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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REPLY BRIEF OF E. J. CODY COMPANY, INC.

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ARGUMENT

I.

REPLY TO RESPONDENTS' ARGUMENT IN SUPPORT OF THE OPINIONS OF DR. BELLER

Whereas it is true that Dr. Beller stated that all of Casey's jobs contributed to his contracting mesothelioma, that cannot be taken as the equivalent of Dr. Beller having testified that Casey's employment at Cody Co. contributed to the disease. Dr. Beller could only assume the truth of what he was told by Casey or those facts which may have been provided to him through Casey's attorney. Dr. Beller couldn't have known which chemicals were present at Casey's work sites for Cody Co., rather, he was merely assuming that the exposure to asbestos containing materials ("ACMs") that was characteristic of floor installation for most, or all, of Casey's career, continued through to his retirement in 1990. As Respondents point out, exposure to ACMs in the workplace is now relatively rare, thus the issue in this case is whether that exposure on the part of Casey ended before he began working for Cody Co. or continued into his employment there also. If we remove Cody Co. from the picture, then Dr. Beller's opinion that Casey's exposure ACMs caused his mesothelioma remain valid – but they just don't implicate Cody Co. as the last employer for purposes of the application of the "last exposure rule" ***Section 287.063.2.***

Cody Co. understands that the "last exposure rule" is a rule of convenience, not of causation, nevertheless, the application of the rule still requires proof that the employment at issue carried with it the hazard of the disease and the hazard of mesothelioma is only created by the presence of ACMs in a friable (breathable) form. Casey testified that he continued to be exposed to dust up until the end of his career but he could not know if that dust contained ACMs. There is no "wealth of evidence", as Respondents assert, of ACM exposure at Cody Co. during the last few years of Casey's employment, to the contrary, by the time Casey came to work for Cody Co. even as a temporary employee, as Robert Cody testified, Cody Co. had stopped installing tile containing asbestos since their regular supplier, Armstrong, had stopped manufacturing VAT in the early 1980s.

Respondents states that Kentile tile was an ACM into 1986 and was likely installed for some period after that. Since Kentile was regularly used in schools, and Casey worked in schools for Cody Co., then Casey must have been exposed to Kentile tile. However, Robert Cody stated that Cody Co. used Armstrong tile, not Kentile tile.

As to the question of Casey's employment history at Cody Co., he was only an occasional employee (the temporary lending of employees by one company to another is common in the industry) until 1987. Only then did he become a fulltime Cody Co. employee. He then worked until the end of the first quarter in 1990 (not 1988 as stated by Dr. Beller). Cody Co. believes that an accurate portrayal of Casey's work history at Cody Co. is crucial since as certainly as Casey was exposed to ACMs during much of thirty

year history as a floor layer, the point of contention here is whether he was exposed during the last few years of his long career. Cody Co. believes that Casey's last exposure to ACM predated his employment at Cody Co. and that the evidence so proves.

II.

REPLY TO RESPONDENTS' ARGUMENT ON ACCIDENT FUND'S LIABILITY FOR THE MESOTHELIOMA ENHANCED BENEFIT

Cody will not respond to Respondents' argument on this issue but to again remind the parties and the Court that the Respondents are only seeking the enhanced mesothelioma benefit from Accident Fund and have limited their efforts to establish that Accident Fund is liable for those benefits by virtue of the mesothelioma policy endorsement on Cody Co.'s policy in effect on the post-January 1, 2014 date of diagnosis.

III.

REPLY TO RESPONDENTS' ARGUMENT ON THE CONSTITUTIONALITY OF THE 2013 AMENDMENTS

Sufficiency of Pleadings and Preserving the Constitutional Issues:

The rules of civil procedure do not generally apply in workers' compensation cases "unless a statute implicates the application of a specific rule", ***Marston v. Juvenile Justice Center***, 88 S. W. 3d. 534, 536, n. 2 (Mo. App. 2002), (such as the rules which

guide the taking and use of depositions under ***287.560, RSMo***.) but do not apply to the scope of the pleadings. ***Elking v. Deaconess Hosp.,*** 996 S. W. 2d 718 (Mo. App., 1999), Therefore, **Rule 55.08** does not generally apply to workers' compensation pleadings. Indeed, "Chapter 287 has minimal requirements for its pleadings and motions." ***U. S. Dep't. of Veterans Affairs v. Boresi,*** 396 S. W. 3d 356, 362 (Mo., 2013). That is, the Missouri Division of Workers' Compensation ("DWC") only requires that the parties complete the Claim for Compensation (Form WC-21) and Answer (Form WC-22) using forms which the DWC has created. Although it is correct that affirmative defenses must be pleaded, the detailed required in civil litigation has never been found to be necessary. Cody Co. does recognize that preserving constitutional issues may require greater detailed pleading than that which is necessary in workers' compensation pleading generally but in this case, Cody Co. added an attachment to Cody Co.'s Answer in which Cody Co. pleaded that the application of the 2013 occupational disease amendments to these facts would violate the U. S. and Missouri Constitutions. (L.F. at 000018-000019). At trial the Administrative Law Judge ("ALJ") was aware of this defense since it was listed in the ALJ's Award as issue 4 (L .F. 000025). Moreover, the ALJ referred to this issue in the Award and declined to address the issue not because it hadn't been properly pleaded and preserved but due to his clear lack of jurisdiction. When Cody Co. appealed the ALJ's Award, they listed constitutionality as a point on appeal (the Legal File erroneously omitted including the entire Application for Review filed by Cody Co,) and the Commission acknowledged the issue in a footnote stating that they have no authority to resolve constitutional challenges (citing ***Tadrus v. Missouri Bd. of Pharmacy***, 849 S.

W. 2d 222, 225 (Mo. App. 1993) ". . . other than to note that such issues/arguments are preserved for appeal."(Emphasis added.) (L.F. at 000046).

Cody Co. submits that it is not necessary, and should not be necessary, for a party to exhaustively plead and brief constitutional issues on the administrative level where neither the ALJ nor the Commission will read or comment upon those issues (understandably in light of their lack of jurisdiction), and where any such arguments will not even preserved as part of the Record on Appeal. It should be sufficient then for the proponents of the constitutional challenge to have preserved the issue for the court to then address.

Lastly, this is the case of first impression as to the applicability and effects of the 2013 amendments to the occupational disease law.. Should this court hold that the constitutionality issues have not be sufficiently preserved due to some insufficiency in the pleadings, or the treatment of the issues at the administrative level, that then will only postpone the inevitable – the need for the constitutional issues to be resolved to guide the parties in the dozens of claims which await the outcome in this matter.

REPLY TO RESPONDENTS' ARGUMENT THAT THE ENHANCED MESOTHELIOMA BENEFIT IS CONSTITUTIONAL SINCE THE AMENDMENTS WHICH CREATED IT ARE ONLY REMEDIAL

The Respondents argue that Cody Co.'s characterization of the enhanced benefits as punitive "cannot be taken seriously" (at pgs. 40-41). However, the reality is that

Casey's spouse and children could have sought the traditional occupational disease benefits (medical expenses, disability and death benefits) if they had chosen to do, they continue to have the right to sue all of the "usual suspects", that is, those manufacturers and distributors of ACMs which are sued with great regularity in civil court in cases involving mesothelioma (and for which no subrogation rights attach under the 2013 amendment to ***Section 287.150*** due to the addition of a Subsection 7, and added provision which now deprives the employer or insurer of the subrogation rights provided in Section 287.150 otherwise where the injury is one of the ten toxic exposure occupational diseases) and now have been awarded $521,545.44 in this case.

Cody Co. grants that mesothelioma is a virulent and always fatal disease but many catastrophic injuries occur at work resulting in permanent total disability and death for which no such enhanced benefits are available. Why, and why mesothelioma? Cody Co. continues to believe that the enhanced benefit is punitive in nature and does not provide a proper remedy lacking in the occupational disease law as it existed prior to the 2013 amendments.

Respondents cite ***McGhee v. W.R. Grace & Co.,*** 312 S.W. 3rd 447 (Mo. App. 2010) in support of their argument that the statutory changes can be applied based upon the date of the diagnosis of the occupational disease even though the last exposure occurred many years in the past. However, there was no constitutional challenge in ***McGhee***, it was a case involving the interpretation of workers' compensation statutes relevant to the question of which of two possible maximum rates of compensation should

be applied, the maximum rate in effect on the date of last exposure or the maximum in effect on the date of the diagnosis of the injury. Although the finding was that the latter maximum rate cap on the latter date was to be applied, the employee was still limited to a rate of compensation based upon his earnings at the time of his last exposure whereas under the 2013 amendments the rate is the MO State Average Weekly Wage without reference to the employee's earnings – a complete departure form how compensation benefits for disability and death have been calculated for the entire eighty-eight years that the Act has been in effect.

Respondents argue that the holding in ***Gervich v. Condaire, Inc.***, 370 S.W.3d 617 (Mo., 2012), cited by Appellant Accident Fund, has no bearing on the constitutionality issues in this case. Although it is correct that ***Gervich*** involved an injury which took place before the remedial legislation in question in that case was passed, the Supreme Court referred favorably to the holding in ***Tilley v. USF Holland Inc.***, 325 S.W. 3d 487 (Mo. App., 2010) in observing that the statutory amendments cannot be applied retroactively since doing so would deprive the surviving spouse of her substantive rights to the benefits which had been, in effect, created by the Supreme Court in the decision in ***Schoemehl v. Treasurer of Missouri***, 217 S.W. 3d 900 (Mo. banc 2007). Here the issue is whether an employer's liability can be dramatically increased retroactively, and of course an increase in an employer's financial obligations under the workers' compensation law is no more or less substantive than a claimant's right to be paid those benefits.

CONCLUSION

Therefore, Cody Co. for the reasons stated above again 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 Reply Brief was filed on this 28th day of September, 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 Reply Brief complies with Rule 84.06(b) and contains 2,349 words all inclusive. To the best of my knowledge and belief, the copy of the Reply Brief 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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