

TRENDS IN U.S. RESPIRATOR LITIGATION

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LEGAL TRENDS IN U.S. RESPIRATOR LITIGATION

Because there has been relatively little litigation reported in the appellate court reporters in the U.S., it is somewhat difficult to identify clearly discernible trends. That does not necessarily mean, therefore, that there is little litigation in the U.S. involving respirators. In the U.S. only cases that are appealed from the trial court level are reported in the law reporters that one finds in a law library. Therefore, there may be numerous cases that are being tried and cases that are being settled prior to trial which involve respirators that would never appear in the law reporters in a library. An example is the settlement which arose out of the lawsuit related to the deaths of three Lubbock, Texas firefighters who died while wearing air packs manufactured by Scott Aviation and certified by the National Institute for Occupational Safety and Health (Haggard v. Scott Aviation Div. of A.T.O., Inc., U.S. Dist. Ct., N.D. Tex., No. CA-5-79-067, Dec., 1980). There were a number of controversial issues in that case, but it was eventually settled with Scott agreeing to pay \$1.7 million to the survivors of the firefighters. The case was settled at the trial level and was reported as only a news item in a legal magazine. It is likely that there are other examples of litigation involving respirators that also go unreported. However, even though, to date, there has not been a great deal of reported case law involving respirators, it is possible, nevertheless, to make some fairly educated predictions about the future of respirator litigation in the U.S.

Respirators appear to be implicated in litigation most frequently in four types of circumstances. First, a substantial number of cases have been reported in which a product manufacturer is held liable to an injured user of its product as a result of the product manufacturer failing to warn the user that a respirator should be worn while the product is being used. In many of the reported cases, the product manufacturers have been held liable for failing to advise its customers to wear a respirator while using the manufacturer's product. There is a related issue that may be litigated which, while no case reports were located which deal with the subject, is one that could have some interesting implications. That issue involves the problem a manufacturer may encounter if he instructs a user of his product to wear a respirator but recommends a respirator that is inappropriate for that use. If such case should arise, it could have some interesting implications for respirator manufacturers and those engaged in respirator research. If the courts were to hold that a product manufacturer has a duty to instruct users on the proper respirator for protection against hazardous exposure to his product, then the product manufacturers might well find themselves having to conduct respirator research in support of their use instructions and warnings. The Borel v. Fibreboard Products Company case, which is discussed below, could reasonably be interpreted to mandate, at least indirectly, just such research.

The second type of litigation in which respirators are often involved is litigation arising from situations in which employers either provide employees with improper or defective respirators or fail to instruct

their employees on proper respirator use. A case in point is MacClave v. City of New York, 281 N.Y.S. 2d 86 (New York Court of Appeals, 1967). In that case a suit was brought by the widow of a deceased NY City fireman who died of carbon monoxide poisoning while fighting a fire. The plaintiff sued alleging negligence on the part of the City in supplying her husband with a defective respirator. The respirator was manufactured by MSA and, according to the case report, was apparently a combination respirator consisting of a canister which contained chemicals and filters designed to eliminate or neutralize toxic gases and smoke. Evidence introduced at the trial showed that the MSA respirator was not designed for use in atmospheres containing more than 2% carbon monoxide or less than 16% oxygen. Yet the City fire department had issued the respirators for general firefighting with no instructions to firefighters that there were limitations on the respirator's use. According to the autopsy report, which was submitted as evidence at the trial, the deceased had 65% CO in his blood at the time of his death. The City argued that since the respirator contained appropriate warnings which were printed on the respirator case and canister the City shouldn't be liable. The jury concluded that it was clear from the evidence that no instructions had been given to the firefighters by the City and that mere printed information on the respirator case and canister were not sufficient. The court said on appeal that the City should never have issued the respirators without providing the firefighters with some means of ascertaining carbon monoxide content in the atmosphere. The City attempted to defend itself with an ironic and circuitous argument, to wit: when equipment, furnished by an employer, is used for a task for

which It Is not intended, the employer should not be liable for injuries resulting from such use. The court didn't buy the City's argument and concluded that the City, in effect, misled the firemen Into using the respirator Inappropriately by Issuing it for general firefighting purposes. The court added that the City had provided no evidence to show that the warnings printed on the respirator were ever brought to the attention of the firefighters. The court stated, "It is hardly to be expected that a fireman would stop to study the printed instructions attached to the mask when, as here, this fire lieutenant seized the mask brought to the scene by another fire company and used it as it was presented."

In a case heard before the Ohio Supreme Court entitled O'Stricker v. Jim Walter Corporation, 447 N.E. 2d 727 (Supreme Court of Ohio, 1983), an employee of a fireproofing contractor brought a negligence suit against the Jim Walter Corporation for whom the contractor was doing work. O'Stricker contracted asbestosis allegedly as a result of his exposure to the asbestos with which he was fireproofing the defendant's homes. O'Stricker's employer, the fireproofing contractor, had supplied O'Stricker with a respirator for use while he was fireproofing. O'Stricker stated that he stopped using the respirator because of discomfort and the respirator's "failure to filter out all the dust." O'Stricker obtained an award from the Jim Walter Corporation. It Is worth noting that, according to the case report, no action was brought against the manufacturer of the respirator worn by O'Stricker even though there appears to have existed an adequate evidentiary basis for doing

so. In the case of Smith v. ASARCO, 627 SW 2d 046 (Supreme Court of Tennessee, 1982), a worker brought a claim for workers' compensation benefits against his employer, ASARCO for total and permanent disability resulting from exposure to silica. ASARCO argued in its defense that the worker had worn a respirator during his working around silica in ASARCO's plant and, therefore, the worker's exposure to silica must have occurred elsewhere. The worker countered that, while he did wear a respirator part of the time, the respirator would pull away from his face whenever he turned his head and that such movement was necessary in order to do his work. The court held that the worker was entitled to worker's compensation benefits. Again, no action was brought against the manufacturer of the respirator. Perhaps such action was considered and dropped, but it would appear that there would be some questions concerning whether the respirator was a poor fit or if it was poorly designed--the latter potentially making the manufacturer vulnerable to liability.

The third type of litigation in which respirators have played a role is that involving workers who refuse to shave or trim facial hair in order to accommodate the respirator. The courts have consistently held that an employer has a right to require a worker to remove or trim facial hair if it is shown that such facial hair will interfere with the protection provided by respirators, and if it is shown that the wearing of respirators is required as part of the worker's job. (Qlszewski and Loiacono v. Hempstead Fire Department, 334 N.Y.S. 2d 504 (N.Y. Supreme Court, Nassau County, 1972.)) Courts are not quite so consistent in their

holdings where the dispute is over whether a person who is terminated for refusing to shave off or trim facial hair is entitled to State unemployment benefits. An example is the case of Engraff v. Colorado Industrial Commission, 678 P. 2d 564 (Colorado Court of Appeals, 1983). Engraff, who was a member of the Sikh Dharma Brotherhood, was required by his religion to wear a turban and prohibited from shaving facial or body hair. Engraff's employer terminated him on grounds that the turban prohibited him from wearing a safety helmet and that his beard would prevent an adequate seal on his respirator. After he was terminated, Engraff applied for unemployment benefits from the State of Colorado and was refused them based on the Colorado rule prohibiting the award of unemployment benefits to persons terminated for cause. The court held that Engraff's termination did not violate his freedom of religion even though his religious beliefs were the basis for his refusal to comply with the safety rules which was the immediate cause of his termination.

However, the court did hold that the State of Colorado's refusal to provide him with full unemployment benefits was constitutionally impermissible. In the Oregon case of Rasco v. Employment Division and FMC Corporation, 578 P. 2d 3 (Oregon Court of Appeals, 1978) the court held that a worker, who refused to trim his beard in order to accommodate the respirator which his employer required that he wear, had left voluntarily and without good cause, and thus, was not entitled to unemployment benefits. Therefore, the restriction of the worker's freedom of expression was not sufficient to entitle him to unemployment benefits, but the restriction of freedom of religion was.

The fourth type of litigation in which respirators are prominently involved is that litigation in which the manufacturer is made a defendant in a personal injury suit for injuries allegedly caused by the respirator's failure to perform properly. The following cases are particularly noteworthy. First, S.A. Healy Co. v. Mine Safety Appliance Co., 281 N.Y.S 2d 321 (New York Court of Appeals, 1967). The deceased, a man named Rooney, was an employee of the City of New York. He and another engineer descended into an underground sewer to check out a leaking valve. Prior to their descent both men donned their respirators after testing them. After turning off the leaking valve, the two men proceeded out of the sewer tunnel and on the way out Rooney collapsed and died of asphyxiation. Since the other worker was leading the way, he did not know that Rooney had collapsed and did not see Rooney remove his respirator. Rooney was found not wearing it when his body was recovered. Mine Safety Appliances Company (MSA) moved to dismiss the case on grounds that there was no evidence that Rooney was actually wearing the respirator at the time of his death. The trial court disagreed and let the case go to the jury which awarded damages to Rooney's widow. MSA appealed the decision. The appellate court stated that while it is true that there was no evidence regarding precisely how the accident happened, it was reasonable to conclude that had the respirator been working efficiently, it would have been "gross negligence, bordering on the intentional, for Rooney to have pulled it off..." The court added that if the respirator were not working properly, its malfunctioning would have been the cause of Rooney's death, regardless of whether he pulled it off because he could not breathe or

kept It on and thereby became asphyxiated. (The sewer tunnel was found to have been filled with hydrogen sulfide.) The appellate court affirmed the judgment against MSA.

MSA was also the defendant in another case involving the same set of circumstances. The plaintiff, Guarino, went into the sewer tunnel In which Rooney had collapsed in an effort to rescue him. Guarino was not wearing a respirator at the time he went into the tunnel and was also overcome by hydrogen sulfide and died of asphyxiation. The court ruled In favor of Guarino against MSA on grounds that the doctrine of "danger Invites rescue" should be applied when one party (MSA) by its culpable act (manufacturing a defective respirator) has placed another person (Rooney) in a position of imminent peril which invited a third person (Guarino), the rescuing plaintiff, to come to his aid. The jury In the case awarded Guarino's survivors \$185,000. (In this tragic incident altogether 3 people died and 5 others were seriously injured.)

In Madrid v. Mine Safety Appliances Co., 486 F.2d 856 (10th Cir, New Mexico, 1973) a products liability action was brought against MSA for the wrongful death of an employee hired by an oil company to perform work Inside oil storage tanks. The decedent's death was caused by asphyxiation while he was wearing a mask manufactured by MSA. The court held that the decedent, an experienced oil field worker, should have known of the danger of entering an oil tank without following prescribed ventilation procedures and was contributorily negligent in not following such procedures. The court also held that the decedent had no right to

rely on the mask or on the labeling--which he claimed was written in language that was not readily understandable--since there was no indication given that the respirator could be used safely in a "hot" (unevacuated) oil tank, and since there was no finding of a defect in the mask itself, but merely a finding that the respirator was not suitable for use under the particular conditions.

It is useful to contrast this case with the MacClave case, discussed earlier, in which the relatives of the deceased chose to pursue a cause of action against his employer, the City of New York, rather than seeking compensation against the respirator manufacturer for inadequate warning. In the instant Madrid case the adequacy of the warning was at issue, but the plaintiff was unsuccessful in obtaining compensation from the respirator manufacturer.

Perhaps the most important of the reported respirator product liability suits is the case entitled Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981). This case is important both because of the facts in the case and also because it was decided by a Federal Court of Appeals which makes it of importance from the standpoint of legal precedent.

The deceased, Charles Porter, was employed by National Gypsum from 1950 until just prior to his death in 1974. Because of high concentrations of silica and cement dust in the pump house area of National Gypsum's plant, Porter was required to wear a respirator when working in that area. Likewise, because of the presence of asbestos in the environment in

certain parts of the main plant, he was required to wear a respirator when working in the main area of the plant as well. Testimony showed that Porter wore his respirator only about 50% of the work day when he was working in the pump house, but that he wore his respirator regularly when he worked in the area of the main plant where asbestos was more prevalent. Immediately prior to his death, a lung biopsy was done on Porter's lungs. The medical report described Porter's condition as "fibrosis with fragments of asbestos bodies trapped in the fibrous connective tissue. Asbestos bodies or fragments of asbestos bodies are seen throughout all the sections." The report gave no indication of silica or cement dust in Porter's lungs. Porter's survivors filed a lawsuit against the respirator manufacturer, American Optical Corporation (AO), alleging: (1) that the AO respirator was defectively designed and, therefore, unreasonably dangerous, and (2) that AO was negligent in failing to warn of the inherent danger of the respirator. The case went to a jury and the jury determined that the respirator was so defective in design as to be unreasonably dangerous and not fit for normal use. The jury awarded Porter's survivors \$155,000. AO then appealed to the Federal Fifth Circuit Court of Appeals.

Much of Porter's case turned on the testimony of a toxicologist who testified concerning the results of an experiment he had conducted on the AO respirator against asbestos. The attorneys for Porter readily admitted that the toxicologist was not a respirator design expert but argued successfully that his experiment should nevertheless be admissible on the issue of defective design. AO countered with a noted industrial

hygienist who, though a renowned hygienist, also could not be qualified as a respirator design expert. The industrial hygienist rendered his opinion that there were significant methodological problems with the toxicologist's experimental methods. AO argued that the deficiencies in the experiment were such that the experiment should not even be admitted into evidence. The court **disagreed**, concluding that even though the toxicologist was not a design expert and even though the experiment had been questioned for its methodological appropriateness and relevance, those were issues of credibility which were appropriately decided by the jury. The experiment by the toxicologist showed actual penetration rates of asbestos through the AO respirator filter of approximately 9% of fibers 50 microns or larger. The toxicologist testified that, in his opinion, this was a conservative penetration estimate because he was not able to detect penetration of fibers less than 50 microns in size. Therefore, the toxicologist rendered the opinion that the actual penetration was probably closer to 20% of total asbestos fibers.

AO pleaded in the alternative that the jury's verdict was based upon evidence none of which indicated that the design of AO's respirator failed to measure up to the "state of the art" of the manufacturing process and the accepted standards in the industry. AO argued further that it **designed** and manufactured its respirator with reasonable care and that it was supported by accepted industrial standards in existence at the time of the design. AO also made a point of the fact that the filter had passed the approval tests of the U.S. Bureau of Mines and met all **standards** outlined in industry publications. Thus, concluded AO, it

could not have been negligent In designing a respirator and filter that were unreasonably dangerous. In response, the court stated that while industry standards may be considered, they are not conclusive on the **issue** of standard of care. The court quoted with approval from a related Louisiana case on the subject:

Even though a design may not be perfect or foolproof, It is still not defective provided reasonable care is taken in its adoption. On the other hand, neither custom or usage In manufacturing style, nor prolonged marketing and use without significant Injury producing accidents, can exonerate the manufacturer from liability for reasonably foreseeable injury resulting from use. These latter factors are merely part of the attending circumstances which must be weighed and considered In each case of **this** nature. Leathem v. Moore, 265 So.2d 270 (La. App. 1972)

The court went on to state that In this case it was not disputed by either A0 or the plaintiff that: (1) Porter had asbestos fibers in his lungs, (2) that asbestos was a cause of his death, and (3) that Porter could not have Inhaled the asbestos fibers anywhere but in National Gypsum's plant. Therefore, according to the court, the liability of A0 would turn on two points: first, whether there was evidence that Porter used A0's filters, and second, whether the filters were defective for their intended use.

The court then summed up the basis for its decision:

...the Porter jury had the testimony of two experts, and the specific findings from tests, to support the view that the R-17 filter was defective in letting through a dangerous number of asbestos particles. Disastrous for American Optical, we think, the evidence revealed that even though American Optical followed and relied upon testing standards formulated by the Bureau of Mines, those test procedures did not involve asbestos particles. Testimony from one of **plaintiff's** witnesses asserted that the government and industrial testing standards were themselves inadequate and it cannot be disputed that there was information available to indicate the need for better test procedures for asbestos filters.

The court upheld the jury verdict in favor of **Porter's** survivors.

The Porter case addressed two issues which would appear to have potentially important implications for respirator litigation in the future. The first issue is that of the so-called "state of the art" defense which is predicated upon conformance with industry and/or government standards. The court made it clear that mere compliance with current standards, even current government standards, is not in and of itself sufficient to support a contention of lack of defect. The court in Porter said that a jury would be free to find that current industry or government standards are simply inadequate. A recent case dealing with a different type of safety equipment is illustrative of the **courts'**

willingness to set aside current standards as inadequate. In that **case**, (Rusin v. Glendale Optical Co., U.S. Dist. Ct., E.D. Mich, No. CA 80-74710, March, 1985) a jury awarded \$1.03 million to a 51 year old die maker who was blinded in one eye when his safety glasses failed. The plaintiff was operating a grinder and was wearing safety glasses which were manufactured by the defendant, Glendale Optical, and supplied by his employer. The grinding wheel flew apart, and a fragment hit the lens of his safety glasses which shattered allowing the fragment to strike his eye. The plaintiff testified that the defendant failed to inform him that the tempered glass lenses in his safety glasses were 1000 times less shatterproof than readily available polycarbonate lenses. The defendant argued that, even though the polycarbonate lenses might be more protective, the tempered glass lenses met current industry, ANSI and government standards, and that therefore the defendant had not failed to exercise due care in selection of the lenses. The court sent the case to the jury and the jury ruled that even though the lenses selected by the defendants may have met the current industry and government standards, the lenses were nevertheless inadequate as were the standards against which they were being measured.

The second important issue addressed by the Porter court was the issue of manufacturer testing of its products. As the court said, the fact that the A0 respirator had never been tested against asbestos prior to the test conducted by the toxicologist was disastrous to A0's case. The guidelines which are currently applied to product manufacturers and which include the duty to test were set forth definitively in a landmark

decision handed down by the same court that rendered the verdict in Porter. That case is entitled, Borel v. Fiberboard Products Company, 493 F.2d 1076 (5th Cir. 1973). It was a products liability suit brought against an asbestos producer by the survivors of a Mr. Borel who contracted asbestosis and mesothelioma from exposure to asbestos while employed by Fiberboard Products Company. In upholding Borel's cause of action against the asbestos producer, the Fifth Circuit Court of Appeals set forth guidelines that have been widely followed by state and federal courts throughout the country. The following is a summary of the guidelines set forth by the court:

First, the manufacturer of a product is under a duty to warn of the dangers associated with the product's use;

Second, the manufacturer is held to the knowledge and skill of an expert and must keep abreast of relevant scientific knowledge, discoveries, and advances in the particular field - and knowledge of such matters is presumed;

Third, the manufacturer has a duty to test and inspect the product, and has a duty to warn of foreseeable dangers which may make the product unreasonably dangerous;

Fourth, the warning must be sufficient to warn of the dangers associated with the product's use.

Thus, under the Borel guidelines, a product manufacturer cannot defend itself against liability for injury caused by its product merely by showing that the manufacturer did not know at the time of the injury that the product could be harmful. The manufacturer has an affirmative duty to keep apprised of studies concerning possible hazards associated with its product. And the Borel guidelines go further in requiring not only that the manufacturer keep abreast of the results of studies and research undertaken by others involving its product, but also that the manufacturer conduct its own tests and studies to discover possible dangers. Under the Borel guidelines the manufacturer has the burden of proving that no reliable studies have been undertaken which show its product to be unreasonably dangerous, and the manufacturer must also show that it has done adequate research and testing of its own product to determine if the product may be unreasonably hazardous. The person injured by the product does not have to prove that the manufacturer failed to do adequate testing; it is the manufacturer who must prove that it did do adequate testing. The latter can be an important tactical advantage to a person injured by a product since it is often quite difficult for a plaintiff to obtain sufficient records and other information from a product manufacturer to support an allegation that the manufacturer failed to test its product adequately. By requiring that the manufacturer present evidence that it did do adequate testing, the injured party is given an opportunity to examine the product **manufacturer's** evidence and to attempt to refute it.

The Borel guidelines are worth keeping In mind because the approach used by that court in making its decision Is evidently a harbinger of things to come. It is important to understand that courts use a standard for ~~decision-making~~ that is very different from that used by scientists In the evaluation of evidence. Scientists ~~speak, write, and think~~ in terms such as statistical significance at the .01 or .05 level, confidence intervals, etc. Scientists evaluate each others work using such measures. Courts, on the other hand, are governed by a standard of measure known as the preponderance of the evidence. Simply explained, it means that all that Is necessary Is that you provide sufficient evidence that it is more likely than not that what you are arguing is correct. In other words, courts deal with statistical significance at the .51 level. That was the basis for the decision in the Porter case. Though A0's ~~industrial~~ hygienist was able to point to some serious shortcomings in the tests run by the plaintiff's toxicologist, the court nevertheless concluded that the tests were sufficient to show that It was more likely than not that a dangerous number of asbestos particles were able to penetrate the filters of the A0 respirator. It is important to keep this concept in mind since in the future, courts might well play a more important role In the respirator field than either the government or consensus standards setting ~~organizations~~.