



There's No Such Thing as a Free Asbestos Screening

by Fran Schreiber

Asbestos-exposed workers often find their way to a pre-selected law firm after a health screening arranged by that law firm or a health enterprise. This is usually done in conjunction with your union after the union receives what they understand to be an offer of a *free screening*.

But there's no such thing as a free lunch!

It starts with a friendly phone call to a union or council. A letter follows introducing the *service*. They explain how many were screened at no cost. They acknowledge regular screenings are conducted through local hospitals or clinics, **but it's a time of urgency — tort reform is imminent**. In essence, members better hurry and get what they can. They often enclose a picture of the trailer facility, testimonials from union leaders, and statistics showing the extent of the problem.

The letter may reveal that a law firm provides the funding for the screening program; those with positive results are represented by these lawyers. They assure you they only work with the best attorneys.

If the union agrees, a form letter is placed on union letterhead, with encouraging comments like "XYZ has helped members for over 20 years and has obtained between \$1,000 and \$100,000 for some." They copy and stuff it in envelopes, postage paid, and the union mails to assure members' privacy.

This *service*, they remind you, is a valuable medical and legal benefit for members and pensioners. They may also remind you of someone who died of asbestos exposure. And workers come from miles around!

Where's the beef?

Perhaps 150 workers a day can be examined. X-rays are often developed on the spot using rented equipment or a tractor-trailer rig hauled in by the health enterprise. When the member arrives for the screening, s/he is often presented with a retainer agreement. **If not signed, the screening may not be made available.** But if you aren't signed before the test, you are signed immediately afterwards if x-rays show any evidence of asbestos exposure.

After signing the retainer, a worker may regret it. The retainer agreements, utilized by some firms who do this kind of work, often take costs out of the client's share. A better way is to take the expenses from the entire settlement, *off the top*, and then the firm and the client take their respective shares. This keeps the attorney from wasting the client's money on unnecessary and exorbitant expenses, perhaps charged by enterprises owned wholly or in part by the attorney, the health enterprise or other interested parties. Further, some costs charged by these firms include things most reputable firms would never charge for: postage, in-house copying, in-house phone and faxes, in-house word and data

processing, in-house investigator fees, etc. Sometimes the firm will even assign a number -- say \$1,500 or more -- to these general non-case specific expenses and state in the retainer they intend to take this out of the first funds received. Some firms go so far as to keep the interest on trust fund moneys.

In contrast, reputable firms charge costs in a personal injury suit for direct expenses on behalf of the client, such as expert witnesses, deposition transcripts from independent firms, court fees, etc.

But that's not all!

Here's what else they'll do to you! Take a close look at the settlement provisions in the retainer agreement. This is where you can really lose your lunch. It may contain incredibly ambiguous language that allows the lawyer to sign a compromise and release for the client; this affects your future right to sue. Giving an attorney authority to execute all releases (settle without specific authority) isn't good.

So what's wrong with this picture?

These schemes exploit workers' fears of asbestos disease, and workers are encouraged to bring lawsuits when they are not really ill. Money from a limited pool can go to workers who are not disabled (and most of the money goes to the attorney as set out below). This leaves less for those who contract more serious and disabling diseases such as cancer and mesothelioma. Furthermore, not only may a seriously injured fellow worker lose, you too may lose if you settle. **When you settle, defendants will require you to waive future rights to sue for a more serious disease.**

Let's do the numbers

Say you settle with several defendants for \$5,000 with a diagnosis of "asbestosis." The attorney takes \$1,500 for general costs and \$500 more for case-specific costs, and then takes a 40% contingency fee from the remaining \$3,000. **You're left with \$1,800 in your pocket.**

So how much does the lawyer get? A full evaluation, including a detailed work history and physical exam performed by a qualified doctor, can cost \$1,500 per person. **But you won't get that.** You'll get something briefer, perhaps only 2 to 4 x-rays costing \$50 - \$60. Complete pulmonary function tests, an important measure of whether you have any impairment as a result of asbestos exposure, can cost \$175, **but these screenings rarely include those tests.**

If the lawyer pays an average \$100 per screening, and health enterprise documents say about 20% of those screened have evidence of asbestos exposure (at least pleural plaques with no indication of disability), then a 4-day screening of 600 costs the lawyer \$60,000. **The lawyer gets 120 x \$3,200 or \$384,000 -- less \$60,000 -- still a tidy sum over \$300,000.**

If you settle now, you may lose later!

If you settle, and you will settle because the attorney will want to recoup the expenses for those folks that didn't show any asbestos exposure, and if in the future you become ill with a cancer or mesothelioma, you may well have no right to sue the same defendant for the new disease. Your family may be left with nothing.

What's the Law in California?

One recent California case hurt workers' chances to recover for a more serious and distinct asbestos-related disease after bringing a lawsuit for asbestosis. Although on appeal to the California Supreme Court (so not currently in effect) the Court of Appeal (First District Division 2) in *Mitchell v. Asbestos Corporation, Ltd.* (1997) 69 Cal.Rptr. 2d 164 threw out a dying man's suit against an asbestos manufacturer for newly diagnosed mesothelioma because he had already sued for "breathing difficulties, asbestosis, and/or any other lung damage."

However, a more recent Court of Appeal case (First District Division 5) filed September 15, 1998 was helpful to asbestos victims. In *Richmond v. A.P. Green Industries, Inc.* (1998) 66 Cal.App.4th 878, the court ruled mesothelioma was not the same disease as asbestosis, nor a certain outcome, thus the cause of action for mesothelioma did not arise until the plaintiff discovered he was suffering from mesothelioma. That court was "...convinced that as a general rule, discrete asbestos injuries may give rise to separate actions." But in the *Richmond* case there was **NO PREVIOUS SETTLEMENT** with defendant Green. In the earlier asbestosis case, Green had not been listed as a defendant. Further, as against another defendant who had been named, but not served, the Court of Appeal ruled the plaintiff could sue again for the new and different disease of mesothelioma; again there had been no previous settlement.

What are Asbestos-Related Diseases?

Asbestos exposure can cause several distinct disabling and sometimes fatal diseases. Among the most common asbestos-caused diseases are:

- **Mesothelioma**

Mesothelioma is a cancer of the membranes lining the lungs, chest or abdomen. It is only caused by exposure to asbestos and it is almost always fatal.

- **Lung and Other Cancers**

Lung cancer or other cancers including cancers of the tongue, sinuses, mouth, larynx, throat, stomach, colon, rectum, intestine, kidney, pancreas and gall bladder can occur as a result of exposure to asbestos.

- **Asbestosis**

Asbestosis is a scarring of the lung tissue or the linings of the lung which can reduce lung function and make breathing difficult. Once the scarring has begun, asbestosis is irreversible. Asbestosis victims can develop complications which can be fatal such as heart disease and lung infections.

If x-rays show pleural plaques, be aware these are only indicators of asbestos exposure and usually involve neither symptoms nor disability. Furthermore, symptoms of asbestos-caused disease generally do not appear for 10-35 years after the first exposure to asbestos.

If you develop any of the following symptoms, see a doctor without delay:

- shortness of breath
- pain in chest or abdomen
- significant weight loss
- chronic cough or change in cough pattern
- blood in sputum (fluid) coughed up from the lungs
- difficulty in swallowing or prolonged hoarseness

Finally, proper medical exam programs are important. Follow the OSHA asbestos regulations. WORKSAFE! can send you the guidelines to give to your doctor. Use reputable independent physicians. California's workers' compensation system requires employer(s) who exposed you to asbestos to cover the costs of medical surveillance so your



union trust funds won't be depleted. And always protect yourself if you are still working around asbestos.

Need Legal Help? Shop for a Good Attorney

If the outcome of a regular medical check-up shows you have any asbestos-related disease, consult a workers' comp attorney or an attorney who handles third party litigation against asbestos manufacturers, suppliers and premises owners. Reputable law firms specializing in asbestos disease litigation will evaluate your case for free and discuss your options.

Shop to protect your rights! Comparison shop among law firms; look at their retainer agreements. If you do this in a less stressful, less rushed environment, you'll be able to make your own informed decision on how to proceed.

SUMMARY

If you are screened and sue for asbestosis and are not seriously disabled, you can expect a relatively small settlement. When you settle, you will probably be required to sign away the right to bring a future lawsuit for a more serious debilitating disease. And California case law probably won't allow you to bring a new action for the more serious disease if you waived that right in settlement. Is the minimal amount you may get now worth the risk that you and your family will get nothing from that defendant if you are unfortunate enough to suffer a worse asbestos-related disease later on?

If you aren't convinced by now, here's more! Some health enterprises are currently under investigation for outright misinterpretation of the results of the asbestos screening. Also some health enterprises are getting one price when they read an x-ray as negative and a higher price when they read it as positive -- a bit of a conflict of interest. This kind of activity may constitute criminal or civil fraud for the lawyers or the health enterprise, and it's not too good for you either. They might go to jail. And you might be told you are ill and then worry, without reason, when that just is not true.

If your union is approached to conduct a screening, think twice. Please also consult your union's attorney or leave a message for WORKSAFE! at 415-433-5077 for more information.

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