IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ACCIDENT FUND NATIONAL INSURANCE COMPANY and E.J. CODY COMPANY, INC.,	)	
Respondents/Appellants,	)	No.: WD80470
vs.	)	
DOLORES MURPHY, et al.,	)	
Appellants/Respondents.	)	

BRIEF OF RESPONDENT/APPELLANT ACCIDENT FUND NATIONAL INSURANCE COMPANY

Appeal from the Labor and Industrial Relations Committee

Jeffery T. McPherson #42825
Alexander C. Barrett #68695
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070 FAX 314.621.5065

ATTORNEYS FOR RESPONDENT/ APPELLANT ACCIDENT FUND NATIONAL INSURANCE COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

JURISDICTIONAL STATEMENT

Robert Casey filed a Claim for Compensation seeking mesothelioma benefits with the Kansas City Office of the Division of Workers' Compensation on February 20, 2015. L.F. at 1-2. Mr. Casey passed away on October 11, 2015, and by oral motion at the January 7, 2016 hearing Mr. Casey's wife, Appellant/Cross-Respondent Dolores Casey, was substituted as the claimant over Accident Fund's objection. L.F. at 9-11; Tr. at 7-9. The Administrative Law Judge entered an award in favor of Mrs. Casey on April 4, 2016. L.F. at 20-21. Respondent/Cross-Appellant Accident Fund National Insurance Company filed its Application for Review with the Labor and Industrial Relations Commission on April 22, 2016. L.F. at 38-40. The Commission entered its Final Award Allowing Compensation on January 31, 2017. L.F. at 46-56. Accident Fund filed its Notice of Appeal on February 8, 2017. L.F. at 79-80.

Jurisdiction is proper in this Court pursuant to § 287.495, RSMo because the Kansas City Office is within the boundaries of this Court and the Division of Workers' Compensation had original jurisdiction over this case. Jurisdiction in this Court is otherwise proper because none of the bases for jurisdiction of the Supreme Court under Article V, Section 3 of the Missouri Constitution is presented in this case.

If the Court concludes, for the reasons discussed in Point 3, that the Administrative Law Judge erred in granting the oral motion to substitute Mrs. Casey as the claimant over Accident Fund's objection, the award entered by the ALJ is void and this Court should remand this matter with instructions to dismiss without prejudice.

STATEMENT OF FACTS

These cross-appeals arise from the Labor and Industrial Commission's award of workers' compensation benefits for mesothelioma to Appellant/Cross-Respondent Dolores Casey ("Mrs. Casey"), and its determination that Respondent/Cross-Appellant Accident Fund National Insurance Company ("Accident Fund") is liable for those benefits.

A. Mr. Casey's Employment with E.J. Cody and Mesothelioma Diagnosis.

Respondent/Appellant E.J. Cody Company, Inc. ("E.J. Cody") is a construction contractor that primarily installs and repairs acoustical ceilings and tile flooring. L.F. at 27. Its offices have been located in Kansas City since the early 1970s. *Id.* Robert Casey ("Mr. Casey") began working part-time for E.J. Cody in 1984. *Id.* He began full-time employment on January 1, 1987, and worked for E.J Cody until retiring in early 1990. *Id.* E.J. Cody was Mr. Casey's final employer. *Id.* While working for E.J. Cody, Mr. Casey installed and repaired tile flooring. *Id.*

Mr. Casey testified that he breathed dust containing asbestos when removing vinyl tiles while working for E.J. Cody. L.F. at 31. The Administrative Law Judge ("ALJ") found no evidence that Mr. Casey was exposed to asbestos after he retired from E.J. Cody. L.F. at 31, 33. The ALJ also found that Mr. Casey was last exposed to asbestos in the employment of E.J. Cody. L.F. at 31.

On October 26, 2014, Mr. Casey experienced a severe and uncontrollable coughing spell, which resulted in his hospitalization. L.F. at 48. He was diagnosed with mesothelioma on November 5, 2014. *Id.* Mr. Casey passed away on October 11, 2015.

L.F. at 9-11. His death certificate identified the cause of death as mesothelioma. L.F. at 29. Dr. Thomas Beller opined that Mr. Casey had a long history of asbestos exposure through the laying of tile flooring, and that the prevailing cause of his mesothelioma was work-related asbestos exposure. L.F. at 29-30.

B. E.J. Cody's Insurance Coverage.

Accident Fund provided E.J. Cody workers' compensation insurance containing a mesothelioma benefit endorsement between March 16, 2014 and March 16, 2016. L.F. at 24. Accident Fund did not provide E.J. Cody workers' compensation insurance prior to March 16, 2014. It is stipulated that E.J. Cody's purchase of this endorsement constituted acceptance of mesothelioma liability pursuant to § 287.200.4(3), RSMo. L.F. at 25.

Part One of the applicable policy explained the application of the workers' compensation coverage. Among other things, it provided: "The employee's last day of exposure to the conditions causing or aggravating [] bodily injury by disease must occur during the policy period." Tr. at 709. The policy separately stated: "The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy." *Id.* Contemporaneous with issuance of the policy, Accident Fund also issued a "Missouri Notification of Additional Mesothelioma Benefits Endorsement" (the "Endorsement") Tr. at 722. The Endorsement provided, in relevant part:

> 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 [these benefits], you must notify us of this election. Once you 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.

Id.

E.J. Cody had workers' compensation coverage provided by California Compensation Insurance Company from March 16, 1988 to March 16, 1992. Tr. at 983-998. That insurer was liquidated by the state of California in 2000. Tr. at 1001. E.J. Cody advised the Missouri Property and Casualty Insurance Guarantee Association ("MIGA") of its potential liability in the event that California Compensation Insurance Company was determined to be liable for Mr. Casey's benefit claim. Tr. at 999-1000. MIGA denied coverage. Tr. at 1001-1002.

C. Procedural Background.

On February 20, 2015, Mr. Casey filed a Claim for Compensation seeking mesothelioma benefits pursuant to section 287.200.4. L.F. at 1-2. His claim identified E.J. Cody as the employer in whose employment his occupational disease due to toxic exposure occurred. L.F. at 1. Mr. Casey passed away on October 11, 2015. L.F. at 10. An

amended claim identifying the date of death and naming Mrs. Casey as a dependent was filed on October 28, 2015. L.F. at 9-11. A formal suggestion of death or motion to substitute parties was never filed or served on the defendants.

At the hearing, Mr. Casey's counsel made an oral motion to substitute Mrs. Casey as the claimant, which the ALJ allowed over Accident Fund's objection. Tr. at 7-9. Mrs. Casey stipulated that she was seeking only the "enhanced" benefits under section 287.200.4(3), and was not seeking any other benefits to which Mr. Casey may have been entitled. L.F. at 24; Tr. at 8.

E.J. Cody denied liability, asserting that there was insufficient evidence to demonstrate that Mr. Casey was exposed to asbestos while working for E.J. Cody. Accident Fund asserted that it was not liable for any benefits due to Mrs. Casey under the last exposure rule because it did not provide E.J. Cody workers' compensation coverage at the time Mr. Casey was last exposed to asbestos, and that there was no coverage under the terms of its policies, which incorporated the last exposure rule. Accident Fund also argued that if it was otherwise determined to be liable for enhanced mesothelioma benefits, the retroactive application of section 287.200.4(3) to asbestos exposure that last occurred in 1990 would violate the Missouri Constitution.

After the hearing, the ALJ entered an award in favor of Mrs. Casey. L.F. at 22-23. He concluded that Mr. Casey was last exposed to asbestos while in the employment of E.J. Cody, and that E.J. Cody was therefore liable under section 287.063. L.F. at 29-34. He concluded that Mr. Casey's testimony was credible, while the testimony of E.J.

Cody's president was not. L.F. at 26, 31-33. The ALJ used an average weekly wage of $861.04 to arrive at a mesothelioma benefit of $547,621.44 under section 287.200.4(3).

The ALJ concluded that Accident Fund was liable for the mesothelioma benefits due to Mrs. Casey. He reasoned that section 287.200.4(3), which took effect on January 1, 2014, created "an entirely new" mesothelioma benefit. L.F. at 34. The ALJ further reasoned that E.J. Cody had opted in to mesothelioma coverage by purchasing coverage from Accident Fund, and that section 287.200.4(3) fixes liability based on the date of diagnosis. L.F. at 35. Because Mr. Casey was diagnosed with mesothelioma after Accident Fund began providing coverage, the ALJ concluded that Accident Fund was liable for the benefits due to Mrs. Casey. L.F. at 35.

The ALJ further concluded that Accident Fund's policy also rendered it liable. L.F. at 35-37. The ALJ reasoned that while the policy's general provisions required an employee to have been last exposed during the policy period, the Endorsement modified that requirement because it provided mesothelioma benefits pursuant to section 287.200.4(3), and that section fixes liability based on the date of diagnosis. L.F. at 36.

Lacking jurisdiction to do otherwise, the ALJ declined to address the constitutionality of applying section 287.200.4(3). L.F. at 37.

On April 22, 2016, Accident Fund appealed the ALJ's award to the Labor and Industrial Relations Commission. L.F. at 38-40. In addition to re-asserting the foregoing arguments, Accident Fund also argued that the ALJ had erred in allowing the oral motion to substitute Mrs. Casey as the claimant.

On January 31, 2017, the Commission entered a Final Award Allowing Compensation in favor of Mrs. Casey. L.F. at 46-56. Because the parties agreed that the ALJ used an erroneous weekly rate of compensation in calculating the benefit award, the Commission modified the amount of the award to $521,545.44. L.F. at 55. In all other respects, the Commission affirmed. L.F. at 47. The Commission adopted the findings and conclusions of the ALJ, to the extent not inconsistent with its own. L.F. at 46.

As to the motion to substitute, the Commission concluded that although Mrs. Casey had not complied with applicable civil rules governing substitution of parties, the Amended Claim was the functional equivalent of a suggestion of death and motion to substitute. L.F. at 54. It alternatively reasoned that section 287.200.4(5) does not require compliance with the rules governing substitution of parties. L.F. at 54-55.

The Commission also concluded that Accident Fund was liable for the benefits due to Mrs. Casey. The Commission first held that the last exposure rule set forth in section 287.063.2 did not apply. L.F. at 50-52. Although it recognized that Missouri applies the last exposure rule to determine liability as between successive insurers, the Commission reasoned that published cases were not on point because in those cases liability had been "shifted" to a later insurer and it was unable to locate a case in which liability had been "shifted back" to a previous insurer. L.F. at 50-51.

The Commission further rejected cases applying the last exposure rule to insurers on the ground that none of those cases had addressed enhanced mesothelioma benefits under section 287.200.4(3). *Id.* It reasoned that because section 287.063.2 refers to

"compensation in this *section* provided," the last exposure rule does not apply to enhanced mesothelioma benefits provided by section 287.200.4(3). *Id.*

Finally, the Commission noted that section 287.200.4(3) does not provide specific guidance about successive insurer liability. *Id.* Nevertheless, it concluded that because section 287.200.4(3) allows an employer to avoid civil liability by purchasing insurance covering the enhanced mesothelioma benefit and because such insurance could not have been procured until after section 287.200.4(3) went into effect in January of 2014, the insurer providing such coverage must necessarily be liable for any claim for the enhanced benefits. L.F. at 51-52. Since Accident Fund had issued policies providing mesothelioma coverage, the Commission concluded it was liable. L.F. at 52.

The Commission also held that Accident Fund's policies could not limit its coverage to claims based on exposures occurring during the policy period. L.F. at 52-53. Citing sections 287.280.1 and 287.310.1, as well as *Allen v. Raftery*, 174 S.W.2d 345 (Mo. App. 1943), the Commission reasoned that insurers providing workers' compensation coverage are obligated to provide complete coverage. *Id.* Accordingly, it concluded that because section 287.200.4(3) applies to mesothelioma claims ***asserted*** during a policy period, the Accident Fund policies could not limit coverage to claims based on ***exposures*** that occur during the policy period. *Id.*

Like the ALJ, the Commission declined to address the parties' constitutional arguments. L.F. at 46.

Accident Fund filed a timely Notice of Appeal on February 8, 2017. L.F. at L.F. at 79-80.

POINTS RELIED ON

1. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD ALLOWING COMPENSATION IN FAVOR OF MRS. CASEY AND HOLDING ACCIDENT FUND LIABLE FOR ENHANCED BENEFITS UNDER SECTION 287.200.4 BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT (A) THE LAST EXPOSURE RULE GOVERNS THE LIABILITY OF AN INSURER FOR A WORKERS' COMPENSATION CLAIM, (B) THAT RULE ASSIGNS LIABILITY TO THE INSURER PROVIDING COVERAGE AT THE TIME OF THE EMPLOYEE'S LAST EXPOSURE BEFORE DISABILITY, AND (C) ACCIDENT FUND DID NOT PROVIDE COVERAGE UNTIL 24 YEARS AFTER MR. CASEY WAS LAST EXPOSED TO ASBESTOS.

§ 287.063.2, RSMo.

§ 287.030.2, RSMo.

Lococo v. Hornberger Elec., Inc., 914 S.W.2d 67, 69 (Mo. App. 1996)

Enyard v. Consolidated Underwriters, 390 S.W.2d 417 (Mo. App. 1965)

2. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD ALLOWING COMPENSATION IN FAVOR OF MRS. CASEY AND HOLDING ACCIDENT FUND LIABLE FOR ENHANCED BENEFITS UNDER SECTION 287.200.4 BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT RETROACTIVE APPLICATION OF SECTION 287.200.4 TO OCCUPATIONAL EXPOSURES PREDATING JANUARY 1, 2014

WOULD VIOLATE ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION.

Garrone v. Treasurer of State of Mo., 157 S.W.3d 237 (Mo. App. 2004)

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

State ex rel. Clay Equip. Co. v. Jensen, 363 S.W.2d 666 (Mo. banc. 1963)

Bull v. Excel Corp., 985 S.W.2d 411, 416 (Mo. App. 1999)

3. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD ALLOWING COMPENSATION IN FAVOR OF MRS. CASEY AND HOLDING ACCIDENT FUND LIABLE FOR ENHANCED BENEFITS UNDER SECTION 287.200.4 BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT MRS. CASEY WAS IMPROPERLY SUBSTITUTED AS THE CLAIMANT, RENDERING THE AWARD A NULLITY.

§ 287.580, RSMo.

Metropolitan St. Louis Sewer Dist. v. Holloran, 751 S.W.2d 749, 751 (Mo. banc. 1988)

Rowland v. Rowland, 121 S.W.3d 555, 556 (Mo. App. 2003)

Rule 52.13

ARGUMENT

The Court should reverse the Commission's award because section 287.063 governs insurer liability for workers' compensation benefits in occupational disease cases. That provision assigns liability to the insurer providing coverage at the time the employee was last exposed to the hazard giving rise to the disease. Accident Fund did not provide coverage to E.J. Cody until 24 years after Mr. Casey was last exposed to asbestos, and is therefore not liable for any benefits payable to him or to Mrs. Casey.

Any doubts concerning the interpretation of section 287.200.4 should be resolved in favor of not applying it to these factual circumstances. In occupational disease cases, the date of last exposure has always fixed employer and insurer liability. Section 287.200.4 added new, enhanced damages for mesothelioma and certain other occupational diseases. For the reasons discussed below, retroactively applying section 287.200.4 and the rest of the 2014 amendments to the Workers' Compensation Law (which are inextricably intertwined with the new damages provision) would alter the vested substantive rights of both employers and employees, and would thus violate Article I, Section 13 of the Missouri Constitution.

If the Court concludes that the Commission properly interpreted the Workers' Compensation Law, and that such interpretation is not unconstitutional as applied to these facts, it should nevertheless reverse and remand with instructions to dismiss the claim without prejudice. Mrs. Casey was never properly substituted as the claimant, and the time for doing so has expired. Mr. Casey thus remains the named Claimant, and the ALJ and Commission lacked jurisdiction to render an award in his favor.

1. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD ALLOWING COMPENSATION IN FAVOR OF MRS. CASEY AND HOLDING ACCIDENT FUND LIABLE FOR ENHANCED BENEFITS UNDER SECTION 287.200.4 BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT (A) THE LAST EXPOSURE RULE GOVERNS THE LIABILITY OF AN INSURER FOR A WORKERS' COMPENSATION CLAIM, (B) THAT RULE ASSIGNS LIABILITY TO THE INSURER PROVIDING COVERAGE AT THE TIME OF THE EMPLOYEE'S LAST EXPOSURE BEFORE DISABILITY, AND (C) ACCIDENT FUND DID NOT PROVIDE COVERAGE UNTIL 24 YEARS AFTER MR. CASEY WAS LAST EXPOSED TO ASBESTOS.

Review of Commission decisions is governed by Article V, Section 18 of the Missouri Constitution and section 287.495. *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 450-51 (Mo. App. 2010). The Court reviews only questions of law and may modify, reverse, remand, or set aside on the following grounds: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the Commission's factual findings do not support the award; or (4) the was not sufficient competent evidence in the record to warrant the award. § 287.495, RSMo.

Questions of law, including the Commission's interpretation of the Workers' Compensation Law, are reviewed *de novo*. *Sachs Elec. Co. v. Mapes*, 254 S.W.3d 900, 902 (Mo. App. 2008). An award based on an erroneous legal conclusion constitutes an act in excess of the Commission's powers. *Bock v. City of Columbia*, 274 S.W.3d 555,

559 (Mo. App. 2008). Review focuses on the findings of the Commission. *Clayton v. Langco Tool & Plastics, Inc.*, 221 S.W.3d 490, 491 (Mo. App. 2007). Where the Commission's award incorporates the ALJ's decision, the Court considers the findings and conclusions of the Commission as including the ALJ's award. *Id.*

A. The Last Exposure Rule Governs Insurer Liability.

Under the Workers' Compensation Law, injury or death caused by an occupational disease is compensable. § 287.067.2, RSMo. "Occupational disease" is defined as: "an identifiable disease arising with or without human fault out of and in the course of the employment." § 287.067.1. Mesothelioma fits the definition of occupational disease.

By statute, an employee is "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," subject to certain exceptions not relevant here. § 287.063.1. 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." § 287.063.2. These provisions are known as the "last exposure rule." *Endicott v. Display Techs., Inc.*, 77 S.W.3d 612, 615 (Mo. banc. 2002). Any reference to an employer in the Workers' Compensation Law "shall also include his or her insurer or group self-insurer." § 287.030.2, RSMo.

The interaction between sections 287.063 and 287.030 is well established. In addition to determining which employer is liable for injury caused by occupational

disease, the last exposure rule also determines which of two successive insurers is liable. *See, e.g.*, *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 49 (Mo. App. 1999); *Feltrop v. Eskens Drywaall & Insulation*, 957 S.W.2d 408, 414 (Mo. App. 1997); *Lococo v. Hornberger Elec., Inc.*, 914 S.W.2d 67, 69 (Mo. App. 1996); *Oberg v. Am. Recreational Prods.*, 916 S.W.2d 304, 306 (Mo. App. 1995).[1]

"Where the issue for determination is which of two successive insurers is responsible for the employee's claim, courts look to the insurer providing coverage ***at the time the employee was last exposed to the hazard before becoming disabled***." *Lococo*, 914 S.W.2d at 69 (emphasis added); *see also Kelley*, 1 S.W.3d at 51; *Feltrop*, 957 S.W.2d at 414; *Oberg*, 916 S.W.2d at 306.

B. Accident Fund Is Not Liable.

Under straightforward application of the last exposure rule, Accident Fund is not liable for any benefits that may be due to Mrs. Casey. Accident Fund did not provide coverage at the time of last exposure before disability. Indeed, Accident Fund did not provide coverage until nearly a quarter of a century after Mr. Casey was last exposed to asbestos. Consequently, it is not liable to pay any benefits to Mrs. Casey. Any such responsibility can lie only with the insurer that provided coverage to E.J. Cody on Mr. Casey's last day of employment.

[1] *Oberg* and *Feltrop* were overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc. 2003).

The Commission committed legal error in concluding the last exposure rule did not apply in this case. Its first rationale was that it could not locate a case "shifting" liability from a successive insurer to a prior insurer. But it is wrong to speak of "shifting" liability from one insurer to another; section 287.063 simply assigns liability to the insurer providing coverage at the time of last exposure.

Enyard v. Consolidated Underwriters, 390 S.W.2d 417 (Mo. App. 1965), resolved this issue under a highly analogous set of circumstances. Applying the last exposure rule, the *Enyard* court assigned responsibility for compensating an employee for his silicosis injuries to the insurer who provided coverage at the time of the employee's last exposure rather than the insurer providing coverage when he discovered he had silicosis 17 years later. *Id.* at 422-23. The same result should obtain here.

Bollman v. Certain-Teed Products Corp., 651 S.W.2d 613 (Mo. App. 1983), cited by the Commission, is not to the contrary. *Bollman* addressed an insurer's attempt to take advantage of a particular exception in section 287.063.2 (now contained in section 287.067.8), that exempted employers from liability for carpal tunnel syndrome if the employee was exposed to the hazard while working for the employer for fewer than 90 days, on the theory that its policy had been in effect fewer than 90 days. *Id.* at 614-15. The court rejected that argument based on the language and purpose of that particular exception. *Id.* at 616. That exception is not at issue, and *Bollman* pre-dates the cases cited above, which all make clear that the last exposure rule fixes the liability of insurers.

The Commission's second rationale, that the last exposure rule does not apply to mesothelioma benefits under section 287.200.4(3), is erroneous. The Commission

reasoned that 287.063.2, by its terms, applies only to "compensation in this *section* provided," and appears to have concluded that the mesothelioma benefits Mrs. Casey sought are provided by section 287.200.4(3).

The Commission's reasoning would read the last exposure rule out of the Workers' Compensation Law. Section 287.063 simply sets forth a rule for determining which employer (or insurer) is liable for any benefits for injury caused by an occupational disease to which an employee might otherwise be entitled. Because section 287.063 does not independently provide any benefits or compensation, the Commission's interpretation would render the provision meaningless. Furthermore, because section 287.063 determines which employer is liable for injury caused by occupational disease, if the Commission's interpretation were correct, there would be no statutory mechanism for determining which employer is liable for section 287.200.4(3) benefits, thereby freeing the employer that last exposed an employee to a hazard to point the finger at prior employers. There is no indication the legislature intended such a result.

The changes to the Workers' Compensation Law that took effect on January 1, 2014 did not alter the application of the last exposure rule. Those amendments made clear that the Workers' Compensation Law provides the exclusive remedy for injury or death caused by accident ***or*** occupational disease, abrogating *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14 (Mo. App. 2011), which held that the statute did not provide the exclusive remedy for occupational disease. *See* § 287.120.2, RSMo.

At the same time, the legislature identified a subset of occupational diseases called "occupational diseases due to toxic exposure." § 287.020.11. That definition is limited to

ten specific diseases, one of which is mesothelioma. *Id.* For claims filed on or after January 1, 2014 for occupational diseases due to toxic exposure that result in permanent total disability or death, the legislature provided for temporarily enhanced benefits. § 287.200.4. Different benefits are available for mesothelioma than for other occupational diseases due to toxic exposure. *Id.*

With respect to mesothelioma, the legislature provided that an employer may "elect" mesothelioma liability under the statute by insuring that liability. § 287.200.4(3)(a). Employers who reject mesothelioma liability under the statute can be sued under common-law theories. § 287.200.4(3)(b). Once an employee exhausts the enhanced benefits applicable to mesothelioma and other occupational diseases due to toxic exposure, the employee then becomes entitled to other lifetime benefits to which he or she would otherwise be entitled as a result of occupational disease. § 287.200.4(1).

In addition, the legislature eliminated employers' right to be subrogated to employees' wrongful death claims against third parties stemming from occupational diseases due to toxic exposure. § 287.150.7. The legislature also created the Missouri Mesothelioma Risk Management Fund, in which employers can participate. § 287.223. The Fund covers only the enhanced benefits under section 287.200.4(3)(a). § 287.223.5.

The Commission appears to have concluded that by requiring an employer to opt in to enhanced mesothelioma liability by purchasing insurance, the legislature intended that the insurer providing such coverage should be liable for such benefits, regardless of when the employee was actually exposed to asbestos. L.F. at 51-52.

This reasoning is without support in the statute. Nothing in the 2014 amendments altered the last exposure rule. Mesothelioma is, without question, an occupational disease. Indeed, the Commission's decision otherwise applied statutory provisions and case law governing employer liability for occupational diseases, thus acknowledging that those provisions still govern liability for enhanced mesothelioma benefits. L.F. at 48-50. Section 287.063 is such a provision, and, as demonstrated above, does not assign liability to Accident Fund under these circumstances.

The Commission based its decision, in part, on the fact that Mrs. Casey stipulated that she was seeking only the enhanced benefits provided by section 287.200.4(3). This changes nothing. Those benefits are merely an ***additional*** benefit an employer may opt in to providing to obtain insulation from civil liability. Ultimately, section 287.200.4's enhanced benefits are payable upon the same condition as any other benefit payable in the event of an occupational disease: an employee's contracting of an occupational disease through his or her employment. And, the same benefits that were previously available to workers who contract mesothelioma remain available after enhanced benefits are exhausted. § 287.200.4(1). There is no basis to conclude that different rules govern an employer or insurer's liability for the enhanced benefits than those that govern liability for the benefits available once they are exhausted.

The legislature is presumed to know existing law when enacting statutes. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 352 (Mo. banc. 2001). By leaving sections 287.063 and 287.030 intact and declining to enact any other provisions governing which insurer is liable for the enhanced benefits provided by

section 287.200.4(3), it must be presumed to have intended that the last exposure rule as heretofore interpreted and applied would continue to govern an insurer's liability.

To the extent that the Commission's decision incorporated the ALJ's legal conclusions, the ALJ's reasoning does not support the award either. The ALJ concluded that Accident Fund was liable on the basis that section 287.200.4(3) fixes liability based on the date of diagnosis. L.F. at 35-37. That is incorrect.

The statute simply distinguishes between "occupational diseases due to toxic exposure, but not including mesothelioma," and "occupational diseases due to toxic exposure [that] are diagnosed to be mesothelioma." § 287.200.4(2)-(3), RSMo. Nothing in that language suggests intent to assign liability to the insurer providing coverage at the time of diagnosis, rather than the one providing coverage at the time of last exposure. Insurer liability continues to be determined by the last exposure rule.

C. The Accident Fund Policy Did Not Provide Coverage.

The ALJ also concluded that the Endorsement effectively obligated Accident Fund to provide coverage for Mr. Casey's injury. L.F. at 35-37. The Commission affirmed. L.F. at 52-53. These holdings were error.

Part One of the Accident Fund policy unambiguously limits coverage for injuries due to occupational disease to circumstances where the "employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease [occurs] during the policy period." Tr. at 709. This limitation simply advised E.J. Cody of what section 287.063 already made clear. The ALJ nevertheless concluded that the Endorsement provided coverage for Mr. Casey's injuries because, quoting section

287.200.4(3), it referenced occupational diseases "diagnosed to be mesothelioma." L.F. at 36; Tr. at 722.

For the reasons already discussed, the ALJ improperly interpreted this language to fix insurer liability based on the date of diagnosis. That language does no such thing, and the Endorsement's quotation of that language does not override the clear limitation on liability set forth in Part One.

The ALJ alternatively reasoned that to the extent there was ambiguity in the policies, it should be construed against Accident Fund. L.F. at 36. There was no ambiguity in the policies; they plainly and unambiguously limited coverage for injuries due to occupational disease in a manner consistent with the last exposure rule and longstanding Missouri law applying it.

The Commission reached the same conclusion, albeit on somewhat different reasoning. Noting that Accident Fund had agreed to provide coverage for mesothelioma benefits, the Commission concluded that sections 287.280.1 and 287.310.1 preclude Accident Fund from covering less than all of E.J. Cody's liability under section 287.200.4(3). Those provisions do not support the Commission's conclusion.

Section 287.280.1 provides, in relevant part, that employers must "insure their entire liability under the workers' compensation law." Section 287.300.1 states that every policy of insurance "against liability under this chapter shall be in accordance with the provisions of this chapter and shall be in a form approved by the directed of the department of insurance, financial institutions and professional registration."

Courts have interpreted these provisions to mean that an insurance policy incorporates the provisions of the Workers' Compensation Law and that insurance providers may not provide less than total coverage through policy limitations. *Allen v. Raftery*, 174 S.W.2d 345, 349-50 (Mo. App. 1943); *see also Liberty Mut. Ins. Co. v. Borsari Tank Corp.*, 248 F.2d 277, 281 (2d Cir. 1957).

But Accident Fund's policy did not attempt to limit its liability in a manner inconsistent with the Workers' Compensation Law. The last exposure rule set forth in section 287.063 has always been, and continues to be, part of the Law. And under that rule, Accident Fund is not liable for claims based on injuries for which the last exposure pre-dates its coverage. The Commission's determination that Accident Fund was attempting to limit the coverage it otherwise agreed to provide under section 287.200.4(3) is ultimately based on the Commission's erroneous determination that section 287.063 does not apply to mesothelioma benefits. Accident Fund is not liable under either the Workers' Compensation Law or the terms of its policy.

For the foregoing reasons, the Commission erred in refusing to apply the last exposure rule, under which Accident Fund is not liable for any benefits payable to Mrs. Casey. The Commission's award should be reversed.

2. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD ALLOWING COMPENSATION IN FAVOR OF MRS. CASEY AND HOLDING ACCIDENT FUND LIABLE FOR ENHANCED BENEFITS UNDER SECTION 287.200.4 BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT RETROACTIVE APPLICATION OF SECTION 287.200.4 TO OCCUPATIONAL EXPOSURES PREDATING JANUARY 1, 2014 WOULD VIOLATE ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION.

For the reasons set forth in Point 1, the last exposure rule continues to govern employer and insurer liability for injuries due to occupational disease, including mesothelioma. That fact alone requires reversal of the award against Accident Fund. An additional ground for reversal, however, is that interpreting the amendments to the Workers' Compensation Law that went into effect on January 1, 2014 to retroactively apply to claims based on last exposures that pre-date their effective date would violate the Missouri Constitution. Accident Fund raised this issue before the ALJ and the Commission. *See* Tr. at 12-13; L.F. at 46.

A. General Retroactivity Principles.

Article I, Section 13 of the Missouri Constitution provides: "That no ex post facto law, nor law impairing the obligation of contract, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." Retrospective laws are those "which take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect

to transactions or considerations already past." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc. 1993) (internal quotes omitted).

The prohibition on retrospective laws applies only to substantive laws, as distinguished from procedural or remedial laws. *Id.* at 341; *Pierce v. State, Dep't of Social Servs.*, 969 S.W.2d 814, 822 (Mo. App. 1998). Procedural or remedial laws "prescribe[] a method of enforcing rights or obtaining redress for their invasion," and remedial laws typically "substitute a new or more appropriate remedy for the enforcement of an existing right." *Pierce*, 969 S.W.2d at 822-23.

Laws are presumed to operate only prospectively. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc. 1982). That presumption does not apply when express statutory language or necessary implication shows that the legislature intended the law to operate retroactively, or where the statute is procedural or remedial in nature. *Id.* But, regardless of legislative intent, a substantive law may not operate retroactively. *Dep't of Social Servs. v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 n.5 (Mo. banc. 1985).

Several types of substantive laws that cannot be retroactively applied are pertinent here. Laws providing a party vested immunity from suit confer a substantive right that may not be taken away. *Doe*, 862 S.W.2d at 341; *Dice v. Darling*, 974 S.W.2d 641, 646 (Mo. App. 1998). Amendments to the Workers' Compensation Law that place limitations on an employer's right to subrogation of an employee's claims against third parties have been deemed substantive. *Liberty Mut. Ins. Co. v. Garffie*, 939 S.W.2d 484, 487 (Mo. App. 1997). Changes to benefits recoverable by an employee's dependents that post-date the employee's injury are also substantive. *Gervich v. Condaire, Inc.*, 370 S.W.3d 617,

623 (Mo. banc. 2012). Laws that alter an employee's burden of proof are substantive. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350 (Mo. App. 2007). Changes to the last exposure rule have likewise been deemed substantive. *Anderson v. Noel T. Adams Ambulance Dist.*, 931 S.W.2d 850, 853 n.1 (Mo. App. 1996), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc. 2003).

B. Exposures and Injuries in Occupational Disease Cases.

As discussed in Point 1, mesothelioma is an occupational disease. While difficult to establish, "the date of exposure to an occupational disease forms the basis for a determination of the employer's and insurer's liability." *Garrone v. Treasurer of State of Mo.*, 157 S.W.3d 237, 243 (Mo. App. 2004). "Pursuant to the last exposure rule, determination of liability is not dependent upon the date of disability. The last exposure rule is not a rule of causation." *Crabill v. Hannicon*, 963 S.W.2d 440, 444 (Mo. App. 1998), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220. The last exposure rule conclusively presumes that the last employer to expose an employee to an occupational hazard caused the occupational disease. § 287.063, RSMo.

An occupational disease is not itself an injury. § 287.020.3(5). An occupational disease does not become compensable until it results in injury. § 287.067.2; *Garrone*, 157 S.W.3d at 244. An occupational disease causes injury and becomes compensable once it results in disability. *Garrone*, 157 S.W.3d at 244.

While an employee cannot obtain workers' compensation benefits until an occupational disease becomes disabling, the date of "injury" has minimal significance to

employer and insurer liability, which is established by last exposure. *Bull v. Excel Corp.*, 985 S.W.2d 411, 416 (Mo. App. 1999). When an employee retires from employment in which he was exposed to an occupational disease, the employer and the insurer providing coverage at that time are conclusively deemed liable if the employee subsequently becomes disabled, at which time the injury becomes compensable.

C. History of Amendments to the Workers' Compensation Law.

In evaluating the constitutionality of retroactively applying the amendments to the Workers' Compensation Law that went into effect on January 1, 2014, it is imperative to consider how the statute operated and was amended prior to that time.

The Workers' Compensation Law was originally enacted in 1926. *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 32 (Mo. App. 2011) (Welsh, J., dissenting). Optional coverage for occupational diseases was first added in 1931. *Id.* Due to the manner in which the Law defined "accident" and "injury," courts routinely struggled to apply it to occupational diseases. *Id.*at 33-34. Nevertheless, between 1957 and 2005, it was reasonably clear that the Law's exclusive remedy provisions applied to both injuries resulting from accidents and those resulting from occupational diseases. *See Staples v. A.P. Green Fire Brick Co.*, 307 S.W.2d 457 (Mo. banc. 1957); *KCP&L*, 353 S.W.3d at 34-37 (Welsh, J., dissenting).

In 2005, the legislature made substantial changes to the Law, including changes to the definition of "accident" and a change in the manner in which the Law's provisions are to be construed. *KCP&L*, 353 S.W.3d at 37-38. As a result of these legislative changes, courts subsequently concluded that the Law no longer provided the exclusive remedy for

occupational diseases, freeing employees who contracted such diseases to pursue civil actions for common-law remedies. *See generally Mo. All. for Retired Ams. v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 679 (Mo. banc. 2009); *KCP&L*, 353 S.W.3d 14 (majority opinion).

As discussed in Point 1, the amendments that took effect on January 1, 2014 returned occupational diseases to the scope of the Law's exclusive remedy provisions. *See* § 287.120.2. In doing so, however, the legislature also singled out mesothelioma and certain other diseases for special treatment. § 287.020.11. Those diseases entitle employees to temporarily enhanced benefits. § 287.200.4. Moreover, those enhanced benefits are payable to beneficiaries or the employee's estate upon death, whereas payment of benefits for permanent total disability due to other occupational diseases continues to cease upon death of the employee. *Compare* § 287.200.4(5), *with* §§ 287.200.1-2. Mesothelioma in particular was singled out for even further enhanced benefits, and employers are required to opt in to providing such coverage to avoid being subjected to civil liability. § 287.200.4(3). Finally, the legislature eliminated the right of employers to seek subrogation to the employee's rights against third parties if the employee obtains workers' compensation benefits for occupational diseases due to toxic exposure. § 287.150.7.

D. 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.

When a statute is subject to two reasonable interpretations, it must be given the construction that renders it constitutional. *State ex rel. Clay Equip. Co. v. Jensen*, 363

S.W.2d 666, 670 (Mo. banc. 1963). The 2014 amendments to the Workers' Compensation Law cannot be retroactively applied to cases in which the employee was last exposed to an occupational disease prior to the amendments' effective date. To do so would be to alter the substantive rights of employers and insurers, whose liability is fixed by the date of last exposure, as well as employees and their beneficiaries, whose claim ultimately stems from said exposure.

Mrs. Casey contended before the Commission that there was no retroactivity problem because Mr. Casey was diagnosed with mesothelioma following the amendments' effective date. Her contention is based on the principle that an employee's cause of action does not accrue until it becomes reasonably ascertainable, which, in this case, was when Mr. Casey began experiencing mesothelioma symptoms. *See* § 287.063.3, RSMo. Accordingly, she argues, the applicable law is that in effect when the injury occurred.

It is true that cases often state that the version of the Workers' Compensation Law to be applied is the one in effect at the time the employee is injured. *See*, *e.g.*, *Pavia v. Smitty's Supermarket*, 366 S.W.3d 542, 549 (Mo. App. 2012); *Doerr v. Teton Transp., Inc.*, 258 S.W.3d 514, 518 n.2 (Mo. App. 2008); *Tillman v. Cam's Trucking, Inc.*, 20 S.W.3d 579, 585-86 (Mo. App. 2000). However, most—if not all—such cases concern injuries resulting from workplace accidents. Those cases do not present the same retroactivity problems because the date of the accident (the circumstance giving rise to liability) is virtually always the same as the date of injury.

As noted above, however, Missouri law has long been clear that the circumstance giving rise to liability for occupational disease is the date of last exposure, which is presumed to be the event that caused the employee's occupational disease. *Garrone*, 157 S.W.3d at 243; *Crabill*, 963 S.W.2d at 444. While an employee cannot file a claim until disability actually manifests, the rights of the parties are nevertheless fixed by the date of last exposure. *Bull*, 985 S.W.2d at 416. Given the realities of occupational disease cases, the applicable law should be that in effect at the time of last exposure.

The concern with retroactive application of laws is the creation of new obligations, imposition of new duties, or attachment of new disabilities to past circumstances. *Doe*, 862 S.W.2d at 340. In the case of occupational disease, there is almost always a substantial delay between the circumstances giving rise to liability and manifestation of the injury that permits an employee to sue. Because liability is based on the date of last exposure, Article I, Section 13 does not permit the legislature to alter the substantive rights of the parties to that past event.

The entire scheme created by the legislature in the 2014 amendments to the Workers' Compensation Law represents a massive alteration of the rights of parties to occupational disease cases. Those amendments affect the substantive rights of both employers and employees. As such, application of those amendments must be limited to exposures post-dating their effective date.[2]

[2] It not clear the legislature intended the amendments to apply retroactively. Although section 287.200.4 applies to "all claims filed on or after January 1, 2014," the legislature

1. Effects on the Substantive Rights of Employers.

The 2014 amendments, if applied retroactively, would work a number of impermissible changes to the rights of employers, whose liability—prior to those amendments—was based on the date of last exposure.

First, based on the law as it existed at the time of Mr. Casey's last exposure in 1990, mesothelioma was an occupational disease subject to the exclusive remedy provisions of the Act. Accordingly, at the time of the circumstances giving rise to its liability, E.J. Cody had a right not to be subjected to civil suit. E.J. Cody purchased insurance based on the exposure it faced at that time.

If the 2014 amendments are applied retroactively to exposures that occurred in 1990, however, E.J. Cody is forced to choose between accepting significantly increased mesothelioma liability for transactions long past (and purchasing insurance to cover them), or opening itself up to common-law causes of action. *See* § 287.200.4(3). The legislature cannot force this Hobson's choice on E.J. Cody and other employers. Those employers had a vested right to be free from civil liability based on the insurance they had purchased to cover liability as it then existed, and that immunity cannot be

---

did not alter the last exposure rule, and at the time the amendments took effect, section 287.800.1 mandated strict construction of the Law's provisions. Because the constitutional inquiry turns on whether the changes were substantive or procedural, the legislature's intent is not decisive. *Villa Capri Homes, Inc.*, 684 S.W.2d at 332 n.5.

retroactively taken away on the condition that they accept additional liability. *See Doe*, 862 S.W.2d at 341; *Dice*, 974 S.W.2d at 646.

Second, the 2014 amendments deprive employers of the right they had previously enjoyed to be subrogated to employees' wrongful death claims against third parties when they are held liable under the Act. *See* § 287.150.7. The right to subrogation is a substantive right that cannot be retroactively limited or removed. *Liberty Mut. Ins. Co.*, 939 S.W.2d at 487. The 2014 amendments therefore cannot be applied to past transactions giving rise to liability, when the employer would have been entitled to subrogation.

Finally, the 2014 amendments obligate employers and their insurers to pay the enhanced benefits available to employees who contract occupational diseases due to toxic exposure to their beneficiaries, even though the law as it existed at the time of last exposure would have terminated such benefits upon death of the employee. Under analogous circumstances, the Supreme Court has ruled that changes in the law that post-date an injury may not be applied to limit the recovery of an employee's beneficiaries. *Gervich*, 370 S.W.3d at 623. By the same token, changes in the law should not be applied retroactively to extend benefits to beneficiaries that would not have been available at the time of last exposure, which gives rise to the employer's liability.

2. Effects on the Substantive Rights of Employees.

The 2014 amendments, if applied retroactively, would also alter the substantive rights of employees.

First, as discussed above, courts interpreted the 2005 amendments to the Act to permit employees to pursue civil suits against their employers for injury due to occupational disease. This remained the law until December 31, 2013. Thus, if the 2014 amendments were given retroactive effect, employees who were last exposed to occupational diseases other than mesothelioma between the effective dates of the 2005 and 2014 amendments would be stripped of their substantive right to pursue common-law causes of action in civil court. And, if the employer purchased mesothelioma coverage, those who were last exposed to occupational hazards giving rise to mesothelioma would also be stripped of that right.

Second, if the amendments were given retroactive effect, and if the Commission was correct that section 287.400.4 eliminated application of the last exposure rule in cases of occupational disease due to toxic exposure, then the Act would no longer automatically impose liability on the employer who last exposed the employee to such diseases, thus requiring employees to demonstrate a causal connection between the exposure and the disease. Prior to the 2014 amendments, the last exposure rule permitted employees to obtain recovery without proof of causation. The amendments would thus represent a massive change in the burden of proof, which cannot be applied retroactively. *Lawson*, 217 S.W.3d at 350; *see also Anderson*, 931 S.W.2d at 853 n.1.

Finally, if the Commission was correct that the last exposure rule does not govern insurer liability for mesothelioma benefits, then some employees who were last exposed prior to the 2005 amendments would be deprived of recovery altogether. Mesothelioma and other occupational diseases may not manifest for decades after last exposure. In that

time, employers may go out of business. Employers that go out of business will not, by definition, have a current workers' compensation insurer. Thus, under the Commission's interpretation, retroactive application of the 2014 amendments would likely result in employees being left without compensation, even though at the time of last exposure there was an insurer that, under the last exposure rule then applicable, would have been obligated to provide coverage.

In sum, the 2014 amendments to the Workers' Compensation Law result in significant restrictions on the substantive rights of all parties in occupational disease cases. Accordingly, those amendments may not be constitutionally applied in cases where the employee was last exposed prior to their effective date.

3. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD ALLOWING COMPENSATION IN FAVOR OF MRS. CASEY AND HOLDING ACCIDENT FUND LIABLE FOR ENHANCED BENEFITS UNDER SECTION 287.200.4 BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT MRS. CASEY WAS IMPROPERLY SUBSTITUTED AS THE CLAIMANT, RENDERING THE AWARD A NULLITY.

Even if the Court concludes that the Commission properly interpreted the Workers' Compensation Law, and that its interpretation can be retroactively applied to the fact of this case, the Court should nevertheless reverse and remand with instructions to dismiss the claim without prejudice because the ALJ and Commission's awards were void. Mrs. Casey was not properly substituted as the claimant, and the ALJ lacked jurisdiction to enter an award in favor of Mr. Casey, who was deceased.

Section 287.580 provides that upon death of a party "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." In civil actions, substitution is governed by sections 507.100 and 506.100, RSMo, as well as Rule 52.13.

When a party dies and the claim is not extinguished, "the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of the hearing, shall be served on the parties as provided in section 506.100." § 507.100.1(1), RSMo. Every "paper which by statute, court rule or order is required to

be served, shall be served upon each of the parties affected thereby." § 506.100.1, RSMo. For parties represented by counsel, service may be accomplished by delivering a copy to the attorney or leaving a copy with the attorney's clerk or an associated attorney. § 506.100.2.

Rule 52.13(a) likewise provides that when a party dies and the claim is not extinguished, the court may, upon motion, order substitution. "Suggestion of death may be made by any party or person in interest by service of a statement of the fact of the death as provided herein for the service of a motion." If a motion for substitution is not served within 90 days after a suggestion of death is filed, "the action shall be dismissed as to the deceased party without prejudice." A written motion, as is plainly required by section 507.100 and Rule 52.13(a), must be served – along with the notice of hearing – no later than five days before the hearing. Rule 44.01(d). The motion must state with particularity the grounds on which it is based and the relief sought. Rule 55.26(a).

Although a court may generally extend deadlines upon a showing of cause, courts cannot extend the time for taking the actions required by Rule 52.13. *See* Rule 44.01(b). "Service is an essential part of the filing under the rule." *Metropolitan St. Louis Sewer Dist. v. Holloran*, 751 S.W.2d 749, 751 (Mo. banc. 1988).

Courts have jurisdiction to render judgments only in favor of or against viable entities, which does not include deceased persons. *Rowland v. Rowland*, 121 S.W.3d 555, 556 (Mo. App. 2003). Rule 52.13 applies to appellate proceedings, and an appeal is without legal effect in the absence of proper substitution. *Id.*

Mrs. Casey failed to comply with the requirements for substitution of parties. Neither Mrs. Casey nor Mr. Casey's attorneys ever filed or served a formal suggestion of death. Nor was Accident Fund ever served with a written motion seeking substitution of Mrs. Casey as the claimant, as required by Rule 52.13. Instead, Accident Fund received a letter from Mr. Casey's counsel on October 12, 2015, which advised that Mr. Casey had died the previous day, and that counsel would "be filing an amended claim for Robert Casey." Tr. at 946. On October 28, 2015, the amended claim was filed, indicating that Mr. Casey had died and naming Mrs. Casey and his children as dependents/beneficiaries. L.F. at 9-11. Mrs. Casey signed the amended claim as the claimant. L.F. at 10. The ALJ subsequently granted Mrs. Casey's oral motion for substitution over Accident Fund's objection. Tr. at 7-9.

The Commission affirmed the substitution, reasoning that the amended claim was "a suggestion of death and motion for substitution of parties in everything but name." L.F. at 54. Even assuming, however, that the amended claim constituted a valid suggestion of death, it did ***not*** constitute a motion to substitute. The amended claim neither stated that it was seeking substitution, nor identified with particularity the grounds therefor. *See* Rule 55.26. It did not identify ***who*** was to be substituted, which explains the alleged "confusion" referenced in Mrs. Casey's own appeal.

Mrs. Casey was obligated to serve Accident Fund with a written motion for substitution within 90 days of the suggestion of death (or by January 26, 2016, if the amended claim is treated as a suggestion of death). *See* Rule 52.13(a). Mrs. Casey did not serve such a motion, opting instead to make an oral motion at the hearing. That oral

motion did not comport with the procedure set forth in Rule 52.13, and violated Rule 44.01(d)'s requirement that the motion be served at least five days prior to the hearing. Because Mrs. Casey did not serve a motion for substitution within 90 days of the amended claim, Rule 52.13(a) required that Mr. Casey's claim be dismissed without prejudice.

Even if the amended claim did not constitute a valid suggestion of death, and the automatic dismissal provision of Rule 52.13(a) was therefore inapplicable, Mrs. Casey still failed to properly move for substitution and the Commission lacked jurisdiction to render an award for Mr. Casey. *Rowland*, 121 S.W.3d at 556. This Court likewise lacks jurisdiction to do anything other than remand with instructions to dismiss without prejudice. *Id.* The outer limits on the time to initiate substitution have long elapsed. *See* § 507.100.1(3), RSMo; *Gardner v. Mercantile Bank of Memphis*, 764 S.W.2d 166, 169-70 (Mo. App. 1989).

The Commission cited a variety of cases for the proposition that "[u]nder the Workers' Compensation Act, substantial rights are to be enforced at the sacrifice of procedural rights." L.F. at 54. None of those cases concerned the substitution of a party following death, or the jurisdiction of an ALJ to enter an award in favor of a deceased person. Moreover, those cases were based in large part on the former version of section 287.800, which provided that the Workers' Compensation Law was to be liberally construed. Following amendments to the Law in 2005, section 287.800.1 now requires ***strict*** construction. Thus, a court will not presume anything that is not expressed. *Harman v. Manheim Remarketing, Inc.*, 471 S.W.3d 876, 883 (Mo. App. 2015).

The Commission also reasoned that section 287.200.4(5) prohibits reading the Workers' Compensation Law to require Mrs. Casey to follow proper substitution procedure. Section 287.200.4(5) states, in pertinent part: "Notwithstanding any other provision of this chapter to the contrary, should the employee die before the additional benefits provided for in [the mesothelioma provision] are paid, the additional benefits are payable to the employee's spouse or children, natural or adopted, legitimate or illegitimate . . . ." That provision does not excuse parties from complying with the substitution procedures set forth in the civil rules. It simply identifies the persons to whom mesothelioma benefits are payable in the event of death. While section 287.200.4(5) makes Mrs. Casey and Mr. Casey's children individuals who may properly be substituted, it does not alter the procedures for accomplishing substitution or permit the Commission to award benefits to a deceased person.

Because Mrs. Casey failed to comply with the procedural requirements for substitution, she was not properly made the claimant. The ALJ and Commission lacked jurisdiction to enter an award in favor of Mr. Casey. This Court should therefore remand with instructions to dismiss without prejudice.

CONCLUSION

The legislature did not alter the last exposure rule, under which Accident Fund is not liable for any benefits payable to Mrs. Casey. Furthermore, the 2014 amendments to the Workers' Compensation Law cannot permissibly be interpreted to apply retroactively to occupational disease cases in which the employee was last exposed prior to their effective date. The Commission's award exceeded the scope of its authority and should be reversed.

Even if the Commission's interpretation and application of the Law were correct, the ALJ committed legal error in substituting Mrs. Casey as the claimant. Mr. Casey therefor remains the named claimant and the Commission's award is void. This Court should remand with instructions to dismiss without prejudice.

Respectfully submitted,

/s/ *Jeffery T. McPherson*
Jeffery T. McPherson #42825
Alexander C. Barrett #68695
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070
314.621.5065 (fax)
jmcpherson@armstrongteasdale.com
abarrett@armstrongteasdale.com

ATTORNEYS FOR RESPONDENTS/
APPELLANTS ACCIDENT FUND
NATIONAL INSURANCE COMPANY

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document and the appendix were served on counsel of record through the Court's electronic notice system on July 7, 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 9,378, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate.

The electronic copies of this brief were canned for viruses and found virus-free through the Symantec anti-virus program.

/s/ Jeffery T. McPherson