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.,	)	
Appellant/Respondent.	)	

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS ("MATA") IN SUPPORT OF APPELLANT/RESPONDENT DOLORES MURPHY

Appeal from the Labor and Industrial Relations Committee

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In Accident Fund's second point relied on, it contends that many employees diagnosed with mesothelioma will find themselves without a remedy should the Commission's decision be upheld. Accident Fund notes that many employers who exposed their employees to asbestos had gone out of business by the time the 2014 amendments were enacted and were therefore incapable of purchasing new insurance to cover the enhanced benefits. While Accident Fund's argument is flawed and the Commission's award should not be overturned, the prospect that many mesothelioma victims could be left without compensation when the employer no longer exists is certainly a great concern and contrary to Section 287.200.4.

There is troubling *dicta* within the Commission's underlying decision which could preclude many workers from receiving compensation in such cases. The Commission wrote that "[a]cceptance of . . . [workers' compensation exclusivity] protections is specifically tied to employer's action of purchasing a policy of insurance to cover their liability for the new, enhanced mesothelioma benefit. For obvious reasons, employer could not have accomplished this action in 1990; nor could employer's insurer in 1990 have offered a policy covering employer's liability under § 287.200.4(3)." L.F. at 51-52. In essence, the Commission implied that an insurance policy in place at the time of an

employee's last exposure could not cover the enhanced benefits because the law did not yet exist at the time the policy was written. While the Commission reached the right overall decision, this particular conclusion was neither obvious nor correct.

A. History and Purpose of the 2014 Amendments

The present case comes to the Commission after an extended series of legislative and judicial overhauls affecting the Missouri Workers' Compensation Act. This chain of events began in August 2005, when the Act underwent a number of significant legislative revisions. Perhaps the most drastic of these changes was to Section 287.800,[1] which was amended to read that "any reviewing courts shall construe the provisions of this chapter strictly." This amendment had an enormous impact upon the applicability of the workers' compensation exclusivity provision to occupational disease claims.

In *State ex rel. KCP&L Greater Missouri Operations Company v. Cook*, 353 S.W.3d 14 (Mo. App. W.D. 2011), an employee diagnosed with mesothelioma challenged the exclusive remedy's applicability in civil court. The court noted that the text of Section 287.120 only provided an exclusive remedy for injuries or deaths of employees which were caused by an "accident." *Id.* at 18. An "accident" was defined in Section 287.020.2 to be a single event that causes an injury at the same time. Consequently, under strict construction, the court found that Section 287.120 no longer provided an exclusive remedy for occupational diseases. *Id.* at 30.

[1] Unless otherwise indicated, all references are to Missouri Revised Statutes, *et seq.* (2016).

For the first time in decades, employees suffering from mesothelioma now had the option of seeking redress against their employers in civil court. Furthermore, unlike the rigidly defined benefit structure that governs workers' compensation proceedings, employers suddenly found themselves subject to the possibility of boundless liability. Given the severity of mesothelioma disease and the extremely negligent manner in which many employees were exposed to the well-known carcinogen asbestos, the potential liability facing employers in these cases was often substantial. Naturally, many employers were not pleased with this prospect and a bill was soon drafted by the Missouri General Assembly to bring occupational diseases back within the exclusivity provisions of Missouri's Workers' Compensation law.

Workers' advocates, on the other hand, pointed out that mesothelioma victims had long been denied just compensation under the Missouri Workers' Compensation Act. Unlike most employees who receive an immediate work-related injury, the median latency period for mesothelioma often spans 30-40 years. By the time of diagnosis, the employee (and his dependent spouse) is often elderly and has few years remaining in which to receive benefits for permanent total disability (or death in the case of his spouse). Furthermore, the average weekly wage traditionally used to calculate benefits has been the employee's wage at the time of his last exposure. *See McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 452 (Mo. App. W.D. 2010). Because this last exposure almost always occurred decades before current levels of inflation, the average weekly wage used to calculate benefits was often a negligibly small rate. The combination of these relatively few weeks of benefits with these low weekly benefit rates only allowed

for a very limited recovery, despite the fact that a mesothelioma victim is invariably permanently totally disabled and will die from the disease.

This treatment of mesothelioma claims under the former workers' compensation law led to an odd paradox. Although mesothelioma claims against employers in civil court were ordinarily worth substantially more than a typical personal injury claim due to an accident, these very same mesothelioma claims were conversely worth a trivial amount when brought in the Division of Workers' Compensation. It hardly made sense that victims of an extremely painful, debilitating and terminal illness should receive less compensation than a typical worker who suffers a temporary disability due to a broken thumb. Advocates for workers and victims of mesothelioma therefore lobbied the General Assembly to pass legislation which would remedy these inherent flaws within the Missouri Workers' Compensation Act while simultaneously protecting employers from limitless civil liability.

The result was Senate Bill 1, a proposal to increase compensation for victims of occupational diseases due to toxic exposure in recognition of both these diseases' severity and the claims' higher value in civil court compared to common personal injury claims. In exchange for payment of these higher benefit amounts, employers would once again receive workers' compensation exclusivity and be shielded from civil liability. This legislation was ultimately passed into law after receiving considerable bipartisan support and went into effect on January 1, 2014. It is against the backdrop of this second great workers' compensation compromise that the Commission authored its *dicta* suggesting an insurance policy at the time of last exposure cannot provide coverage for the enhanced

benefits. This erroneous statutory construction could effectively destroy the impact of the new law in the many cases where the employer who last exposed the employee no longer exists.

B. The Problem Of The Non-Existent Employer

Given the uniquely long latency period between an employee's exposure to asbestos and development of mesothelioma, a significant number of employers (if not most) will inevitably be out of business by the time the employee is diagnosed and suffers an injury. In fact, the most common occupations to suffer from asbestos-related diseases – blue collar insulators, pipefitters, boilermakers, etc. – primarily worked for small independent contractor crews that hired out of their local unions. By nature, such employers typically had a finite lifespan and often dissolved when their owners retired.

Even though the present case is the first to reach the Missouri Court of Appeals under the 2014 amendments, it is essentially the inverse of most cases that will be brought under the new law. Here, E.J. Cody happened to still exist at the time of Mr. Casey's mesothelioma diagnosis while the insurer covering the timeframe of Mr. Casey's last exposure happened to be insolvent. However, the majority of cases will involve the reverse fact pattern in which a relatively small employer no longer exists but a large insurance company who covered the time of last exposure is still viable. In contrast to both Accident Fund's argument and the Commission's *dicta*, the new statute does not operate to "affix" sole liability with a single insurer. Rather, the 2014 amendments provide for enhanced benefit coverage by ***both*** the policy in place at the time of compensable disability ***and*** the policy in place at the time of last exposure.

C. A Strict Construction Of Section 287.200.4(3) Mandates That Employers With Pre-Existing Insurance Policies From The Time Of An Employee's Last Exposure Have Elected to Accept Liability For Enhanced Benefits

The Missouri Workers' Compensation Law is to be strictly construed under Section 287.800, and "[a] strict construction of a statute presumes nothing that is not expressed." *Lewis v. Treasurer of State*, 435 S.W.3d 144, 154-155 (Mo. App. E.D. 2014). Section 287.200.4(3) expresses nothing requiring an employer to purchase new insurance in order to insure their liability after the statute went into effect. The statute simply reads that an employer has "elected to accept" liability under Section 287.200.4(3) if the employer has gone about "insuring their liability" for these benefits. There is no other qualifying language – nothing in the statute indicates when this insurance policy must have been purchased, what time period it must cover, or the triggering events for coverage.

A strict construction of a statute must give full effect to both the language's plain meaning and, if possible, the legislature's intent. *See Honer v. Treasurer of State*, 192 S.W.3d 526, 529 (Mo. App. E.D. 2006) (holding that the "[w]orker's compensation law is entirely statutory, and when interpreting the law, we ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and, if possible, give effect to that intent."). The only reasonable inference that may be drawn under strict construction, without otherwise making presumptions not clearly expressed in the statute, is that an employer has gone about "insuring their liability" if an insurance policy exists which can be read to cover such liability. It such a policy exists, then by the plain language of the statute the employer is deemed to have "elected to accept mesothelioma

liability under [Section 287.200.4(3)]" and its insurer is liable for payment of the benefits enumerated therein.

Since 1965, appellate cases interpreting the Missouri Workers' Compensation Law held that an insurer who provides coverage at the time of the employee's last exposure to the hazard of the occupational disease is liable for benefits. *See, e.g.*, *Enyard v. Consolidated Underwriters*, 390 S.W.2d 417, 429 (Mo. App. St.L. 1965); and *Tunstill v. Eagle Sheet Metal Works*, 870 S.W.2d 264 (Mo. App. S.D. 1994). The law required that these insurance policies be written to provide coverage if the last exposure occurred during the policy period, as "[e]very policy of insurance against liability under this chapter shall be in accordance with the provisions of this chapter." § Section 287.310.1. Thus, "the act becomes a part of any insurance policy which is written, and itself determines the scope of the insurer's undertaking in any matter involving the claim of an injured employee." *See Allen v. Raftery*, 174 S.W.2d 345, 350 (Mo. App. 1943). As a result, insurance policies were written to provide coverage if the last exposure occurred during the policy period. *See, e.g.*, *Bollmann v. Certain-Teed Products Corp.*, 651 S.W.2d 613, 614-616 (Mo. App. E.D. 1983) (insurance policy stated that "'[t]his policy applies only to injury . . . by disease caused or aggravated by exposure of which the last day of the last exposure in the employment of the insured, to conditions causing the disease occurs during the policy period.'").

Furthermore, these policies were written to insure all benefits if the last exposure occurred during the policy period. "Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure their entire liability under the

workers' compensation law." § 287.280.1. Appellate courts have long construed this language to mean that "when an insurer undertakes to insure the liability of a particular employer under the act, such insurer must not only agree to accept 'all' of the provisions of the act, but must be held to insure the employer's 'entire liability thereunder.'" *Allen*, 174 S.W.2d at 350.

Because these policies must have been written to provide coverage for an occupational disease such as mesothelioma as long as the last exposure occurred during the policy period, and because they must have been written to cover all benefits, they provide coverage for the enhanced benefits enumerated in Section 287.200.4(3). Notably, unlike the Workers' Compensation Act itself, the terms of insurance policies are liberally construed in favor of providing coverage. *See Haulers Ins. Co. v. Pounds*, 272 S.W.3d 902, 905 (Mo. App. S.D. 2008) (holding that "an insurance policy is a contract to afford protection to an insured and will be interpreted, if reasonably possible, to provide coverage.") (internal citations omitted). It is undoubtedly "reasonably possible" to interpret policies in place at the time of the employee's last exposure as providing coverage for the enhanced benefits, because these policies purport to cover the employer's "entire" liability if and when a compensable occupational disease arises.

The analysis boils down to two steps. First, a strict construction of the statute indicates that an employer has elected to accept mesothelioma liability under Section 287.200.4(3) as long as any solvent policy exists that can be read to "insure" this liability, regardless of when the policy was purchased or the specific timeframe it covers. Second, a liberal construction of these pre-existing insurance policies indicates that they provide

coverage for the enhanced benefits because they purport to cover the employer's "entire liability" as long as the last exposure occurred during the policy period, and the subset of mesothelioma benefits enumerated in Section 287.200.4(3) logically falls under the greater umbrella of "entire."[2]

Although the Commission considered it "obvious" that an insurance policy in 1990 could not provide coverage for increased benefits, this does not find support in either a strict construction of the 2014 amendments, in Missouri precedent or in persuasive case law from across the country. L.F. 51-52. It is hardly obvious to find that an insurance policy which openly purports to provide coverage for all benefits does not actually provide coverage for all benefits. Furthermore, insurance policies or self-insurers covering the timeframe of last exposure have routinely provided coverage for increased or new benefits that did not exist at the time of last exposure.[3] Missouri law – as well as

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[2] The plain meaning of "entire" is "having no element or part left out." *See* Merriam-Webster Online Dictionary.

[3] *See McGhee*, 312 S.W.3d at 451 (holding that higher benefit amount allowed at the time of asbestosis diagnosis applied rather than lower amount capped by benefit ceiling in place at time of last exposure); *Shifflett v. Powhattan Mining Co.*, 442 A.2d 980, 982 (Md. 1982) (holding that statutory benefit ceiling of $45,000 at time of asbestosis diagnosis applied rather than $20,000 ceiling at time of last exposure, and that "[t]he general rule is that benefit increases are not retroactive and that the benefit level in effect at the time of injury controls."); *Henderson v. RSI, Inc.*, 824 P.2d 91, 96-97 (Co. App. 5th

case law from all across the country – recognizes that the benefit level in effect at the time of the disability or diagnosis controls, that benefit increases are not retroactive, and that insurance policies and self-insurers from the time of last exposure are liable to pay these increased benefits. The fact that the January 2014 amendments were not in effect when these policies were written is immaterial, because a policy does not provide any benefits until a claim accrues when the employee suffers an injury by occupational disease. "[I]t is a well-established principle that the law in effect on the date of the injury governs a claim under the Workers' Compensation Law." *Pavia v. Smitty's Supermarket*, 366 S.W.3d 542, 549 (Mo. App. S.D. 2012).

Although it is unclear, the Commission may have reached its conclusion on the basis that the words "elect" and "accept" required some type of affirmative act on the part of the employer once Section 287.200.4(3) went into effect. However, the phrase "elect to accept" was defined to comprise three scenarios, one of which is simply where the

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Div. 1991) (holding that maximum wage rate in effect at time of asbestos-related lung cancer diagnosis governs, not rate in place at time of last exposure); and *Liberty Mut. Ins. Co. v. Starnes*, 563 S.W.2d 178 (Tenn. 1978) (holding that higher benefit rates in effect at time of asbestosis diagnosis applied over rates in place at time of last exposure, and that "[w]hile it is true that an employer's potential liability for the future disability of a former employee increases upon an increase in the benefit rates, the resulting uncertainty in the employer's potential exposure is no different from that resulting from the possibility of an increase in the benefits payable to a current employee.").

employer has gone about "insuring their liability." If this criterion has been met, then the employer has automatically "elected to accept" by the plain language of the statute. To the extent the words "elect" and "accept" have meanings that conflict with this clearly delineated criterion, those additional meanings are of no consequence. "[W]hen the legislature construes its own language by providing definitions, that construction supersedes the commonly accepted dictionary or judicial definition, and it is binding on the courts." *Ivie v. Smith*, 439 S.W.3d 189, 203 (Mo. banc 2014). Nothing about the distinct phrase "insuring their liability" requires any affirmative act on the part of employers. Having a pre-existing policy "insuring their liability" satisfies this criterion just as surely as purchasing a new policy "insuring their liability" does.

By their own terms, pre-existing Missouri workers' compensation policies provide coverage for an employer's entire liability if the last exposure occurs during the policy period, which logically includes a subset of liability under Section 287.200.4(3). Thus, even if an employer no longer exists, the employer is still deemed to have "elected to accept" mesothelioma liability as long as the employer is insured by a solvent policy covering the time of last exposure. Under a strict construction of the January 2014 amendments, a pre-existing insurance policy covering the timeframe of the employee's last exposure provides coverage for the enhanced benefits.

D. Multiple Insurers May Provide Coverage For The Enhanced Benefits In Mesothelioma Claims

None of the above is to say the Commission reached an erroneous result in its underlying decision. Neither prior case law nor Section 287.063.2 in conjunction with

Section 287.030.2 applies to affix sole liability for the enhanced benefits in Section 287.200.4(3) with the insurer at the time of last exposure. As the Commission appropriately noted, "none of the reported decisions are, strictly speaking, applicable to any discussion of successive insurer liability in the specific context of the enhanced mesothelioma benefit under § 287.200.4(3), because this legislation simply did not exist when those decisions were rendered . . . § 287.200.4(3) does not provide specific guidance for resolving the issue of successive insurer liability[.]" L.F. at 51.

In the absence of any "specific" guidance, a strict construction cannot presume what is not expressed. *Lewis*, 435 S.W.3d at 154-155. The statute does not expressly assign liability with any particular insurer, and it therefore cannot be presumed that the legislature only intended to allow coverage from one particular insurer who covers one specific time period. The broad and open-ended nature of the new phrase "insuring their liability" breaks with prior case law and Section 287.063.2 in conjunction with Section 287.030.2 to provide an employer with multiple ways of insuring these benefits.

One way an employer may go about "insuring their liability" is to actively purchase a new insurance policy at a higher premium that provides coverage. However, another way an employer may go about "insuring their liability" is the very act of having a viable pre-existing insurance policy that provides coverage for the employer's entire liability if the last exposure to the hazard occurred during the policy period. The notion that multiple insurers may provide coverage for a single injury is not a foreign concept. Health insurers routinely provide primary, secondary or overlapping levels of coverage

for an insured, and the workers' compensation law already envisions a system of primary and secondary liability between employers and insurers. § 287.300.

E. The Overall Statutory Structure of Section 287.200.4 Strongly Suggests Insurance Policies From The Time Of Last Exposure Provide Coverage

The treatment of claims for the other "occupational diseases due to toxic exposure" besides mesothelioma provides additional support for this interpretation. Section 287.200.4(2) grants increased benefits for occupational diseases due to toxic exposure such as asbestosis,[4] although the benefit increase is far less than that provided for mesothelioma. Unlike Section 287.200.4(3), this subsection makes no reference to insurance coverage. Accordingly, because a strict construction cannot presume what is not expressed, Section 287.200.4(2) does not modify any pre-existing law regarding insurance coverage and is still governed by case law establishing that the insurer at the time of last exposure is liable to pay benefits. *Enyard*, 390 S.W.2d at 429; and *Tunstill*, 870 S.W.2d at 272.

Thus, in cases involving the less severe and non-malignant disease of asbestosis, pre-existing insurance policies covering the time of the employee's last exposure will be liable to pay increased benefits regardless of whether the employer still exists. If policies at the time of last exposure cannot similarly provide coverage for the enhanced mesothelioma benefits, it would lead to an odd paradox. Why would the legislature have allowed employees diagnosed with asbestosis to recover increased benefits regardless of

[4] Asbestosis is included in the definition of "occupational disease due to toxic exposure." § Section 287.020.11.

whether the employer still exists, but neglect to create that same safeguard for employees diagnosed with the more severe and malignant disease of mesothelioma? Such an outcome cannot comport with the legislature's intent. *See Honer*, 192 S.W.3d at 529 (noting that "[t]he law favors a statutory interpretation that tends to avert an unreasonable result.").

The legislature provided a much larger enhanced benefit for mesothelioma claims compared to the other occupational diseases due to toxic exposure, indicating that it intended to provide even greater coverage for mesothelioma victims.[5] By providing that an employer elects to accept the benefits in Section 287.200.4(3) through "insuring their liability", the legislature broke from prior case law affixing sole liability with the insurer at the time of last exposure. It extended maximum coverage to the broadest class of employees suffering from mesothelioma by granting currently existing employers the option of purchasing new insurance to cover these benefits as well. The "elect to accept" framework was meant to expand insurance coverage for mesothelioma claims relative to the lesser occupational diseases due to toxic exposure, not to restrict coverage to the

[5] The statute also envisions a set-off for asbestosis victims who recover benefits and are later diagnosed with mesothelioma. § 287.200.5. If insurance policies in place at the time of last exposure cannot provide coverage for enhanced benefits in mesothelioma cases, this provision would have little to no import as most employees would only be able to recover for asbestosis in the first place.

relatively small number of cases in which the employer of last exposure happens to still exist after some 30-40 years.

The legislature – which is "presumed to be aware of the state of the law at the time it enacts a statute" – did this because it knew policies covering the time of last exposure provide full coverage for benefits and it foresaw fact patterns in which these policies would be lost or insolvent, which is exactly what occurred in the present case. *See Robertson v. State*, 392 S.W.3d 1, 6 (Mo. App. W.D. 2012) (internal citations omitted). This precaution is not surprising given the extraordinarily long latency period between asbestos exposure and mesothelioma. Rather than craft the statute to impose direct workers' compensation liability upon currently existing employers in these situations (as would presumably occur in asbestosis cases), the legislature gave employers in mesothelioma cases the option of purchasing new insurance to cover these heightened benefits and therefore avoid paying them directly. Alternatively, it gave employers in these situations the further option of facing civil liability if the employer believes the risk of disease is small and they do not wish to purchase a new policy at a higher premium. In this manner, the legislature ensured that the maximum number of employees affected by the most severe occupational disease of mesothelioma would almost always have a remedy and that employers would have maximum flexibility.

The Commission's statement that insurance policies covering the time of an employee's last exposure cannot provide coverage for the enhanced benefits was unnecessary. There was no solvent insurer at the time of last exposure in this case and the Commission was not asked to decide whether such an insurer could have been held

liable. While the Commission correctly determined that Accident Fund held liability for the enhanced benefits, this erroneous *dicta* will undoubtedly be cited in future mesothelioma cases in an attempt to preclude workers from recovering when their employer no longer exists. For the foregoing reasons, the Commission's *dicta* should be addressed and rebuked.

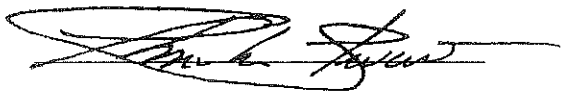
CONCLUSION

Mesothelioma is undoubtedly one of the most deadly, devastating and painful occupational diseases in the world. It is always terminal. It stalks its victims through the decades; often revealing itself only after the employee has reached the long awaited goal of retirement. Missouri Worker's Compensation law has long recognized it was the insurance policy that was in place when the employee was last exposed to asbestos dust on the job that covered the loss for this disease. This is true even if the loss occurred 30 or 40 years after the employee was last exposed. Given the latency period of mesothelioma, many employers may no longer be in existence at the time the disease manifests itself. However the policy of insurance which covered the employee when last exposed often is still in existence to compensate the claim. It was with this knowledge, of both the disease and the statutory and case law, that Section 287.200.4 was enacted.

Everything about Section 287.200.4; its plain and unambiguous language, the way it deals with "lesser" occupational diseases (e.g. asbestos), the clear intent of the legislature to provide additional compensation for the victims of this deadly disease, leads to one conclusion — the courts must read the new act to find coverage for

mesothelioma victims. In the event the employer's insurance company of last exposure is no longer in existence (or if they had no insurance to begin with), the new act allows the employer an option to purchase new insurance. However, when there is an insurance policy in existence that covers the last exposure, the employer has "insured their liability" for the mesothelioma claim per the statutory requirements. There is nothing unusual about the system established by the legislature in Section 287.200.4; it would be strange, and indeed tragic for many hundreds of workers, if the new act were to be read in such a way to deny coverage for this insidious disease.

Amicus Curiae respectively pray this Honorable Court to uphold the award to Appellant/Respondent Dolores Murphy. In addition *Amicus Curiae*, as *friend of the court,* seeks to advise the Court of the additional fact patterns that will present themselves in Worker's Compensation/mesothelioma claims across the state — namely claims where the employer was out of business at the time Section 287.200.4 came into effect, but an older policy of insurance survives to cover the loss.



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Certificate of Service

The undersigned hereby certifies that on September 5, 2017, the foregoing documents were filed with the clerk of the court by using the Missouri E-Filing system, which will send a notice of electronic filing to all counsel of record including but not limited to:

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CERTIFICATE OF COMPLIANCE

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 4,507, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate.

The brief was prepared in Microsoft Word and filed electronically with the Court of Appeals.

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