs' experts in a statistically significant two-thirds of the cases, finding that 42 of the 65 claimants did not have an asbestos-related condition.[115] Judge Rubin concluded that Rule 706 may be essential to governing a trial and guarding against a "Battle of the Experts" whereby the jury makes a final determination based on subjective factors, such as the charm, wit, and appearance of a witness. He resolved to use Rule 706 in future asbestos cases where appropriate, so long as certain common-sense conditions were fulfilled, such as appointment of impartial experts.

Both state and federal courts should consider the use of neutral physician panels to ensure the reliability of medical evidence allegedly supportive of asbestos claims. The risks of exaggerated claims of asbestos disease by plaintiff physicians, or understated claims of disease by defendant physicians, have been sufficiently documented in the Manville and Tireworkers Medical Audits to warrant concern about the objectivity of paid medical experts in the asbestos litigation. If courts were truly interested in improving the accuracy of asbestos litigation outcomes, as they should be, this rather straightforward option would be a widely effective means of achieving that end.

D. Other Court Tools to Restore Judicial Integrity in the Asbestos Litigation

Courts have a variety of other resources on which to draw if their objective is to restore fairness and justice in the compensation of asbestos claimants. The following examples are illustrative.

1. Monitor Contingency Fees

Courts have the authority—I would say duty—to monitor and limit contingency fees to preserve a greater proportion of funds for deserving claimants. Hard-working lawyers, without question, deserve fair compensation for representing their clients. But asbestos cases are quintessential "mature" torts where the formula for building cases is well established. Almost all asbestos cases settle in large blocks with relatively little individual treatment of claims, and with minimal risk of nonrecovery to the lawyers. Given these truths, it is an injustice that lawyers routinely receive 33% to 40% of each recovery, often aggregating to millions of dollars, while sick and needy claimants receive less than they deserve.

Judge Weinstein, who supervises the Manville Trust, has observed that unreasonable and excessive contingency arrangements may exist in asbestos litigation. For example, in the rare case where attorneys' asbestos fees were reduced from 33% to 25%, Judge Weinstein observed the routine nature of legal services in the context of large settlements:

> In any mass tort case, there is an opportunity for a small number of attorneys, each individually representing large numbers of potential claimants, to secure for themselves huge attorneys' fees under individual contingency contracts that bear little or no relation to the actual work to be done or the risks in the case. The problem is particularly acute in the context of a stipulated settlement such as the instant one, where subsequent legal work on behalf of most individual claimants will be relatively routine, mechanical and almost certain to result in recovery.[116]

As bankruptcy after bankruptcy is filed and the finite pool of resources grows smaller, judges must reassess the appropriateness of huge contingency fees that largely go unquestioned.

2. Effective Use of the Bankruptcy Forum

Bankruptcy has become an unfortunate reality of the asbestos litigation, but it also provides a unique opportunity for bankruptcy jurists to resolve asbestos cases equitably. Asbestos-related bankruptcies typically result in the establishment of an asbestos trust that pays pending and future asbestos claims against the bankrupt entity. The court and trustees are obligated to develop reliable in-take criteria by which claims are assessed and paid. Therefore, bankruptcy courts are positioned to adopt those evaluative techniques that have worked in the nonbankruptcy context, such as appointment of independent medical experts to assess alleged medical impairment (e.g., Judge Rubin) and disqualification of unreliable expert "diagnoses" based solely on mass litigation screenings (e.g., Judge Weiner).

Bankruptcy courts also have the authority to appoint neutral trustees to manage the trust, an important component of ensuring a fair and just distribution of the bankruptcy assets. The merits of selecting neutral trustees should be obvious. Yet certain members of the plaintiffs' bar, which often dominate the creditors' committee in bankruptcy, may attempt to influence the trustees' selection. Bankruptcy judges must be vigilant in safeguarding the independence of the trustees on whom the court must rely so heavily.

Certain bankruptcy courts have adopted other useful strategies to evaluate asbestos claims. In the Raymark bankruptcy, for example, unimpaired claimants are not compensated unless they become sick, much like the rule followed by Pennsylvania courts. In the Johns-Manville bankruptcy, the Manville Trust audited claims to verify medical diagnoses by plaintiff experts, concluding that thousands of claimants had either no asbestos-related disease or a less severe condition than alleged. Lawyers for some claimants eventually sued the Trust, asserting that the Trust's governing documents did not permit its medical audit policies. That litigation effectively limited the Manville audit program, but its effectiveness while active is a reminder to bankruptcy judges that audit authority is a valuable tool that should be given to trusts upon their creation. Different bankruptcy trusts could benefit by sharing such information on specific cases (claimants

typically have suits against multiple bankrupt defendants) and by alerting each other to docket management techniques that improve efficiency and fairness.

The bankruptcy court's insistence on reliable evidence of an asbestos-related disease also has a collateral, but immensely important, consequence for both claimants and the bankrupt debtor: ensuring that the debtor complies with its insurance contracts. Insurance coverage often provides a substantial amount of funds eventually paid to asbestos claimants, while also enhancing the debtor's prospects of emerging from bankruptcy. By requiring plaintiffs to submit reliable evidence of injury and causation, the bankruptcy court achieves two objectives: (1) it allows the debtor to fulfill its continuing duty to obtain quality documentary proof necessary to trigger policy coverage, and (2) it preserves the bankrupt estate's insurance assets for claimants who are legitimately sick now and in the future.

In the end, bankruptcy courts will have a significant impact on the direction and eventual resolution of the asbestos litigation. Whether that resolution will come this decade depends largely on the ability of bankruptcy and state judges to succeed where prior courts have failed.

3. Limit Punitive Damages Awards

Courts have the power to assess the appropriateness of punitive damages on the rare occasion cases are tried. The original asbestos manufacturers have declared bankruptcy, leaving more and more peripheral companies as asbestos defendants. The message of deterrence has been conveyed successfully: hide the dangers of a product and risk the solvency of an entire industry. While punitive damages certainly may be appropriate for a select few of these peripheral companies, defendants face the very real threat of sustaining duplicative and redundant punitive damages awards.

Judges possess substantial ability and discretion as a matter of law to prevent a given defendant from being assessed multiple punitive damages awards arising out of the same conduct. Courts must consider whether punitive damages have served their purpose in this litigation

and whether such damages would be better allocated to compensating sick claimants. Limitations by judges on the threat of punitive damages awards also will help lower the incentive to file claims on behalf of nonsick claimants. Moreover, punitive damages awards coupled with burdensome state appellate bonding requirements essentially have prevented higher court review of many asbestos actions. This lack of appellate review is another basis for limiting future exposure to punitive awards.

4. Reinvigorate *Forum Non Conveniens*

It is no coincidence that asbestos lawsuits cluster in patterns that are completely unrelated to where injured plaintiffs reside or where their injuries occurred. Plaintiff-favorable jurisdictions are chosen for lawsuits without a demonstrated connection between the jurisdiction and the filed claim. This trend has so distorted the judicial system that some localities have more asbestos claimants than they do residents. A reinvigoration of the doctrine of *forum non conveniens* would go a long way toward providing more individualized justice for both plaintiffs and defendants.

5. Prevent Joinder, Consolidation, and Discovery Abuses

A final option for restoring judicial integrity in the asbestos litigation relates to the joinder, consolidation, and discovery abuses discussed in Section III, *supra*. The courts have the ultimate obligation to ensure that litigants' due process rights are respected—regardless of docket pressure. While liberal use of joinder and consolidation rules initially was perceived to provide a judicial solution to the asbestos litigation crisis, relaxing those rules has done little to stem the seemingly endless supply of claims by the unimpaired. Judges risk undermining basic and long-standing legal rules by continuing this tendency to group together dissimilar claims that should be managed and tried separately. Joinder and consolidation may provide temporary relief from asbestos cases, but that benefit is not, in my view, worth the damage inflicted on our legal traditions.

State judges, of course, bear the brunt of determining how to give individualized consideration to thousands of cases, a seemingly impossible task. I submit, however, that compromising legal rules, no matter how pragmatic or justified, cannot be our first line of judicial defense to a type of litigation that has defied resolution. Indeed, federal courts should feel obliged to intervene on due process and equal protection grounds if state courts are too inundated to apply state procedural rules in accordance with constitutional requirements. I remain convinced that our collective experience and judicial wisdom can arrive at a better solution, one that protects the integrity of our judicial institution while ensuring fairness to all parties in the asbestos litigation.

V. CONCLUSION

The judiciary has a vital role to play in solving the asbestos litigation crisis. The sheer number of cases, unlike any type of previous litigation, has compelled courts to value expediency in resolving claims at the expense of fairness and procedural safeguards designed to protect litigants' rights. That strategy has failed: claims are reaching record levels, more cases are being filed by individuals who are unimpaired, bankruptcies continue to mount, and limited defendant funds are compensating lawyers and the least injured claimants instead of truly sick victims.

In my view, jurists have the responsibility and authority to improve the way our Judicial System manages asbestos cases. The goal is not without obstacles. However, while this litigation has confounded courts, litigants, and academics for decades, I submit that solutions exist to the subversion of justice in these cases. Indeed, it is our duty to find them.

I agree with Senior United States Circuit Court Judge Joseph F. Weis, Jr., of the Third Circuit Court of Appeals, who in 1993 wrote:

> It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.[117]

Strength of imagination, courage to enforce the law under extreme pressure, and commitment to the judicial oath are qualities of our judiciary that I believe remain intact. Now more than ever, our Judicial System needs state and federal judges to utilize their talents to restore integrity and reason to the asbestos litigation. I have confidence that they are up to the task.

[1] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).
[2] *See* Letter from Christopher Edley, Jr., Professor of Law, Harvard Law School, to Robert Raben, Assistant Attorney General, at 3 (Nov. 19, 1999).
[3] *Id.*
[4] *Id.*
[5] *See* Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (Institute for Civil Justice, Rand Corp., Aug. 2001).
[6] *Id.* at 2.
[7] *Id.* at 12.
[8] Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 2 (Mar. 1991).
[9] *Id.* at 14.
[10] *Id.* at 26.
[11] *Id.* at 27.
[12] Ortiz, 527 U.S. at 865.
[13] *See* Raji Bhagavatula et al., *Asbestos: A Moving Target*, 102, No. 5 A.M. BEST'S REVIEW 85 (Sept. 1, 2001) (estimating $275 billion in cumulative asbestos liability); *see also* Michael Angelina & Jennifer Biggs, *Sizing Up Asbestos Exposure*, 16, No. 20 MEALEY'S LITIGATION REPORT: ASBESTOS 32-38 (Nov. 26, 2001) (estimating $200 billion); *Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, BUSINESS WIRE, June 12, 2001; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1 (noting that $200 billion in estimated asbestos liability exceeds costs associated with Superfund, Hurricane Andrew, and the September 11 terrorist attacks).
[14] *See, e.g.*, Eric Roston, *The Asbestos Pit: An Old Issue Is Back and the Lawsuits Are Killing Shares*, TIME, Mar. 11, 2002.
[15] Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154.
[16] Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1.

[17] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 384, 393 (1993)).

[18] Order, *In re* Joint E. & S. Dist. Asbestos Litig., No. 4000, 82B11656 (BRL), 2001 WL 146436, at *1 (E.D.N.Y. Nov. 7, 2001).

[19] Administrative Order No. 8, *In re* Asbestos Prods. Liab. Litig., MDL 875 (E.D. Pa. Jan. 14, 2002).

[20] *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, App. C (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *see, e.g.*, ANDREW CHURG, NEOPLASTIC ASBESTOS-INDUCED DISEASE, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 339 (2d ed. 1998) ("Benign pleural disease, particularly plaque, is still seen with considerable frequency, but it generally has little or no functional import."); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 455 (3d ed. 1994) ("Whether calcified or not, pleural plaques alone are symptomless.").

[21] Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?* 13 CARDOZO L. REV. 1819, 1853 (1992).

[22] RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS, at 2 (1985); *see also* VICTOR ROGGLI, ET AL., PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 176 (Little, Brown and Co. 1992) ("The great majority of individuals with pleural plaques alone have no symptoms or physiologic changes.").

[23] *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990).

[24] CHURG, *supra* note 20, at 339.

[25] DOLL & PETO, *supra* note 22, at 2.

[26] Parloff, *supra* note 15.

[27] Gerard Altonji et al., *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, A.M. BEST SPECIAL REPORT, at 5 (May 7, 2001).

[28] *See* Hensler, *supra* note 5, at 6, 29.

[29] *See* Michael E. Angelina & Jennifer L. Biggs, *Asbestos Claims: Is This the Beginning or the End?* TILLINGHAST-TOWERS PERRIN REPORT 15 (Presented at the Casualty Actuaries of the Mid-Atlantic Region 2001 Regional Meeting May 30, 2001) (reproducing disease mix chart of filings with the Manville Trust in 2000).

[30] Memorandum by Interested Attorney (S. Kazan), at 3-4, *In re* Joint E. & S. Dist. Asbestos Litig., 90 CV 3973 (JBW) (E.D.N.Y. 2001).

[31] Letter from Steve Kazan to Ron Motley et al., at 1 (Oct. 24, 2001) (attached as exhibit to Memorandum by Interested Attorney, *supra* note 30).

[32] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

[33] *See* Parloff, *supra* note 15; Trial Tr., Simeon Johnson v. AC&S, Civ. No. 2000-181 (Cir. Ct. Holmes, Miss. 2001).

[34] *Id.*

[35] Letter from Manville Trustees to Judges Weinstein and Lifland, at 4 (Dec. 5, 2001).

[36] Hearing Tr. at 40-41, 47-48, *In re* Kentile Floors, No. 92-46466 (Bankr. S.D.N.Y. Apr. 30, 2001).

[37] *See* Parloff, *supra* note 15.

[38] *See* Second Am. Compl., G-I Holdings v. Baron & Budd et al., No. 01, Civ. 0216 (RWS) (S.D.N.Y. Jan. 25, 2002).

[39] *See* Aff. of Patricia Houser ¶¶ 14-17, *In re* Manville Personal Injury Settlement Trust Med. Audit Procedures Litig., 98 Civ. 5693 (Mar. 31, 1999).

[40] *See* A.R. Localio et al., *The Manville Personal Injury Settlement Trust X-Ray Audit: An Assessment of the Identification of the Underlying Disease Process Implications for Medical Review by Certified B-Readers*, Biostatistics Section, Dept. of Health Evaluation Sciences, Penn State Univ. College of Medicine & Center for Clinical Epidemiology and Biostatistics, Pennsylvania State University (Feb. 24, 1998).

[41] *See* Aff. of Patricia Houser, *supra* note 39, ¶ 44.

[42] *See* Memorandum from Patricia Houser to Manville Trustees (May 13, 1998) (attaching table with complete data).

[43] *Id.*

[44] *See* R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32, No. 11 J. OCCUPATIONAL MED. 1088-90 (Nov. 1990).

[45] *Id.* at 1089.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1090.

[49] Lisa Girion, *supra* note 13 (quoting Tillinghast-Towers consulting actuary); *see also* Gerard Altonji et al., *supra* note 27, at 5 ("[I]t is common practice for [plaintiff] attorneys to package at least one 'meso' [cancer] claim together with numerous other claimants and to threaten suit on the 'meso' claim(s) if payment demands for the entire package are not met.").

[50] *See In re* Arriola Energy Corp., 74 B.R. 784, 790-91 (S.D. Tex. 1987).

[51] *See* Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001.

[52] *See* Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, Jackson-Clarion Ledger, June 17, 2001; *Mississippi Jury Returns $150M Verdict Against AC&S, Dresser Industries, 3M Corp.* 16, No. 19 MEALEY'S LITIGATION REPORT: ASBESTOS 4 (Nov. 9, 2001).

[53] *See* Parloff, *supra* note 15.

[54] *See* Harris Interactive, *U.S. Chamber of Commerce State Liability Systems Ranking Study* (Jan. 11, 2001).

[55] *Id.*

[56] *See* MISS. CODE ANN. §§ 11-11-3, 11-11-11 (2001); Miss. R. Civ. P. 82(c).

[57] *See* MISS. CODE ANN. § 11-11-11; Miss. R. Civ. P. 82(c).

[58] *See* Mitchell, *supra* note 52.

[59] *See* American Bankers Ins. Co. v. Alexander, Nos. 98-IA-00046-SCT, 97-IA-01271, 2001 WL 83952, at **1-6 (Miss. Feb. 1, 2001) (affirming decision of, *inter alia*, trial judge in Claiborne County to permit joinder of 1,371 plaintiffs in an insurance fraud case); *see also* Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 27, 2001 (discussing *American Bankers*).

[60] *See* Miss. R. Civ. P. 42(a).

[60] *Id.*, cmt. ("The [trial] court has complete discretion within the bounds of justice and its jurisdiction.").

[61] *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (July 1, 1999) (statement of the Honorable Conrad L. Mallett, Jr.).

[62] *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (July 1, 1999) (statement of Prof. Christopher F. Edley, Jr.).

[63] Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

[64] Malcolm v. National Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993).

[65] *See In re* North Am. Refractories Co., 53 S.W.3d 917, 920 (Tex. App. 2001), *op. withdrawn & superseded on different grounds*, No. 09-01-270-CV, 2001 WL 1517920 (Tex. App. 2001).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See, e.g.*, Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink, Relatively Healthy Plaintiffs Swamp Courts, Sending Companies into Chapter 11*, WALL ST. J., Apr. 15, 2002; Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001.

[70] *See, e.g.*, Bill Burke, *A Pittance for Their Pain*, VIRGINIAN-PILOT and LEDGER-STAR, May 10, 2001.

[71] *Id.*

[72] *Hearings on H.R. 1283* (Edley Statement), *supra* note 63.

[73] Letter from Manville Trustees, *supra* note 35, at 2.

[74] *The Fairness in Asbestos Compensation Act of 1999: Hearings on S. 758 Before the Senate Judiciary Comm.*, 106th Cong. (Oct. 5, 1999) (statement of the Honorable Conrad L. Mallett, Jr.).

[75] Administrative Order No. 8, *supra* note 19.

[76] Memorandum by Interested Attorney, *supra* note 30, at 4.

[77] *See Merrill Lynch Asbestos Panel Presentation* (Executive Summary), Dec. 18, 2000; *see also* Hensler et al., *supra* note 5, at 12-13.

[78] First Am. Compl. ¶ 3, Huber v. Taylor, C.W. No. 02-0304 (W.D. Pa. Mar. 1, 2002).

[79] *Id.*

[80] *Id.*

[81] *Id.* ¶¶ 3, 73-110.

[82] *Id.*; *see also* Matt Moore, *For Some Who Were Part of Asbestos Settlement, Questions Linger*, ASSOCIATED PRESS, Feb. 14, 2000 (stating that some plaintiffs in the settlement "are questioning why the monetary awards were based more on geography than sickness").

[83] *See* Angelina & Biggs, *supra* note 29, at 17.

[84] *See For U.S. Law Firms, Asbestos Has Evolved into a Profitable Industry over the Past 30 Years*, BUSINESS, Feb. 10, 2002; *see also* Hensler et al., *supra* note 5, at 11.

[85] *See* F.T. McCarthey, *Still Killing: Asbestos Claims: Asbestos Strike[s] Again*, ECONOMIST, Aug. 19, 2000.

[87] *See* Richard Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001.

[88] *Id.*

[89] *Id.*

[90] *See Ford Motor Co. Facing Billions in Safety-Related Suit Claims*, ATLANTA JOURNAL-CONSTITUTION, Mar. 24, 2001.

[91] *See* Paul Sherer, *New Credit Aids Federal-Mogul in Asbestos Battle*, WALL ST. J., Jan. 4, 2001.

[92] *See* Monte Burke, *An Affair to Remember: Crown Cork owned an asbestos company for 93 days in the 1960's. The purchase price just went way up.*, FORBES, June 11, 2001; *see also Pa. House Declines to Pass Amendment to Bill to Limit Asbestos Liability* 16, No. 11 MEALEY'S LITIGATION REPORT: ASBESTOS 8 (July 6, 2001); *Pennsylvania Governor Signs Bill Limiting Crown Cork & Seal Asbestos Liability* 16, No. 22 MEALEY'S LITIGATION REPORT: ASBESTOS 10 (Dec. 21, 2001).

[93] *Id.*

[94] *Id.*

[95] *See* Darrell Hassler, *Crown Cork & Seal Shuts Six Plants, Cuts 700 Jobs*, BLOOMBERG NEWS, Feb. 8, 2002.

[96] *See* Altonji et al., *supra* note 27, at 3.

[97] *See* Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, BLOOMBERG NEWS, Feb. 4, 2002.

[98] *Id.*

[99] *See* Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996).

[100] *See* Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88 (Tex. 1999).

[101] *See, e.g.*, Bernier v. Raymark Indus., 516 A.2d 534 (Me. 1986); *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563 (D. Haw. 1990); Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987).

[102] Administrative Order No. 8, *supra* note 19.

[103] *Id.*

[104] *See* Lore v. Lone Pine Corp., No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (not designated for publication).

[105] *See, e.g.*, Acuna v. Brown & Root Inc., 200 F.3d 335, 338-40 (5th Cir. 2000) (affirming dismissal of more than 1,600 uranium personal injury claims after plaintiffs failed to comply with trial court's pre-discovery orders requiring them to establish certain elements of their claims through expert affidavits).

[106] Martinez v. City of San Antonio, 40 S.W.3d 587, 591-93 (Tex. App. 2001); *see also* Cottle v. The Superior Court of Ventura County, 3 Cal. App. 4th 1367, 1387 (Cal. Ct. App. 1992).

[107] *See, e.g.*, Mark Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 13-16 (2001).

[108] Berenson, *supra* note 16.

[109] *See* Robert Stephens v. Combustion Engineering, Civ. No. 11-0010 (Cir. Ct. Jasper, Miss., ____ 2002).

[110] *See, e.g.*, Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *8 (D. Kan. May 30, 1990).

[111] *See, e.g., In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 769 (3d Cir. 1994); Turpin v. Merrell Dow Pharm., 959 F.2d 1349, 1359-60 (6th Cir. 1992); Haggerty v. Upjohn Co., 950 F. Supp. 1160, 1165-68 (S.D. Fla. 1996); Emigh v. Consol. Rail Corp., 710 F. Supp. 608, 612 (W.D. Pa. 1989); *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1250 (E.D.N.Y. 1985); Carter v. United States, 593 F. Supp. 505, 514-15 (W.D. Mich. 1984).

[112] Reger et al., *supra* note 44.

[113] Raymark, *supra* note 110.

[114] *See* Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (Oct. 1991).

[115] *Id.* at 39.

[116] *In re* Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 558 (S.D.N.Y. 1995), *aff'd in part and vacated in part*, 100 F.3d 944 (2d Cir. 1996), 100 F.3d 945 (2d Cir. 1996), and 78 F.3d 764 (2d Cir. 1996); *see also* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 74 (Northwestern Univ. Press. 1995) ("Plaintiffs' counsel like [mass settlements] because they generally do not reduce their percentage fee per case so that, because of the large settlement amounts, their lawyers' hourly fees jump spectacularly. An audit of the Baltimore asbestos cases, for example, might show a net fee on the order of thousands of dollars per hour.").

[117] Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom.* Owens-Corning Fiberglass Corp. v. Dunn, 510 U.S. 1031 (1993).

ABOUT THE AUTHOR

Griffin B. Bell is a senior partner in the law firm of King & Spalding.

Judge Bell was born in Americus, Georgia, on October 31, 1918, and attended public schools and Georgia Southwestern College. From 1941 to 1946, he served in the U.S. Army, attaining the rank of major. In 1948, he graduated *cum laude* from Mercer University Law School in Macon with an LL.B. degree. He has received the Order of the Coif from Vanderbilt Law School and honorary degrees from Mercer University and several other colleges and universities.

From 1948 to 1961, he practiced law in Georgia, joining King & Spalding in 1953 and becoming its managing partner in 1958.

Judge Bell was appointed by President John F. Kennedy to the U.S. Court of Appeals for the Fifth Circuit in 1961. Judge Bell served on the Fifth Circuit for fifteen years until 1976, and during that time was a director of the Federal Judicial Center. In December 1976, President Jimmy E. Carter nominated him to become the 72nd Attorney General of the United States. Judge Bell received the oath of office from Chief Justice Warren E. Berger in January 1977 and served as Attorney General until August 1979.

During 1980, Judge Bell led the American delegation to the Conference on Security and Cooperation in Europe, held in Madrid. In 1981, he served as Co-Chairman of the Attorney General's National Task Force on Violent Crime. He received the Thomas Jefferson Memorial Foundation Award in 1984 for excellence in law.

Judge Bell served on the Secretary of State's Advisory Committee on South Africa from 1985 to 1987. He also was a Director of the Ethics Resource Center for several years and in 1986 served as its Chairman of the Board. From 1986 to 1989, Judge Bell served as a member of the Board of Trustees of the Foundation for the Commemoration of the United States Constitution. In 1989, he accepted an appointment as Vice Chairman of President George H.W. Bush's Commission on Federal Ethics Law Reform. During the Independent Counsel's investigation of the Iran-Contra Affair, Judge Bell represented President Bush.

In his private practice, Judge Bell has represented clients in all phases of trial and appellate litigation. He has conducted numerous investigations, including internal reviews for E.F. Hutton's Board of Directors concerning fraud charges, and an independent review of the

Exxon *Valdez* oil spill in Alaska commissioned by Exxon Corporation's Board of Directors.

Most recently in 2002, Judge Bell served on Secretary of Defense Donald Rumsfeld's ad hoc Advisory Committee on new rules governing military tribunals. He also completed his service on the Webster Commission, which in March 2002 issued its report on FBI security programs and Russian spy Robert Hanssen.

Judge Bell continues to practice law and is active in issues involving the United States Judicial System.

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Tab 31

Unified Agenda
Prerule Stage

1218-AB70 - 1975. OCCUPATIONAL EXPOSURE TO CRYSTALLINE SILICA

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1975. OCCUPATIONAL EXPOSURE TO CRYSTALLINE SILICA

Priority: Economically Significant. Major under 5 USC 801.

Unfunded Mandates: Undetermined

Legal Authority: 29 USC 655(b); 29 USC 657

CFR Citation: 29 CFR 1910; 29 CFR 1915; 29 CFR 1917; 29 CFR 1918; 29 CFR 1926

Legal Deadline: None

Abstract: Crystalline silica is a significant component of the earth's crust, and many workers in a wide range of industries are exposed to it, usually in the form of respirable quartz or, less frequently, cristobalite. Chronic silicosis is a uniquely occupational disease resulting from exposure of employees over long periods of time (10 years or more). Exposure to high levels of respirable crystalline silica causes acute or accelerated forms of silicosis that are ultimately fatal. The current OSHA permissible exposure limit (PEL) for general industry is based on a formula recommended by the American Conference of Governmental Industrial Hygienists (ACGIH) in 1971 (PEL=10mg/cubic meter/(% silica + 2), as respirable dust). The current PEL for construction and maritime (derived from ACGIH's 1962 Threshold Limit Value) is based on particle counting technology, which is considered obsolete. NIOSH and ACGIH recommend a 50ug/m3 exposure limit for respirable crystalline silica.

Both industry and worker groups have recognized that a comprehensive standard for crystalline silica is needed to provide for exposure monitoring, medical surveillance, and worker training. The American Society for Testing and Materials (ASTM) has published a recommended standard for addressing the hazards of crystalline silica. The Building Construction Trades Department of the AFL-CIO has also developed a recommended comprehensive program standard. These standards include provisions for methods of compliance, exposure monitoring, training, and medical surveillance.

Statement of Need: Over two million workers are exposed to crystalline silica dust in general industry, construction and maritime industries. Industries that could be particularly affected by a standard for crystalline silica include: foundries, industries that have abrasive blasting operations, paint manufacture, glass and concrete product manufacture, brick making, china and pottery manufacture, manufacture of plumbing fixtures, and many construction activities including highway repair, masonry, concrete work, rock drilling, and tuckpointing. The seriousness of the health hazards associated with silica exposure is demonstrated by the fatalities and disabling illnesses that continue to occur; between 1990 and 1996, 200 to 300 deaths per year are known to have occurred where silicosis was identified on death certificates as an underlying or contributing cause of death. It is likely that many more cases have occurred

where silicosis went undetected. In addition, the International Agency for Research on Cancer (IARC) has designated crystalline silica as a known human carcinogen. Exposure to crystalline silica has also been associated with an increased risk of developing tuberculosis and other nonmalignant respiratory diseases, as well as renal and autoimmune respiratory diseases. Exposure studies and OSHA enforcement data indicate that some workers continue to be exposed to levels of crystalline silica far in excess of current exposure limits. Congress has included compensation of silicosis victims on Federal nuclear testing sites in the Energy Employees' Occupational Illness Compensation Program Act of 2000. There is a particular need for the Agency to modernize its exposure limits for construction and maritime, and to address some specific issues that will need to be resolved to propose a comprehensive standard.

Summary of Legal Basis: The legal basis for the proposed rule is a preliminary determination that workers are exposed to a significant risk of silicosis and other serious disease and that rulemaking is needed to substantially reduce the risk. In addition, the proposed rule will recognize that the PELs for construction and maritime are outdated and need to be revised to reflect current sampling and analytical technologies.

Alternatives: Over the past several years, the Agency has attempted to address this problem through a variety of non-regulatory approaches, including initiation of a Special Emphasis Program on silica in October 1997, sponsorship with NIOSH and MSHA of the National Conference to Eliminate Silicosis, and dissemination of guidance information on its Web site. The Agency is currently evaluating several options for the scope of the rulemaking.

Anticipated Cost and Benefits: The scope of the proposed rulemaking and estimates of the costs and benefits are still under development.

Risks: A detailed risk analysis is under way.

Timetable:

Action	Date	FR Cite
Completed SBREFA Report	12/19/03	
Complete Peer Review of Health Effects and Risk Assessment	11/00/06	

Regulatory Flexibility Analysis Required: Yes

Small Entities Affected: Businesses

Government Levels Affected: Undetermined

Agency Contact: Dorothy Dougherty, Acting Director, Directorate of Standards and Guidance, Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue NW., FP Building, Room 3718, Washington, DC 20210
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Email: dougherty.dorothy@dol.gov

RIN: 1218-AB70

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[Whereupon, at 4:46 p.m., the subcommittee was adjourned.]

○