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.	)	

REPLY BRIEF OF RESPONDENT/APPELLANT ACCIDENT FUND NATIONAL INSURANCE COMPANY

Appeal from the Labor and Industrial Relations Committee

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ARGUMENT

Mrs. Casey asks the Court to interpret section 287.200.4(3), in which the legislature sought to provide enhanced benefits for mesothelioma victims, as a rejection of the application of the last exposure rule to mesothelioma claims and of the statutory requirement that any reference in the Workers' Compensation Law to an employer include the employer's insurer. Mrs. Casey also asks the Court to conclude that the legislature intended to convert workers' compensation policies covering mesothelioma benefits from occurrence-based policies into claims-based policies.

The Court should reject these strained conclusions, which may benefit Mrs. Casey but will inevitably hurt future mesothelioma victims. There is nothing in section 287.200.4(3) suggesting a legislative intent to abandon decades of established law. Indeed, Mrs. Casey relies on the last exposure rule as the basis of her claim against the employer in this case. And MATA, in its amicus brief, recognizes the disastrous consequences Mrs. Casey's interpretation would have for mesothelioma victims, unless the Court accepts its wholly untenable position that the legislature intended ***both*** the insurer with coverage at the time of last exposure and the one with coverage at the time of mesothelioma diagnosis to be liable.

Accident Fund's interpretation, by contrast, harmonizes section 287.200.4(3) with existing law, comports with the requirement that the Workers' Compensation Law be strictly construed, and avoids re-writing most workers' compensation policies while effectuating legislative intent to provide enhanced benefits to mesothelioma victims. And,

unlike Mrs. Casey's interpretation, Accident Fund's interpretation avoids significant constitutional problems.

The award of the Commission should be reversed.

1. The last exposure rule applies to mesothelioma claims.

Mrs. Casey incorrectly asserts that section 287.200.4 makes the insurer providing coverage on the date of mesothelioma diagnosis liable to pay mesothelioma benefits rather than the insurer providing coverage at the time of last exposure. The last exposure rule has always governed the workers' compensation liability of successive insurers. Section 287.200.4, which must be strictly construed, does not provide a different rule for assessing insurer liability for mesothelioma benefits.

A. The 2014 amendments did not alter the last exposure rule.

The employer that last exposed an employee to an occupational disease is conclusively deemed liable for compensation payable as a result of such disease. § 287.063.2, RSMo. Any reference to an employer in the Workers' Compensation Law also includes the employer's insurer. § 287.030.2, RSMo. Since 1965, it has been settled that the insurer liable for an employee's occupational disease claim is the insurer that provided coverage at the time of last exposure. *Enyard v. Consol. Underwriters*, 390 S.W.2d 417, 422-23 (Mo. App. 1965); *see Oberg v. Am. Recreational Prods.*, 916 S.W.2d 304, 306 (Mo. App. 1995). As MATA notes, workers' compensation policies have long been written to incorporate the last exposure rule. Amicus Br. 11. Accident Fund's policy was so written. Tr. 709.

Section 287.200.4(3) could not impliedly repeal the last exposure rule for claims for mesothelioma benefits. The provisions of the Workers' Compensation Law are strictly construed. § 287.800.1, RSMo. As Mrs. Casey's cited case makes clear, in construing the statute, courts will not presume anything that is not expressed: "Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. The operation of the statute must be confined to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. A strict construction of a statute presumes nothing that is not expressed." *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. App. 2011) (quoting *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010)).

Mrs. Casey suggests that section 287.200.4(3) assigns liability to the insurer providing coverage at the time of diagnosis because that provision references "occupational diseases . . . diagnosed to be mesothelioma." But section 287.200.4 simply distinguishes between "occupational diseases due to toxic exposure, but not including mesothelioma" and "occupational diseases . . . diagnosed to be mesothelioma." It does not remotely suggest that the legislature was impliedly providing a new ***temporal*** rule for determining insurer liability.

Mrs. Casey's reliance on the canon of statutory construction requiring courts to apply a chronologically later statute where two statutory provisions irreconcilably conflict is likewise misplaced. There is no conflict between sections 287.200.4, 287.063.2, and 287.030.2. Section 287.200.4 simply does not address which insurer is liable to pay a claim.

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). The legislature was aware of both the last exposure rule and the requirement that the Workers' Compensation Law be strictly construed. It purposely chose not to enact a new provision governing insurer liability for mesothelioma claims.

Mrs. Casey erroneously contends that the interaction between section 287.030.2 and section 287.200.4 renders Accident Fund liable for payment of any mesothelioma benefits due to her. But section 287.200.4(3) references "employers that have elected to accept mesothelioma liability." Employers can elect to accept mesothelioma liability by insuring their liability. Simply put, employers elect mesothelioma liability under section 287.200.4(3); insurers do not. Application of section 287.030.2 to section 287.200.4(3) would render the latter provision nonsensical. The relevant question is which of E.J. Cody's insurers is liable to pay any benefits due to Mrs. Casey. Under longstanding Missouri law, the answer to that question has always been, and remains, the insurer "with coverage when the employee was last exposed before disability." *Oberg*, 916 S.W.2d at 306.

Nor does the structure of section 287.200 evidence legislative intent to assign liability to the insurer providing coverage at the time of diagnosis. Mrs. Casey argues that because the statute is written in the present tense and requires an employer to elect to accept mesothelioma liability, the legislature must have intended for insurers providing coverage at the time of diagnosis to be held liable. She also seems to suggest that the fact that the statute makes benefits payable upon permanent disability or death somehow

demonstrates such intent. She further contends that the existence of a sunset provision supports assigning liability to the insurer at the time of diagnosis.

However, none of these aspects of section 287.200.4(3) has anything to do with ***which*** insurer is liable, an issue governed by the last exposure rule. Moreover, all of these arguments presume matters not expressed in the statute and run afoul of the strict construction rule.

Section 287.200.4(3)(a) merely states that employers can elect to accept mesothelioma liability by "insuring their liability" and providing notice to the department. Under the last exposure rule, insurers have long issued occurrence-based policies covering occupational disease claims based on exposures that occur during the policy period. Nothing in section 287.200.4 requires an employer to purchase a ***new***, claims-made policy covering any and all mesothelioma claims stemming from exposures that occurred decades ago. Employers that already had policies covering occupational disease claims have "insur[ed] their liability," as required by the statute.

Accepting Mrs. Casey's argument would require the Court to conclude that the legislature intended to mandate that after January 1, 2014 employers and insurers must insure mesothelioma claims on a claims-made basis rather than an occurrence basis. But this would represent a massive shift in the way such liability has been insured. Had the legislature intended such a sea-change, it would have clearly written the statute to notify the insurance industry of this supposed requirement, which it did not. Under strict construction, the Court should not presume the legislature intended such a shift. *State ex rel. KCP & L*, 353 S.W.3d at 20.

The requirement that an employee be permanently disabled or deceased in order to qualify for benefits also does nothing to assign liability to the insurer providing coverage at diagnosis. This is merely a condition for making a claim. It does not govern ***who*** is liable, which is covered by section 287.063.

The inclusion of a 2038 sunset date in section 287.200.4(3) does not support a different result. Mrs. Casey argues that applying the last exposure rule to mesothelioma claims would result in only a handful of such claims being paid due mesothelioma's lengthy development period. Her argument, however, makes a number of unsupported assumptions. Perhaps most fundamentally, she appears to assume that insurers providing coverage at the time of last exposure, but prior to the enactment of the 2014 amendments, cannot be held liable for the benefits provided by section 287.200.4(3). But nothing in the statute dictates such a result. Mrs. Casey's real complaint is that the insurer providing E.J. Cody coverage at the time of last exposure has gone out of business. That circumstance does not change the fact that the last exposure rule governs insurer liability.[1]

[1] Moreover, as MATA points out, most cases are likely to involve the inverse situation in which an employer has gone out of business but its insurer remains. Amicus Br. 9. Given that reality, it is inconceivable that the legislature intended to assign liability to the insurer providing coverage at the time of diagnosis, since there often will be no such insurer.

Mrs. Casey similarly argues that applying the last exposure rule would be a windfall to insurers, which should not be allowed to charge premiums for providing mesothelioma coverage that is active for only 25 years. Even assuming that section 287.200.4(3) is permitted to expire and is not replaced, ***and*** that Accident Fund could not be held liable after 2038 for mesothelioma benefits related to last exposures that occurred during its policy period (a result that is by no means clear), Mrs. Casey fails to explain how that would be unfair or relevant to whether the last exposure rule applies to mesothelioma claims.

Insurers charge premiums based on both the amount of potential liability and the likelihood of claims being made, among other things. And employers are free not to purchase current mesothelioma coverage if they believe there is little likelihood they will expose employees to asbestos on an ongoing basis, in which case they would be subject to civil liability for such exposures. The sunset provision is fully compatible with application of the last exposure rule.

Mrs. Casey's heavy reliance on Accident Fund's inclusion of a mesothelioma endorsement in the policy it issued E.J. Cody is also misguided. She seems to argue that Accident Fund would not have issued such an endorsement if coverage were not determined at the time of diagnosis. The determinative issue, however, is the proper interpretation of the Workers' Compensation Law and the legislature's intent in amending it. Accident Fund's endorsement has no bearing on those issues, and did not expand the scope of coverage beyond that mandated by law. Moreover, the endorsement is in no way inconsistent with the last exposure rule and does not purport to cover

mesothelioma claims on a claims-made basis. When the endorsement is read in conjunction with the policy as a whole—as it must be—it is clear that Accident Fund agreed to insure only those occupational diseases claims stemming from exposures that occurred during its policy period. E.J. Cody's acceptance of the endorsement simply represents its choice to opt in to current coverage to avoid uninsured liability in the future, however remote that possibility may be.

Finally, there is no basis for concluding that the insurer providing coverage at the time of last exposure and the one providing coverage at the time of diagnosis are ***both*** liable for mesothelioma benefits. MATA spends most of its brief explaining why insurers providing coverage at the time of last exposure are liable for mesothelioma benefits under well-established Missouri law. It nevertheless contends that under section 287.200.4, multiple insurers can be held liable. Amicus Br. 15-17. Its rationale is that case law applying the last exposure rule pre-dates the enactment of section 287.200.4, and section 287.200.4 does not assign liability to any particular insurer.

Section 287.200.4 does not address which employer or insurer is liable for paying mesothelioma benefits for the simple reason that there were ***already*** separate statutory provisions governing that issue. *See* §§ 287.063, 287.030.2, RSMo. It is thus unsurprising that the legislature did not address the issue in section 287.200.4. Nothing in the 2014 amendments indicates legislative intent to supply a different rule in mesothelioma cases. Moreover, MATA wholly fails to explain how liability would be determined when there is both an insurer that provided coverage at last exposure and one

providing coverage at the time of diagnosis in the picture. There is but one liable insurer -- the one providing coverage at last exposure prior to disability.

B. Public policy does not support holding Accident Fund liable.

The Court should reject Mrs. Casey's policy arguments in support of not applying the last exposure rule to mesothelioma claims. These arguments are largely based on false assumptions and, in any event, do not constitute a basis for ignoring the clear provisions of the Workers' Compensation Law.

First, Accident Fund is not engaged in some sinister attempt to foist liability on E.J. Cody for benefits that Accident Fund actually agreed to furnish. Accident Fund's policy plainly stated that it provided coverage for occupational disease claims when the last exposure occurred during the policy period, just like every other workers' compensation policy E.J. Cody would have purchased. Tr. 709; Amicus Br. 11. E.J. Cody knew what it was buying. But for the fact that E.J. Cody's prior insurer went out of business, E.J. Cody would have coverage. Mrs. Casey's contention that Accident Fund drafted "its very own policy language" promising to cover mesothelioma claims on a claims-made basis is incorrect. Pl. Br. 28. Accident Fund's endorsement was simply the endorsement form promulgated by the National Council on Compensation Insurance, Missouri's approved advisory organization. *See* Tr. 722.[2]

[2] The language of Accident Fund's endorsement is identical to that of the NCCI endorsement, which is available at http://insurance.mo.gov/consumers/wc/documents/04-MO-2013.pdf .

Second, Mrs. Casey's assertion that the purpose of the Workers' Compensation law is to place losses for employment-related injuries on industry does not support refusing to apply the last exposure rule to mesothelioma claims. That purpose is served regardless of which insurer (or employer) is assigned liability. Again, the fact that the prior insurer happens to have gone out of business does not change Missouri law.

Finally, there is nothing "absurd" about limiting insurers' liability to claims arising from exposures that occurred during the periods in which they provided coverage simply because mesothelioma is slow to develop. This is how the last exposure rule has always operated, and it is how policies covering occupational disease claims have long been drafted.

Nor is this result unique to mesothelioma. In *Enyard*, for example, the insurer providing coverage at the time of exposure was held liable rather than the insurer providing coverage at the time the employee discovered he had silicosis, even though 14 years had elapsed since coverage expired. 390 S.W.2d 417. Like mesothelioma, silicosis and other slow-developing diseases are "occupational diseases due to toxic exposure," and there can be no question that the last exposure rule still applies to them. *See* §§ 287.020.11 and 287.200.4(2), RSMo. If the legislature had intended to make mesothelioma the ***only*** occupational disease to which the last exposure rule does not apply, it would have done so directly, rather than by implication.

2. The Commission's interpretation would be unconstitutional.

As the foregoing section makes clear, the last exposure rule applies to mesothelioma claims. The Court should therefore reverse the Commission's award

insofar as it assigns liability to Accident Fund. Another reason to reject the Commission's interpretation of the Workers' Compensation Law (championed here by Mrs. Casey) is that it raises serious concerns under Article I, Section 13 of the Missouri Constitution.

A. Accident Fund did not waive its constitutional arguments.

Accident Fund has not waived its argument that the Commission's interpretation of the Workers' Compensation Law creates constitutional problems. Mrs. Casey contends Accident Fund waived this argument because it did not assert the unconstitutionality of section 287.200.4(3) as an affirmative defense in its answers, thus failing to raise the issue at the first available opportunity. However, Accident Fund was not required to raise its constitutional arguments before the ALJ or the Commission at all, even though it did so.

The primary purpose of the rule requiring a litigant to raise constitutional arguments at the earliest opportunity is to permit the body before which the case is pending an opportunity to rule on them. *Duncan v. Mo. Bd. of Architects,* 744 S.W.2d 524, 531 (Mo. App. 1988). Because administrative agencies lack authority to decide the constitutionality of statutes, litigants are not required to raise such arguments before the agency. *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 634 n.6 (Mo. App. 2011); *Tadrus v. Mo. Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo. App. 1993); *Duncan*, 744 S.W.2d at 531.

Here, Accident Fund ***did*** raise the issue, albeit not in its answers. Accident Fund raised the issue before the ALJ, who noted Accident Fund was challenging whether

section 287.200.4 could be retroactively applied and that it was a disputed issue. Tr. 12-13. Accident Fund also raised the issue in its appeal to the Commission, before which the issue was fully briefed by all sides. *See* Tr. 39. Mrs. Casey thus had an opportunity to respond to the argument, and the Commission had a chance to consider it, satisfying the requirements of the rule. *See Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc. 1996).

B. The Commission's interpretation raises retroactivity problems.

Mrs. Casey contends that a party bears a heavy burden to prove that a statute is unconstitutional and notes that constitutionality is presumed. But Accident Fund is not contending, as a general matter, that every application of section 287.200.4 is unconstitutional. Rather, Accident Fund notes that the Commission's interpretation of that provision, which is erroneous for reasons already explained, should also be rejected because it raises significant constitutional concerns. *See State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 187 n.7 (Mo. banc 2011) (courts are "reluctant to interpret statutes in a manner that would render them unconstitutional or raise serious constitutional difficulties").

The concern with retrospective laws is that they "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) (emphasis added). In occupational disease cases, the liability of employers and insurers has long been determined and fixed, by statute, based on the employee's exposure to the hazard of occupational disease. § 287.063.1-2, RSMo. While a claim does not accrue, and the

statute of limitations does not begin to run, until the claimant actually suffers injury as the result of an occupational disease, that date is largely irrelevant to the employer or insurer, whose liability is determined based on exposure. *See* § 287.063.3.

In the case of mesothelioma and other slow-developing occupational diseases, employers purchase insurance to cover claims that may not manifest for decades. These purchases are made based on then-existing law. In the intervening years, the legislature may make substantial changes to the Workers' Compensation Law. Those changes may, in turn, have significant effects on the substantive rights of employers, insurers, and employees. Because the employee's exposure is the primary "transaction" that determines the rights of the parties in an occupational disease case, it should be the focal point for retroactivity analysis.

Much of Mrs. Casey's argument focuses on the fact that in workers' compensation cases, the law applied is typically the law in effect at the time the employee is injured. *E.g.*, *Pavia v. Smitty's Supermarket*, 366 S.W.3d 542, 549 (Mo. App. 2012). She cites *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447 (Mo. App. 2010), in which the court held that the law governing the compensation cap in an occupational disease case was that in effect at the time the employee became disabled rather than that in effect at the time of last exposure. Mrs. Casey contends that there is no retroactivity problem because Mr. Casey was not diagnosed with mesothelioma (injured) until after the 2014 amendments went into effect. However, none of the parties in *McGhee* raised a challenge to retroactive application of the rate cap provision to an exposure that occurred 24 years

prior to diagnosis. Thus, *McGhee* says nothing about whether retroactivity should focus on the date of injury or the date of exposure in an occupational disease case.[3]

With these principles in mind, it is important to consider how occupational disease liability is insured, the effect of an employer's purchase of workers' compensation coverage, and the implications of the Commission's interpretation of section 287.200.4.

As MATA explains, workers' compensation insurance policies must be, and generally have been, drafted to incorporate the provisions of the Workers' Compensation Law. Amicus Br. 11-12. Thus, policies have been drafted in accordance with the last exposure rule and provide coverage for occupational diseases arising from exposures occurring during the policy period.

Prior to 2005, when an employer insured its workers' compensation liability, it was immune from civil liability, and the Workers' Compensation Law provided an employee's exclusive remedy. *See* § 287.120, RSMo. Failure to obtain coverage exposed the employer to civil liability and stripped it of certain defenses. *See* § 287.280.1, RSMo.; *Mays v. Williams*, 494 S.W.2d 289, 291 (Mo. banc 1973). In compliance with these requirements, E.J. Cody purchased workers' compensation

[3] As previously explained, only substantive laws engender retroactivity concerns. Because the issue was not raised, the *McGhee* court had no occasion to address whether a rate cap increase, by itself, would be a substantive rather than remedial change. As discussed *infra*, the Commission's interpretation of section 287.200.4 involves far more than an increase in payable benefits.

insurance covering occupational disease claims while Mr. Casey worked there. Its purchase of such insurance entitled it to immunity from civil suit.

As a result of the 2005 amendments to the Workers' Compensation Law, occupational diseases were temporarily removed from the scope of the Law's exclusive remedy provisions. *See KCP&L,* 353 S.W.3d 14. The 2014 amendments returned occupational diseases to the exclusive remedy provision, but also added special rules applicable to occupational diseases due to toxic exposure, particularly mesothelioma.

Mrs. Casey contends there are no retroactivity problems with the Commission's interpretation of section 287.200.4 because it simply increases the benefits payable on mesothelioma claims, which she argues is a remedial rather than substantive change. But this is incorrect. As Accident Fund previously explained, the Commission's interpretation of the statute impacts numerous substantive rights of employers, insurers and employees.

At a most basic level, the Commission held, and Mrs. Casey argues, that under section 287.200.4, the insurer providing coverage at the time of diagnosis is responsible for paying mesothelioma benefits. A necessary corollary of this position, of course, is that the insurance policy in effect at the time of an employee's last asbestos exposure ***does not*** provide such coverage. In other words, under the Commission's interpretation, an employer must purchase a new, claims-made policy covering any and all mesothelioma claims made during the policy period, regardless of when the last exposure actually occurred.

This interpretation presents serious constitutional difficulties. Under section 287.200.4(3), an employer must elect to accept mesothelioma liability in order to enjoy immunity from civil suit. As discussed above, however, E.J. Cody already enjoyed such immunity because it purchased a workers' compensation policy covering Mr. Casey's exposure while he was employed there. The legislature may not retroactively strip a party of vested immunity from suit. *Doe*, 862 S.W.2d at 341; *Dice v. Darling*, 974 S.W.2d 641, 646 (Mo. App. 1998). Under the Commission's interpretation, however, employers who previously purchased insurance policies rendering them immune to civil liability would be deemed subject to civil suit unless they purchase new, claims-made policies covering the same liabilities they already insured.

Applying the last exposure rule avoids this problem. E.J. Cody and other employers will retain the immunity they previously obtained by virtue of their existing policies. To enjoy immunity from suits arising from exposures that occur after January 1, 2014, they will need to purchase current coverage.

Mrs. Casey appears to suggest that E.J. Cody did not have a vested right to immunity when the 2014 amendments went into effect. Although unclear, her position seems to be that this is the case because Mr. Casey was not "injured" until after the amendments' effective date. But this overlooks the "inherent conflict between the concepts of injury—generally a distinct event that occurs at a particular point in time—and occupational disease—a process that occurs gradually over time." *McGhee*, 312 S.W.3d at 455. When an employee is injured by a workplace accident, his or her claim will be covered by the insurance policy and law in effect on that date. Few retroactivity

problems will arise in those cases. In the case of slow-developing occupational diseases, however, the circumstance that ultimately gives rise to the employer's liability is the exposure of the employee to the disease.

An employer that complies with the Workers' Compensation Law and obtains insurance coverage entitling it to immunity from suit should not be deprived of that immunity due to changes in the law that post-date the employee's term of employment. Mrs. Casey fails to meaningfully address the unique concerns that are posed by that interpretation of the law. Such a reading of section 287.200.4 involves far more than a mere increase in the amount of benefits payable.

The foregoing constitutional problems posed by the Commission's interpretation are reason enough to reject it. But there are other constitutional problems posed by retroactive application of the 2014 amendments. For example, statutes that place limitations on an employer's subrogation rights have been deemed substantive and not retroactively applicable. *Liberty Mut. Ins. Co. v. Garffie*, 939 S.W.2d 484, 487 (Mo. App. 1997). The 2014 amendments do just that. *See* § 287.150.7, RSMo. Mrs. Casey's only response is that in *Liberty Mutual* (an accidental injury case), the change in the law post-dated the injury. But this reasoning overlooks the fact that the central event giving rise to an employer's liability in an occupational disease case is the exposure.

Moreover, changes to the last exposure rule have been deemed substantive. *Anderson v. Noel T. Adams Ambulance Dist.*, 931 S.W.2d 850, 853 n.1 (Mo. App. 1996), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Changes in the burden of proof are also substantive and cannot be

retroactively applied. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350 (Mo. App. 2007). In advocating that the last exposure rule does not apply to mesothelioma claims, Mrs. Casey ignores the fundamental change this would cause in the burden of proof.

The last exposure rule governs the liability of ***both*** employers and insurers. The Commission held that section 287.063.2 does not apply to claims for mesothelioma benefits under section 287.200.4(3). L.F. 51. The problem with this is that the last exposure rule permits employees to hold an employer liable for occupational disease claims without proof of causation, and precludes the employer from arguing that some other exposure or employer caused the occupational disease. If the last exposure rule is not applicable to mesothelioma claims, all employees who previously would have been permitted to establish their employer's liability based on exposure alone, will now face the potentially insurmountable task of proving causation.

Most of the foregoing problems can be avoided by interpreting section 287.200.4(3), consistent with its plain and unambiguous language, to leave the last exposure rule intact. Contrary to Mrs. Casey's assertion, this would not create "chaos." It would simply assign liability to the insurer providing coverage at the time of last exposure, as Missouri law has always done.

3. Mrs. Casey was not properly substituted as the claimant.

Mrs. Casey contends she was properly substituted as the claimant in this case because she filed an amended claim stating that Mr. Casey had died after her counsel sent counsel for Accident Fund and E.J. Cody a letter informing them of Mr. Casey's death. She also contends section 287.580 requires only that substitution be accomplished

"similar to" the manner in which it is achieved in civil actions, and notes that there is no procedure for motion practice in workers' compensation proceedings.

As previously explained, section 287.580 permits workers' compensation proceedings to continue after the death of the claimant if substitution is made "in like manner as in civil actions." In civil actions, substitution is accomplished by serving the opposing party with a suggestion of death and a motion to substitute within 90 days thereafter. *See* §§ 506.100 and 507.100, RSMo.; Rule 52.13.

Even assuming that counsel's letter of October 12, 2015, or the amended claim dated October 28, 2015, could be the equivalent of or "similar to" a suggestion of death, neither are "similar to" a motion for substitution. The letter merely advised that counsel would "be filing an amended claim for Robert Casey." Tr. 946. The amended claim did not request that Mrs. Casey, or anyone else, be substituted as the claimant. L.F. 9-11. Regardless of whether Mrs. Casey could have filed a separate motion to substitute, the amended claim could have stated that Mrs. Casey was seeking leave to be substituted as the claimant, since the form contains a section for "Additional Statements," which was used to list Mr. Casey's children as dependents. L.F. 10-11. In sum, neither the letter nor the amended claim was sufficient to accomplish substitution "in like manner as in civil actions."

Mrs. Casey alternatively contends that the ALJ was authorized to shorten the time for making the motion to substitute and to permit an oral motion on the day of the hearing. Section 507.100 and Rule 52.13 plainly contemplate a written motion and service of such motion in accordance with section 506.100 and Rule 43.01. "Service is

an essential part of the filing under [Rule 52.13]. The service must be made as a motion is served." *Metro. St. Louis Sewer Dist. v. Holloran*, 751 S.W.2d 749, 751 (Mo. banc 1988). Accordingly, the oral motion made by Mrs. Casey's counsel on the date of the hearing was insufficient to accomplish substitution "in like manner as in civil actions."

Because Mrs. Casey was never properly substituted as the claimant, Mr. Casey remained the named claimant. The ALJ and Commission lacked the power to enter an award in favor of Mr. Casey after his death. *See Rowland v. Rowland*, 121 S.W.3d 555, 556 (Mo. App. 2003). This Court should remand with instructions to dismiss without prejudice.

CONCLUSION

For the foregoing reasons, the award of the Commission should be reversed.

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 28, 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 5,112, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate.

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/s/ Jeffery T. McPherson