In the Missouri Court of Appeals
Western District

ACCIDENT FUND INSURANCE COMPANY; E.J. CODY COMPANY, INC.,	)	
Respondents-Appellants,	)	**WD80470 Consolidated with WD80481 and WD80525**
v.	)	
ROBERT CASEY, EMPLOYEE/DOLORES MURPHY,	)	**FILED: December 19, 2017**
Appellant-Respondent.	)	

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

BEFORE DIVISION THREE: LISA WHITE HARDWICK, PRESIDING JUDGE, VICTOR C. HOWARD AND ALOK AHUJA, JUDGES

In this workers compensation case, all parties appeal from the Labor and Industrial Relations Commission's decision that Accident Fund National Insurance Company ("Insurer") is liable for $521,545.44 in workers compensation benefits to Dolores Murphy based upon the death of her husband, Robert Casey, from mesothelioma due to toxic exposure to asbestos through his employment at E.J. Cody Company, Inc. ("Employer"). In their appeals, both Insurer and Employer argue that the Commission's application of Section 287.200.4, RSMo 2016,[1] to

[1] All statutory references are to the Revised Statutes of Missouri 2016, unless otherwise indicated.

Murphy's claim violates the Missouri Constitution's prohibition against retrospective laws.

Because we believe that this case raises a real and substantial challenge to the validity of a state statute, it is within the Missouri Supreme Court's exclusive jurisdiction under Article V, section 3 of the Missouri Constitution. Therefore, we hereby order the case transferred to the Missouri Supreme Court.

FACTUAL AND PROCEDURAL HISTORY

Casey worked for approximately 30 years as a tile installer for various companies. Employer is a construction company located in Kansas City that primarily installs and repairs acoustical ceilings and tile flooring. Casey began working part-time for Employer in 1984. He started working full-time for Employer on January 1, 1987, and worked for Employer until he retired in early 1990. Throughout Casey's career as a floor tile installer, including during his employment with Employer, he was repeatedly exposed to asbestos and its hazards because he installed vinyl asbestos tile and used cutback, which is an asbestos-containing adhesive used for installing vinyl asbestos tile.

Twenty-four years after he retired from Employer, Casey experienced a severe and uncontrollable coughing spell on October 26, 2014, which resulted in his hospitalization. He was diagnosed with mesothelioma on November 5, 2014. Casey filed a claim for workers' compensation benefits against Employer in February 2015. Casey died while the claim was pending. Murphy subsequently

filed an amended claim listing herself as his dependent and his eight children as his surviving children.

A hearing was held before an Administrative Law Judge ("ALJ"). At the start of the hearing, Murphy stipulated that she was seeking benefits solely under the "new" statute, Section 287.200.4, which became effective on January 1, 2014, and was not seeking any benefits under the "old" law applicable to occupational diseases. Section 287.200.4 provides for compensation "[f]or all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total disability or death." Section 287.200.4(3) specifically provides for compensation for mesothelioma claims and states, in pertinent part:

> (3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:
>
> (a) For employers that have elected to accept mesothelioma liability under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer or group of employers such employer is a member of. Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool. A group of employers may enter into an agreement to pool their liabilities under this subsection. If such group is joined, individual members shall not be required to qualify as individual self-insurers. Such group shall comply with section 287.223. In order for an employer to make such an election, the employer shall provide the department with notice of such an election in a manner established by the department. The provisions of this paragraph shall expire on December 31, 2038[.]

Employer elected to accept mesothelioma liability under this statute and obtained workers compensation insurance with a mesothelioma endorsement from Insurer, effective March 16, 2014, through March 16, 2016.

Following the hearing, the ALJ found that Employer was liable under Section 287.063.2's last exposure rule[2] and that Insurer was liable to provide coverage to Employer for Casey's mesothelioma benefits because he was diagnosed in the fall of 2014, which was within the policy period. Therefore, the ALJ awarded mesothelioma benefits under Section 287.200.4 to Murphy and to Casey's eight children.

Employer and Insurer appealed to the Commission. The Commission affirmed and adopted the ALJ's decision, with a few modifications. Specifically, the Commission found that Section 287.063.2's last exposure rule does not apply to claims made under the new Section 287.200.4. The Commission determined that Employer was liable because there was substantial evidence that Casey's mesothelioma was an identifiable disease that had its origin in a risk connected to his employment with Employer and that his occupational exposure was the prevailing factor causing him to suffer the resulting medical condition of mesothelioma, disability referable thereto, and resultant death.

[2] Section 287.063.2's last exposure rule states, in pertinent part: "The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure[.]"

The Commission then determined that Insurer was also liable, even though Insurer was not Employer's insurer when Casey was last exposed to asbestos in 1990. The Commission explained that, "[f]or obvious reasons," Employer's insurer in 1990 could not have offered a policy covering Employer's liability under 2014's Section 287.200.4(3), and Employer's insurer in 1990 could not have calculated a premium that would have taken into account the legislature's enhanced mesothelioma benefits for claims filed after January 1, 2014. However, the Commission found that Insurer, in 2014, could calculate such premiums and take into account the risk that Employer would face enhanced liability for mesothelioma benefits for all claims filed after January 1, 2014. Because Insurer specifically agreed to cover Employer's enhanced liability under Section 287.200.4(3) and "presumably" calculated and collected premiums based on that enhanced liability, the Commission found that Insurer could not now avoid its obligation.

Therefore, the Commission affirmed the ALJ's determination that Employer was liable to Murphy for mesothelioma benefits under Section 287.200.4(3) and that Insurer was liable to cover Employer's liability. The Commission awarded Murphy $521,545.44. However, the Commission reversed the ALJ's award of benefits to Casey's eight children after finding that the amended claim for compensation did not include them as claimants or dependents.

All parties appeal. Murphy contends the Commission erred in failing to include Casey's children in the award. Both Employer and Insurer argue that the application of Section 287.200.4 to this claim violates the Missouri Constitution's

prohibition against retrospective laws. Additionally, Employer challenges the sufficiency of the evidence supporting the Commission's award, while Insurer asserts that the Commission's award exceeds its powers because Insurer is not liable under the last exposure rule and Murphy was not properly substituted as a party after Casey's death.

ANALYSIS

Under Article V, section 3 of the Missouri Constitution, the Missouri Supreme Court has "exclusive appellate jurisdiction in all cases involving the validity of a . . . statute . . . of this state." "If any point on appeal involves such question, the entire case must be transferred to the Supreme Court." *Estate of Potashnick*, 841 S.W.2d 714, 718 (Mo. App. 1992) (citing *State ex rel. Union Elec. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985)).

The Supreme Court's "exclusive appellate jurisdiction is not invoked simply because a case involves a constitutional issue," however. *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. banc 2015). Rather, the Court's "exclusive appellate jurisdiction is invoked when a party asserts that a state statute directly violates the constitution either facially or as applied." *Id*. Employer and Insurer challenge the constitutionality of Section 287.200.4 as applied to an occupational disease claim where the employee's last exposure to the hazard of the occupational disease predates the statute's effective date of January 1, 2014.

The arguments raised by Employer and Insurer do not merely contend that we should interpret Section 287.200.4 to apply only to post-enactment exposure.

Instead, Employer and Insurer's arguments necessarily attack the validity of provisions of Section 287.200.4 itself. The statute explicitly provides that benefits for mesothelioma "shall be provided" in the manner specified in the statute, "[f]or all claims filed on or after January 1, 2014." Thus, the General Assembly has specified that the provisions of Section 287.200.4 shall apply to claims like the one asserted by Casey's survivors. Employer and Insurer argue that, under Article I, section 13 of the Missouri Constitution, the legislature had no authority to dictate that the new statute apply to the current claim. This is a challenge to the constitutional validity of Section 287.200.4, not merely an argument as to whether the statute should be judicially interpreted to apply only to post-enactment asbestos exposure. Thus, their constitutional challenge facially falls within the Supreme Court's exclusive appellate jurisdiction.

This does not end the inquiry, however. "The mere assertion that a statute is unconstitutional does not alone deprive this Court of jurisdiction." *Sharp v. Curators of Univ. of Mo.*, 138 S.W.3d 735, 737 (Mo. App. 2003). Jurisdiction of cases involving the validity of a state statute vests exclusively in the Supreme Court only if the claim has been properly preserved and the allegation is real and substantial and not merely colorable. *Id*. at 738.

Looking first at preservation, Murphy argues that Employer and Insurer failed to preserve their constitutional challenge by not raising it at the earliest opportunity, which she asserts was as an affirmative defense in their answers to her claim for compensation. We disagree. "Administrative agencies lack the

jurisdiction to determine the constitutionality of statutory enactments." *Duncan v. Mo. Bd. for Architects, Prof'l Eng'rs & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. 1988). Because "an administrative hearing commission is not empowered to determine the constitutionality of statutes, a party is not required to raise those issues at that level." *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 634 n.6 (Mo. App. 2011) (citations omitted). "We see no logical reason to require that a constitutional challenge to the validity of a statute be raised before an administrative body in order to preserve the issue for appellate review." *Duncan*, 744 S.W.2d at 531 (footnote omitted). Thus, Employer and Insurer were not required to raise their constitutional challenge before the ALJ and the Commission to preserve it. Nevertheless, the record indicates that the issue was, in fact, raised in the administrative proceedings. Both the ALJ and the Commission noted that Employer and Insurer were challenging the constitutionality of the application of Section 287.200.4 and that they, as administrative agencies, had no authority to decide the issue. Moreover, the Commission expressly stated that the issue was preserved for appeal.

Next, we consider whether the constitutional challenge is real and substantial and not merely colorable. We will find a constitutional challenge to be real and substantial if, "upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy[.]" *Potashnick*, 841 S.W.2d at 718 (citation omitted). While the fact that the constitutional challenge is one of first impression indicates that the issue is

real and substantial and made in good faith, *Sharp*, 138 S.W.3d at 738, the challenge will be deemed merely colorable if it "is so legally or factually insubstantial as to be plainly without merit." *Thompson*, 347 S.W.3d at 634 (citations omitted).

Section 287.200.4(3) provides that, for all mesothelioma claims filed on or after January 1, 2014, which result in permanent disability or death, an employer that has elected to accept mesothelioma liability is liable to pay an additional amount of 300% of the state's average weekly wage for 212 weeks. § 287.200.4(3)(a). If the employer has elected to reject mesothelioma liability, then the exclusive remedy provisions of the Workers' Compensation Act do not apply. § 287.200.4(3)(b).

Employer and Insurer contend the application of Section 287.200.4 to an occupational disease claim where the employee's last exposure to the hazard of the occupational disease predates the statute's effective date of January 1, 2014, violates Missouri Constitution Article I, section 13's prohibition against laws retrospective in their operation. Retrospective laws are those "which take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993) (citation omitted). The prohibition against retrospective laws applies only to substantive laws and not to procedural or remedial laws, which "prescribe[ ] a method of enforcing rights or obtaining redress for their invasion" or

"substitute a new or more appropriate remedy for the enforcement of an existing right." *Pierce v. State, Dep't of Soc. Servs*., 969 S.W.2d 814, 822 (Mo. App. 1998) (citations omitted).

Employer and Insurer assert that the application of Section 287.200.4 impairs their substantive rights because, prior to the statute's enactment, their liability was fixed as of the date of Casey's last exposure to the hazard in 1990. In 1990, mesothelioma was subject to the exclusive remedy provisions of the Workers' Compensation Act. Section 287.200.4(3), however, requires all employers to accept mesothelioma liability or risk being subject to a civil suit without the exclusivity protection the employer had at the time of the last exposure. Employer and Insurer argue that employers have a vested right to be free from civil liability based on the insurance they purchased to cover liability as it existed at the date of last exposure, and that immunity cannot be retroactively taken away on the condition that they accept additional liability.[3] Employer and Insurer also argue that the application of Section 287.200.4 imposes new obligations on them not only by dramatically increasing the amount of compensation for which they are liable but also by extending their liability to Casey's beneficiaries, even though the law as it existed at the time of last

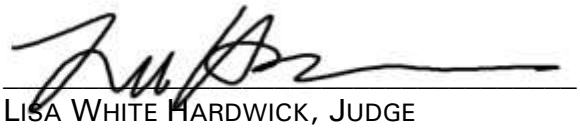
[3] Although this case does not involve a subrogation issue, Employer and Insurer also argue that, if the 2014 version of the occupational disease statutes is applied to claims where the exposure predates 2014, then employers will lose the right to be subrogated to employees' wrongful death claims against third parties, a right that they held prior to the enactment of Section 287.150.7 in 2014.

exposure would have terminated such benefits upon Casey's death. *Compare* § 287.200.4(5) *with* § 287.200.1, RSMo 1986.

The constitutional challenge to the application of Section 287.200.4 to an occupational disease claim where the employee's last exposure to the hazard of the occupational disease predates the statute's effective date of January 1, 2014, is a matter of first impression and is not "so legally or factually insubstantial as to be plainly without merit." *Thompson*, 347 S.W.3d at 634 (citation omitted). Accordingly, the constitutional challenge is real and substantial and not merely colorable.

CONCLUSION

Because we have determined on preliminary review that the constitutional challenge to Section 287.200.4 as applied was properly preserved for appellate review and is real and substantial, we transfer this case to the Missouri Supreme Court.



LISA WHITE HARDWICK, JUDGE

ALL CONCUR.