IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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

BRIEF OF APPELLANTS/RESPONDENTS ROBERT CASEY (DECEASED) AND DOLORES MURPHY, ET AL.

Appeal from the Labor and Industrial Relations Commission

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ADDITIONAL FACTS REGARDING EXPOSURE AND LIABILITY

Robert Casey testified that while working for E.J. Cody, he cut and laid vinyl asbestos tile. He also used cutback-containing asbestos while working for E.J. Cody. *(Tr 80)* Mr. Casey would cut the vinyl asbestos tile to make it fit around posts or doorways (*Tr 80*). He also used a duster and a scraper while working for E.J. Cody to clean the asbestos containing cutback off of the old floors. He would work on his hands and knees. It was extremely dusty work and he would be covered in dust. (*Tr 80*). He did a lot of repair and replacement of old floors for E.J. Cody. (*Tr 80*)

The E.J. Cody warehouse had a room in which old vinyl asbestos tile and adhesive were kept. Mr. Casey would look through the E.J. Cody warehouse to find something that would match the job or patch they were doing. He testified specifically that it was vinyl asbestos tile. (*Tr 81*) He testified that the area in the warehouse where the vinyl asbestos tile was kept was dusty, and was an area with shelving against the wall. (*Tr 81*)

While working for E.J. Cody, Mr. Casey did not ever see anyone using asbestos abatement suits or masks, and he never used that type of equipment. (*Tr 81*) Cody testified that the use of abatement contractors began in approximately 1990, about the time that Mr. Casey retired from this type of work, and that after that time, the same type of work that Mr. Casey did, scraping asbestos-containing cutback, was done by asbestos abatement contractors using white suits and respirators for protection from asbestos. (*Tr 826,827*)

Mr. Casey specifically testified that any time he would scrape a floor with asbestos cutback, the cutback would create dust and that he would breathe in that dust. (*Tr 81*) He testified about working at the Shawnee Mission Medical Center on a job where he scraped off asbestos cutback and breathed in the dust while working for E.J. Cody. (*Tr 81*)

Dr. Thomas Beller's report, the only medical report in evidence in the case from any medical specialist, stated that each and every exposure to asbestos contributed to cause the mesothelioma. (*Tr 98*)

Mr. Cody also testified that he knew asbestos is a mineral that is mined, that it is still mined today, and that it is a danger to public health and is hazardous. (*Tr 753*) He also testified that no matter what the level of exposure, it is hazardous. (*Tr 754*) Cody stated that the asbestos dust moves around in the air very easily and that he knows it is hazardous to breathe in any of the fibers. (*Tr 754*). He also testified that cutting vinyl asbestos tile and chipping it would create friable asbestos. (*Tr 766*) He testified that vinyl asbestos tile was very popular and used almost exclusively in flooring in the 1960s, 1970s, and 1980s. (*Tr 769*) He testified that he would have no quarrel with the fact that Mr. Casey testified that he would have to remove old cutback and sometimes use a brush when he was working for E.J. Cody. (*Tr 809*) He testified that Mr. Casey actually used asbestos containing cutback while working for E.J. Cody. (*Tr 812*) He also confirmed that he knew Mr. Casey worked on the Shawnee Mission Medical Center remodel job for E.J. Cody. (*Tr 812*) Mr. Cody testified that between 1984-1990 (the dates that Mr. Casey worked for E.J. Cody), that if they replaced a tile floor, it would most likely have been a vinyl asbestos tile that was replaced.

(*Tr 823*) Cody admits in its brief at page 10 that, "Casey might have scraped asbestos containing cutback between 1984 and 1990."

Finally, Mr. Cody testified that he is much more knowledgeable now about the dangers and hazards of asbestos than he was from 1984-1990 when Mr. Casey was working for him. (*Tr 830-831*) Mr. Cody testified that by the 1990s, when all the abatement contractors came in, that his workers would not touch the floors that contained vinyl asbestos tile. (*Tr 831*) He also testified that after 1990, if his company did a school, abatement contractors would do the work, but that before 1990, if his company did a school, then the asbestos tile would be taken up by employees such as Mr. Casey. They would scrape up old asbestos cutback and sweep the floors, and then put down new tile that did not contain asbestos. (*Tr 836*)

The Administrative Law Judge in the award spoke to this factual issue of whether Mr. Casey was last exposed to the hazard of asbestos while working for E.J. Cody. In pertinent part, the award states:

> "Robert Casey testified that throughout his working career, including at E.J. Cody, he installed vinyl asbestos tile. He also testified at length about how he would need to scrape up asbestos cutback on remodel jobs when the floor tile had been taken up, and that there would be pieces of vinyl asbestos tile and cutback that he would have to dry scrape to make the floor smooth, and then he would sweep with a brush. He would breathe the asbestos fibers whenever he would do this type of work for EJ. Cody.
>
> Mr. Cody agreed with safety warnings found in "Recommended Work Practices for Removal of Resilient Floor Coverings," put into effect <u>after</u> Robert Casey retired. The warnings state:
>
> '"Do not <u>sand, dry sweep, dry scrape</u>, drill, saw, bead blast or

> mechanically chip or pulverize existing resilient flooring, backing, lining felt, asphaltic "cutback" adhesive, or other adhesive.
>
> These products may contain asbestos fibers/and or crystalline silica.
>
> Avoid creating dust. Inhalation of such dust is a cancer and respiratory tract hazard."'

The Administrative Law Judge goes on to state:

> "Robert Cody's testimony was apparently offered in an attempt to show that Robert Casey was not exposed to the hazard while working for his company. The testimony that Robert Cody gave was not persuasive on the issue at all."

The Administrative Law Judge further states, "Robert Cody's testimony at hearing was also at odds with his deposition testimony under oath." (*Legal File p 31*)

The award cites numerous places where Mr. Cody's testimony was different at hearing than it was in his deposition. (*Legal File p 32-33*)

The Administrative Law Judge used the following language in the award, which was later adopted by the Commission, "Therefore, there is convincing evidence indicating that Robert Casey was "last exposed to the hazard" while working in his last employment with E.J. Cody." (*Legal File p 33*)

ADDITIONAL FACTS ON CONSTITUTIONALITY ISSUE

Accident Fund filed an answer asserting various affirmative defenses, but did not ever raise a constitutional affirmative defense in its answer to the original claim. (*Legal File p 8*) It also filed an answer to the amended claim brought by Mr. Casey's widow and his children. It is titled as an "original" answer to the amended claim for compensation. In that

answer, Accident Fund raised additional affirmative defenses. (*Legal File p 14-15)* This answer again raised no affirmative defense of any constitutional issues that it now raises. (*Legal File p 18–19*) E.J. Cody only raised a "due process" affirmative defense in its answers. (*Tr 1006*) No "due process" argument is made by either employer or insurer in their briefs.

ADDITIONAL FACTS ON THE ISSUE OF THE PROPER PARTIES

Robert Casey was widowed in 1997 after being married for 47 years and having eight children. He married his prom date from high school, Dolores Murphy, in 2007, who was also widowed. When she remarried, she kept her last name of Murphy. (*Tr 78*)

The new mesothelioma law found in Section 287.200.4(3) went into effect on January 1, 2014. Mr. Casey was generally in good health until he had a coughing spell in October 2014. He was taken to Menorah Hospital where he was diagnosed with mesothelioma on November 11, 2014. He got a second opinion from M.D. Anderson Cancer Center in Houston, Texas, which also confirmed the diagnosis of mesothelioma. He was told that he would progressively get worse and die from the disease. (*Tr 82*).

Claimant filed his claim for compensation on February 18, 2015, with the box checked on the new claim form from The Division of Workers' Compensation that states, "Check this box ONLY if you are filing a Claim due to an Occupational Disease due to **toxic exposure resulting in a diagnosis of mesothelioma.**" (*Legal File p 1*) Separate answers to this claim were filed by the employer and its insurer, Accident Fund. No mention of Article I, Section 13 is made by either party in their answers, and no mention of it is made until the filings in

the Court of Appeals. (*Legal File p 4, 5, 6, 7*)

On October 11, 2015, Robert Casey died. The death certificate states he died from "malignant mesothelioma" at the age of 87. (*Tr 652*) The next day, October 12, 2015, claimant's attorney wrote to the defense attorneys at their respective law offices. The letter stated:

> "RE: Robert Casey v. E.J. Cody
> Injury No.: 14-102671
>
> Dear John and Jim:
>
> I will be filing an amended claim for Robert Casey. Mr. Casey passed away from mesothelioma on Sunday, October 11, 2015. I would like to keep the trial setting as nothing has really changed, other than the fact that this is now a death case, rather than a live mesothelioma case. I plan on submitting Mr. Casey's deposition at the time of hearing." (*Ex O, Tr 946*)

On October 26, 2015, claimant filed an amended claim for compensation, again checking the box under paragraph 8 of the new Claim for Compensation form, stating that this was "an Occupational Disease due to **toxic exposure resulting in a diagnosis of mesothelioma**." (*Legal File 09*)

On page two of the Claim for Compensation the box asking "Did injury result in death?" was checked. (*Legal File 10, 11*) That claim lists Dolores Murphy as the spouse. Under "Additional Statements" it is added:

> "Under a mesothelioma claim, the surviving children of Robert Casey can make a claim. The surviving children are:
> Rena Blocher
> Tom Casey
> Steve Casey
> Catherine Mannell

Patricia Bradford
Dinah Lambert-Mitchell
Angela Sedano
Mike Casey"
(*Legal file 11*)

Both employer and Accident Fund filed separate and timely answers. Neither answer raised any issue claiming Mrs. Murphy or the eight children were not added as proper parties. The case went to hearing on January 7, 2016. At hearing before evidence was put on, the attorney for Accident Fund, John Fox, raised for the first time that Mrs. Murphy, the widow, was not properly substituted and should have been substituted pursuant to the Civil Rules. (*Tr 7, 8*)

At that pretrial before hearing, the following statements were made by counsel and the court beginning at *Tr 7, line 13-18*:

> "MR MACH: Yes, let me address that. First, let me make an oral motion. I don't think this is necessary, but because Mr. Fox brought it up, I will make the motion to substitute Delores (sic) Casey – give a suggestion of death and substitute Delores (sic) Casey as the appropriate party as the widow of Robert Casey."
>
> "Yeah. The other thing I wanted to bring up at this point is that in the amended claim -- we filed an amended claim following Mr. Casey's death and that amended claim names Delores. (sic) So I believe that a substitution of parties is not necessary under the civil law. The Missouri's workers' compensation statute, I think, governs this issue. But in an abundance of caution, I'd move the Court to substitute her, Delores, (sic) as the appropriate party as we try this death case." (*Tr 7, line 21-25, Tr 8, line 1-4*)
>
> "THE COURT: All right. First, let's take up the oral motion. Any objections there?
>
> MR. FOX: Your Honor, on behalf of Accident Fund National Insurance Company, I would object to the oral motion for substitution of parties in that the

> oral motion does not comport with requirements of Section 287.580, the related Civil Rule 52.13, and also the related civil statutes of 507.100 and 506.100.
>
> THE COURT: Mr. Kennedy?
>
> MR. KENNEDY: I'll join in that.
>
> THE COURT: Okay. Show that objection overruled and that the oral motion to substitute party is allowed." (*Tr 8, lines 19-25 and Tr 9, lines1-6*)

The case then went to hearing that morning with the award finding that Dolores Murphy and the eight children were entitled to benefits for the enhanced mesothelioma portion of Section 287.200.4(3)

ARGUMENT

POINT I

RESPONSE TO APPELLANT E.J. CODY'S POINT 1 OF ITS BRIEF: THE COMMISSION DID NOT ERR IN AFFIRMING THE AWARD OF THE WORKER'S COMPENSATION ADMINISTRATIVE LAW JUDGE BECAUSE THERE WAS UNDISPUTED EVIDENCE THAT MR. CASEY DIED AS A RESULT OF MESOTHELIOMA, AND THAT E.J. CODY WAS THE EMPLOYER WHERE HE WAS "LAST EXPOSED TO THE HAZARD" OF ASBESTOS. THERE WAS ABUNDANT EVIDENCE IN THE RECORD TO SUPPORT THE AWARD. THIS COURT IS BOUND BY THE FINDINGS OF FACT AND THE CREDIBILITY GIVEN TO THE WITNESSES BY THE INDUSTRIAL COMMISSION.

After undisputed evidence of a diagnosis of work-related mesothelioma, all claimant had to prove to make his case against E.J. Cody, is that he was "last exposed to the hazard" of asbestos during his six years of employment with E.J. Cody, since it was undisputed that E.J. Cody was his last employer. The legislature has addressed this issue in very succinct fashion.

Section 287.063.1 states:

> "An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists. . ."

Section 287.063.2 states:

> "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, subject to the notice provision of section 287.420."

The courts have routinely held that this "last exposure" rule does not require causation. *Pierce v BSC, Inc.*, 207 S.W.3d 619 (Mo banc 2006). It is a law of convenience. Therefore, the employer E.J. Cody is liable for the mesothelioma benefit provided in Section 287.200.4(3) if there was <u>any</u> proof that Mr. Casey was, <u>for no matter how short a time</u>, "last exposed to the hazard" of asbestos while working for E.J. Cody between 1984 and his retirement in March 1990. A review of the facts found by the Administrative Law Judge and incorporated into the award by the Commission really ends any argument E.J. Cody has to avoiding liability. Nevertheless, we will address E.J. Cody's argument.

It is important to note that Dr. Beller's report, the only medical report in evidence, stated that <u>each and every</u> one of Mr. Casey's asbestos exposures <u>contributed to</u> the development of his mesothelioma. Therefore, not only do we have the minimum of "last exposure to the hazard" while at E.J. Cody, we also have undisputed evidence of an <u>actual medical causation</u> from the exposures at E.J. Cody.

E.J. Cody makes a long and rambling argument that somehow Dr. Beller's evidence

was not enough to make it liable. It argues that Mr. Cody testified that asbestos was no longer put in new floor tiling, because most of the asbestos had been removed from new floor tiles by the time Mr. Casey started working for E.J. Cody. E.J. Cody argues that the exposure that Mr. Casey had to asbestos was "speculation," despite Mr. Casey's direct testimony of exposure on an almost daily basis while working for E.J. Cody. At page 23 of its brief, it attacks Casey's credibility, saying he was old and in the later stages of mesothelioma. The videotape of the Casey deposition was played at trial. The video deposition was taken on June 1, 2015. The judge saw both Casey and Cody, and certainly was free to make a decision regarding their credibility. The videotaped deposition showed a very sharp, never confused, gentleman. He answered all questions forthrightly.

Cody next admits that the Commission has the power to determine credibility of witnesses' testimony, but then argues that the Commission was wrong in believing Mr. Casey's testimony and should have only believed Mr. Cody's oftentimes inconsistent testimony.

Cody complains at length that the Administrative Law Judge was incorrect when he cited to the record and showed how Mr. Cody's testimony was different in his deposition than at hearing. Cody's attorney argues that Cody was "confused." Therefore, his credibility should not have been damaged. This argument is meaningless since the Commission adopted the findings of the Administrative Law Judge and the Commission makes all judgments on the credibility of witnesses.

In *Kent v Goodyear Tire and Rubber*, 147 S.W.3d 865, 868 (Mo App W.D. 2004),

this court lays out the black letter law on this issue.

> "With regard to factual issues, the appellate court defers to the Labor and Industrial Relations Commission's decisions regarding the weight given to witnesses' testimony, and is bound by the Commission's factual determinations when the evidence supports either of two opposing findings. (Citations omitted) A single expert's opinion may be competent and substantial evidence in support of an award of benefits, even where the causes of the occupational disease in question are indeterminate in nature. *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 48 (Mo App E.D. 1999)."

Because Dr. Beller did not specifically state that the mesothelioma was caused by Casey's employment with E.J. Cody, it argues the claim fails. Dr. Beller testified that each and every exposure to asbestos caused or contributed to cause the mesothelioma, and, therefore, that coupled with Mr. Casey's testimony that he breathed in asbestos-containing dust while working for E.J. Cody on many occasions and Mr. Cody himself agreeing that Mr. Casey was exposed to the hazard while working for E.J. Cody, makes this argument totally without any backing. In fact, the Missouri Worker's Compensation Law does not even require causation from these "last exposures to the hazard," see *Pierce v BSC, Inc* supra.

The credibility statements made by the Administrative Law Judge were incorporated in the award by the Commission unanimously. (*Legal File p 55-56*)

The employer cites the Southern District case of *Pippin v St Joe Minerals Corporation.*, 799 S.W.2d 898 (Mo App S.D. 1990) for the proposition that a Missouri worker's compensation case cannot be based on, "just the mere possibility of exposure."

Claimant happily accepts this proposition. *Pippin* is a case, which is a silicosis claim where there was very little actual evidence of exposure to silica, but it was found to be

compensable by the Southern District Court of Appeals. *Pippin* addresses what the claimant must prove in an exposure to hazardous material worker's compensation claim.

Although the "mere possibility" is not enough, the court points out that all that is necessary is a "reasonable probability." The opinion states, "Such a reasonable probability is a sufficient basis for the Commission to find for claimant. . . .'Probable' means that it appears to be founded in reason and experience which inclines the mind to believe, but leaves room for doubt." Citing *Barr v. Vickers, Inc.*, 648 S.W.2d 577 (Mo App S.D. 1983). In *Pippin* the employee died before any diagnosis. The *Pippin* court found that exposure to silica dust during a 22-year working career of the claimant was sufficient to meet this "reasonable probability" standard. Notes in the medical records regarding his employment history and the fact that he worked for a long period of time as a welder and electrician in a lead mine where there was a lot of limestone dust was enough for the doctor to testify that claimant's silicosis contributed to Pippin's death.

The wealth of evidence in our case far outstrips the amount of evidence found to be competent for the post-mortem silicosis diagnosis in *Pippin*. In the instant case, there is much more than the "mere possibility" of exposure. There was direct evidence of repeated ongoing exposure to asbestos by Mr. Casey while he worked for E.J. Cody and throughout his floor laying career.

At page 23 of its brief, the employer argues that Mr. Casey must have been mistaken because he never saw abatement contractors on premises where he was assigned to work. The reality is, that fits exactly with the evidence, even from Mr. Cody himself. Cody

testified that the abatement business did not start until 1990, (*Tr 31*) the year Casey retired.

The statement made in Cody's brief without any citation to the record that vinyl asbestos tile was not installed in any new construction as late as the mid-1980s is also false. The federal register confirms that Kentile containing asbestos was made through 1986 and was certainly installed after that time. (*Tr 885*) Kentile is the vinyl asbestos tile that was installed in most schools. Casey did work in schools for Cody. (*Tr 35*) The Administrative Law Judge and the Commission had abundant evidence to find that Mr. Casey was "last exposed to the hazard" during the last six years of his working career for E.J. Cody.

The employer next makes an attack on Dr. Beller, the claimant's Board Certified pulmonologist. Although the employer offered no medical evidence, it conceded that the death certificate indicated that Mr. Casey died from mesothelioma and did not dispute the mesothelioma diagnosis at Menorah Medical Center in Kansas City, nor the confirmation of the mesothelioma diagnosis made at the M.D. Anderson Cancer Center in Houston, Texas, it complains that Dr. Beller did not specifically name E.J. Cody as the culprit.

First and foremost, if Mr. Casey had mesothelioma, and if he was exposed to asbestos in the work place, and if he was last exposed to the hazard of mesothelioma through exposure to asbestos at his last place of employment, E.J. Cody is liable regardless of causation. All of that evidence is clearly in place. It is ironic that E.J. Cody's brief incorrectly quotes Dr. Beller's note, claiming it states that Mr. Casey retired in "1886." (sic) (See Cody's brief at page 24) Dr. Beller's report clearly states 1986, rather than 1886. (*Tr 96*) Beller's report clearly lists E.J. Cody as Casey's last employer. (*Tr 96*)

Employer argues that Dr. Beller in his report said that Mr. Casey had to be exposed to asbestos to cause the mesothelioma, and if there was no asbestos exposure during the six years he worked for E.J. Cody, then it should win. That simply was not the evidence. Mr. Casey was clearly exposed to the hazard at Cody.

Cody also speculates that Casey might have been exposed at another employer during 1984 to 1986. It should be noted that Cody offered no evidence that Casey was exposed at any other employer during the time from 1984 to 1986. Again, Cody's brief is not based on the evidence at hearing.

When we have evidence of exposure to the hazard in place, employer's argument falls completely apart. It again argues futilely at page 24 of its brief that, "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." That entire argument has been previously hashed out and found in favor of Mr. Casey by the Commission. The factual argument that E.J. Cody makes over the next four pages of its brief is simply without merit.

Once Dr. Beller's report was in evidence, and he stated that each and every exposure to asbestos contributed to cause the disease, and Mr. Casey proved exposure to asbestos at E.J. Cody, Mr. Casey's case against E.J. Cody was made. E.J. Cody's Point I must fail.

POINT II

RESPONSE TO POINT 1 OF APPELLANT ACCIDENT FUND NATIONAL INSURANCE COMPANY'S BRIEF: THE COMMISSION DID NOT ERR IN AFFIRMING THE AWARD ALLOWING COMPENSATION IN FAVOR OF MR. CASEY

AND FINDING ACCIDENT FUND LIABLE FOR THE ENHANCED BENEFITS BECAUSE THE NEW STATUTE ON ITS FACE, SECTION 287.200.4(3), PROVIDES THAT THERE IS A NEW BENEFIT AVAILABLE FOR THOSE "DIAGNOSED" WITH MESOTHELIOMA. THAT NEW BENEFIT CAN BE INSURED (PRESENT TENSE) AND E.J. CODY PURCHASED INSURANCE FROM ITS WORKER'S COMPENSATION CARRIER, ACCIDENT FUND NATIONAL INSURANCE COMPANY, TO PROTECT IT FROM THE VERY TYPE OF MESOTHELIOMA WORKER'S COMPENSATION CLAIM BROUGHT BY MR. CASEY AND FAMILY. THE LAST EXPOSURE RULE DOES NOT APPLY TO THAT INSURANCE COVERAGE BECAUSE THE PLAIN MEANING OF THE STATUTE AND THE ACCIDENT FUND ENDORSEMENT DRAFTED TO COVER THAT NEW MESOTHELIOMA LIABILITY CLEARLY COVERS MR. CASEY'S DISEASE AND BENEFITS.

Mesothelioma is a heinous cancer that is incurable and attacks the lining of the lungs of its victims. It is most often caused by workplace exposure to asbestos with a latency period of 25-50 years from the time of exposure to the diagnosis which is the ultimate death sentence. Casey's diagnosis came approximately 25 years after his last exposure.

In 2005, the legislature amended the Worker's Compensation Law and left an ambiguity which allowed for case law to develop that those with occupational diseases such as mesothelioma could sue their employers directly, rather than being limited to the statutory benefits of worker's compensation. See *State ex rel KCP&L Greater MO Operations Co. v Cook,* 353 S.W.3d 14 (Mo App W.D. 2011).

During the 2013 legislative session, the legislature sought to close the loophole, exclusively placing occupational diseases back under the sole remedy provisions of the Worker's Compensation Act. In a compromise to get this, a new benefit was created for those who had been "diagnosed with mesothelioma," and other toxic exposure workplace diseases. Section 287.200.4(3), created additional weeks of benefits at the state's average

weekly wage for those that could prove that they had exposure to asbestos in their workplace and that asbestos caused the deadly disease of mesothelioma, and that they were totally disabled or dead.

The Department of Labor added new language to the preprinted, "fill in blank" claim forms. Beginning January 1, 2014, the claim form required by the Department of Labor added a new box 8. That box 8 has a specific provision for mesothelioma. Box 8 lists the 9 other toxic exposure occupational diseases named in the 2014 Amendments, but there is a specific line for mesothelioma, which states, "Check this box ONLY if you are filing a Claim due to an Occupational Disease due to **toxic exposure resulting in a diagnosis of mesothelioma**." (Emphasis added)

It should also be noted that the instructions on the claim form state that this claim form should be used "if your accident or injury occurred after January 1, 2014, and that the claim form cannot be altered. (Form WC21)

This form, for the first time mimics the new statute and uses "diagnosis." It also only applies to the toxic exposure claims for mesothelioma.

Accident Fund attacks the findings of the Administrative Law Judge and the Commission that interpreted that new mesothelioma section to require the insurance carrier at the time of "diagnosis" of the mesothelioma to be responsible for the additional weekly benefits found in the statute.

Of note, the compromise allowing these additional benefits also created a "sunset" provision, and these new benefits are only available for 25 years. The new mesothelioma

benefits end in 2038.

Because of the importance of the statutory construction of this statute, the pertinent section is set out below with our emphasis added:

> "For 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, benefits in this chapter shall be provided as follows:
>
> . . .(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. . ."
> >
> > **(b) For employers who reject mesothelioma under this subsection, then the exclusive remedy provisions under section 287.120 shall not apply to such liability. The provisions of this paragraph shall expire on December 31, 2038; . . .

The statute is written in the present tense, makes no reference to the "last exposures" and provides that employers may protect themselves from this new liability under this subsection by "insuring their liability." This is exactly what Cody did. For 2014 and 2015, Cody purchased worker's compensation insurance from Accident Fund that contained a "mesothelioma endorsement" that promised to ". . . provide insurance for these additional benefits." (*Tr 701*) This endorsement was written specifically to address the change in the law that allowed recovery of the enhanced benefits for mesothelioma benefits in the new

Section 287.200.4(3).

Because of the 25 year limited life of the statute, because of the employer's right to reject mesothelioma liability under the opt-out, or to elect to accept mesothelioma liability by purchasing insurance under the statute, because of the long latency between exposure and diagnosis, disability, or death, and because of the fact that there is very little, if any, current "exposure to the hazard" of asbestos in today's workplace, Accident Fund's argument for the last exposure rule to apply to its liability would make this statute totally meaningless and it would only benefit insurance companies.

Without acknowledging the clear language of the new statute, Accident Fund argues that the "last exposure rule" for liability for the employer controls which insurance carrier should cover E.J. Cody's liability for the new enhanced mesothelioma benefits in this case. Mr. Casey in this case stipulated with both the employer and insurer that this case was only going to be tried for the additional weeks of mesothelioma benefits under Section 287.200.4(3). (*Tr 6, 7, 8*) Accident Fund's argument completely ignores the insurance portion of that new law which went into effect on January 1, 2014, and its very own mesothelioma endorsement for which it received a premium from its insured E.J. Cody to protect it from this very claim. Accident Fund would have E.J. Cody pay the entire award since the insurance company at the time of the "last exposure," California Insurance Company, is defunct. This is quite a clever ploy on the part of Accident Fund, and would shift liability for paying the entire award to E.J. Cody, a small business that paid a premium to Accident Fund for a "mesothelioma endorsement" to protect it from liability for payment

under the new benefits section of 287.200.4(3) RSMo, but instead, has only received a denial of coverage from Accident Fund.

Because of Accident Fund's arguments concerning the statutory construction of this particular portion of the Worker's Compensation Act, it is necessary to look at the rules of statutory construction. A good discussion of those are found in a Western District worker's compensation case, *Anderson v Ken Kaufman & Sons Excavating, LLC*, 248 S.W.3d 101 (Mo App W.D. 2008). In that case, the court was looking at the statutory construction of an inconsistency in the 2005 amendments, which the claimant asserted allowed him to sue the employer directly in a wrongful death claim. The court rejected that and set out many rules for statutory construction.

First:

> "The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used. . . (Citation omitted) Only in those cases [w]here the language of the statute is ambiguous or where its plain meaning would lead to an illogical result, will this court look past the plain and ordinary meaning of a statute." *Nichols v. Dir. of Revenue*, 116 S.W.3d 583, 586 (Mo App W.D.2003), *Anderson v Ken Kaufman & Sons Excavating, LLC* 248 S.W.3d 101, 106 (Mo App W.D. 2008)

Also of importance in this case, the statutory rule of construction cited again in *Anderson* states:

> "When it is impossible to harmonize two conflicting statutory provisions, [a]s a general rule, a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute." 248 S.W.3d at 107 (Emphasis added)

Here, the chronologically more recent and more specific statute, Section 287.200.4(3)

would control, and this statute is written in the present tense. It provides an employer can "opt-in or "opt-out" of mesothelioma coverage. It uses "diagnosed to be mesothelioma" as the requirement for liability for the insurer, not "last exposed to the hazard."

Looking next at the purpose of the Worker's Compensation Law to help determine the legislative intent, the very purpose of the Worker's Compensation Law is set out again in *Anderson*, "The purpose of Missouri's Workers' Compensation Law is 'to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment.'" (Quoting 248 S.W.3d at 108.) *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 901 (Mo banc 2007).

Here, the 2013 amendments to the Worker's Compensation Act sought to place occupational diseases back under the "sole remedy" of the worker's compensation system but, as a trade off, a class of toxic occupational diseases, including mesothelioma, were given additional weeks of benefits and freedom from third-party subrogation. (See Section 287.150.7) Mesothelioma liability is given even more benefits and it is singled out with a section that only applies to it. Section 287.200.4(3), (4), (5), and (6). Employers are also given the present option to come under the worker's compensation system for the mesothelioma benefits, or they can opt out of providing those benefits, thus subjecting themselves to civil liability for mesothelioma for their employees.

The *Anderson* court also provides that the interpretation of the statute should "subserve rather than subvert legislative intent." *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 716 (Mo banc 2004)

Finally, the *Anderson* opinion cites *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo banc 2007) for the proposition that "Construction of statutes should avoid unreasonable or absurd results."

Here, Accident Fund's proposed interpretation of the new mesothelioma compensation benefits section would lead to such an unreasonable or absurd result.

The legislature put in "additional benefits" for mesothelioma victims that went into effect on January 1, 2014. The statute provides for an additional 300 percent of the state's average weekly wage for 212 weeks. Section 287.200.4(3)(a). Accident Fund sold a policy of insurance to E.J. Cody to cover these new "additional benefits." (See language of Accident Fund's mesothelioma endorsement) Accident Fund now conveniently argues that its policy would only apply to claims for these "enhanced benefits" made twenty-five to fifty years from now for individuals whose "last exposure" to asbestos came in 2014 or 2015. This would be a truly absurd result.

Let's look carefully at the new statute. The new statute provides an opt-in or opt-out provision for mesothelioma coverage. Accident Fund argues that the insurer in 1989 to 1990 is liable because that was the insurer at the time of "last exposure." Using Accident Fund's logic, this opt-in or opt-out would be impossible. Cody purchased worker's compensation insurance from California Insurance Company for 1989 and 1990. California Insurance Company has been defunct for over 15 years. Section 287.200.4(3)(a) states in part, "For employers that have elected 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." Today, an employer could not choose to "opt-in" or "opt-out" under Section 287.200.4(3)(b), if the worker's compensation insurance coverage belongs to the carrier for an exposure thirty years ago. Under the general law as cited by the Commission, every insurer must insure its entire liability under the Worker's Compensation Law, Section 287.280. Here, the specific, newer statute controls over any older rule.

E.J. Cody opted to accept this new mesothelioma liability under this subsection by insuring its risk with Accident Fund in 2014 and 2015. When E.J. Cody purchased the policy from Accident Fund, Accident Fund added what it calls a "mesothelioma endorsement" that promises to cover "these additional benefits." It should be noted that Cody is very careful not to have any asbestos exposure for its workers in the present time.

It is important to note that if the liability goes back to the insurer where claimant was last exposed some 30 years ago, there would be absolutely no way for an E.J. Cody to "opt in" or "opt out" of this new mesothelioma coverage under the 2014 statute. That portion of the new statute would be meaningless.

Here, Accident Fund in its endorsement specifically stated that it would cover this particular liability, and exactly mirrored the language of the statute in its endorsement. Remember that statute applies only to mesothelioma claims made after January 1, 2014, seeking the enhanced mesothelioma benefits. That endorsement found in its 2014 and 2015 policies, indicates that it will provide coverage to the insured, in this case, E.J. Cody, and promises with very specific language that its policy, ". . . 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." This is the very same language found in Section 287.200.4(3).

Accident Fund promised in the present tense to E.J. Cody, through this very endorsement, that it would cover claims filed after January 1, 2014, such as Robert Casey's under the new law that were "diagnosed to be mesothelioma." Further, this mesothelioma endorsement drafted by the insurance carrier with no input from the employer, provides no language that the "last exposure" must occur during the endorsement's policy period. It only speaks of the "diagnosis" of mesothelioma, and promises to cover "these additional benefits," under the new Section 287.200.4(3)

The diagnosis of mesothelioma was made during the policy period on November 11, 2014, after Accident Fund accepted the premium and provided the endorsement for E.J. Cody that it would cover that risk. It should be noted the Accident Fund's own policy promises its policy holders that the policy can only be modified by a "valid endorsement." (*Tr 709*) Here, we have such a "valid endorsement" that was drafted and included by Accident Fund using its very own policy language, which would override any other provisions of the policy concerning the "last exposure" rule. It failed to put "last exposure" language in the endorsement, but instead said it would cover "those diagnosed to be mesothelioma," not those who were last exposed to the hazard during the policy. The endorsement, set out in its entirety, mirrors the new mesothelioma benefit to the letter, and tells its insureds that this policy provides insurance for these "additional benefits":

"This endorsement applies only to insurance provided by the policy because

Missouri is shown in Item 3.A. of the Information Page.

> 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.
>
> If you reject liability for mesothelioma additional benefits provided under Section 287.200.4, subdivision (3), of the Missouri Revised Statutes, you must notify us of of this election. Once vou notify us, we will endorse this policy to exclude insurance for these additional benefits. If you reject liability for mesothelioma additional benefits, the exclusive remedy provisions under Missouri Revised Statutes Section 287.120 shall not apply to your liability for mesothelioma additional benefits." (See endorsement at *Tr 701*)

We set out the endorsement at length because it so obviously applies insurance to this case. The endorsement segregates the "additional benefits" only available under the new Section 287.200.4(3), the only benefits Casey is seeking here, and promises E.J. Cody that it will pay those specific benefits.

Even if it is argued that the endorsement creates an ambiguity in the insurance contract, that ambiguity would be read in favor of its insured, E.J. Cody. See the award which cites *Krombach v Mayflower Insurance Co*, 827 S.W.2d 208, 210 (Mo banc 1992) "When provisions of an insurance policy are ambiguous, they are construed against the insurer." The endorsement specifically refers to the new Section 287.200.4(3) benefits and cites to the statute which did not even exist prior to that amendment going into effect January 1, 2014. The third paragraph of the endorsement refers to the new "opt out" provision of the statute.

There really can be no argument that this insurance endorsement covers the "new

benefits" of the new mesothelioma statute, which in turn confer benefits on Mr. Casey since he was "diagnosed" during the policy period.

Here, the new statute goes a step further and does not provide recovery of the new mesothelioma benefits until the employee is either "permanently and totally disabled or dead." (See Section 287.200.4) Under the new mesothelioma statute for benefits to be paid, not only does claimant have to be diagnosed with the disease, but he must either be permanently and totally disabled or dead from the disease before benefits are owed. This is another clear departure and a narrowing of this new benefit from the general occupational disease law and the specific new mesothelioma law. Dr. Beller's report clearly and undisputedly states that Mr. Casey was totally disabled by the mesothelioma. (". . .my opinion is that the prevailing cause of the mesothelioma is his work-related asbestos exposures. I also believe that he is fully disabled because of this malignant tumor." (*Tr 99*) This certainly comports with the provisions of the new statute requiring insurance for these additional weeks of benefits under the amended Worker's Compensation Law, once there is proof of total disability or death.

At page 20 of its brief, in attempting to support the last exposure rule governing insurer liability in this case, Accident Fund cites Section 287.030.2 RSMo, which states that any reference to the employer in a Worker's Compensation Law shall also include his or her insurer or group self-insurer. It then attempts to tie the insurer to the last exposure rule for employer's liability. Unfortunately for Accident Fund, if you make that argument and look at the new statute, Accident Fund again would be liable. In looking at Section 287.200.4(3)

we will add in brackets the "insurer" every time the term "employer" is used in the statute. Under Section 287.200.4(3) the amended statute would read:

> "In cases where occupational disease due to toxic exposure are diagnosed to be mesothelioma: (a) for employers [Accident Fund] that have elected to accept mesothelioma liability under this subsection, an additional amount of 300 percent of the states average weekly wage for 212 weeks shall be paid by

the employer [Accident Fund]. . ."

As can be seen, where the "insurer" is substituted for the "employer," the insurance company for E.J. Cody, Accident Fund, is clearly liable under the new statute.

SUNSET PROVISION

To take Accident Fund's argument to its absurd and illogical end, the legislature would have created this law specifically to benefit insurance companies. It would allow additional premiums for insurance companies which decide to write mesothelioma coverage for the new law and to therefore collect additional premium payments for it with nearly no exposure for paying benefits on these policies. Because of the long latency period for mesothelioma, insurers would never have to pay on their policies. For mesothelioma, the diagnosis is often 25 to as much as 50 years after the "last exposure." The insurance companies would be the only ones to benefit from this statute. The statute opens a narrow 25-year window for payment of this enhanced benefit. The statute opens on January 1, 2014, and sunsets on December 31, 2038.

If Accident Fund wrote this policy with its endorsement and the policy only provided benefits for, as it argues, a "last exposure" during the 2014 or 2015 policy period, it would

have two likely scenarios to gain the premium without having any exposure for liability. First, there is virtually no current "hazardous asbestos exposure" in Missouri workplaces and, second, even if someone was "last exposed" at this time, the sunset on the statute would likely occur before Accident Fund would be liable, because there can be no claim until there is a diagnosis and permanent total disability or death. For current exposures to the hazard purportedly covered by Accident Fund, this would not happen before the statute sunsets in 2038. It would be a perfect scenario for the insurance companies; get a premium with no exposure for liability. Employers like Cody would be exposed to liability because of their inability to "opt-in." New mesothelioma benefits would not be available because its insurance company from 30 years ago is no longer in business, and it would make it nearly impossible for sick employees to gain these useful additional mesothelioma benefits. This certainly was not the legislature's intent behind Section 287.200.4(3). This would be an absurd result, which the statutory construction rules set out by the Supreme Court strictly forbids in *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo banc 2007)

For these and the other reasons, Accident Fund's Point I must be denied.

POINT III

POINT III OF RESPONDENT CASEY'S BRIEF IS IN RESPONSE TO POINT II OF THE ACCIDENT FUND BRIEF AND POINT 2 OF THE E.J. CODY BRIEF: THE COMMISSION DID NOT ERR AS A MATTER OF LAW IN AWARDING BENEFITS FOR THE MESOTHELIOMA DEATH UNDER SECTION 287.200.4(3) BECAUSE:

a. ACCIDENT FUND FAILED TO RAISE ANY CONSTITUTIONAL DEFENSE IN ITS ANSWER AS AN AFFIRMATIVE DEFENSE. IT THEREFORE WAIVED ANY CLAIM TO ARGUE THE CONSTITUTIONALITY OF THIS STATUTE. E.J. CODY RAISED ONLY

> A "DUE PROCESS," "EQUAL PROTECTION" DEFENSE AS ITS AFFIRMATIVE DEFENSE IN ITS ANSWER. THERE IS NO ARGUMENT MADE BY EITHER EMPLOYER OR ITS INSURANCE CARRIER IN EITHER BRIEF THAT THIS IS A "DUE PROCESS" OR "EQUAL PROTECTION" CASE. THE EMPLOYER AND ITS INSURER FAILED TO FOLLOW RULE 55.08 REQUIRING THAT, "A PARTY SHALL SET FORTH ALL APPLICABLE AFFIRMATIVE DEFENSES AND AVOIDANCES," AND THEREFORE FAILED TO PRESERVE THE CONSTITUTIONAL QUESTIONS. SEE MAYES v SAINT LUKE'S HOSP. OF KANSAS CITY, 430 S.W.3d 260 (MO 2014).

Both defendants waived any claim to their affirmative defense claiming the new statute violates Article I, Section 13 of the Missouri Constitution by failing to plead it pursuant to Supreme Court Rule 55.08. Very simply put, if an affirmative defense is not pled, it is waived. Rule 55.08 states that, "a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to . . ." and lists several affirmative defenses.

An affirmative defense is one that may defeat a plaintiff's cause of action because the facts allow the defendant to avoid all legal responsibility. The constitutional arguments now made fit that definition. If an affirmative defense is not pled, it results in the waiver of that defense. *Leos Enterprises Inc v Hollrah* 805 S.W.2d 739 (Mo App W.D. 1991) This court in a case involving a policy defense in an insurance contract held that the policy defense must be raised as an affirmative defense. See *Century Fire Sprinklers Inc v CNA/Transportation Insurance Company*, 23 S.W.3d 874 (Mo App W.D. 2000).

Both defendants now attempt to raise a constitutional argument that there is a retroactive component to the statute that would violate a portion of the Missouri Constitution.

Neither the employer nor the insurer raised this as an affirmative defense in their answers to the original claim or to the amended claim, nor specifically at the hearing, nor in their issues for appeal to the Industrial Commission. Therefore, the constitutional arguments in both the employer's and the insurer's briefs must be disregarded.

At page 27 of its brief, Cody argues that both employer and insurer pled "lack of constitutionality" as an affirmative defense. First, this is totally untrue. Accident Fund did not even raise any constitutional defense in its answer, and Cody only raised "due process," and "equal protection" which it apparently has now abandoned. Second, "lack of constitutionality" does not provide nearly enough information to comply with Rule 58.08.

The black letter law for asserting affirmative defenses at the earliest possible time is found in *Mayes v Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 where the opinion states:

> "To raise a constitutional challenge properly, the party must:
>
> > (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review."

The Worker's Compensation Lawyer's Desk Book published by the Missouri Bar also confirms this under the Worker's Compensation Law where it states:

> "Generally, affirmative defenses are not preserved by the filing of a general denial. It has been specifically codified that it is the employer's burden of proof to establish affirmative defenses. Section 287.808, RSMo Supp. 2012." *II Mo.*

Workers' Compensation Law § 9.25 (MoBar 4th ed. 2013)

Here, the employer and its insurance carrier did not comply with the law by raising the specific constitutional defense and the facts necessary to support it at the earliest possible time in the answer or even at hearing.

In Accident Fund's brief, it alleges that it raised its constitutional argument at the initial time of the hearing, citing to the transcript at page 13. Checking the transcript, Accident Fund's attorney at that time raised no such constitutional argument. All he said was that he was asking the court to find whether the statute could be retroactively applied. He made no reference to the Missouri Constitution, nor to any facts as required by Rule 55.08, and only on this appeal is Article I, Section 13 of the Missouri Constitution regarding ex post facto or retroactive civil laws brought up. See Accident Fund's brief at page 29. Even in its issues for appeal from the Administrative Law Judge's award to the Industrial Commission, it only claims that there was an "ex post facto" law violation (*Legal File 39*). Ex post facto laws only apply to criminal cases. *State v Honeycutt*, 421 S.W.3d, 410 (Mo 2014) This certainly did not preserve the current issue for the Court of Appeals.

The employer, E.J. Cody, on the other hand, only raised a "due process," "equal protection" constitutional argument as an affirmative defense in its answer to the original claim and amended claim. It has generally filed a "me, too" brief concerning the issue adopting much of the argument that Accident Fund now raises for the first time.

The Eastern District in *State ex rel Nixon+ v Consumer Automotive Resources, Inc.*, 882 S.W.2d 717, 721 sets out the rationale for requiring an early raising of affirmative

defenses under Rule 55.08. The opinion states:

> "Rule 55.08 requires a party raising an affirmative defense to plead the defense. The purpose behind this rule is to give plaintiff notice of the defense. (Citations omitted) 'A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance.' Rule 55.08. An affirmative defense is asserted by pleading additional facts *721 not necessary to support a plaintiff's case which establish a defense to liability. (Citations omitted) Bare legal conclusions fail to inform the plaintiff of the facts relied upon and, thus, fail to further the purpose protected by Rule 55.08." (Emphasis added)

For these reasons, the constitutional affirmative defenses are and have effectively been waived. This court should not consider them.

b. SECTION 287.200.4(3) GIVING ADDITIONAL WEEKS OF BENEFITS FOR AN ENHANCED MESOTHELIOMA VICTIM IS CONSTITUTIONAL ON ITS FACE, AND IS NOT RETROACTIVE, AND EVEN IF RETROACTIVE, IT IS REMEDIAL ONLY, WHICH IS AN EXCEPTION TO THE ARGUMENT THAT THE STATUTE IS UNCONSTITUTIONAL

STATUTE IS NOT RETROACTIVE

Should this court find that the constitutional defense it not waived, the statute is still constitutional. This statute is not retroactive in any way. On its face, it only applies to claims filed after its effective date of January 1, 2014.

This new law is not "retroactive in its operation" so it complies with the constitution. It must be remembered that the Worker's Compensation Act is totally designed to be a no-fault system. Section 287.120.1 states:

> "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment . . ." (Emphasis added)

The law is the same as to Cody's liability under the Worker's Compensation Law regardless of fault, and regardless of when the last exposure to the hazard may have been.

Accident Fund argues that the date of diagnosis/injury is not important in a worker's compensation case, but the date of last exposure is the important point. This new statute makes the "diagnosis" and the date of permanent total disability or death the most important dates.

This claim did not arise until the diagnosis and disability of Mr. Casey in November of 2014, ten months after the statute became effective. It is clear that the date of diagnosis in an asbestos case is the date of injury and the date the statute of limitations begins to run. *Elmore v Owens-Illinois*, supra. This statute has no retroactive application. The law remained the same for placing liability on the employer who last exposed the employee to the hazard of the occupational disease.

As can be seen from this Section, E.J. Cody was and had been liable for Mr. Casey's occupational disease of mesothelioma since it was diagnosed, irrespective of any fault on behalf of E.J. Cody. It is important to note that had Cody not elected to purchase insurance for mesothelioma coverage under the new statute, Casey could not have collected the enhanced mesothelioma worker's compensation benefits from Cody. Cody would have been in the same position it was in on December 31, 2013, and before because it would have been subject to direct civil liability. This was the law prior to the 2014 amendments for companies such as Cody, because of the 2005 amendments and this court's interpretation of those amendments in *State ex rel KCP&L Greater Missouri Operations Co v Cook*, 353 S.W.3d

14 (Mo App W.D. 2011) There would be none of the claimed retroactive effects on the substantive rights of employers argument on page 36 of Accident Fund's brief. The effect of the "opt-in" or "opt-out" provisions would yield two results for Cody. One would be the status quo by opting out and two, the additional weeks of compensation owed for those purchasing insurance and "opting-in."

To be clear, Cody was subject to direct liability for any asbestos exposure it had to Casey through the civil system had Casey been diagnosed with mesothelioma before January 1, 2014. Casey was not diagnosed until after that date. Therefore, his disease became subject to the new law. It was Cody's decision after the new law went into effect on January 1, 2014, whether it would insure the risk and only be liable for the enhanced mesothelioma benefits, or if it would opt-out and only be subject to civil liability where fault must be proved. The civil liability would have been exactly the same for Cody before or after 2014 amendment went into effect had Cody "opted out."

With that backdrop, we turn to the steep burden for Accident Fund to prove the statute unconstitutional.

The constitutional validity of a statute is a question of law, the review of which is de novo. *Weinschenk v State*, 203 S.W.3d 201, 210 (Mo banc 2006). Missouri courts, however, recognize the rule of construction that statutes are presumed constitutional. *State v Schleiermacher*, 924 S.W.2d 269 (Mo banc 1996) An act of the legislature approved by the governor carries with it a strong presumption of constitutionality. *Hoskins v Business Men's Assurance*, 79 S.W.3d 901 (Mo 2002). A statute's validity is presumed and it will not be

declared unconstitutional unless it clearly contravenes a constitutional provision. *Doe v Phillips*, 194 S.W.3d 833, 841 (Mo banc 2006). Finally, the Supreme Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature. *Hoskins* 79 S.W.3d at 901.

The employer and its insurer carry a huge burden into their constitutional argument, even if the court allows such an argument. The party challenging a statute's constitutionality bears the burden of proving the statute clearly and undoubtedly violates the constitution. *Garozzo v Missouri Dept of Ins.*, 389 S.W.3d 660 (Mo 2013)

"Further, merely to label certain consequences as substantive and others as procedural is not sufficient; notions of justice and fair play in a particular case are always germane." *Croffoot v Max German, Inc.* 857 S.W.2d 435, 436 (Mo App E.D. 1993)

Here, Accident Fund argues that Section 287.200.4(3) violates the provision of Article I, Section 13 of the Missouri Constitution that provides "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." (Emphasis added) This new mesothelioma statute is clearly not "retrospective in its operation."

Accident Fund completely ignores the fact that the claimant could never make a claim until after he was diagnosed with mesothelioma, which was after the statute's effective date. By that time, the employer knew of the change in the law, and was able to purchase insurance from Accident Fund to cover that claim. Accident Fund as an insurance company could assess the risk and charge a premium based on that risk, and pay the additional weeks of

compensation provided for in the amended statute. Accident Fund argues that the last exposure to the hazard occurring before the effective date makes the statute unconstitutional.

To follow Accident Fund's argument, the entire new statute bringing occupational diseases back under the umbrella of the Worker's Compensation Law once again would be "retroactive" and unconstitutional for any case where the last exposure predated January 1, 2014. Accident Fund's argument would create nothing but chaos. This new statute only applies to claims when the injury happened after the effective date.

REMEDIAL CHANGES NOT UNCONSTITUTIONAL

Even if there is a retroactive component, the law clearly only provides additional remedies and it therefore is still constitutional.

The amendments are clearly not to apply to cases until after the effective date, and any remedial portion of the amended statute merely provides the increase in the weeks of compensation available to the employee under the enhanced benefits section of the new mesothelioma law. Had there been no amendments adding enhanced mesothelioma benefits, E.J. Cody would have still been liable for the mesothelioma benefits traditionally available under the Worker's Compensation Law. The only thing this new law put into effect was an additional remedy of more weeks of compensation at the state's average weekly wage, and provided that Cody could insure that risk by purchasing insurance. Cody argues that this is somehow punitive. (See page 30 of Cody's brief) Can Cody really say that increasing the benefits to $521,545.44 for someone stricken with mesothelioma and either totally disabled or dead is not compensatory, but somehow punitive? Cody's argument cannot be taken

seriously.

The essence of the insurance company's argument is that because the statute provides for increased weeks of benefits for an injured employee whose liability is based on exposures or activities that predate the effective date of the statute, then it must be unconstitutional, because of substantive changes to the law.

First, ex post facto laws apply only to criminal cases, and are clearly unconstitutional. *State v Honeycutt*, 421 S.W.3d, 410 (Mo 2014). The ex post facto element raised by Accident Fund before the Commission is clearly irrelevant. But for civil cases, retrospective provisions are not nearly as cut and dry, and there are many scenarios where civil law can have retrospective effects and still be constitutional.

The first exception is that a civil law can be retrospective if it is remedial in nature. Civil laws are allowed to be retrospective if they relate to procedural or remedial rights, but not if they relate to substantive rights. *Harstick v Gabriel*, 98 S.W. 760 (Mo 1906). See also *Essex Contr, Inc v Jefferson City*, 277 S.W.3d 647 (Mo 2009) Substantive laws fix and declare primary rights and remedies to individuals concerning their personal property, while remedial statutes affect only the remedy provided, including laws that substitute the new or more appropriate remedy for the enforcement of an existing right. For example, in *Essex Contr, Inc v Jefferson City*, 277 S.W.3d 647 (Mo 2009), a contractor was held liable for increased penalties for street failures, which were enacted after it put in the street. The court held that the increase in penalties was merely remedial and constitutional. Here, the rights of Cody for liability under the Worker's Compensation Law for the occupational disease of

mesothelioma have not changed. Only the remedy has changed. The *Essex* case specifically stands for the point that there is no constitutional prohibition on the retrospective application of a new remedy.

In *Leutzinger v The Treasurer of Missouri*, 895 S.W.2d 591 (Mo App E.D. 1995), a worker's compensation case, the court held that new standards for Second Injury Fund liability as set forth in the new statute could be retroactively applied to pending cases at the time of the amendments.

In this case, the statute merely gave additional amounts of weekly benefits as a remedy to mesothelioma victims for claims arising after the effective date of the statute. At the very least, that would be remedial and would fit within the exception. A statute is not unconstitutionally retrospective if it substitutes a remedy or provides a new remedy. *State ex rel Clay Equip Corp v Jensen*, 363 S.W.2 666 (Mo 1963)

2014 AMENDMENTS ARE NOT SUBSTANTIVE

At Point D of its argument at page 33 of its brief, Accident Fund bluntly states, "The amendments to the Workers' Compensation Law cannot constitutionally be applied to cases in which the employee's last exposure pre-dates January 1, 2014." If that were the case, then every year when the worker's compensation rates increase each July 1, the statute would become unconstitutional and retroactive for any occupational disease where there was a last exposure prior to that July 1, change in the law, but a diagnosis after the July 1 increase in rates.

Casey was diagnosed with mesothelioma following the amendments effective date and

he died after that effective date. He could have no cause of action until he was diagnosed, and permanently and totally disabled or dead. Only his remedy changed by adding additional weeks for a disease that had always been recognized as an occupational disease under Missouri Worker's Compensation Law, yet Accident Fund argues that the changes in the law are substantive changes.

Accident Fund cites *Gervich* 370 S.W.3d 617, 623 for the proposition that the Supreme Court has ruled that changes in the law that postdate an injury may not be applied to limit the recovery of an employee's beneficiaries. That simply is not analogous to the instant case. Here, the injury happened after the law changed allowing additional benefits for mesothelioma. In *Gervich*, more than two years after Mr. Gervich's cause of action accrued, the benefits were changed by the legislature for permanent total disability. That simply is not analogous to the facts in the instant case, and should be disregarded by the court.

Accident Fund's brief repeatedly cites cases wherein the injury occurred before the law changed. Likewise, *Doe v Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo banc 1993) a case cited by Accident Fund dealt with a cause of action which was barred by the statute of limitations many years before the new statute's attempt to retroactively resurrect claims against Catholic priests who were alleged to have committed atrocities with youth in their churches. The court held that the priests had a "vested right" in the running of the statute of limitations many years prior, and the new statute could not retroactively take that away. Again, the substantive change was after the vesting of the right to be free from

suit because the statute of limitations had run, and therefore, unconstitutional. This was not a remedial change by any means.

The one consistent theme that runs through all the cases cited by Accident Fund is that the cause of action accrued prior to the change in the law, thus making the statutory law changes retroactive. None are occupational disease cases where the disease was diagnosed after the effective date of the statute.

Accident Fund cites *Liberty Mut. Ins. Co. v Garffie*, 939 S.W.2d 484 (Mo App E.D.1997) for the proposition that amendments changing subrogation are not allowed to be retroactive. That case is easily distinguishable. It was a case where the injury happened before the statute was amended, and was not an occupational disease case. Here, there is no retroactive effect. Our injury did not occur until the diagnosis, which was after the effective date of the statute. Here, the waiver of subrogation is totally remedial, adding to claimant's remedy.

Gervich v Condaire, Inc., 370 S.W.3d 617 (Mo banc 2012) and other cases cited by insurer deal with cases where the injury predated the statutory change, too. In *McGhee v WR Grace*, 312 S.W.3d 447, (Mo App S.D. 2010), an asbestosis case, the court distinguished *Enyard* and held that the maximum rate of compensation in an asbestosis case would be determined as of the date of diagnosis and disability, not the date of "last exposure." The new statute uses this date of diagnosis and disability to determine the rate at which the additional benefits are to be paid to mesothelioma victims like Mr. Casey.

It has long been held that the version of the Worker's Compensation Act to be applied is the one in effect at the time the employee is injured. *Doerr v Teton Transp., Inc.*, 258 S.W.3d 514, 518 (Mo App S.D. 2008). There is no retroactivity nor retroactive problem, because insurance carriers and employers analyze risk, and there is absolutely no claim until there is a diagnosis and either disability or death after the new statute's effective date. Employers were able to purchase worker's compensation insurance effective January 1, 2014, with a mesothelioma endorsement to cover this issue. No money was owed for additional weeks of compensation under the enhanced benefit until the time after the effective date of the statute when the claim was made. Therefore, Accident Fund's argument regarding retroactivity must fail. The new statute is constitutional.

POINT IV

POINT IV OF THIS BRIEF APPLIES TO POINT III OF ACCIDENT FUND'S BRIEF: THE COMMISSION DID NOT ERR IN AWARDING BENEFITS TO THE WIDOW IN THIS CASE, BECAUSE AFTER THE DEATH OF MR. CASEY, BOTH EMPLOYER AND INSURANCE CARRIER WERE NOTIFIED OF THE DEATH, AND AN AMENDED CLAIM NAMING THE WIDOW AND CHILDREN WAS TIMELY FILED AND PROCEEDED TO HEARING BEFORE THERE WAS AN OBJECTION. FURTHER, THE TRIAL JUDGE SUSTAINED CLAIMANT'S MOTION TO SUBSTITUTE THE WIDOW PRIOR TO THE START OF THE HEARING, AND NEITHER THE EMPLOYER OR ITS INSURER PROVIDED ANY EVIDENCE OF PREJUDICE TO THEM BY HIS SUSTAINING THIS MOTION, WHICH WAS WITHIN HIS DISCRETION UNDER RULE 55.30(a) AND FINALLY, THE STATUTE 287.200.4(5) ALLOWS ANY BENEFITS NOT PAID AT THE TIME OF DEATH TO GO TO THE WIDOW OR CHILDREN.

The final point for Accident Fund is that it claims that Mrs. Murphy and the children should not be allowed to recover for the death of Mr. Casey, because Mrs. Murphy was not properly substituted as a party in this action. That argument completely fails to recognize

that worker's compensation is an administrative system.

The Worker's Compensation Law specifically states at Section 287.550:

> "All proceedings before the commission or any commissioner shall be simple, informal, and summary, and without regard to the technical rules of evidence, and in accordance with section 287.800. All such proceedings shall be according to such rules and regulations as may be adopted by the commission."

Often times insurers such as Accident Fund deal with unrepresented claimants throughout the entire claim for compensation. Many claims are paid with claimants having no attorney involved.

In worker's compensation proceedings substantial compliance with the provision of the law is ordinarily sufficient. See *Groce v J.E. Pyle*, 215 S.W.2d 482, 492 (Mo App W.D. 1958). "Procedural rights are considered a subsidiary and substantive rights are to be enforced at the sacrifice of procedural formality." The *Groce* case also stands for the proposition that "The provisions of the civil code <u>are not applicable</u> to worker's compensation proceedings. The Compensation Act itself is an exclusive and complete code and provides for its own procedure." (Emphasis added) (*Grose v Pyle* at 492)

The procedure for worker's compensation claims, particularly filing the claim, are found at Title 8 CSR 50-2.010(7) which provides that "The employee or the employee's dependents may file a Claim for Compensation." Claim forms may be found online and claimants can fill them out on their own without counsel. Claimants must use the preprinted forms. Those forms have a box to check if an amended claim is filed. Of importance, "Counsel may amend a claim at any time with or <u>without</u> leave of court." II MO Worker's

Compensation Law Section 9.26 (Mo Bar 4th Ed 2013) This is of importance in the instant case because claimant filed an amended claim naming the spouse and children of Robert Casey in a timely fashion after first notifying both the employer's and insurer's attorneys by letter that Mr. Casey had passed away and that an amended claim would be filed. (*Tr 946*) No objection was raised by either attorney when the amended claim was filed. Both filed answers to the amended claim. Nothing was raised regarding a need for substitution of parties at that time. It was only on the day of hearing that the insurer Accident Fund's attorney for the first time raised the substitution issue.

Further, although Accident Fund repeatedly argues that a motion for substitution should have been filed, the Worker's Compensation Act provides no motion practice within the statute. Nowhere in the CSR or the statute itself is there any way to file or have a motion heard. Again, the "proceedings of worker's compensation are to be 'simple,' informal and summary." *State ex rel Harold Lakman v Siedlik,* 872 S.W.2d 503 (Mo App W.D. 1994)

Continuing, the employer and insurer argue that the exact civil rules formula should apply to this administrative case based on Section 287.580 RSMo, which is part of the Worker's Compensation Act, and states:

> "If any party shall die pending any proceedings under this chapter, the same shall not abate, but on notice to the parties may be revived and proceed in favor of the successor to the rights or against the personal representative of the party liable, in like manner as in civil actions." (Emphasis added)

Accident Fund assumes "in like manner" as set out in this statute requires following all of the civil rules for substitution. To the contrary, since 2005 we are required to use

"strict construction" when interpreting the Worker's Compensation Law. (See Section 287.800) ". . . in like manner," as used in Section 287.580 RSMo, is not defined in the statute, so we look to the dictionary meaning which would only mean that it would have the characteristics of or be similar to the way it is done in civil cases. The employee certainly handled this in a "similar manner" to that required under the civil law. He gave notice by letter to the parties that an amended claim would be filed, and filed an amended claim without a motion for leave, since none is required in the Worker's Compensation Law. All parties admit they were notified and, in fact, filed timely answers to the amended claim.

The form-over-substance argument made by the employer and its insurer must be dismissed. See Websters New Collegiate Dictionary's definition of "like," which states, "having the characteristics; similar to." Had the legislature, knowing that since its amendment in 2005, the Worker's Compensation Law is to be "strictly construed" wanted the exact same method for substitution, it would have used the wording "the exact same way" as in civil cases, and would have likely provided a motion practice and method within the Worker's Compensation Law to parallel the civil procedure. The legislature did not do that. Accident Fund admits that the Commission had indicated in its award that the amended claim was the "functional equivalent" to following the civil rules for substitution after Casey's death.

In an abundance of caution, the claimant's attorney at hearing went on and sought leave of court to substitute the widow. The Administrative Law Judge sustained this motion to substitute prior to the start of the hearing. (*Tr 6-11*)

Despite this, the insurer claims that it was not given the proper notice and service, and that the rules of civil procedure were not followed in substituting the widow.

Even if this court would require the claimant to follow strictly the rules for substitution in civil cases and ignore the fact that there is no motion practice provided under Missouri's Worker's Compensation Law as set out above, the hearing judge had the authority to shorten the time for the motion for substitution and hear it on the date of the hearing and rule on it at that time. It is noteworthy that the insurance company, Accident Fund, makes absolutely no argument that it did not have notice that Mr. Casey's widow would be the new claimant after his death. An amended claim had been filed and Accident Fund answered without objection. Accident Fund certainly knew the widow was the intended party.

Accident Fund completely ignores Supreme Court Rule 55.26 which requires motions to be in writing unless made during a hearing or trial. Obviously, this motion was made during a hearing. Accident Fund further ignores Supreme Court Rule 55.30, which allows the trial judge to take up motions at any time or place as long as it is reasonable. Supreme Court Rule 55.30(a) specifically states:

> "Unless local conditions make it impracticable, each trial court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time or place and on such notice, if any, as it considers reasonable may make orders for the advancement, conduct and hearing of motions." (Emphasis added)

If, in fact, there was a motion practice provided for in the Worker's Compensation

Law which it simply does not have, the trial judge could still take up the motion for substitution made orally at hearing by claimant's attorney and rule on it on that date and time. Rule 55.30 specifically states that motions may be taken up "at any time or place and on such notice, if any, as it considers reasonable may make orders for the advancement, conduct and hearing of motions." (Emphasis added) This gives the trial court complete discretion on such motion.

Of importance, the burden then falls on the insurer to prove that the judge abused his discretion and that there was some prejudice resulting from the shortening of the time in granting the motion. In *Truck Ins. Exchange v Hunt*, 590 S.W.2d 425 (Mo App S.D. 1979) the court held that the trial court was within its discretion in ordering production of certain evidence upon motion filed on the morning of, but prior to the commencement of trial. The party opposing such motion had to demonstrate prejudice resulting from the shortening of time. In that case, the appellant failed to prove such prejudice.

Likewise, in *Siedler v Tamar Realty Company*, 491 S.W.2d 566 (Mo App E.D. 1973), the opinion states:

> "A trial judge has broad discretion to permit amendments to pleadings at any stage of the proceedings, even after verdict. In order to convict the trial court of error in the exercise of this discretion, the party objecting must show that the presentation of his case was prejudiced by the action of the trial court in permitting the amendment." (491 S.W.2d at 568)

In that case, the Court of Appeals upheld the trial court where the trial court permitted the plaintiff to amend her petition while the plaintiff's opening statement was being made, and after, the jury had been sworn in. Plaintiff amended her petition to allege that she was

a licensed real estate sales person.

Here, the trial judge was certainly within his discretion to allow the motion for substitution on shortened notice because the case had been proceeding on the amended claim without objection for months, and had been set for hearing based on that amended claim, which already named the widow and children of the deceased claimant. Absolutely no prejudice can be shown by the insurance company or E.J. Cody in this case.

Finally, the new statute provides that if the claimant dies before all of the enhanced mesothelioma benefits have been paid, that the widow and children get those benefits. (Section 287.200.4(5))

Point III of Accident Fund's brief must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on September 6, 2017.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is **12,971**, excluding the cover, table of contents, table of authorities, signature block, and this certificate.

/s/ Scott W. Mach, Esq.
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