

Appeal No. WD80470

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

ROBERT CASEY, DECEASED, EMPLOYEE/DOLORES MURPHY, APPELLANT;

vs

**E.J. CODY COMPANY, INC., APPELLANT-RESPONDENT
ACCIDENT FUND INSURANCE COMPANY,
RESPONDENT-APPELLANT.**

Appeal from Labor and Industrial Relations Commission

John J. Larsen, Jr. Chairman

James G. Avery, Jr. Member

Curtis E. Chick, Jr. Member

Injury No. 14-102671

APPELLANT'S BRIEF

The Popham Law Firm, PC
Scott W. Mach - MO #31656
Cooper S. Mach - MO 68223
712 Broadway, Suite 100
Kansas City, Missouri 64105
Telephone:816/221-2288
Facsimile:816/221-3999
smach@pophamlaw.com
cmach@pophamlaw.com

ATTORNEYS FOR APPELLANT, EMPLOYEE DOLORES MURPHY

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JURISDICTIONAL STATEMENT

This case arose from a hearing and award of lump sum mesothelioma benefits in the Kansas City Office of The Division of Workers' Compensation, which was appealed to the Missouri Labor and Industrial Relations Commission. Jurisdiction is found pursuant to Section 287.495 RSMo as a timely appeal was made from a final award of the Missouri Labor and Industrial Relations Commission, which held that claimant was entitled to \$521,454.44 under Section 287.200.4 of the Missouri Worker's Compensation law as amended on January 1, 2014.

STATEMENT OF FACTS

Robert Casey was married to Dolores Murphy at the time of his death. He dies as a result of mesothelioma. Robert Casey had eight children. His daughter, Dinah Mitchell, testified at hearing that they are: herself, Rena Joan Blocher, Thomas Joseph Casey, Steven Patrick Casey, Catherine Ann Mannell, Patricia Dean Bradford, Angela Marie Sedano, and Michael Franklin Casey. (*Tr* 16)

Dolores Murphy and all eight children made claims under the new Section 287.200.4 RSMo (2014) for the death of their husband and father. (See Amended Claim for Compensation filed October 28, 2015) (Appendix A)

Mr. Casey was born on December 20, 1927, and spent his career as a floor tile installer. (*Tr* 79) As a floor tile installer, he worked around asbestos materials for his entire working career. (*Tr* 79) He last worked in the industry when he worked for the employer in this case, E.J. Cody. (*Tr* 80) He worked from 1984 until 1990 for E.J. Cody. (*Tr* 79, 752)

Mr. Casey testified that he was repeatedly exposed to asbestos and its hazards because he installed vinyl asbestos tile and used cutback, which is the adhesive that was used for installing vinyl asbestos tile. (*Tr* 79, 80) It also contained asbestos. He also testified that throughout his career, including his employment with E.J.Cody, he had to scrape up dried cutback when replacing old vinyl asbestos tile, which caused asbestos dust to be released which he then breathed. (*Tr* 80, 81) Each and every one of his exposures contributed to his disease, according to the only medical evidence in the case. (*Ex* 8)

His employer, through its president, Robert Cody, testified that his company used vinyl asbestos tile, but stopped buying new vinyl asbestos tile in the early 1980s. (*Tr 25*) Cody later admitted that Casey likely scraped up asbestos cutback while working for E.J. Cody. (*Tr 33*) The first time Cody ever even learned that asbestos may be dangerous was when his brother came back from the service in 1985. (*Tr 29*)

Mr. Casey testified that he was diagnosed with mesothelioma at Menorah Medical Center on October 14, 2014. (*Ex C and G, Tr 16, 82*) He was then seen at M.D. Anderson Cancer Center in Houston, Texas, for a second opinion, where the diagnosis was confirmed. (*Ex D*) The only independent medical examination was performed by Dr. Thomas Beller, board certified pulmonologist at the Kansas City Pulmonary Clinic. (*Ex B*) Dr. Beller's report confirms that Robert Casey's occupational exposure to asbestos was "the prevailing cause" of his mesothelioma. The only listed cause of death on the death certificate (*Ex I*) is "mesothelioma." Neither the employer nor the insurer put on any medical evidence and there was no evidence to dispute this diagnosis for both Mr. Casey's disability prior to his death and his death.

Thomas Beller, MD, in Exhibit B states:

"Mr. Casey has respiratory symptoms associated with a pleural mesothelioma, which is a malignant neoplasm involving the pleura or lining around the lung. His pulmonary function studies show combined obstructive and restrictive ventilatory defects as well as abnormal gas transfer; all of which are consistent with this diagnosis. His chest x-rays also demonstrate a moderate pleural effusion and pleural reaction consistent with the diagnosis of mesothelioma. He has a left-sided PleurX® catheter which is helping with drainage from persistent malignant effusion. Mr. Casey has a long history of working as a floor layer. He has been exposed to asbestos tiles through this work. His job

involved working with all types of floor covering including those containing asbestos in the tile or adhesive. He was usually covered with dust and frequently worked in a dusty environment where asbestos fibers were present. He did not wear respiratory protection or a face mask as part of his employment. The prevailing cause of Mr. Casey's mesothelioma is his work-related asbestos exposure. Each one of his asbestos exposures contributed to the development of his mesothelioma. He is fully disabled at this time and the prognosis is guarded. He is not a candidate for surgery and both radiation and chemotherapy offer little benefit with this malignant tumor.”

Mr. Casey died from this asbestos-related mesothelioma on October 11, 2015. (See death certificate, *Ex I, Tr 652*). The undisputed facts in this case are that Robert Casey was exposed to asbestos in his work, contracted mesothelioma from that work exposure to asbestos, and then died from mesothelioma. He is survived by the claimants, his wife and eight adult children. (*Tr 16, 17*)

The employer, E.J. Cody, was and still is a flooring and ceiling contractor in Kansas City, Missouri. It held a worker's compensation policy at both the time of diagnosis and the time of death for Robert Casey with Accident Fund Insurance Company. (*Ex M, 2*) Accident Fund provided an endorsement within that policy specific to Missouri worker's compensation insureds, entitled “Missouri Notification of Additional Mesothelioma Benefits Endorsement.” (*Ex L*) The endorsement states:

“Section 287.200.4, subdivision (3), of the Missouri Revised Statutes provides additional benefits in the case of occupational diseases due to toxic exposure that are diagnosed to be mesothelioma and result in permanent total disability or death. Your policy provides insurance for these additional benefits.” (emphasis added)

This is a standard insurance endorsement form copyrighted by the National Council

on Compensation Insurance. (*Ex M and Ex 2*)

The mesothelioma endorsement from Accident Fund's policy for employer, E.J. Cody, tracks directly with the language found in the new law in Section 287.200.4 and in the definition section for mesothelioma found in Section 287.020.11 RSMo. (*Ex L*)

These January 1, 2014, amendments make specific reference for the first time to "occupational disease due to toxic exposure." See Section 287.020.11 RSMo which refers specifically to "mesothelioma" under the "occupational disease due to toxic exposure." Under the old law, there was no specific reference to mesothelioma. The new laws' exclusive remedy provisions can be waived by rejecting this new mesothelioma liability. See Section 287.200.1(b). The above-referenced Accident Fund Insurance Policy Endorsement for E.J. Cody addresses this waiver section of the exclusive remedy in the final paragraph of its endorsement. (*See Ex L above*) The endorsement mirrors the new statute.

Accident Fund's policy also contains language which the insurer relies on in its argument. It states, at Part One: "The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period."

Under the General Section of that same policy, however, Accident Fund has the following language. "The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy." (The mesothelioma endorsement modifying the policy is found at *Ex M, Tr 722*, and also set out in *Ex L*.)

There is also a "conform" to state law provision in Accident Fund's policy found at page 2, subparagraph H.6, which states, "Terms of this insurance that conflict with the

workers compensation law are changed by this statement to conform to that law.” (*Tr 710*)

Mrs. Murphy and all eight children are shown as claimants on the amended worker’s compensation claim. This is the claim for the death of Mr. Casey on which this case was tried.

The Administrative Law Judge and the Commission unanimously awarded enhanced mesothelioma benefits under Section 287.200.4 for the death of Mr. Casey to his widow Dolores Murphy, but the award of the Commission struck the eight children from its Award.

The Award found Accident Fund liable as the insurance carrier for E.J. Cody because it had the new mesothelioma endorsement in its policy for E.J. Cody at the time of Mr. Casey’s diagnosis and death from mesothelioma. It is from this Award striking the claims of the eight adult children that this appeal is taken.

POINT RELIED ON

The Labor and Industrial Relations Commission erred in not including the eight children of Robert Casey, the deceased, in the Award because the new Section 287.200.4(5) provides as a matter of law that the surviving spouse and children can receive benefits under the Statute. The Labor and Industrial Relations Commission misread the Claim for Compensation, (see footnote 6, page 10 of the award) and failed to note that the eight children made a formal claim on an additional page of the claim form, and were awarded compensation by the Administrative Law Judge.

This mistakenly led to the eight children being left out of the Industrial Commission's Award, which is in contravention of Section 287.200.4(5) RSMo 2014, and the underlying award of the Administrative Law Judge.

ARGUMENT

It is clear that this court can correct the Commission's error of not including the eight children of the claimant in the Award. "This court reviews decisions of the Commission which are clearly interpretations or applications of law for correctness without deference to the Commission's judgment. *Tidwell v Cluster*, 8 SW3d 585, 588 (MoApp 1999). Even findings of ultimate facts reached through application of rules of law rather than by natural reasoning based on facts alone are conclusions of law. *Id.* Review of legal determinations is de novo, and issues involving the interpretation of statutory language are questions of law. *Lakin v Gem.Am Mutual Holding Company*, 55 SW3d 499, 503 (MoApp 2001) (citations omitted). *Headrick v Jackes-Evans Mfg Co.*, 108 SW3d 114, ED 2003.

The Commission entered its award on January 31, 2017. The award of the Administrative Law Judge was basically kept intact. The award differed from the award of the Administrative Law Judge in that it only awarded compensation to the widow of Robert Casey, Dolores Murphy, and not to the eight children that the Administrative Law Judge had also included in his Award because the Commission stated that the children had not filed a claim. This was a clear mistake by the Commission.

We know the Commission was mistaken because of what is set out in footnote 6 on page 10 of its award. It states:

"We note that the administrative law judge's award includes a listing of employee's children as additional 'dependents' in this matter. *Award*, page 1. However, the amended claim for compensation, filed October 28, 2015, did not identify employee's children as dependents or claimants, nor is there any motion on the record before us to include these individuals as parties to any

award in this matter. For this reason, we have identified Dolores Murphy as the sole claimant herein.”

The actual Amended Claim for Compensation filed stamped as received by the Division on October 28, 2015, does contain a separate sheet with all the children named as those that can make a claim. They are not listed in block 14 of the Amended Claim form as the “employee’s dependants” because they were not, in fact, dependants. They are Mr. Casey’s natural born adult children. Importantly, under section 287.200.4(5), cited in the award, the new law provides that they need not be dependants, but only need be the “children, natural or adopted” of the deceased employee to take under the statute.

It should be noted under box 21 of this Amended Claim for Compensation at the bottom, there is an asterisk that says, “See attached.” The attached page states, “Under a mesothelioma claim, the surviving children of Robert Casey can make a claim. The surviving children are. . .” wherein the eight children are named. For the Court’s easy reference, attached is a copy of that Amended Claim for Compensation, (Appendix A). The worker’s compensation law is remedial in nature and, therefore, the children should be included in the award. That is also what the family wishes.

The Administrative Law Judge in this case did have benefit of the Amended Claim for Compensation. That, coupled with the testimony of Dinah Mitchell, the daughter of the deceased employee, gives rise to the fact that the Administrative Law Judge included the eight children in the original award.

Because of footnote 6, we believe that the Commission did not realize that the eight

children were named in the Amended Claim for Compensation on the additional sheet.

In fact, when notified of its mistake, the Commission's secretary asked claimant's attorney to file a Motion to Correct the Award, and claimant filed that motion. (See Appendix B) However, a Notice of Appeal was filed by Accident Fund before the Commission could rule on the Motion to Correct the Award, and the Commission lost its jurisdiction to correct the Award.

CONCLUSION

For these reasons, claimants respectfully request that the portion of the original award of the Administrative Law Judge awarding compensation to the widow and eight children be made part of the opinion of the Court, or in the alternative, to remand to the Commission so that it can correct the error and add the eight adult children.

The addition of the children has no practical effect on the employer or the insurance carrier in this case. No issue was raised by either employer or insurer as to the propriety of including the eight adult children when they appealed to the Industrial Commission.

Respectfully submitted,

THE POPHAM LAW FIRM, PC

By: /s/ Scott W. Mach
Scott W. Mach - MO #31656
Cooper S. Mach - MO 68223
712 Broadway, Suite 100
Kansas City, Missouri 64105
Telephone: 816/221-2288
Facsimile: 816/221-3999

**ATTORNEYS FOR
APPELLANT/RESPONDENT**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was sent via ECF filing, email, and U.S. Mail, postage prepaid, on this 8th day of May, 2016 to the following:

James B. Kennedy, Esq.
201 North Broadway, Suite 2500
St. Louis, MO 63102
Attorney for E.J. Cody

John Fox, Esq.
Daniel Luebbering, Esq.
8301 State Line Road, Suite 105
Kansas City, MO 64111
Attorney for Accident Fund

Alexander C. Barrett, Esq.
3405 West Truman Blvd, Suite 210
Jefferson City, MO 65109
Co-Counsel for Accident Fund

/s/ Scott W. Mach
Attorney for Appellant/Respondent

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Comes now Appellant and certifies that this brief complies with both Rule 84.06(b) with respect to the word limitations in that it contains 2,253 words (less than 31,000 per Rule 84.06(b),) said number of words obtained by using the Microsoft Word Count feature.

The brief was prepared in Microsoft Word and filed electronically with the Court of Appeals.

/s/ Scott W. Mach
Attorney for Appellant/Respondent