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October 30, 2017

VIA E-MAIL AND E-FILING

Ms. Susan Sonnenberg
Clerk of Court
Missouri Court of Appeals, Western District
1300 Oak Street
Kansas City, Missouri 64106-2970

Re: Accident Fund National Insurance Company, et al. v. Dolores Murphy, et al., No. WD80470 - Supplemental Briefing Requested by the Court

Dear Ms. Sonnenberg:

The Court has requested the parties to address whether arguments concerning the constitutional ramifications of the Labor and Industrial Commission's interpretation of section 287.200, RSMo, have been preserved and whether the Supreme Court's exclusive jurisdiction may be invoked even though the appeal may be resolved on other grounds. This letter is Respondent Accident Fund's response to the Court's order.

This appeal concerns the proper interpretation of section 287.200. Accident Fund's argument is that the Commission erred in interpreting this statutory provision so as to preclude application of the last exposure rule to claims for mesothelioma benefits. As part of that argument, Accident Fund notes that the Commission's interpretation of the statute would create significant constitutional concerns under Article I, Section 13 of the Missouri Constitution.

Accident Fund has not waived its argument concerning the constitutional ramifications of the Commission's interpretation. A party is not required to raise constitutional arguments in administrative proceedings because administrative agencies lack jurisdiction to address them. And even if this argument were required to be raised in the administrative proceedings, Accident Fund did so before both the administrative law judge and the Commission.

This Court has jurisdiction. In order to trigger the Supreme Court's exclusive jurisdiction over cases involving the validity of a statute, a constitutional challenge must be real and substantial, and the constitutionality of a statute must be directly challenged. Arguments that a statute should be interpreted to avoid constitutional concerns do not fall within the Supreme Court's exclusive jurisdiction. Accident Fund is not directly challenging the constitutionality of section 287.200. Rather, Accident Fund is arguing that the Commission erroneously interpreted the statute and that the Commission's interpretation should be rejected because, among other things, it would create significant constitutional concerns under Article I, Section 13. This is a statutory interpretation argument of the sort this Court routinely considers.

1. Accident Fund has preserved its statutory interpretation argument based on the constitutional problems created by the Commission's interpretation.

Constitutional issues typically must be raised at the earliest opportunity in order to be preserved for review. *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996). The purpose of this requirement is to prevent surprise to the opposing party and to permit the trial court to identify and rule on the issue. *Id.*

It is settled, however, that state administrative agencies lack jurisdiction to address the constitutionality of statutes. *Duncan v. Mo. Bd. for Architects, Prof'l Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. 1988). Thus, parties are not required to raise constitutional issues before administrative agencies in order to preserve them for appellate review. See, e.g., *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 634 n.6 (Mo. App. 2011) (since an administrative hearing commission is not empowered to determine the constitutionality of statutes, a party is not required to raise those issues at that level); *Tadrus v. Mo. Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo. App. 1993) (because administrative agencies lack jurisdiction to decide constitutional issues, earliest opportunity to raise issue is on appeal); *Duncan*, 744 S.W.2d at 531 ("Raising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide. The law does not require the doing of a useless and futile act.").

Mrs. Casey does not contend that Accident Fund failed to raise the issue at the agency level, but rather that the issue was not raised as an affirmative defense. As discussed below, however, Accident Fund does not maintain that section 287.200, properly interpreted, is unconstitutional. Rather, it maintains that constitutional concerns with the Commission's interpretation of the statute counsel in favor of rejecting that interpretation. Given the nature of Accident Fund's argument, it would have made no sense to raise it as an affirmative defense. Cf. *Duncan*, 744 S.W.2d at 531 ("When [the first] opportunity arises depends on the facts and circumstances of each individual case.").

Even if Accident Fund had been required to raise the issue before the Commission, it did so. The administrative law judge noted that Accident Fund was contesting retroactive application of section 287.200 and that he could not decide the issue. Tr. at 12-13; L.F. at 25, 37. The issue was also raised before the Commission. See L.F. at 39. The Commission similarly stated that it could not address the issue, but noted that it had been preserved for appeal. L.F. at 46 & n.2 Accordingly, the issue was presented to the Commission, and Mrs. Casey cannot fairly claim surprise that Accident Fund is pursuing it on appeal. Under these circumstances, the purposes of the rule requiring early presentation of constitutional issues were met, even though the rule does not apply in this case. See *Call*, 925 S.W.2d at 848 (concluding purposes of rule were served where constitutional issue was presented in post-trial motion, permitting trial court to consider it and opposing party to respond).

Contrary to Mrs. Casey's assertion, the nature of actions before the Commission does not support applying a different preservation rule. Courts do not require constitutional issues to be raised before administrative agencies because they cannot decide those issues, which is what both the administrative law judge and the Commission stated when Accident Fund did raise the issue. The argument has been preserved.

2. This Court has jurisdiction over this appeal because Accident Fund is challenging the Commission's interpretation of section 287.200, not directly attacking the statute's constitutionality.

The Supreme Court has exclusive jurisdiction over appeals challenging the validity of a state statute. Mo. Const. art. V, § 3. But not every argument or claim implicating the constitutionality of a state statute triggers the Supreme Court's exclusive jurisdiction. *Glass v. First Nat'l Bank of St. Louis, N.A.*, 186 S.W.3d 766, 766-67 (Mo. banc 2005). "The constitutional issue must be real and substantial, not merely colorable." *Id.* And "the constitutionality of the statute must be directly challenged. To say that a statute would be unconstitutional if construed in a certain manner does not meet the requirement." *Knight v. Calvert Fire Ins. Co.*, 260 S.W.2d 673, 675 (Mo. banc 1953).

The Court noted in its order requesting letter briefs that the Supreme Court's exclusive jurisdiction over a case cannot depend upon how certain issues are decided, with appellate jurisdiction in the Supreme Court if decided one way but jurisdiction in this Court if decided the other way. *See Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016). That rule, however, is not implicated by this appeal. As this Court recently observed, that rule is implicated where an appeal contains a constitutional issue invoking the Supreme Court's exclusive jurisdiction, but there are other issues in the appeal, a decision on which may obviate the need to reach the constitutional challenge. *See Doe v. Greitens*, No. WD80387 (Mo. App. Oct. 3, 2017) (transferring appeal to Supreme Court).

In this case, Accident Fund's argument that the Commission's interpretation of section 287.200 creates constitutional problems does not invoke the Supreme Court's exclusive jurisdiction in the first instance. As noted, an argument "that a statute would be unconstitutional if construed in a particular manner" does not invoke the Supreme Court's exclusive jurisdiction. *Knight*, 260 S.W.2d at 675. Put another way, to invoke the Supreme Court's exclusive jurisdiction, "the attack on the constitutionality of a statute must be that whatever it means and under any construction of which it is susceptible, it is unconstitutional." *Id.* Accordingly, the Court of Appeals has routinely retained jurisdiction over appeals presenting arguments analogous to the one presented by Accident Fund. *See, e.g., City of Slater v. Slate*, 494 S.W.3d 580, 585 (Mo. App. 2016); *Mo. Prosecuting Attorneys & Circuit Attorneys Retirement Sys. v. Pemiscot Cnty.*, 217 S.W.3d 393, 400 (Mo. App. 2007).

Ultimately, this appeal presents questions concerning the proper interpretation of section 287.200. Among other arguments, Accident Fund relies on the canon of statutory interpretation providing that courts should interpret a statute in a manner so as to render it constitutional. The Court of Appeals regularly applies this canon of statutory interpretation. *See, e.g., Carroll v. Oak Hall Assocs., L.P.*, 898 S.W.2d 603, 607-08 (Mo. App. 1995); *ARO Sys., Inc. v. Supervisor of Liquor Control*, 684 S.W.2d 504, 507-08 (Mo. App. 1984); *Ellis v. State Dep't of Pub. Health & Welfare*, 277 S.W.2d 331, 337-38 (Mo. App. 1955). As the Eastern District recently explained:

Though [the appellant's] points on appeal seem to present a constitutional challenge to the validity of the rent and possession statute, she does not. Rather, [the appellant] expressly argues that § 535.040 should be interpreted in a way that avoids an unconstitutional result. Simply put, [the appellant] challenges the trial court's interpretation of a statute. Statutory interpretation and construction in light of the Constitution is well within the jurisdiction of this court.

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Brainchild Holdings, LLC v. Cameron, No. ED104122 (Mo. App. Apr. 25, 2017) (transferring appeal to Supreme Court on other grounds).

Based on the foregoing authorities, Accident Fund has preserved its statutory interpretation arguments for appeal, and those arguments are within this Court's jurisdiction to decide.

Respectfully submitted,

/s/ Jeffery T. McPherson

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