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GETTING THE SAND OUT OF THE EYES OF THE LAW: THE NEED FOR A CLEAR RULE FOR SAND SUPPLIERS IN TEXAS AFTER *HUMBLE SAND & GRAVEL, INC. v. GOMEZ*

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I. INTRODUCTION

Silica—quartz in its most common form—is a natural substance. It is the primary component of sand on the beach and “has many uses from filling gardens and lawns to mixing with concrete to filling sandboxes.”¹ Silica in its natural form is not harmful, but when fragmented into tiny particles it can be dangerous when inhaled.² For example, in abrasive blasting, commonly referred to as sandblasting, and in foundry operations, silica particles can be broken up and freely inhaled unless proper precautions are taken. Inhaled silica particles may be trapped in the lungs and lead to a disease called silicosis.³ “[W]orkers in dusty trades are at the greatest risk of silicosis from [occupational] exposure to crystalline silica.”⁴

Health risks associated with the inhalation of “silica dust have been well known for a very long time.”⁵ As early as the Fourth Century B.C., Hippocrates observed the link between respiratory disease and mining and stonemasonry work.⁶ Agricola’s Sixteenth-Century treatise on mining demonstrated that scholars recognized that silica dust “penetrates into the windpipe and lungs, and produces difficulty breathing” after being “stirred and beaten up by

1. *Damond v. Avondale Indus., Inc.*, 718 So. 2d 551, 552 (La. Ct. App. 1998). “[S]ilica comprises more than one quarter of the earth’s crust and is the major component in ninety-five percent of the earth’s rocks.” Linda Regis, Comment, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 207, 227 (1999); see also BRANCH OF INDUSTRIAL MINERALS, U.S. BUREAU OF MINES & U.S. DEP’T OF THE INTERIOR, CRYSTALLINE SILICA PRIMER 5 (Special Publication 1992) (explaining that silica is “one of the building blocks of our planet”).

2. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 173-74 (Tex. 2004).

3. See David Weill, *Silica and Asbestos: Similarities and Differences from a Medical Perspective*, 3-2 MEALEY’S LITIG. REP.: SILICA 21, Oct. 22, 2004 (“Silicosis results when sufficient amounts of respirable crystalline silica—generally particles of less than 10 micrometers in size—are inhaled and become deposited in the lungs after overwhelming the lung defense system.”).

4. Linda Regis, Comment, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 201, 209 (1999).

5. *Gomez*, 146 S.W.3d at 174; accord *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 751 (Tex. 1993) (stating that the risk that silica exposure may cause respiratory disease “has been recognized for more than a century”); see also *Phillips v. A-Best Prods.*, 665 A.2d 1167, 1169-70 n.2 (Pa. 1995) (stating that “[f]or more than half a century, exposure to silica sand has been linked with the development of silicosis, a disease which causes scarring of the lungs”); *Tex. Employers’ Ins. Ass’n v. Etheredge*, 154 Tex. 1, 272 S.W.2d 869, 872-73 (1954) (describing silicosis and its development).

6. *Gomez*, 146 S.W.3d at 174.

digging.”⁷ Furthermore, the first treatise on occupational disease, *De Morbis Artificum*, written in 1700, identified “silicosis as a pneumoconiosis (‘a disease of the lungs caused by the habitual inhalation of irritant . . . particles’) common to stonemasons.”⁸

In the United States, the American Foundrymen’s Society has distributed literature addressing silica exposure and other foundry hazards to its members for over 100 years.⁹ In 1908, the U.S. Bureau of Labor recognized the health risks of dust for hard-rock miners, stonecutters, potters, glass workers, sandblasters, and foundry workers.¹⁰ Then, in 1936, national awareness of the hazards of silica exposure increased dramatically when nearly 1,000 miners died near Gauley Bridge, West Virginia, after digging a tunnel “three miles through rock formations rich in silica” to build a hydroelectric facility.¹¹ The “Hawk’s Nest Tunnel” incident is still considered America’s worst industrial disaster.¹²

The Department of Labor’s first National Silicosis Conference featured the film “Stop Silicosis,” which described how to protect workers from overexposure to silica.¹³ The Conference culminated in a 1937 report that “directly addressed silicosis prevention in industrial settings, recommending measures for employers to take on

7. See Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendants’ Perspective*, 1-5 MEALEY’S LITIG. REP.: SILICA 20, Jan. 2003 (discussing historically reported health hazards).

8. See *Gomez*, 146 S.W.3d at 174 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1746 (1961)).

9. See *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 557, 562 (W.D. Va. 1984) (stating that “[t]he American Foundrymen’s Society . . . is an international technical organization comprised of individuals and businesses that is dedicated to the creation and dissemination of technical information related to the foundry industry”), *aff’d sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

10. See Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendants’ Perspective*, 1-5 MEALEY’S LITIG. REP.: SILICA 20, Jan. 2003 (citing U.S. BUREAU OF LABOR, BULL. NO. 79: THE MORTALITY FROM CONSUMPTION IN DUSTY TRADES 633-875 (1908)).

11. *Gomez*, 146 S.W.3d at 174.

12. See *id.* at 174 (describing the impact of the disaster); see also HENRY N. DOYLE, THE FEDERAL INDUSTRIAL HYGIENE AGENCY: A HISTORY OF THE DIVISION OF OCCUPATIONAL HEALTH, U.S. PUB. HEALTH SERV. (undated) (discussing other incidents including a 1910 investigation among lead miners near Joplin, Missouri, and a series of studies on Vermont granite workers from the 1920s to the 1950s) (on file with the *St. Mary’s Law Journal*).

13. See *Haase v. Badger Mining Corp.*, 669 N.W.2d 737, 744 n.2 (Wis. Ct. App. 2003) (describing the film and establishing other measures to prevent silicosis), *aff’d*, 682 N.W.2d 389 (Wis. 2004).

behalf of their workers.”¹⁴ In 1938, the American National Standards Institute adopted safety standards “calling for the use of respirators in abrasive blasting.”¹⁵ As far back as 1949, the United States Supreme Court noted that “[i]t is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust.”¹⁶

Since 1971, the Department of Labor’s Occupational Safety & Health Administration (OSHA) has set a permissible exposure limit (PEL) for occupational exposure to airborne silica.¹⁷ In 1974, OSHA applied extensive abrasive blasting safety regulations enacted for government contractors in the 1960s under the Walsh-Healy Act¹⁸ to all employers,¹⁹ and adopted standards for working with silica in the construction and maritime industries.²⁰ OSHA

14. *See id.* (noting that “[a]mong the recommendations were workplace surveys, compliance with laws and regulations, respiratory protection and employee safety training”).

15. *Gomez*, 146 S.W.3d at 175. The American National Standards Institute (ANSI) is a consensus group of various industry participants, including manufacturers, suppliers, employers, unions, and customers. *See* Abstract, Am. Nat’l Standards Inst., Am. Nat’l Standard for Respiratory Prot., ANSI Z88.2, <http://retail.ihc.com/abstracts/ansi/ansi-z882.jsp> (last visited Oct. 25, 2005) (showing that the current ANSI Standard Z88.2 sets forth accepted practices for employers regarding the proper selection and use of respirators to protect workers from airborne contaminants in the workplace) (on file with the *St. Mary’s Law Journal*).

16. *Urie v. Thompson*, 337 U.S. 163, 180 (1949) (quoting *Sadowski v. Long Island R.R.*, 55 N.E.2d 497, 500-01 (N.Y. 1944)).

17. *See Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 975 n.6 (N.D. Iowa 2002) (citing 29 C.F.R. § 1910.1000 (2001)) (stating that OSHA established in 1972 the PEL of “1 milligrams per cubic meter over a time weighted average of eight hours” for silica), *aff’d*, 319 F.3d 350 (8th Cir. 2003). The National Institute for Occupational Safety and Health (NIOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH) have proposed even more stringent recommended exposure limits (REL) for silica. *See* Linda Regis, Comment, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 207, 210-11 (1999) (citing U.S.C.A. § 655(b)(1) (West 1998)) (comparing the more stringent exposure limit established by NIOSH of .05 milligrams per cubic meter over a time weighted average of eight hours with the PEL of .1 milligrams per cubic meter over a time weighted average of eight hours that OSHA promulgated); *see also* NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., PUBL’N NO. 2001-129, HEALTH EFFECTS OF OCCUPATIONAL EXPOSURE TO RESPIRABLE CRYSTALLINE SILICA app. at tbl. A-1 (2002), available at <http://www.cdc.gov/niosh-02-129pd.html> (providing a comparison of PEL and REL for crystalline silica).

18. 41 U.S.C. §§ 35-45 (1936).

19. *See Gomez*, 146 S.W.3d at 175 (noting the codification of 29 C.F.R. § 1910.94(a)(5)(ii) (1974) and other regulations imposed by OSHA in the 1970s).

20. *See* 29 C.F.R. § 1910.1000(c) (2004) (establishing the PEL of silica for occupational contact and creating a table outlining the limits for silica exposure).

regulations for abrasive blasting require employers to properly select, use, clean, store, inspect, and maintain respirators; to instruct employees in their proper use and limitations; to conduct frequent random inspections to assure their proper selection, use, cleaning, and maintenance; and to provide high-purity breathing air in air-fed hood respirators.²¹ OSHA regulations also require employers to develop and implement comprehensive hazard communication programs that include material safety data sheets, labels, and training to inform employees about hazardous substances in the workplace and the means of avoiding those hazards.²² The purpose of hazard communication training is to explain and reinforce the information presented to employees through the written labels and material safety data sheets, and to apply this information in the workplace.²³ In addition, the Federal Occupational Safety and Health Act specifically requires each employer to furnish its employees with a place of employment that is free from recognized hazards that cause, or are likely to cause, death or serious physical harm.²⁴

For years, litigation against industrial sand manufacturers and other industrial mineral companies, respirator (dust mask) makers, and related safety equipment manufacturers concerning silica exposure was stable, "with only a low number of people pursuing silica claims" each year.²⁵ Recently, however, there has been a marked increase in the number of silica lawsuits.²⁶ "One large in-

21. See *id.* § 1910.134(c)(1) (2004) (listing the specific procedures that employers must establish and implement as part of their required respiratory protection programs).

22. See *id.* § 1910.1200(a) (2004) (defining the purpose of development and implementation of hazard communication programs). Federal regulations also require sand suppliers to provide their customers with a Material Safety Data Sheet that includes "[a]ny generally applicable precautions for safe handling and use which are known to the chemical manufacturer" and "[a]ny generally applicable control measures which are known to the chemical manufacturer, . . . such as appropriate engineering controls, work practices, or personal protective equipment." *Id.* § 1910.1200(g)(2)(viii)-(ix) (2004).

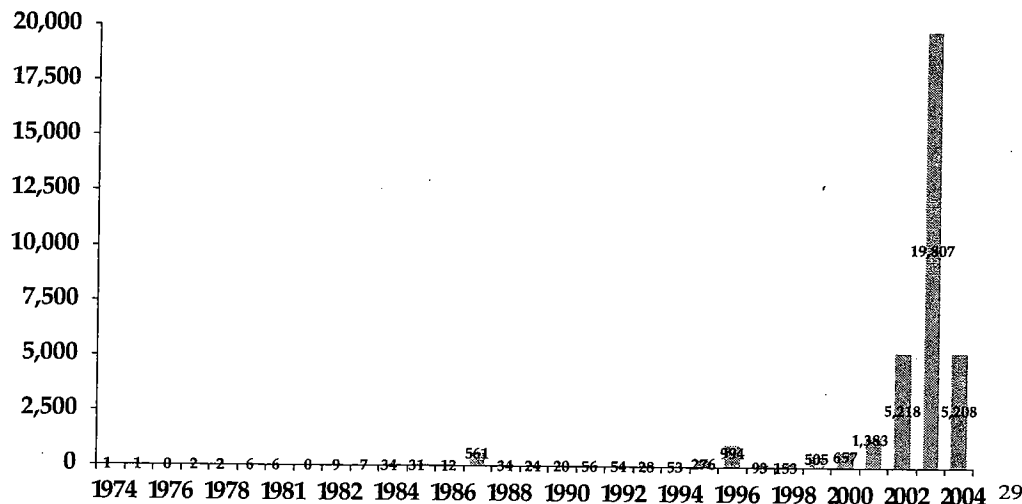
23. See *id.* § 1910.1200(h) (2004) (requiring specific employee information and training guidelines to be used by employers when hazardous chemicals are involved in the workplace).

24. See 29 U.S.C. § 651(b) (2004) (mandating the creation of occupational health and safety standards and providing for medical criteria to ensure safe and healthy working conditions).

25. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY'S LITIG. REP.: ASBESTOS 4, Feb. 21, 2005.

26. See Kelly Barron, *Bonanza or Boondoggle? Plaintiffs' Lawyers Hope Silica Dust Could Be the Next Asbestos*, CRAIN'S CHI. BUS., Feb. 28, 2005, at 35, available at 2005

insurance company is handling more than 25,000 silica claims in twenty-eight states—a tenfold rise from August of 2002.”²⁷ E.D. Bullard Company, the inventor of the hard hat and a maker of respirators, has seen a similar jump in claims since 2002: 62 cases with 200 plaintiffs in 1999; 156 cases with 4305 plaintiffs in 2002; and 643 cases with 17,288 plaintiffs in 2003.²⁸ Sand suppliers are experiencing the same trend, as illustrated in the chart below.



WLNR 3322581 (explaining that the inhalation of silica dust particles has led to explosive silica litigation and approximately 17,000 silica suits were filed in the first half of 2003); Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003, at C1, available at 2003 WLNR 5662921 (reporting that the recent increase in the number of silica related lawsuits has begun to cause concern among insurance companies); Patti Waldmeir, *The Americas: Business Fears Silica Lawsuits Could Wreak Same Havoc As Asbestosis*, FIN. TIMES U.S.A., Feb. 2, 2005, at 3, available at 2005 WLNR 1400086 (noting that “silica suits have skyrocketed recently in response to tort reform measures at the state and federal level”).

27. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY’S LITIG. REP.: ASBESTOS 4, Feb. 21, 2005; see also Susan Warren, *Silicosis Suits Rise Like Dust/Lawyers in Asbestos Cases Target Many of the Same Companies*, WALL ST. J., Sept. 4, 2003, at B5 (asserting that insurance companies are beginning to see large increases in the number of silica claims).

28. See Susanne Sclafane, *Silica Dust: The Next Asbestos? Hard Hat Maker with Former RIMS President Among 160 Defendants Facing Dust Claims*, 108-18 NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., May 10, 2004, available at 2004 WLNR 14746125 (discussing the noted increase in the number of silica suits filed by plaintiffs in 2003); see also Bob Sherwood, *Weighing the Risk from Food and Phones*, FIN. TIMES LONDON, Apr. 28, 2003, at 12, available at 2003 WLNR 8136508 (stating that “[s]ilicosis claims [in the United States] are climbing at such a rate that one company has 17,000 suits against it—and it just makes masks designed to protect people from silica dust”).

29. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY’S LITIG. REP.: ASBESTOS 4, Feb. 21, 2005.

It appears that plaintiffs' attorneys are manufacturing silica claims by using the same lawsuit-generating devices developed in the asbestos context.³⁰ These tactics "include plaintiff recruitment through direct mailings, the use of marketing firms to develop 'inventories', free mass screenings, mobile x-ray vans, and Internet websites."³¹ "Screenings of potential silica plaintiffs by plaintiffs' law firms and their agents have increased 'immeasurably' during the past few years."³²

"Most commentators point to pending legislative efforts relating to asbestos litigation, tort-reform initiatives in Mississippi and Texas, and the use of mass screenings as the reason silicosis 'victims' have seemingly emerged from the woodwork."³³ Some law-

30. *Id.*; accord Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendants' Perspective*, 1-5 MEALEY'S LITIG. REP.: SILICA 19, Jan. 2003 (cautioning that plaintiffs' attorneys may effortlessly transform asbestos litigation trends into silica litigation due to the marked similarities between the two); see also Jonathan D. Glater, *The Tort Wars, at a Turning Point*, N.Y. TIMES, Oct. 9, 2005, at C1, available at 2005 WLNR 16361092 (analogizing silica litigation with traditional asbestos wisdom); Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, (AEI-Brookings Joint Center for Regulatory Studies), Sept. 2005, at 3, available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1193> (explaining the link between increases in silica and abestosis cases to attorney-funded mass screenings).

31. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY'S LITIG. REP.: ASBESTOS 6, Feb. 21, 2005; see also Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, CORP. LEGAL TIMES, at 64, Mar. 2003 (explaining "potential plaintiffs could include families of workers and people who lived or worked near silica sites"); Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, (AEI-Brookings Joint Center for Regulatory Studies) Sept. 2005, at 5-7, available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1193> (discussing the tactics employed by plaintiffs' attorneys).

32. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY'S LITIG. REP.: ASBESTOS, 6, Feb. 21, 2005; accord Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 62-97 (2003) (describing mass screening procedures used by plaintiffs' lawyers to generate clients and the related financial incentives).

33. Roy T. Atwood et al., Commentary, *In Silica Litigation, The Numbers Alone Dictate Careful Scrutiny of Injury and Causation*, 26-2 ANDREWS ASBESTOS LITIG. REP. 12, Dec. 4, 2003; see also *Asbestos: The Mixed Dust and FELA Issues: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Lester Brickman, Professor, Benjamin N. Cardozo School of Law of Yeshiva University), available at http://judiciary.senate.gov/print_testimony.cfm?id=1362&wit_id=3963 (describing mass screenings in asbestos and silica cases); Gilbert S. Keteltas, *Learning the Lessons of Asbestos: Courts and Defendants Can Do Better in the Case of Silica*, 26-6 ANDREWS ASBESTOS LITIG. REP. 9,

