IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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NO. WD80470

ROBERT CASEY (DECEASED) and DELORES MURPHY, ET AL,

Appellant,

vs.

E. J. CODY COMPANY, INC.

Appellant, Co-Respondent and

ACCIDENT FUND NATIONAL INSURANCE COMPANY, INSURER

Appellant, Co-Respondent

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APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS OF MISSOURI

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BRIEF OF E. J. CODY COMPANY, INC.

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JURISDICTIONAL STATEMENT

This case is an appeal by the employer, E. J. Cody Co., Inc. (separately from the appeal filed by the employer's workers' compensation insurer) of a Final Award of the Missouri Labor and Industrial Relations Commission dated January 31, 2017. In that award, workers' compensation benefits were granted to the injured employee's surviving spouse. That award followed an earlier Award on Hearing issued by an Administrative Law Judge of the Missouri Division of Workers' Compensation in which benefits were granted to the surviving spouse and children. All parties have appealed.

This appeal then is being pursued under **RSMo. Section 287.495** and since the employment out of which the alleged occupational disease arose involved a contract of hire taking place in, and led to employment principally localized in, Jackson County, State of Missouri, this matter falls within the territorial jurisdiction of the Western District pursuant to **RSMo. Section 477.070** and **RSMo. Section 287.120**. Since not all of the issues on appeal would confer exclusive jurisdiction on the Missouri Supreme Court under **Article V. Section 3** of the Constitution of the State of Missouri, the case falls within the general appellate jurisdiction of the Court of Appeals under **RSMo. Section 287.495.**1 and **Article V. Section 3** of the Constitution of the State of Missouri.

STATEMENT OF FACTS

1. Nature and History of the Proceedings

Robert Casey ("Casey"), now deceased, filed a Claim for Compensation under the Missouri Workers' Compensation Law alleging the he contracted an occupational disease, mesothelioma, diagnosed on October 14, 2014, as the result of exposure to asbestos and named E. J. Cody Company, Inc. ("Cody Co".) as the responsible employer since last worked for Cody Co. before his retirement in 1990. Cody Co. and Cody's insurer on the date of diagnosis, Accident Fund National Insurance Company ("Accident Fund") denied compensability. After his death, Casey's widow (Delores Murphy) and children were substituted as the claimants, a trial was held, and an Award on Hearing was issued by an Administrative Law Judge of the Division of Workers' Compensation finding that Casey contracted mesothelioma arising out of and in the course of his employment and since the last employer to expose Casey to the hazard of mesothelioma was Cody Co, the Cody Co. was the liable employer. The claimants were awarded the value of the "enhanced" benefit (as it has now come to be known) for mesothelioma created by the 2013 amendments (effective January 1, 2014), specifically **Section 287.200.4(3),** and that Accident Fund, as Cody Co.'s insurer on the date of diagnosis, and having added a mesothelioma endorsement to the applicable policy, was liable to pay the enhanced benefit (and no other workers' compensation occupational disease benefits were or are being sought by the claimants).

Cody Co. and Accident Fund (independently) appealed the Award and the Missouri Labor and Industrial Relations Commission ("Commission") then issued a Final Award on January 31, 2017 modifying the Award of the Administrative Law Judge but in which Cody Co. was again found to liable as the "last employer" under **Section 287.063.1** and in which Accident Fund was again found to be liable, as the Cody Co.'s insurer on October 14, 2014, to pay the enhanced mesothelioma benefit.

All parties appealed the Commission's Final Award, the claimant ("claimant" is intended to apply to either the surviving spouse or the spouse and the children collectively) on the grounds that they believe that the Commission erred in specifying to whom the benefit is to be paid, Cody Co. and Accident Fund are appealing the finding of their respective liability.

Cody Co. and Accident Fund are also challenging the constitutionality of the application of the 2013 amendments to the worker's compensation law, which have created additional benefits for "occupational diseases due to toxic exposure", which include mesothelioma, to the facts of this case.

This is a case of first impression on the issue of the liability for the newly created benefit for mesothelioma (one of the ten "occupational diseases due to toxic exposure' as now so designated under **Section 287.020.11, RSMo., as amended 2013),** and the constitutionality of the application of these amendments to the facts of this case.

1. Relevant Facts

Introduction

[Cody Co. is only appealing the rulings that Casey contacted mesothelioma and that he was last exposed to the hazard of contracting the OD as the result of expose to asbestos when he worked for Cody Co., his last employer; and is challenging the constitutionality of the 2013 amendments as applied in this cases. However, Cody Co. is not disputing the ruling that if Cody Co. is liable, that Accident Fund, as Cody Co.'s insurer on the date of diagnosis, is liable for the enhanced benefit (if the enhanced benefit can be awarded at all). Thus, Cody Co. will leave it to Accident Fund to provide any additional facts which specifically related the coverage issue.]

Robert Casey's testimony consisted of the introduction of his June 1, 2015 videotaped deposition. (Tr. 76-89). On that date, he was 87 years of age and lived in Leawood, KS with his second wife, Delores Murphy. He has eight children by his first wife, who passed away in 1997. After serving in the Navy, playing professional baseball and doing some odd jobs, he began his 30+ year career as a floor layer, initially installing asphalt tile. Later in his career the switch was made to vinyl asbestos tile ("VAT"),, apparently due to the shortage of asphalt related to the oil embargo of 1973-74) and he continued thereafter to install VAT (for as long as it remained on the market). He worked for a series of companies which installed tile up to and though his employment by Cody Co., his last employer before he retired. That employment ran from the mid-1980s until 1990. He described how the old tile and

adhesive had to be removed and the VAT installed using cutback or thin set. He often had to cut the VAT and scrape the floors since the smallest imperfection in the floor surface would affect the appearance of the new floor. This work would create a great deal of dust which would get on his clothes. Casey thought that he has laid VAT up to the date of his retirement. Casey could not recall having worked around asbestos abatement workers and was unware of instances where abatement had taken place before he worked on the premises. Casey stated that he was diagnosed with mesothelioma in 2014 and was then receiving palliative treatment, but knew that his prognosis was very poor.

On cross-examination by the attorney for Cody Co., Casey admitted that Cody Co.'s work was exclusively commercial installation (although he may have done a job at Robert Cody's home), that Cody Co. treated him "like a king", that he thought that he had installed VAT up to the time of his retirement but admitted that near the end, he could not tell if we was using VAT or not, and admitted that at some point, Cody Co. had cleaned up their warehouse and had disposed of old product.

On cross-examination by the attorney for Accident Fund, Casey admitted that he remodeled a basement at the request of one of his Son-in-Laws and that this involved laying linoleum after he scraped the floor. Casey also described his work history prior to working for Cody Co., stated that he believed that most or all of his other employers had gone out of business, and that he retired on Union benefits in 1990 and has not worked at all since then.

Dinah Mitchell testified on her, and the other the claimants' behalf. (Tr. 16-22) She is one of Casey eight children and helped take care of him until his death from mesothelioma in 2015. She had the opportunity, while she was still living with her parents, to observe his appearance when he returned home from work up through his work at Cody Co. and he was always dirty, dusty, and sweaty. She could not recall any time after his retirement where he would have been exposed to asbestos.

On cross-examination, Ms. Mitchell admitted that her father had worked for a long series of employers as a floor layer, that he had always come home from his work dirty and dusty, and that she could not testify to the exact dates of his employment by Cody Co.

Robert J. Cody ("Cody") testified in person (Tr. 22-66) and by deposition (Tr. 728-877, Exhibits, 879-945). When called a witness for claimants, Cody testified that he is the co-owner, and president, of Cody Co. He stated that for decades the use of asphalt floor tile was the standard but at some point, perhaps related to the oil embargo, VAT replaced asphalt tile. Then at some point in the 1980s, VAT was removed from the market. He believes that his primary supplier, Armstrong, stopped distributing VAT in 1981 but he admitted that it was later for other makers of VAT. He started in the business in 1974 and then, and for a period of time later, that he was unware of any risk associated with the use of VAT. He thought that Casey had begun working in 1987 but then Social Security earning records were produced which showed that Cody Co. paid wages to Casey in 1984, 1985 and 1986 if only for a few

days (as a borrowed employee, as was a common practice in his business). Cody pointed out though that Casey wasn't a regular employee until 1987.

Cody admitted that by 1985, he had knowledge that asbestos can be dangerous and that it was possible that Casey might have had to scrape cutback to do final preparation before installing a floor but that his suppliers stopped distributing VAT a long time before he knew of the hazards of asbestos exposure. Cody agreed that Casey might do minor preparation before laying a floor but wouldn't admit that all tile replaced with new non-VAT after 1984 or so would be replacing VAT and that he agreed with his deposition testimony that the federal government issued guidelines and warnings relating to the handling of ACM, such as its removal and other handling, although he would not agree that the Resilient Floor Covering Institute had recommended work practices relating to ACM. Cody admitted that "he imagined that" Casey might have scraped asbestos containing cutback at some point between 1984 and 1990. Cody also admitted that Cody Co. hasn't suffered because Casey hadn't provided notice of his OD within 30 days of his diagnosis.

On examination by Cody Co.'s counsel, Cody agreed that Casey may have worked for him as a barrowed employee for a few days or weeks before 1987 but that according to Cody Co.'s records, he was not a W-2 employee until January 1987. Cody Co. had very little VAT remaining on their premises when they moved in 1980 and that by 1984, there should have been none, or if any was still present, it would only have been a carton or two, but that would have been removed by 1986 or 1987.

Casey recalled being shown a series of "messy and ugly" photographs depicting what appears to be damaged VAT, or VAT being removed, but they appeared to have involved residential work, that none of it involved Cody Co. jobs, and that he had no idea where the photos came from. Cody then reiterated that he believed that at no time during Casey's employment did he install VAT or encounter VAT in Cody Co.'s warehouse, even boxed.

Included with Cody's deposition were EPA regulations dated February 18, 1990 listing various manufacturers or processors of ACM, the types of ACM which they made or processed, the dates of manufacture or processing and the dates on which the ACM was removed from their products (Tr. 879-886 – difficult to read in the transcript); the Resilient Floor Covering Institute's Recommended Work Practices for Removal of Resilient Floor Coverings (Tr. 888-920); the Form 1, Report of Injury (Tr. 922); photographs of floor tile removal work or removal sites (Tr. 923, the dates and locations of the photographs are not shown); Casey's W-2 (Tr. 934); a Report of Injury and a Surgeon's Report for a 1989 finger injury (Tr. 935); employment records from Cody Co. (Tr. 938); and a letter/notice from Armstrong listing Armstrong's floor products' asbestos removal dates. (Tr. 945)

The Certificate of Death confirms that the cause of Casey's death was malignant mesothelioma. (Tr. 652)

The claimant introduced two OSHA documents which appear to have been printed on December 15, 2015 which contain detailed regulations applicable to the handling of ACM in all types of circumstances (Tr. 653-700), although the effective dates of

these regulations do not appear from the Exhibit. The claimants also introduced the MO Notification of Mesothelioma Benefits (Tr. 701) and the Accident Fund WC policy March 16, 2014 to March 16, 2015. (Tr. 702-727)

The claimants' medical evidence took the form of the April 22, 2015 consultation report of **Dr. Thomas Beller, M.D.**, (a pulmonologist), his test results, and his C.V. (Tr. 96-108) Dr. Beller confirmed the diagnosis of left pleural mesothelioma in the context of a history of work-related asbestos exposure. Dr. Beller stated that the prevailing factor causing Casey's mesothelioma was his work-related asbestos exposure and that "each one of his asbestos exposures contributed to the development of his mesothelioma". He opined that Casey was permanently and "fully" disabled as the result of the malignant tumor. Medical records were also introduced by the claimants that confirm the diagnosis of, and treatment for, Casey's mesothelioma. (Tr. 109-651)

Cody Co. also offered Accident Fund's WC policy from 2014-2015 (Tr. 947) as well as Cody Co.'s WC coverage records from the DWC from 1991 through 1991 (Tr. 963), correspondence to and from MIGA (Tr. 999), Cody Co.'s Answer to the Amended Claim (Tr. 1006), the DWC's Notice of Hearing (Tr. 1011), and, lastly, the insolvent companies listing from MIGA (Tr. 1012), which shows that California Compensation was liquidated on September 26, 2000. However, Cody Co.'s coverage, or the lack thereof, on the claimed date of last exposure was not a fact which the Commission had to address (and which the Court of Appeals will not need

to address) since the claimants are only seeking the newly created enhanced mesothelioma benefit.

STANDARD OF REVIEW

The Court reviews the Commission's Award to determine whether it is authorized by law and supported by competent and substantial evidence on the whole record. ***Richard v. Department of Corrections***, 162 S.W.3d 35, 37 (Mo.App.W.D. 2005). Under **Section 298.495**, the Court may reverse, remand for hearing, or set aside the Award on the following ground: 1) The Commission acted without or in excess of its poer; 2) the Award was procured by fraud; 3) the facts found by the Commission does not support the Award; or 4) there was not sufficient, competent or substantial evidence in the record to warrant the making of the Award. **RSMo** §287.495.1; **Hampton v. Big Boy Steel Erection**, 121 S.W.3d 220, 222 (Mo. banc 2003).

The Court examines the record, to determine if it contains sufficient, competent, and substantial evidence to support he Award. ***Adamson v. DTC Calhoun Trucking***, 212 S.W.3d 207, 212 (MoApp.S.D. 2007). It will set aside the Commision's factual findings and resulting Award, if the Award is contrary to the overwhelming weight of the evidence. ***Id.*** Whether a workers' compensation award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. ***Roberts v. MHTC***, 222 S.W.3d 322, 331 (Mo.App.S.D. 2007). The appellate Court reviews the Award objectively, without viewing the evidence and its inferences in the light most favorable to the Award. ***Franco-Lopez v. Martinez***, 433 S.W.3d, 454, 457

(Mo.App.W.D. 2014). A workers' compensation award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence. ***Id***.

On appeal, questions of law are given de novo review. ***Dubose v. City of St. Louis***, 210 S.W.3d 391, 394 (Mo.App.E.D. 2006). The Court is not bound by the Commission's application of the law, and no deference is afforded to the Commission's interpretation of the law. ***Id***.

POINTS RELIED ON

I.

In their Final Award Allowing Compensation the Commission erred as a matter of law in affirming the Award of the Division of Workers' Compensation in which benefits were awarded to the surviving spouse of Robert Casey on the grounds that Casey died as the result of mesothelioma which arose out of and which was contracted in the course of Casey's employment since the facts found by the Commission do not support the Award and there was not sufficient competent evidence in the record to warrant the making of the award since:

A.

The claimant's evidence only established that Casey contracted mesothelioma during the course of his thirty years of employment as a floor installer but does not support the Commission's conclusion that Casey's exposure continued through Casey's late employment, which was at Cody Co., since by the time that Casey began working at Cody Co. asbestos has been removed from the floor tile which Casey installed for Cody Co.'s customers.

Pippin v. St. Joe Minerals Corporation, 799 S.W. 2d 898 (Mo.App.S.D.1990)

Kelley v. Banta & Stude Constr. Co., Inc., 1 S.W.3d 43 (Mo. App.E.D.1999)

Griggs v. A. B. Chance, 503 S.W. 2d 697 (Mo. App.W.D. 1974)

White v. Henderson Implement Co., 879 S.W.2d 575 (Mo.App.W.D. 1994)

B.

The testimony of the only expert witness, Dr. Thomas Beller, does not attribute Casey's mesothelioma to his alleged exposure to asbestos while working for Cody Co. but only to his history of asbestos exposure during his thirty years of work as floor installer, so Dr. Beller's testimony does not support the Award since the only evidence that Casey was last exposed to asbestos at Cody Co. was speculation and was therefore insufficient evidence to support an award of compensation.

Vickers v. Mo. Dep't. of Pub. Safety, 283 S.W.3d 287 (Mo.App. 2009)

Estes v Noranda Aluminum, Inc., 574 S.W.2d 34 (Mo. App. S.D. 1978)

Miller v. Ralston Purina Co., 109 S.W. 2d 866 (Mo.App. 1937)

II.

The Commission erred as a matter of law in awarding the additional benefits for mesothelioma which were created in 2013, and which became effective January 1, 2014 under the newly created Section 287.200.4(3), since to award this newly created benefit in a case in which it was agreed by all parties that Casey's last exposure to asbestos could not have taken place later that early 1990 violates the Missouri Constitution in the following way:

Since Casey's last exposure took place no later than 1990, Cody Co.'s liability, if any, was set as of the date of the last exposure, and this those benefits were limited to those benefits under the pre-January, 2014 workers' compensation law (none of which the claimant is seeking) and for the Commission to have applied the 2013 amendments to the facts of this case resulted in a constitutionally prohibited retroactive application of a law which became effective twenty-four years after Casey last worked and thereby created a potential obligation on the part of Cody Co. to provide workers' compensation benefits far in excess of those for which Cody Co. would have been liable but for the Commission's actions.

Sharp v. Curators of the University of Missouri, 138 S.W.3d 735 (Mo.App.2003)

Missouri Alliance for Retired Americans, et al., v. Department of Labor and Industrial Relations, 277 S.W. 3d 670 (Mo. banc 2009)

Wilkes v. Mo. Hwy. & Transp. Comm'n, 762 S.W.2d 27, 28 (Mo. banc 1988)

Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338,340 (Mo. banc 1993)

Article I, Section 13, Constitution of the State of Missouri

Article V. Section 3, Constitution of the State of Missouri

ARGUMENT

I.

In their Final Award Allowing Compensation the Commission erred as a matter of law in affirming the Award of the Division of Workers' Compensation in which benefits were awarded to the surviving spouse of Robert Casey on the grounds that Casey died as the result of mesothelioma which arose out of and which was contracted in the course of Casey's employment since the facts found by the Commission do not support the Award and there was not sufficient competent evidence in the record to warrant the making of the Award since:

A.

The claimant's evidence only established that Casey contracted mesothelioma due during the course of this thirty years of employment as a floor installer but does not support the Commission's conclusion that Casey's exposure continued through Casey's last employment, which was at Cody Co., since by the time that Casey began working at Cody Co. asbestos had been removed from the floor tile which Casey installed for Cody Co.'s customers.

The claimant has the burden of proving within reasonable probability that the employee was exposed to the hazard of the occupational disease at issue, not just the mere possibility of exposure. ***Pippin v. St. Joe Minerals Corporation***, 799 S. W.2d 898 (Mo. App. S. D.1990). This burden of proof requires the claimant to establish through

medical testimony that probability of exposure. ***Kelley v. Banta & Stude Const. Co., Inc.***, 1 S.W.3d 43 (Mo. App. E.D.1999). Proof that the injury or disease being claimed could have resulted on one of two causes, one of which is compensable, the other of which is not, is not sufficient proof to support and award. ***Griggs v. A. B. Chance***, 503 S.W.2d 697 (Mo. App. W. D. 1974).

Speculation and conjecture as to an essential element such as the proof of medical causation cannot form the basis for an award of compensation. ***Wiedmaier v. Robert A. McNeil Corp.***, 718 S.W. 2d 174, 177 (Mo. App. W.D. 1986); ***White v. Henderson Implement Co.***, 879 S.W.2d 575, 580 (Mo. App. W.D. 1994).

Mesothelioma was a recognized occupational disease before the 2013 amendments. Cody Co. is not arguing that Casey's disease was caused by an exposure away from his employment but are disputing that he was last exposed to the hazard of mesothelioma during his employment by Cody Co. as is required by **Sections 287.063.1 and 287.063.2.**

None of Casey's prior employers were named as defendants even though their identity was known. Instead, the claimant focused only on Cody Co. so should but that is at the claimant's peril.

Introduction

Before the early or mid-1970s, Cody installed asphalt tile. Although vinyl products containing asbestos had been available for many years, there is no evidence that

Cody Co. used VAT until the 1970's, apparently due to the shortage of asphalt tile in the early or mid-1970s thought to be at least in part related to OPEC's 1973-74 oil embargo. But then if the early 1980s, VAT was removed from resilient flooring products which Cody Co. installed due to the risk of asbestos exposure. (Tr. 23) Although Cody Co. may not have appreciated, in the early 1980s, the risk which the use of VAT presented, the asbestos was removed from all of Armstrong's (Cody Co.'s supplier) U. S. manufactured vinyl products by April 1983, and other manufactures also did the same during the '80s. Cody was sure that for whatever reason, there was no VAT used by Cody Co. as late as1984 when Casey first did a few hours or days work for Cody Co. The point of this rendition is that the preponderance of the evidence shows that although Casey certainly installed VAT for prior employers, he did not so for Cody Co. and since asphalt tile had been used for many years before the adoption of the use of VAT, then not all of the floor coverings which had to be removed by Cody Co.'s customer, or laborers working for another contractor (where a new floor was being laid to replace an existing floor), was necessarily old VAT flooring.

Cody testified by deposition and in person at trial. Cody Co. is a family owned business operated by Cody and his brother. Cody Co. specializes in the installation of floor and ceiling tile, primarily in commercial (as opposed to residential) settings. Casey was hired as a full-time employee in January 1987 and was considered a very good employee and the compliment was returned by Casey when he testified that Cody Co. "treated him like a king". (Tr. 84) Although the ALJ stated that Casey worked for Cody Co. "on a case-by-case basis" from 1984 forward, so infrequent was that lent/borrowed

work, Cody didn't recall the occasional work until shown the Social Security earnings records (which were never placed in evidence by claimants' counsel, the only document which was referred to during the trial that isn't in evidence) and those records only show that Cody Co. paid Casey $284 during the entirely of 1984, with similarly modest payments until 1987. (Tr. 27) During that three year period then from 1984 through 1986 Casey continued to work for his regular employer, or a collection of regular employers, since there was no evidence that there had been a significant interruption in his career as a floor layer. Why then the Commission adopted the Administrative Law Judge's conclusion that there was no evidence that Casey was exposed to asbestos while working as a floor layer for other employers during that period from 1984 through 1986 is baffling, given the seeming assumption that there was still VAT everywhere into the 1980's and Casey's testimony that he installed floor tile continuously for the 30 or so years before his 1990 retirement.

Although Cody Co. knows that the Commission has the power to determine the credibility of a witness' testimony, the trier of fact was unfair to Cody when he found that he changed his testimony as to when Casey began working for Cody Co. In fact, the only records which Cody Co. still had (24 year later and which were very difficult to locate) where the written records, such as the W-2 dated in 1987, but nothing which reflected Casey's occasional work for Cody Co. earlier in the mid-1980's. Such occasional work sharing was common in the flooring industry (as it is in many trades) and to accuse Cody of providing inconsistent testimony due to a lapse of memory going back to events taking place up to 30 years ago (1986-2015) was harsh and not supported by the evidence.

Similarly, the ALJ stated that Cody's testimony was inconsistent with regard to the extent of, a timing of, his knowledge of the hazards of asbestos. However, isn't the issue the fact of and extent of Casey's exposure? If the VAT had been removed from the marketplace in the early 1980s, what difference did Cody's knowledge of its risks make?

Lastly, Awards refer to Cody's confused testimony over the timing of the notice from Armstrong to question his credibility. That is, at his deposition, and at trial, Cody was referred to the notice and asked to admit that it could not have been sent and received until 1985 or later if it referred to 1985 in past tense. However, Casey was confused, thinking that he was being asked to admit that the VAT could have remained in Armstrong's U.S. products until 1985 or later instead of the 1981-1983 time frame quoted in the notice. Only at trial did it finally dawn on him that the time frame during which the notice was sent was the issue did Cody agree that the reference to 1985 established that the letter was sent in 1985 or later.

Cody Co. believes then that is Cody's testimony had been given the weight that is merited, that the Commission would have concluded that Casey's last exposure to ACM did not take place during Casey's employment by Cody Co.

Let's now review the testimony of Casey, while we are discussing the issue of the credibility of the witnesses' testimony.

Cody Co. isn't intending to attack Casey's credibility generally. By all accounts he was a very good person and a very good worker. But like Cody, he was testifying to facts and circumstances involving events which had taken place 25 years, even 30 years, earlier. In addition, he was 87 years of age when his deposition was taken in 2015, was in

the late stages of mesothelioma, and was, understandably, very emotional. Thus, it is easy to understand why he may not have been able to recall the changes in his work environments over the course of the 1980s. That is, he was unable to recall any circumstances when he had been aware of asbestos abatement on premises where he was assigned to work. The EPA began regulating asbestos as early as the early 1970s. Certainly commercial buildings, such as the schools and hospitals in which Cody Co. frequently worked, were targeted early for asbestos abatement, particularly when renovation was scheduled and certainly no new VAT was installed in any new construction as late as the mid-1980s.

Furthermore, the presence of dirt and dust does not prove the presence of asbestos, much less friable asbestos. Floor installation is, to this day, dusty, dirty, and sweaty work, but his doesn't mean that it carries with it the hazard of asbestos exposure. The question then is: when did that work stop, at least for Casey, carrying with it, the hazard of asbestos exposure? It is Cody Co.'s belief that the work no longer carried that risk by the time that Casey became a full-time employee of Cody Co.

B.

The testimony of the only expert witness, Dr. Thomas Beller, does not attribute Casey's mesothelioma to his alleged exposure to asbestos while working for Cody Co. but only to his history of asbestos exposure during his thirty years work as a floor installer, so Dr. Beller's testimony does not support the Award since the only evidence that Casey was last exposed to asbestos at Cody Co. was

speculative and was therefore insufficient evidence to support an award of compensation.

Dr. Beller did not single out Casey's employment at Cody Co. in arriving at any of his opinions. Dr. Beller stated "The prevailing cause of Mr. Casey's mesothelioma is his work-related asbestos exposure. Each one of his asbestos exposures contributed equally to the development of his mesothelioma". (Tr. 98) However, under the heading "Occupational History" in Dr. Beller's report, Dr. Beller only listed Cody Co. as Casey's last employer (in a long string of past employers) and in doing so, incorrectly stated that Casey retired in 1886. (Tr. 96) So it is clear that Dr. Beller was only assuming that the conditions present during Casey's employment by Cody Co. were substantially identical to those to which Casey had encountered earlier in his career during the period when floor and ceiling tile were ACMs. However, there is no substantial credible evidence which established that Casey was exposed to ACMs while working for Cody Co. at the end of his 30 or so year career as a floor layer.

Cody described in detail that during the '80s, Cody Co. had stopped installing VAT. Whether that was because Cody Co. became aware of the dangers of VAT, or his suppliers stopped distributing VAT, is irrelevant to the issue of exposure. Although the Commission was correct in observing that the "last exposure rule" is a rule of convenience, not of causation, the mere fact that Casey was still a floor layer when he worked for Cody Co., and floor laying is an employment in which, during times in the past, involved the hazard of asbestos exposure, is not enough to invoke the rule. For Cody

Co. to be liable as the last employer for purposes of the rule, it must be shown that asbestos was present in Casey's work places and was present in a form (friable asbestos) which allowed it to enter his body though inhalation or ingestion. ***Miller v. Ralston Purina Co.***, 109 S.W.2d 886 (Mo. 1937).

The finding that Casey breathed dust containing asbestos while working for Cody Co. is speculation. There is no way that Casey could have known that any dust that he may have encountered while working for Cody Co. contained friable (breathable) asbestos. As has been stated above, and again with all due respect to Casey, it is simply not reasonable to accept Casey's testimony that his work environment didn't change significantly up to 1990 when he left Cody Co. and retired.

The importance of these facts in the context of Dr. Beller's opinions is that if Casey had not been exposed to friable asbestos then his mesothelioma had to have been caused by his exposure when he was working in hazardous environments before he worked for Casey. There is no possible way that Dr. Beller could have, 25 years later, assessed the contribution of any exposure to ACM at Cody Co. - nor did he even attempt to do so. Although Cody Co. grants that it was not the claimants' burden to show direct medical causation or contribution based upon Casey's work at Cody Co., but proof that there was an exposure to the hazard at issue it is necessary and Dr. Beller's opinions are only as credible as the facts on which they were based are credible. ***Vickers v. Mo. Dep't of Pub. Safety***, 283 S.W. 3d 287 (Mo. App. 2009); ***Miller v. Ralston Purina, Id. Estes v. Noranda Aluminum, Inc.***, 574 S.W.2d 34 (Mo.App. W.D 1978)/ Thus, Dr. Beller's opinions only support the claimants' case if Casey was exposed to friable asbestos at

Cody Co. but if the ALJ had correctly concluded that such a conclusion could not be reached, then all Dr. Beller's opinions would have proven is that Casey's mesothelioma was caused by his earlier employment as a floor layer.

This Court's decision in ***Smith v. Capital Region Medical Center***, 412 S.W.3d252 (Mo.App.W.D. 2013) is likely to be cited in support of the Commission's decision. However, the distinction is that in ***Smith*** the employee had worked for many years as a lab technician and the only evidence that he may have been exposed to hepatitis away from his historical one-employer job was that of a remote blood transfusion. Here though Casey had worked for many employers before Cody Co. and it is likely that given the timing of the use of VAT (and the prevalence of ACMs otherwise) that his Cody Co. job may have been the only employment is which he was not (Cody Co. believes) exposed to ACM.

II.

The Commission erred as a matter of law in awarding the additional benefits for mesothelioma which were created in 2013, and which became effective on January 1, 2014 under the newly created Section 287.200.4(3), since to award this newly created benefit in a case in which it was agreed by all parties that Casey's last exposure to asbestos could not have taken place later that early 1990 violates the Missouri Constitution in the following way:

Since Casey's last exposure took place no later than 1990, Cody Co.'s liability, if any, was set as of the date of the last exposure, and thus those benefits were limited to those benefits available under the pre-January 1, 2014 workers'

compensation law (none of which the claimant is seeking) and for the Commission to have applied the 2013 amendments to the facts of this case resulted from a constitutionally prohibited retroactive application of a law which became effective twenty four years after Casey last worked and thereby created a potential obligation on the part of Cody Co. to provide workers' compensation benefits far in excess of those for which Cody Co. would have been liable but for the Commission's actions.

Introduction

Both defendants, Cody Co. and Accident Fund, have raised the issue of the constitutionality of the 2014 OD amendments. Cody Co. pleaded lack of constitutionality as an affirmative defense. This issue was repeated at the start of the hearing and was referred to summarily in the Awards since neither the Division of Workers' Compensation and the Commission has jurisdiction to determine the constitutionality of a Missouri statute under **Article V. section 3** of the Missouri Constitution. However, it is incumbent on the party questioning the constitutionality of a statute to preserve that issue at every stage of the proceedings since the appellate court might otherwise rule that the issue has not been properly preserved. ***Sharp v. Curators of the University of Missouri***, 138 S.W. 3d 735 (Mo. App. 2003)

The 2013 amendments undoubtedly were the eventual result of the replacement of the former "rule of liberal construction" with the "rule strict construction" with the amendment to Section 287.800 in 2005. **Section 287.800, as amended 2005**. This then lead to industry's loss of exclusivity protection in occupational disease cases under the holding in ***Missouri Alliance for Retired Americans, et al. v. Department of Labor and***

Industrial Relations, 277 S.W.3d 670 (Mo. banc 2009). Exclusivity was restored in the 2013 amendments through the additional of occupational disease language to **Section 287.120.2**, but at the same time employers (and insurers) were deprived of their historical subrogation rights with the addition of a subsection 7 to **287.150. Section 287.150.7,** as amended 2013**.** This then brings us up to date.

Cody Co. believes that the entire compensation scheme contained in the 20014 amendments which related to the "occupational diseases due to toxic exposure" are unconstitutional since they deprive employers of existing rights, and constitute special laws, which do not address or accomplish a valid state purpose.

The 2014 OD amendments:

1. Deprive the employer of the subrogation rights which existed on the last date of exposure in 1990.
2. Single out ten occupational diseases of the many occupational diseases which the law recognizes (or may recognize in the future) for special treatment;
3. Provide a compensation scheme which for the first time compels the payment of an amount of compensation which is calculated using as the compensation measure the State Average Weekly Wage without regard to the earnings of the employee when last exposed, or at any other time, contrary to the provisions of **Section 287.250** which applies to any other injury or disease.

4. Ignore the historical concept of dependency required under **Section 287.240** as a prerequisite for a claim for benefits on the part of a surviving spouse or child on account of the employee's disability or death;
5. Add enhanced benefits for specified diseases with no basis in medicine or logic since these diseases are not necessarily more serious or devastating than other occupational disease which were not included in the list;
6. Reduce the employees who have contacted other occupational diseases, or those who have sustained devastating injuries due to accident events, to a category of "second class claimants" regardless of how serious their diseases or accidental injuries may be;
7. Single out mesothelioma for a sort of "platinum plan" (to draw a parallel to health insurance overage) whereby those with mesothelioma, or their families or estate, are paid about three times what the other nine special occupational diseases generate (which is particularly odd since due to the usual very lengthy latency period of the development of the disease, employees who contract mesothelioma often don't develop symptoms until they are already out to the work force, as here, where Casey had been retired for 25 years before he became ill and was diagnosed);
8. Requires all employers to either accept or reject "mesothelioma liability" at the risk of opening the employer up for a civil suit without exclusivity protection in the event of rejection. **Section 287.200.4(3)(b).**

As to the argument that these amendments constitute a form of punishment for employers whom have "callously" exposed their employees to the risk of these potentially devastating diseases, it should be pointed out that the behavior being punished, particularly in the case of mesothelioma or asbestosis (and perhaps others of the ten diseases), is behavior which could have taken place up to 50 + years ago, when the employer had no knowledge, and could not have had knowledge, of the risks to which the employer's worker were being exposed. (And as to the unfortunate insurers – that is an issue which Accident Fund can address).

For **287.200.4** to be determined to be unconstitutional it must first be a law which affects substantive rights, not just the method of enforcing existing rights. ***Wilkes v. Mo. Hwy. & Transp. Comm'n***, 762 S.W.2d 27, 28 (Mo. banc 1988), such as when the law imposes "new obligations, duties, or disabilities with respect to past transactions." ***Doe v. Roman Catholic Diocese of Jefferson City***, 862 S.W.338, 340 (Mo. banc 1993).

The application of 287.200.4(3) to these facts would clearly deprive Cody Co. of the vested right to have Cody's Co.'s liability limited to the law in effect when Casey was employed and when he was exposed. The application of the amendments would also impose new obligations on Cody Co., by dramatically increasing the amount of compensation for which Cody's current insurer is liable. If addition, it extends that liability not only to the surviving spouse but also to Casey' non-dependent children (and even to Casey's estate if he has not been survived by a spouse and/or children) contrary

to the limitation on Cody's Co.'s liability under the pre-2014 **Section 287.240** as it applies to occupational disease.

Laws which involve penalties are always considered substantive and can only be applied prospectively. ***Yellow Freight Sys., Inc. v Mayor's Comm'n of Human Rts***., 791 S. W. 2d 882 (Mo. banc 1990). Although the creation of the enhanced benefits for the ten designated toxic exposure occupational diseases, particularly the greatly increased benefit for mesothelioma above the other nine diseases, is not identified as a penalty, isn't that what the enhanced benefits are in reality? What other purpose does **287.200.4** serve than to penalize certain industries and businesses, a penalty which serves no legitimate purpose.

[Since under the Commission's award Cody Co. has not been held to be directly liable for, (and cannot be held directly liable for) the benefit which has been granted under the Award, Cody Co. will defer any further consideration of constitutionality issues to Co-Appellant, Accident Fund.]

CONCLUSION

Therefore, Cody Co. for the reasons stated above respectfully requests that the finding of liability on the part of Cody Co. be reversed and that an denial of compensation be entered or in the alternative that the Court rules that the newly created **Section 287.200.4** and **287.200.4(3)** be declared unconstitutional as applied by the Commission to the facts of this matter.

Respectfully submitted:

s/s James B. Kennedy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief, and the Appendix (separately filed) was filed on this 7th day of July, 2017 by use of the Missouri Electronic filing system, and that on the same day by separate email service upon:

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CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 84.06(b) and contains 8,210 words all inclusive (exclusive of the Appendix). To the best of my knowledge and belief, the copy of the Brief (and Appendix) forwarded to the Clerk of the Court, via electronic mail, in lieu of a floppy disk or CD, has been scanned for viruses, and is virus-free.

/s/ James B. Kennedy

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