IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ACCIDENT FUND INSURANCE COMPANY, AND E.J. CODY COMPANY, INC.,	)	
Respondents/Appellants,	)	
v	)	**Cause No.: WD80470**
DOLORES MURPHY et al.,	)	
Appellants/Respondents.	)	

LETTER BRIEF

ISSUE NUMBER 1

- **The employer/insurer have not adequately preserved the constitutional issue, even in light of *Duncan v. Missouri Bd. for Architects,* 744 S.W.2d 524, 531 (Mo. App. E.D. 1988).**

The worker's compensation system is set up for adversarial or "contested" cases. The Code of State Regulation sets out the rules for The Department of Labor and Industrial Relations Worker's Compensation system at 8 CSR 50-2.010. An employee makes the case a contested case by filing a formal claim for compensation, which was done here. Once a claim is filed, 8 CSR 50-2.010(7) controls, and the employer is required to file an answer to put at issue the items in the claim it wishes to contest. That answer is required to be filed within 30 days of the Division's acknowledgment of the claim on an answer form provided by The Division of Workers' Compensation. If an answer is not filed within that time period, the statements of facts in the claim for compensation "shall be deemed admitted for any further proceedings." (8 CSR 50-2.010(8)(B)). The Code of State Regulations also requires that forms for the claim and the answer be filed in their current, not outdated, form. At 8 CSR 50-2(5)(A) it allows the Division to reject forms that do not reflect the Division's official seal.

Form W C-22 is the answer form which was required to be used to answer this claim. This answer form requires that all affirmative defenses must be plead. (*Appendix A* has the answers to the amended claim actually filed in this case. Note at paragraph 9 of each of the answers that it is required that the employer and its insurer, "list all affirmative defenses."

Accident Fund completely failed to list any constitutional defense as an affirmative defense as is required by the answer form that it filled out in this case.

Ironically, E.J. Cody pleads a constitutional defense in its answer, so it evidently believed raising a constitutional defense was necessary. The only constitutional defense it raised as an affirmative defense, however, was an "equal protection" argument. (*Appendix A*) From its briefing, that defense has apparently been abandoned. The fact that Cody raised the "equal protection" argument at the time of filing its answer is further proof that the constitutional argument as an affirmative defense must have been made according to the rules of The Division of Workers' Compensation at the time the answer was filed. There would be no purpose in The Division of Workers' Compensation requiring an employer or insurer to "list all affirmative defenses" in its preprinted answer form if it did not intend to have an affirmative defense, such as a constitutional argument, raised at that point, also.

This dovetails with the provision cited in the employee's brief in chief which indicates that the Missouri Worker's Compensation Law, Fourth Edition, Volume 1, which is the desk book published by Missouri Bar, provides that all affirmative defenses must be pled.

There is no indication in the opinion in *Duncan v. Missouri Bd. for Architects,* 744 S.W.2d 524, (E.D. 1988) that the Board for Architects had any such pleading requirement. In that case, the court in dicta states, "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." (744 S.W.2d at 531) Finally, the *Duncan* court goes on to state that the court concluded that the constitutional argument was raised before the Board for Architects, and that the Commission was "fully cognizant of the constitutional challenge to the vagueness of the statute." (744 S.W.2d, 531) The failure to raise the constitutional argument in that case was really moot.

Of importance, neither the Missouri Board for Architects, Professional Engineers, and Land Surveyors, nor the Missouri Dental Board (*Schierding v Mo Dental Board*, 705 S.W.2d, 484 (Mo.App. 1958)) is anything like the Department of Labor, Division of Worker's Compensation. The Architecture and Dental Boards are both administrative agencies that determine the appropriateness of licenses and qualifications for architects, engineers, and dentists respectively. The worker's compensation claim and its subsequent hearing is more akin to a lawsuit once it becomes a contested claim.

For that reason, specific rules of procedure have been put into place, and one of those rules includes a requirement that "all affirmative defenses must be listed" on the answer to the claim. There is definitely a logical reason to require the constitutional challenge to be raised in the answer in a worker's compensation claim.

If a constitutional challenge is raised, the employee can evaluate whether or not he believes that constitutional challenge might be a good challenge and can decide whether or not to actually pursue the case. In the instant case, the employee chose to file the claim under the new statute, was not apprised of the affirmative defense of a constitutional challenge that is now being raised, and spent significant amounts of time and money preparing the case, gathering medical records, procuring an expert and an expert's opinion, the cost of depositions, and the like. All of this was

undertaken before there was even mention of this "retroactive" constitutional defense, which the insurance company now attempts to use to defeat this claim.

In *City of Saint Louis v Butler*, 358 Mo, 1221, 219 S.W.2d 372 (Mo banc 1948) the Missouri Supreme Court succinctly stated that in order to preserve the constitutional issue for review, it must be raised at the first available opportunity. Obviously, The Division of Workers' Compensation gave an opportunity for the constitutional affirmative defense to be raised in the answer. In fact, it directed that all affirmative defenses be listed in the answer. The form of the answer does not say list "some" affirmative defenses, it states, "list all" affirmative defenses. It should also be noted that the Worker's Compensation Law must be strictly construed: "all" must mean "all." (287.800 RSMo) Neither the employer nor the insurer chose to raise the current "retroactive" constitutional affirmative defense in its answer to the original claim or amended claim.

Language cited in *Duncan v. Missouri Bd. for Architects* is acutely applicable in this case. It explains why a party must raise the constitutional defense at its first opportunity. "A party may not wait until he has lost the case and then, in contravention of a statute and the Constitution itself and to the cluttering up and confusion of the Courts, pick and choose his appellate forum by a belated constitutional question dragged in by its very heals into the case." *Duncan* @ 531, citing *Deiner v Sutermeister,* 266 Mo 505, 176 S.W. 757 (1915)

The fact that the administrative agency may not be able to rule on the issue does not affect the fact that the way the case may be presented and tried if a specific constitutional argument is being made, could certainly vary as to whether or not the constitutionality of the statute was really in play. That is why pleading of all affirmative defenses is required under the Worker's Compensation Law.

For these reasons, the employee believes that this court should retain jurisdiction and should

find that the constitutional arguments of Accident Fund and Cody have been waived by failure to follow the preprinted answer form of The Division of Workers' Compensation which requires a listing of "all" affirmative defenses.

ISSUE NUMBER 2

- **The Accident Fund jurisdictional statement is proper and this Court should retain jurisdiction.**

Accident Fund's jurisdictional statement found at pg. 8 of its Brief states in part, "Jurisdiction is proper in this Court pursuant to §287.495 RsMo. . . ." That is a provision of the workers' compensation law that provides that a final award of the Commission shall be conclusive and binding unless a party within thirty (30) days files an Appeal within the Appellate Court having jurisdiction in the area of the accident. This case comes to the Court based on that statute and the fact that it came from the Kansas City Division of Workers' Compensation means the case is properly before this Court.

The Accident Fund jurisdictional statement goes on to state the jurisdiction of the Western District is also proper because none of the bases for jurisdiction of the Supreme Court under Article V §3 of the Missouri Constitution are presented in this case.

Article V §3 regarding jurisdiction of the Supreme Court states, "The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the Constitution of this state, the construction of the revenue laws of this state, the title to any State office and in all cases where the punishment imposed is death. The Court of Appeals shall have general appellate jurisdiction in all cases except those

within the exclusive jurisdiction of the Supreme Court."

This Court in *Hilburn v. State of Missouri*, 226 S.W.3d 859 (W. Dist. 2007) held that the Supreme Court has exclusive jurisdiction over "real and substantial constitutional challenges , but if a constitutional claim is simply colorable, Court of Appeals may address the challenge." *Hilburn*, 226 S.W.3d at 862.

The employer and insurer argue that a statute on its face which states that it only applies to claims filed "on or after" its effective date is somehow retro-active. This would only be a "colorable" constitutional challenge at best.

Here, the employer and its insurer indicate that Article V §3 of the Constitution is not applicable to the constitutional challenges in their jurisdictional statement, therefore, they admit that this is merely a "colorable" constitutional claim that can be heard by the Court of Appeals.

Since they admit that this is merely a "colorable" claim, this Court retains jurisdiction of the entire case and upon its preliminary inquiry this Court should retain jurisdiction.

For all of these reasons, the claimants in this case believe that the Western District Court of Appeals has jurisdiction over the entire claim.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 30, 2017, I filed the foregoing with the clerk of the court by using the Missouri E-Filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Scott W. Mach, Esq.
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