IN THE MISSOURI SUPREME COURT

VINCENT HEGGER (DECEASED), et al.,	)	
	)	
	)	
APPELLANTS,	)	
	)	No. SC97993
VS.	)	
	)	
VALLEY FARM DAIRY COMPANY, et al.,	)	
	)	
RESPONDENTS.	)	

ON APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION
AND TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

JOINT SUBSTITUTE BRIEF OF RESPONDENTS AMERISURE INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, AND VALLEY FARM DAIRY COMPANY

T. Michael Ward, # 32816
Elaine M. Moss, #44674
BROWN & JAMES, P.C.
800 Market Street, Suite 1100
St. Louis, Missouri 63101-2501
(314) 421-3400
(314) 421-3128 – Facsimile
mward@bjpc.com
emoss@bjpc.com

Attorneys for Respondent
Amerisure Insurance Company

Christopher T. Archer, #37692
ARCHER & LASSA, LLC
906 Olive Street, Suite 420
St. Louis, Missouri 63101
314-241-2481 – Phone
314-241-1145 – Facsimile
chris@askarcher.com

Attorneys for Respondents
Valley Farm Dairy Company and
Amerisure Insurance Company

Jaudon R. Godsey, #48693
MORROW, WILLNAUER,
CHURCH, LLC
500 N. Broadway, Suite 1500
St. Louis, Missouri 63102
314-282-9800 – Phone
314-875-9215 – Facsimile
jgodsey@mwcattorneys.com

Attorneys for Respondent
The Travelers Indemnity
Company

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STATEMENT OF FACTS

Respondent-Insurer Amerisure Insurance Company, Respondent-Insurer The Travelers Indemnity Company, and Respondent-Employer Valley Farm Dairy Company generally agree with the Statement of Facts provided by Appellant. They also provide the following additional Statement of Facts.

Employee Vincent Hegger was exposed to asbestos while working at Valley Farm Dairy Company ("Employer"). He was last employed by Employer sometime in 1984. (T. 56, 62-63, 86.)

After 1984, Employee worked at Care Unit Hospital, technically working for two separate employers at that same location and facility. (T. 13, 19.). There is no evidence that he was exposed to asbestos at that location. (T. 14.)

The parties stipulated that Employee was diagnosed with mesothelioma on March 19, 2014, and passed away from mesothelioma on June 7, 2015. (T. 56, 68-69.) They also stipulated that Employer ceased to exist in 1998. (T. 3, 56.)

At the time of death, Employee was not married. He was survived by his natural adult children, including Steven Hegger. (T. 3.)

Before his death, Employee filed his Claim for Compensation on March 3, 2015. (L.F. 1.) After his death, an amended claim substituting his son, Steven Hegger, as the claimant was filed on August 27, 2015.[1] (L.F. 11-13.) For his claim, Employee seeks solely

[1] In Respondents' Brief, for simplicity of reference, the claimant, Steven Hegger, shall be referred to as "Employee."

the enhanced mesothelioma benefits provided by MO. REV. STAT. § 287.400.4(3) (2016). (T. 56.) No other recovery under the Workers' Compensation Act has been claimed. (T. 4.)

The parties stipulated that Amerisure Insurance Company provided workers' compensation insurance coverage for Employer from October 17, 1983, to October 17, 1984, and that The Travelers Indemnity Company provided the coverage from October 17, 1984, to October 17, 1985. (T. 4.) As noted by Employee in his Statement of Facts, the Labor and Industrial Relations Commission made no finding as to which of Employer's insurers, Amerisure or Travelers, provided coverage in 1984 at the time Employee last worked for Employer. (Appellant's Brief at 10.)

POINTS RELIED ON

I. The Commission did not err in entering its final award denying compensation because the Commission acted within its authority in concluding that the Employer at last exposure, Valley Farm Dairy Company, did not, and could not, elect to accept liability for the enhanced mesothelioma benefits under MO. REV. STAT. § 287.200.4(3), in that the Employer had ceased existence in 1998, sixteen years before Section 287.200.4(3) went into effect on January 1, 2014, and the insurance policies issued by Employer's insurers, Amerisure Insurance Company and The Travelers Indemnity Company, were issued in 1983 and 1984, respectively, and were not, and could not have been, written to satisfy the election requirement of Section 287.200.4(3) or provide coverage for the optional mesothelioma benefits that were first available for claims filed on or after January 1, 2014, thirty years later.

Accident Fund Ins. Co. v. Casey, 550 S.W.3d 76 (Mo. banc 2018)

Desai v. Seneca Specialty Ins. Co., 2019 WL 2588572 (Mo. banc June 25, 2019)

Selvey v. Robertson, 468 S.W.2d 212 (Mo. App. 1971)

Miller v. Municipal Theatre Ass'n of St. Louis, 540 S.W.2d 899 (Mo. App. 1976)

MO. CONST., art. I, Section 13

MO. REV. STAT. § 287.200.4(3) (2016)

II. The Commission did not err in entering its final award denying compensation because the Commission acted within its authority in concluding the election requirement for acceptance by employers of liability for the enhanced mesothelioma benefits under MO. REV. STAT. § 287.200.4(3) was not met in this case, in that it is undisputed that the Employer had ceased existence in 1998, sixteen years before Section 287.200.4(3) went into effect on January 1, 2014, and, thus, the Employer did not, and could not, satisfy the statute's mandatory notice requirement, which must be satisfied to establish the election to accept mesothelioma liability under the statute.

Accident Fund Ins. Co. v. Casey, 550 S.W.3d 76 (Mo. banc 2018)

Kansas City v. City of Raytown, 421 S.W.2d 504 (Mo. 1967)

Borrson v. Missouri-Kansas-Texas R. Co., 172 S.W.2d 835 (Mo. 1943)

Brown v. City of St. Louis, 842 S.W.2d 163 (Mo. App. E.D. 1992)

MO. REV. STAT. § 287.200.4(3) (2016)

MO. REV. STAT. § 287.808

STANDARD OF REVIEW

The Court's review of the Commission's final award is governed by Article V, Section 18 of the Missouri Constitution, MO. REV. STAT. § 287.490 (2016), and MO. REV. STAT. § 287.495 (2016). The Court reviews only questions of law and may modify, reverse, remand, or set aside the final award 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) there was insufficient competent evidence in the record to warrant the award. Section 287.495.1.

The Court's review focuses on the Commission's findings. *Clayton v. Langco Tool & Plastics, Inc.*, 221 S.W.3d 490, 491 (Mo. App. S.D. 2007). When the Commission's final award incorporates the Administrative Law Judge's decision, the Court deems the Commission's findings and conclusions to include the Administrative Law Judge's award. *Id.*

The Court reviews questions of law, including the Commission's interpretation of the Workers' Compensation Law, *de novo*. *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 67 (Mo. banc 2018). 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. W.D. 2008).

ARGUMENT

I. The Commission did not err in entering its final award denying compensation because the Commission acted within its authority in concluding that the Employer at last exposure, Valley Farm Dairy Company, did not, and could not, elect to accept liability for the enhanced mesothelioma benefits under MO. REV. STAT. § 287.200.4(3), in that the Employer had ceased existence in 1998, sixteen years before Section 287.200.4(3) went into effect on January 1, 2014, and the insurance policies issued by Employer's insurers, Amerisure Insurance Company and The Travelers Indemnity Company, were issued in 1983 and 1984, respectively, and were not, and could not have been, written to satisfy the election requirement of Section 287.200.4(3) or provide coverage for the optional mesothelioma benefits that were first available for claims filed on or after January 1, 2014, thirty years later.

A. Introduction

Employee challenges the Commission's final award denying compensation under MO. REV. STAT. § 287.200.4(3) (2016)[2] for optional enhanced mesothelioma benefits. Employer argues that a strict construction of Section 287.200.4(3) compels the conclusion that the Employer satisfied the election requirement under the statute for liability for these benefits by procuring insurance coverage for its workers' compensation liability at the time of Employee's last exposure in 1984, thirty years before the statute's enactment. Employee

[2] Throughout this brief, statutory references shall be to the 2016 edition of the Revised Statutes of Missouri, unless otherwise specified.

so explains because "insuring liability" is one of the statutorily defined ways an employer may "elect to accept" liability for enhanced mesothelioma benefits under the statute. Therefore, Employee argues Employer was not required, on or after January 1, 2014, to take affirmative action to elect to accept liability for the enhanced mesothelioma benefits or procure new insurance coverage to satisfy the election requirement because the Employer had insurance in 1984 that covered its workers' compensation liability at Employee's last exposure.

Employee claims his interpretation is compelled by a strict construction of Section 287.200.4(3). It is not. The statute's plain language does not support his argument. The statute requires an express election – an affirmative choice – by Employer to accept optional mesothelioma liability under the statute by, *inter alia*, procuring insurance for the liability. In this case, an election by Employer was an impossibility because Employer was long defunct before the statute's enactment.

When Employee's argument is shorn of his erroneous recourse to the canons of construction, his appeal reveals itself to be nothing more than an impermissible attempt to rewrite the statute to engraft a retrospective "default" exception to Section 287.200.4(3) to provide enhanced mesothelioma benefits when the employer is defunct and cannot make the requisite election, so long as the employer had workers' compensation insurance at the time of the employee's last exposure to asbestos. Examination of his argument demonstrates it rests on a series of impossibilities, namely, the Employer prospectively elected optional mesothelioma liability to ensure its exclusive jurisdiction protection under Chapter 287 when it procured its workers' compensation insurance coverage in effect at

Employee's last exposure in 1984 to prevent potential civil liability at common law that did not exist in 1984 – and which arguably did not arise until the 2005 amendments to Chapter 287 – and, thus, accepted liability for the payment of optional mesothelioma benefits that were only first available on or after January 1, 2014, without meeting any of the statute's express election requirements, which Employer could not meet because the benefits and election requirements did not exist in 1984 and Employer did not exist in 2014 when these benefits did become available.

The Commission did not err in rejecting Employee's claim. Employee's argument cannot survive Section 287.200.3(4)'s plain language, the statute's strict construction, the Supreme Court's decision in *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018), and the undisputed facts. Therefore, the Commission's final award should be affirmed.

B. The Plain and Unambiguous Language of Section 287.200.4(3): The Employer must choose to accept mesothelioma liability under the statute and procure insurance that expressly covers the optional benefits.

Employee has brought a claim for enhanced mesothelioma benefits under Section 287.200.4(3). He has the burden to prove entitlement to the enhanced benefits under the statute. MO. REV. STAT. § 287.808. (RA43) He must prove all necessary elements of his claim. *Brown v. City of St. Louis*, 842 S.W.2d 163, 166 (Mo. App. E.D. 1992). His burden extends to showing the Employer is subject to liability for the benefits under the statute. *Id.*; *see also MaCaleb v. Greer*, 267 S.W.2d 54, 59 (Mo. 1954).

Here, Employee did not, and cannot sustain, his burden. Under no circumstances can he show the Employer made the requisite election under the statute to accept liability for optional mesothelioma benefits.

On appeal, Employee attempts to rewrite his burden of proof contrary to Section 287.200.4(3)'s terms by eliminating the statute's requirement that employers must elect to accept mesothelioma liability under the statute. Instead of showing the election requirement was met, Employee claims no election accepting mesothelioma liability under the statute was required of his Employer because the Employer had maintained workers' compensation insurance at the time of his last exposure to asbestos in 1984, thirty years before the statute took effect on January 1, 2014. Employee's argument is defeated by the statute's plain and unambiguous language, without recourse to the rules of construction or any other judicial aids.

When the legislature's intent is clear and unambiguous, based on a statute's plain and ordinary meaning, the Court is bound by that intent and cannot resort to any statutory construction in interpreting the statute. *Howard v. City of Kansas City*, 332 S.W.3d 772, 787 (Mo. banc 2011). Here, Section 287.200.4(3) is written in such a manner. The statute, by its terms, permits only one reasonable interpretation, namely, an employer must affirmatively elect to accept optional liability for enhanced mesothelioma benefits under the statute.

Consider the statute's terms. Section 287.200.4(3) states:

> 4. For all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total

disability or death, benefits in this chapter shall be provided as follows:

* * *

(3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:

(a) *For employers that have elected to accept mesothelioma liability under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer* or group of employers such employer is a member of. *Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool.* A group of employers may enter into an agreement to pool their liabilities under this subsection. If such group is joined, individual members shall not be required to qualify as individual self-insurers. Such group shall comply with section 287.223. *In order for an employer to make such an election, the employer shall provide the department with notice of such an election in a manner established by the department.* The provisions of this paragraph shall expire on December 31, 2038; or

(b) *For employers who reject mesothelioma under this subsection, then the exclusive remedy provisions under section 287.120 shall not apply to such liability*. The provisions of this paragraph shall expire on December 31, 2038. (Emphasis added.) (RA19)

Section 287.200.4(3) demonstrates there can be no enhanced mesothelioma liability absent an election by the employer to accept mesothelioma liability in the manner prescribed by the statute. The statute, in plain and unambiguous language, provides for mesothelioma liability under the following terms:

First, the statute provides enhanced compensation for individuals diagnosed with mesothelioma for all workers' compensation claims filed on or after January 1, 2014.

Second, the employee's right to recover the enhanced mesothelioma benefits requires an election by the employee's employer to accept mesothelioma liability under the statute. The benefits are optional. Employers may either accept or reject liability for them.

Third, the statute prescribes three methods by which an employer may elect to accept optional mesothelioma liability. Employers may make the requisite election: (1) by insuring their liability for enhanced mesothelioma benefits; (2) by qualifying as a self-insurer; or (3) by becoming a member of a group insurance pool.

Fourth, to make the requisite election, the employer must provide the Department of Labor and Industrial Relations with notice of the employer's election to accept mesothelioma liability in a manner established by the Department.

Section 287.200.4(3)'s plain and unambiguous terms demonstrate the Commission's final award denying enhanced mesothelioma benefits under the statute should be affirmed. Employee did not, and could not, sustain his burden to establish entitlement to the benefits. His claim fails for want of an employer election under the statute. It is undisputed that the Employer did not make the requisite election under the statute to accept liability for the optional mesothelioma benefits authorized by the statute. In this case, the Employer ceased existence in 1998, sixteen years before the statute's enactment. (T. 3, 56.) Therefore, since the Employer did not, and could not, elect to accept mesothelioma liability under the statute, the Commission did not err in denying

Employee's claim for enhanced mesothelioma benefits. Section 287.200.4(3)'s terms and the undisputed facts permit no other conclusion.

C. The Court's *Casey* decision demonstrates the Employer must make an affirmative decision to accept mesothelioma liability under Section 287.200.4(3) and purchase insurance coverage for its optional liability under the statute.

Employee cites the Court's decision in *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018), to support his argument that the Employer's insurance coverage at his last exposure satisfies the Employer's election requirement to accept mesothelioma liability under Section 287.200.4(3) because the Employer's coverage must insure its "entire liability" under Chapter 287. Employee's argument does not advance his appeal. The Court's decision in *Casey* cannot be read to support Section 287.200.4(3)'s application in the absence of an express election by the employer to accept mesothelioma liability and the employer's express procurement of insurance to provide coverage for these optional enhanced benefits.

The Court, in *Casey*, held the Accident Fund policy provided coverage for the employer's liability for enhanced mesothelioma benefits because the employee's claim was filed after the statute's effective date, the employer had elected to accept mesothelioma liability under the statute, and the employer had purchased the Accident Fund policy, "a policy that explicitly contemplated enhanced compensation for mesothelioma claims," to cover the employer's decision to accept liability for the new optional mesothelioma benefits. 550 S.W.3d at 80. The Accident Fund policy included an endorsement entitled, "Mesothelioma Notification of Additional Benefits Endorsement," which added coverage

to the employer's policy for mesothelioma liability under Section 287.200.4(3). *Id.* at 79. The endorsement, as recited by the Court, provided as follows:

> 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.

Id.

This endorsement, known as Form WC 24 03 02, is the form approved by the Missouri Department of Commerce and Insurance ("DCI") to provide insurance coverage for an employer's election to accept mesothelioma liability under Section 287.200.4(3). *See* insurance.mo.gov./insurance/wc/documents/04-MO-2013.

The Court's decision in *Casey* defeats Employee's argument. There, the Court made plain that absent an express election by the employer to accept liability for enhanced mesothelioma benefits and the employer's purchase of insurance to cover its liability for these optional benefits, Section 287.200.4(3) has no application. In no way can the Court's decision be read to subject an employer to optional mesothelioma liability under the statute when the employer never made an election, much less when the employer could never make the election because the employer was long defunct before the statute's enactment in 2014. Nor can the Court's decision be read to subject insurers to liability under the statute whose policies were issued decades before the statute's enactment and which never assumed the risk of providing coverage for the optional mesothelioma benefits in the manner prescribed by the Department of Labor and Industrial Relations or on a form

approved by the DCI to cover the new optional liability, much less charge a premium for this new and significant liability.

The fact that the Employer maintained insurance coverage at the time of Employee's last exposure in 1984 is of no import under *Casey*. Employer's available insurance coverage in 1984 is irrelevant to the calculus of coverage for optional mesothelioma benefits under Section 287.200.4(3). The Court's decision shows that the statute requires action by the employer through an express election to accept liability under the statute and the express procurement of insurance coverage to cover that liability. These steps cannot happen by default. They cannot occur retrospectively. The Court emphasized that Section 287.200.4(3) is not a retrospective law and cannot create new duties or obligations for past transactions or give past transactions a new legal effect. 550 S.W.3d at 82.

The Court's treatment of the Accident Fund policy so shows. The Accident Fund policy was issued after January 1, 2014. The employee's last exposure to asbestos occurred in 1990. For coverage purposes, the Court rejected Accident Fund's argument that the relevant time for determining insurance coverage for benefits under Section 287.200.4(3) was the time of the employee's last exposure. The Court explained:

> The relevant inquiry in this matter is not under whose employment [the employee] was last exposed, but whether the terms of Employer's policy provide coverage. The answer is clear. [Accident Fund] provided coverage to Employer by expressly adopting Section 287.200.4 into its endorsement.

Casey, 550 S.W.3d at 81.[3]

[3] The Court's decision in *Casey* did not change the longstanding Last Exposure Rule that governs an employer's liability for occupational disease cases generally. The Court's decision only addresses the liability for the enhanced mesothelioma benefits under Section

Here, Employer had no insurance providing coverage for optional mesothelioma liability under Section 287.200.4(3). Employer's insurance coverage at Employee's last exposure did not, and could not, provide coverage for this liability because the liability did not exist at the time.

Restated, the Court's decision in *Casey* forecloses subjecting a long-defunct employer and its insurers to liability for optional mesothelioma benefits under Section 287.200.4(3) absent the requisite election and insurance coverage mandated by the statute. In no way can the Court's decision be read to authorize an exception to the election requirement applicable to defunct employers based on their past procurement of insurance, insurance that was never expressly written – in contrast to the Accident Fund policy in *Casey* – to provide coverage for the optional benefits following an employer's election to accept mesothelioma liability under the statute. The *Casey* decision permits no other conclusion.

Indeed, Employee's argument, which subjects insurers on the risk at Employee's last exposure, directly conflicts with the Court's decision in *Casey* and the statute's plain language. The statute makes no reference to the Last Exposure Rule and contains no language placing liability for these benefits on the insurers on the risk at last exposure.

Clearly, the legislature did not intend such a result in the absence of any language in the statute supporting such an interpretation. Employee's argument also leads to absurd

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287.200.4(3), an optional remedy that first became available on January 1, 2014, one that requires the employer's election to accept liability for the benefits and the employer's purchase of insurance coverage specifically for the new liability, which the Court held could not be imposed retrospectively. 550 S.W.3d at 82.

results. There will be cases in which the employer had insurance at last exposure and also under a policy with the required mesothelioma endorsement at the time a claim for enhanced mesothelioma benefits is made. In such a case, which insurer provides coverage for the employer's optional mesothelioma liability – the insurer, at last exposure, per Employee's argument, or the insurer with the requisite endorsement, per the *Casey* decision and the statute's plain language? Clearly, the latter; the former has no support in the statute or the *Casey* decision, which places liability on the employer's insurer at the time the claim for the enhanced benefits is made.

D. Strict construction of Section 287.200.4(3) confirms the conclusion that Employee's claim for enhanced mesothelioma benefits fails for want of an employer election under the statute.

Employee's recourse to the rules of statutory construction to support his appeal does not compel a different conclusion. Employee claims strict construction of Section 287.200.4(3) shows no election was required to establish his right to optional mesothelioma benefits under the statute because his Employer had insurance at the time of his last exposure in 1984. He explains that "insuring liability" is one of the three statutorily defined ways an employer may "elect to accept" mesothelioma liability. Therefore, he claims no election was required because Employer, by insuring its workers' compensation liability in 1984, "elected to accept" liability for the optional mesothelioma benefits that first became available in 2014. Employee's argument should be denied.

Employee's argument cannot be reconciled with the legislature's intent, as expressed by the statute's plain language. Absent in Section 287.200.4(3) is any language supporting Employee's argument under the canons of construction. The statute contains no

language providing that an employer who maintained workers' compensation insurance before the statute's enactment in 2014 would be automatically protected from civil liability under MO. REV. STAT. § 287.120 because the employer would be deemed automatically to have elected to accept liability under the statute for optional mesothelioma benefits under the statute based on the employer's past procurement of insurance.

The canons of construction, when strictly applied to Section 287.200.4(3), do not save Employee's claim. They cannot be employed to eliminate the election requirement for the enhanced mesothelioma benefits that first became law in January 2014. Contrary to Employee's argument, the statute cannot be interpreted to eliminate the election requirement based on the Employer's antecedent conduct in maintaining workers' compensation insurance in 1984, at Employee's last exposure. Absent is any language in the statute imposing liability for enhanced mesothelioma benefits on employers who maintained insurance in the past, but not at the time the new law took effect in 2014, and who never made, and who could never make, a decision to accept liability for those benefits.

On appeal, the Court construes Section 287.200.4 strictly. In 2005, the legislature mandated "strict construction of the Workers' Compensation Law. MO. REV. STAT. § 287.800.1. (RA41) The canon of strict construction presumes nothing in a legislative enactment that is not expressed. *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 154 (Mo. App. E.D. 2014). Under this canon, the Court cannot add or subtract words from, or ignore the plain meaning of the words employed by, the statute. *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 n.5 (Mo. banc 2018).

Ultimately, when the legislature's intent can be ascertained from the statute's plain and ordinary meaning, the Court is bound to give the statute that construction. *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). This is true regardless of whether strict construction or liberal construction is required. *Dickemann*, 550 S.W.3d at 68 n.5. Absent an express definition in the statute, the Court gives statutory language its plain and ordinary meaning, as typically found in dictionaries. *Id*. at 68. The Court harmonizes all the provisions of a legislative act and must give every clause some meaning. *Id*. Thus, the Court accords meaning to every word, clause, sentence, and section of a statute and necessarily presumes the legislature would never enact a meaningless provision. *Dickemann*, 550 S.W.3d at 158; *State v. Plastec, Inc*., 980 S.W.2d 152, 54-55 (Mo. App. E.D. 1998).

These rules of construction dictate affirmance of the Commission's award. The language under scrutiny in Section 287.200.4(3) follows:

> Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool.

The plain and clear meaning of these terms requires an affirmative act by employers to accept mesothelioma liability under the statute. A retrospective construction – one extending to insurance policies in effect in 1984, at the time of Employee's last exposure to asbestos, without any affirmative undertaking by Employer under the statute – cannot be reconciled with the statute's language.

1. "Elect to Accept Liability"

Consider the plain meaning of the statute's operative terms: "elect to accept."

The term "elect" is a present tense, active voice verb. The term means "to make a selection of" or "to choose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 731 (2002); *see also* THE NEW OXFORD AMERICAN DICTIONARY 9 (2001) (choose, "opt for or choose to do something"). The term "accept" is stated in its infinitive form in the statute. "Accept" is also a present tense, active voice verb. The term means "to receive with consent (something given or offered)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 10 (2002); *see also* THE NEW OXFORD AMERICAN DICTIONARY 9 (2001) ("consent to receive (a thing offered))."

The phrase "elect to accept," under the canons of construction, can be interpreted only one way. The phrase requires an affirmative decision by an employer – a choice – to accept or reject mesothelioma liability under the statute. The statute's language belies Employee's claim that the statutory election can occur without the Employer's affirmative action to accept liability under the statute and rules out the argument that an election can be made by past conduct – in this case conduct over thirty years old – that occurred decades before the election requirement for mesothelioma liability became a matter of Missouri law.

The phrase "elect to accept" also has a long history under the Missouri Workers' Compensation Law in the context of occupational diseases. Missouri's original Workers' Compensation Law did not cover occupational diseases. *Renfro v. Pittsburgh Plate Glass Co.*, 130 S.W.2d 165, 171 (Mo. App. 1939); MO. REV. STAT. § 3305(b) (1929). (RA2) Later, the legislature adopted procedures to afford optional coverage for occupational

diseases. MO. REV. STAT. § 287.020.4 (1949). (RA5) The amendments prescribed a procedure for an employer's election of occupational disease coverage that also included notice of election requirements. *Id.*[4] *See also* MO. REV. STAT. § 287.063 (1959) (prescribing amended procedures for the election of occupational disease coverage under Chapter 287). (RA8-9) Then, in 1974, the legislature eliminated the election requirement and made coverage for occupational diseases mandatory under MO. REV. STAT. § 287.110.2 (1978) (RA11), which remained the law until the 2005 amendments to Chapter 287 opened the door to civil liability for occupational disease cases against employers by removing occupational disease claims from the workers' compensation exclusive remedy provisions. MO. REV. STAT. § 287.120.2 (Cum. Supp. 2007). (RA14) *See State ex rel. KCP&L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 32-37 (Mo. App. W.D. 2011) (J., Welsh, dissenting) (providing a detailed review of the treatment of occupational diseases claims under Chapter 287).

It is the 2005 sea change in the Workers' Compensation Law concerning occupational disease claims that the 2014 enactment of Section 287.200.4(3) addressed by restoring exclusive jurisdiction over mesothelioma claims for which employers had elected to accept mesothelioma liability. Given the historical treatment of occupational disease claims under Chapter 287, the legislature's recourse to an election procedure should come

[4] MO. REV. STAT. § 287.020.4 (1949) stated, in pertinent part, that "nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases, unless the employer shall file with the commission a written notice that he elects to bring himself with respect to occupational disease within the provisions of this chapter and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the commission." (RA5)

as no surprise. Moreover, history makes clear, consistent with the statute's plain meaning and the *Casey* decision, that an election requires affirmative conduct and cannot be accomplished passively.

Other contemporary provisions of Chapter 287 confirm this conclusion. Consider MO. REV. STAT. § 287.090 (RA16), which addresses exempt employers and occupations and which prescribes an election procedure to bring exempt employers and employees within Missouri's workers' compensation laws. Section 287.090.2 provides that an exempt employer "may elect coverage as to the employer or as to the class of employees of that employer . . . by purchasing and accepting a valid workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member," and further providing that "[t]he election shall take effect on the effective date of the workers' compensation policy or endorsement, or by written notice to the group self-insurer. . . ." (RA16) Section 287.090.2, by its terms, demonstrates that the procurement generally of workers' compensation insurance by an employer does not subject the employer to liability for exempt employees in the absence of an affirmative election to provide workers' compensation for them. Restated, under Section 287.090.2, an election requires affirmative conduct by the employer to provide coverage for exempt employees and cannot be satisfied simply by the fact the employer has workers' compensation insurance available for other employees.

The decision in *Selvey v. Robertson*, 468 S.W.2d 212, 216 (Mo. App. 1971), demonstrates that satisfaction of the election requirement under Section 287.090.2 requires an affirmative undertaking. There, the Missouri Court of Appeals held an employee

engaged in farm labor was not entitled to workers' compensation because there was "not a scintilla of evidence" that his employer had elected to bring himself under Chapter 287 in either of the two ways prescribed by MO. REV. STAT. § 287.090.2 (1969), to extend workers' compensation benefits to farm workers, namely, by filing with the Division of Workers' Compensation his notice of election or by purchasing workers' compensation insurance showing an intent to do so.

Similarly, the Court of Appeals' decision in *Miller v. Municipal Theatre Ass'n of St. Louis*, 540 S.W.2d 899, 905 (Mo. App. 1976), makes plain that proof of insurance is not proof of an election required to provide coverage for otherwise exempt employees. There, the Court of Appeals held that the employer's purchase of workers' compensation insurance, standing alone, without any showing that the employer otherwise satisfied the election requirements of Section 287.090, did not constitute an election under the statute. The election requirement under Section 287.200.4(3) is no different.

Finally, the conclusion that an actual choice or other affirmative conduct is required to satisfy the election requirement is confirmed by Section 287.200.4(3) itself, which spells out in subsection 4(3)(b) the consequences to the employer if mesothelioma liability under the statute is rejected, namely, the loss of the exclusive remedy provisions of MO. REV. STAT. § 287.120. The statute makes plain that employers have a clear choice to accept or reject mesothelioma liability. If acceptance were automatic, based on the maintenance of past insurance coverage, as Employee here has argued, then rejection of liability under the statute would be impossible, and Section 287.200.4(3)(b) would have been a useless and meaningless enactment, a conclusion that the Court is foreclosed from making. *Caplinger*

v. Rahman, 529 S.W.3d 326, 332 (Mo. App. S.D. 2017). Restated, the legislature anticipated situations in which there would be no employer election to accept mesothelioma liability under the statute and prescribed the consequence to those employers who decide not to accept liability under the statute.

Employee's argument cannot be reconciled with Section 287.200.4(3)(b). His argument eliminates an employer's express right to reject liability under the statute. Employee does not explain, in the face of his argument for automatic acceptance of liability under the statute, how a defunct employer may exercise its right under the statute to reject liability.

Contrary to Employee's argument, an election under the statute cannot be automatic. It cannot be the product of antecedent conduct unrelated to the statute. Otherwise, the legislature would not have had cause to spell out the consequences when liability is rejected.

2. "By . . . Insuring Their Liability"

The prepositional phrase following the words "elect to accept" confirms that affirmative conduct is required to make an election under the statute. No election may take place without this conduct occurring.

In particular, the phrase prescribes the affirmative conduct that an employer must undertake to "elect to accept" liability for the optional mesothelioma benefits under the statute. The phrase is written in the disjunctive. It gives employers three options to choose from when deciding to accept this optional liability under the statute. Employee's appeal

addresses the first option for satisfying the election requirement, namely, "by . . . insuring their liability."

The word "insuring" is a present participle. In the statute, the word acts as a gerund because it is the object of the preposition "by." Read in context, and construing the statute as a whole, the phrase "by . . . insuring their liability" forecloses any interpretation that the legislature intended that an employer's purchase of insurance policies before January 1, 2014, would automatically satisfy the election requirement. The statute's plain language admits only present and prospective conduct.

Indeed, Employee's argument – one that requires Section 287.200.4(3) to be interpreted to permit past actions to satisfy the statute's election requirement – turns the statute on its head and would require the Court to rewrite this prepositional phrase by adding words and changing the statute's tense. In effect, Employee asks the Court to do what it cannot do. Courts are not empowered to disregard the plain meaning of the words used by the legislature, much less add words under the auspices of statutory construction. *Pittman v. Cook Paper Recycling Corp*., 478 S.W.3d 479, 483 (Mo. App. W.D. 2015); *Peters v. Wady Indus., Inc*., 489 S.W.3d 784, 792 n.6 (Mo. banc 2016).

Under Employee's argument, the statute would read as follows:

> Employers that elect to accept mesothelioma liability under this subsection may do so by either *having insured their liability, by having qualified as a self-insurer, or by having qualified as a member of a group insurance pool*.

However, Section 287.200.4(3) is not written that way. Absent is any language permitting the statute to be read in the manner that Employee proposes. Indeed, the Court in *Casey* rejected the statute's retrospective application. 550 S.W.3d at 82.

3. "Under this Subsection"

Employee's argument is defeated by still other plain language in Section 287.200.4(3). Consider, again, the statute's terms: "Employers that elect to accept mesothelioma liability *under this subsection* may do so by either insuring their liability. . . ." (Emphasis added.) The phrase "under this subsection" demonstrates that only conduct by employers on or after January 1, 2014, can satisfy the election requirement for optional mesothelioma benefits under the statute. Restated, "this subsection" did not exist until January 1, 2014; therefore, no election under "this subsection" could take place before that date.

The phrase "under this section" in a statute has a specific meaning when an enactment containing the phrase is not a mere continuation of the prior law such as Section 287.200.4(3), which changed the law concerning mesothelioma liability under Chapter 287. *Desai v. Seneca Specialty Ins. Co.*, 2019 WL 2588572, *4 (Mo. banc June 25, 2019). The phrase, in such cases, restricts the statute's application exclusively to conduct occurring after the statute's enactment. *Id*. Thus, in *Desai*, the Court – in addressing the legislature's 2017 amendment of Section 537.065 that governs contracts entered "under this section" – held that a contract entered in 2016 fell outside the statute's bounds. *Id*. The Court explained:

> Here, the contract was entered into prior to the amended statute's enactment, so the amended statute does not apply to this case. The [parties] did not enter into a contract under "this section"—because "this section" and its provisions did not exist in November 2016. . . .

Id.

The same is true of Employer and its insurance coverage at Employee's last exposure in 1984. Before January 1, 2014, there was no way for an employer to elect to accept mesothelioma liability under Section 287.200.4(3) because the optional liability for enhanced mesothelioma liability did not exist before the statute's enactment. Restated, the statute's language makes clear that insurance procured by an employer before the statute's enactment cannot satisfy the statute's election requirement because there was no such statutory liability, much less an election requirement for the liability, at the time. *Desai*, 2019 WL 2588572 at *4; *see also Miller*, 540 S.W.2d at 905 (Mo. App. 1976) (proof of insurance absent a showing the employer satisfied the election requirements under Section 287.090 is insufficient to establish an election for coverage for exempt employees under the statute). In the end, it was impossible for the Employer to make an election "under this subsection" in 1984, or at any time before it ceased existence.

E. The Employer's insurance coverage in effect at Employee's last exposure does not satisfy the election requirement for enhanced mesothelioma benefits under Section 287.200.4(3).

Employee's argument that Employer's insurance coverage in effect at his last exposure must cover Employer's "entire liability" under the workers' compensation law does not compel a different conclusion. MO. REV. STAT. § 287.280 requires employers to insure their "entire liability" under Chapter 287. Employer did so. The insurance policies issued by Amerisure and Travelers satisfy this requirement.

Employee's argument fails because Employer's "entire liability" to Employee does not include liability for enhanced mesothelioma benefits under Section 287.200.4(3). Mesothelioma liability under the statute is optional. It is not a mandatory benefit under

Chapter 287. The liability requires an employer election and the employer's purchase of insurance to cover its liability for the benefit.

Absent an election by Employer to accept liability for mesothelioma liability, and, here, there was none, and could be none, Employer and its insurers have no liability to pay Employee these optional benefits. Therefore, Employer's policies necessarily covered Employer's "entire liability," under the workers' compensation law, as of 1984, but that liability, in the absence of an election under Section 287.200.4(3), did not include liability for enhanced mesothelioma benefits under the statute. The statute's plain language permits no other conclusion.

Indeed, it is clear the legislature, by its enactment of Section 287.200.4(3), intended to create an exception to the general rule in Section 287.280 for enhanced mesothelioma benefits. This conclusion is confirmed by the optional nature of the liability under the statute, which requires an express employer election to accept the liability and satisfaction of one of the three defined ways for employers to provide coverage for the election, namely, the procurement of insurance for the election, such as the Missouri Notification of Additional Mesothelioma Benefits Endorsement discussed by the Court in *Casey*, self-insurance, or participation in a group insurance pool.

Consider the provisions in Section 287.200.4(2), which apply to occupational disease claims generally, and which, by legislative mandate, do not apply to mesothelioma claims. In contrast to the mesothelioma benefits under Section 287.200.4(3), Section 287.200.4(2) does not subject an employer's liability for occupational disease claims to an

election requirement that requires a showing that the employer has specifically insured its liability for the benefit.

The legislature's distinct treatment of mesothelioma claims from occupational disease claims defeats Employee's argument that Employer's insurance coverage at last exposure satisfies the election requirement and provides coverage for the enhanced benefits. Proof of insurance in 1984 is not proof of an election under the statute on or after January 1, 2014.

The Court, in construing a statute, must give meaning to every word, clause, sentence, and section of a statute and necessarily presumes the legislature would never enact a meaningless provision. *Plastec, Inc*., 980 S.W.2d at 54-55; *Dickemann*, 550 S.W.3d at 158. By requiring an election requirement for enhanced mesothelioma benefits, the legislature made plain that express insurance coverage for this optional liability was required, as set forth in Section 287.200.4(3). Otherwise, if it had been the legislature's intent to require a pre-existing insurance policy, such as one in effect at Employee's last exposure, to provide coverage for the enhanced benefits, the legislature could have treated mesothelioma claims in the same manner as occupational disease claims generally, claims for which no election to accept liability is required. However, the legislature did not do so. Moreover, as held by the Court in *Casey*, Section 287.200.4(3) is not a retrospective law and its provisions cannot be applied to impose new duties and obligations on past transactions, such as Employer's insurance coverage in place at the time of Employee's last exposure. 550 S.W.3d at 82.

Thus, contrary to Employee's argument, Employer's insurance coverage at Employee's last exposure does cover Employer's "entire liability" under the workers' compensation law. However, that liability does not include optional liability for enhanced mesothelioma benefits under Section 287.200.4(3). Here, the Employer never owed Employee these optional benefits because the requisite election to accept liability for the benefits under the statute was not, and could not be, made because Employer was long defunct before the statute went into effect in 2014 and its insurance coverage at the time of Employee's last exposure was not written to cover this new optional liability.

F. Section 287.200.4(3) cannot be applied retrospectively because the statute is a substantive law.

Although Employee disclaims doing so, the relief he seeks, if granted, would require the Court to apply Section 287.200.4(3) in a retrospective manner to Employer's insurance policies in effect in 1984. The Missouri Constitution prohibits such a result. 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." (RA48) 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).

Respondents have preserved their constitutional objection to Employee's interpretation of Section 287.200.4(3). Their objection was preserved both at the hearing

of this case and on appeal to the Missouri Labor and Industrial Relations Commission. (T. 21; L.F. 37, 81, 85.) Their objection was also preserved in their briefing before the Missouri Court of Appeals. *See* Brief of Respondents Valley Farm Dairy Company and Amerisure Insurance Company at 1, 14-17; Brief of Respondent The Travelers Indemnity Company at 4, 13-15; and *Hegger v. Valley Farm Dairy Co*., 2019 WL 2181663 at n.6 (Mo. App. E.D. May 21, 2019).

Employee's argument that Employer's insurance coverage in effect at last exposure in 1984 satisfies the election requirement under Section 287.200.4(3), which first became law in 2014, cannot survive the Court's decision in *Casey*. The Court made plain in *Casey* that the statute cannot be applied retrospectively because the statute requires action by the employer through an express election and the express procurement of insurance coverage to cover the elected statutory benefits. The Court explained:

> *Section 287.200.4 is not a retrospective law*. Because Insurer affirmatively assented to providing these enhanced benefits, the new law does not impair any vested right Employer or Insurer once held. *Furthermore, section 287.200 does not create any new duty or obligation with regard to past transactions or give any past transaction a new legal effect*. Insurer provided, and Employer accepted, coverage "for ... additional benefits [provided by section 287.200.4(3)]," and, in turn, they provided and accepted coverage for Mr. Casey's claim, filed February 2015.

Casey, 550 S.W.3d at 82 (emphasis added).

The principles that govern the retrospective application of legislative enactments confirm this conclusion. Laws are presumed to operate prospectively only. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc. 1982). This presumption does not apply when express statutory language or necessary implication shows the legislature intended a statute

to operate retroactively, or where the statute is procedural or remedial in nature. *Id.* For purposes of this rule, procedural laws provide the mechanism by which a cause of action is prosecuted and remedial laws substitute a new or more appropriate remedy for the enforcement of an existing right. *Larson v. Ford Motor Co*., 217 S.W.3d 345, 348 (Mo. App. E.D. 2007); *Pierce v. Dep't of Social Servs*., 969 S.W.2d 814, 822 (Mo. App. W.D. 1998).

In contrast, substantive laws define the primary rights and remedies of individuals concerning their property or person. *Larson*, 217 S.W.3d at 350. Such laws may not be applied retrospectively. *Dep't of Social Servs. v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 n.5 (Mo. banc. 1985).

Section 287.200.4(3), which provides optional enhanced benefits novel and unique to mesothelioma claims, is a substantive law. The statute addresses the substantive rights of both employees and employers. The statute provides new benefits for occupational disease claims involving mesothelioma. The statute also determines whether an employee has a right to recover benefits under Chapter 287 or in the civil courts, and whether the employer has the protection of the exclusive remedy provisions of Section 287.120. Moreover, unlike the law that existed before the statute's enactment, which would have required the termination of benefits upon the employee's death (MO. REV. STAT. § 287.240.1), now, under Section 287.200.4(5), those enhanced benefits unpaid at the time of the employee's death may be paid to the employee's spouse or children, and if the employee left no surviving spouse or children, the unpaid benefits must be paid in a single payment to the employee's estate. The additional class of people entitled to recover the

enhanced benefits represents a new right for a new class of beneficiaries. In no way can the statute be characterized as merely a procedural or remedial law. *See, e.g.*, *Liberty Mut. Ins. Co. v. Garffie*, 939 S.W.2d 484, 487 (Mo. App. E.D. 1997) (amendments to Chapter 287 that place limitations on an employer's right to subrogation against third parties held substantive); *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 623 (Mo. banc. 2012) (changes to benefits recoverable by employee's dependents that post-date the employee's injury held substantive); *Anderson v. Noel T. Adams Ambulance Dist.*, 931 S.W.2d 850, 853 n.1 (Mo. App. W.D. 1996) (overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc. 2003) (changes to the Last Exposure Rule deemed substantive); and *Larson*, 217 S.W.3d at 350 (law altering the employee's burden of proof is substantive).

The prospective nature of liability under Section 287.200.4(3) is further shown by the legislature's contemporaneous creation of the Missouri Mesothelioma Risk Management Fund under MO. REV. STAT. § 287.223, effective January 1, 2014. (RA23) If, as claimed by Employee, all employers established their liability for enhanced mesothelioma liability under the statute by insuring their liability in the past, there would be no need for the legislature to establish an insurance fund on a prospective basis to cover the new optional mesothelioma liability.

These authorities demonstrate Section 287.200.4(3) cannot be applied in a retrospective manner that requires Employer's insurance coverage at Employee's last exposure in 1984 to provide coverage for enhanced mesothelioma benefits that were first available in 2014. Again, mere proof of some insurance, absent more, is not proof of an

election under the statute. The benefits are optional. They depend on the employer's election to accept liability for them under the statute. Therefore, in the absence of an election in conformity with the statute's terms, no liability for the benefits can be imposed on the Employer and its insurers. *See Desai v. Seneca Specialty Ins. Co*., 2019 WL 2588572, *4 (Mo. banc June 25, 2019) ("Here, the contract was entered into prior to the amended statute, so the amended statute does not apply to this case.").

Absent in this case is the requisite affirmative assent and decision by the Employer to provide enhanced mesothelioma benefits under Section 287.200.4(3) and the concomitant procurement of insurance coverage to cover this specific and newly enacted optional liability. Employer's insurance coverage at Employee's last exposure cannot be rewritten to provide coverage for this new liability – one the Employer never elected to accept or one its insurers undertook in 1984 to cover. As this Court held in *Casey*, the statute does not impose new duties or obligations on Employer's past insurance coverage in effect at the Employee's last exposure and cannot give those contracts a new legal effect, one that would impermissibly require them to cover a new liability that Employer never elected, and could never have elected, to accept. *Id*. at 82. The Court's decision in *Casey* and the rules prohibiting the retrospective application of substantive laws permit no other conclusion.

G. Conclusion

The Commission's final award should be affirmed. The Commission did not err in concluding that Employee was not entitled to recover enhanced mesothelioma benefits under Section 287.200.4(3) because there can be no recovery of these optional benefits

absent compliance with the statute's plain and unambiguous terms, and, here, there was no compliance, nor could there have been compliance under any circumstances, because the Employer was long defunct as a legal entity and could never have made the required election, much less procure insurance coverage to satisfy the election. In this case, Employer did not, and could not, elect to accept liability for these benefits. Employer had ceased existence in 1998, sixteen years before the statute went into effect on January 1, 2014, and its insurance policies at the time of Employee's last exposure in 1984 were issued thirty years earlier. These policies were not, and could not have been, written to satisfy Employer's election requirement under the statute, much less provide insurance coverage for the enhanced mesothelioma benefits that first became available on January 1, 2014.

Employee, in the face of Section 287.200.4(3)'s plain and unambiguous terms, seeks the creation of an exception that would impose liability for enhanced mesothelioma benefits in the case of defunct employers and their insurers in the absence of the requisite statutory election and in cases in which such an election would be impossible. His attempt to engraft such a retrospective "default" rule to the statute for defunct employees is contrary to the statute's plain language.

The Court is without authority to rewrite the statute in this manner. Section 287.200.4(3), by its terms, contains no "default" provision and is written to apply prospectively to claims made on or after January 1, 2014, and for which employers made the requisite statutory election on or after January 1, 2014, by procuring insurance written to cover the election and the enhanced benefits that must be paid as a consequence of the election and by giving notice to the Department. Absent in the statute is any suggestion

that the statute was enacted to subject employers to the statute's enhanced benefits that were defunct when the statute was enacted and which could never have made the required election, much less procure the insurance coverage necessary to satisfy the statute's requirements for making the election to accept liability under the statute for the optional benefits in the first instance. Therefore, the Commission's final award should be affirmed. The statute's plain and unambiguous terms and the Court's decision in *Casey* compel this conclusion.

II. The Commission did not err in entering its final award denying compensation because the Commission acted within its authority in concluding the election requirement for acceptance by employers of liability for the enhanced mesothelioma benefits under MO. REV. STAT. § 287.200.4(3) was not met in this case, in that it is undisputed that Employer had ceased existence in 1998, sixteen years before Section 287.200.4(3) went into effect on January 1, 2014, and, thus, the Employer did not, and could not, satisfy the statute's mandatory notice requirement, which must be satisfied to establish the election to accept mesothelioma liability under the statute.

Employee's second point on appeal presents another challenge to the Commission's final award in which the Commission concluded that he failed to show entitlement to the enhanced mesothelioma benefits under Section 287.200.4(3) because his Employer, which had ceased to exist before the statute's enactment, could not elect to accept optional mesothelioma liability under the statute. Employee's point focuses on the statute's notice requirement.

Employee claims the notice provision has no application because it applies only when an employer elects to accept mesothelioma liability under the statute by becoming a member of a group insurance pool and not when the employer has insured its liability for workers' compensation. He also argues the record before the Commission fails to show the manner established by the Department for the required notice. Finally, he argues that proof of notice is not an essential element of his claim in any event. Employee's point should be denied.

A strict construction of the plain and clear language of Section 287.200.4(3) disposes of Employee's argument and renders any complaint concerning the statute's notice requirement moot. As addressed in this brief, the statute requires the Employer to make a decision to accept mesothelioma liability under the statute. Here, an election under the statute was impossible. Employer ceased to exist long before the statute's enactment and could not make a decision to accept liability under the statute. Absent an election, and, here, there was none, the question of Employer's notice of its election need not be reached.

However, in the alternative and in the event the Court should consider this question, Respondents address Employee's notice arguments on the merits.

Section 287.200.4(3)'s notice provision is not limited exclusively to those employers who make their statutory election by becoming a member of a group insurance pool. Employee claims otherwise because the statute's notice provision is preceded by a three-sentence discussion concerning group insurance pools that follows the statute's election provision: "Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool." The three sentences that precede the notice provision state:

> A group of employers may enter into an agreement to pool their liabilities under this subsection. If such a group is joined, individual members shall not be required to qualify as individual self-insurers. Such group shall comply with section 287.223.

This discussion of group insurance pools is then followed by the statute's notice provision, which states:

> In order for an employee to make such an election, the employer shall provide the department with notice of such an election in a manner established by the department.

The rules of construction defeat Employee's argument. The statute's notice provision applies to all three election mechanisms stated in the statute by which an employer may choose to accept mesothelioma liability. When the statute is read as a whole, it is clear the notice provision applies equally to all three election methods, and not just to the group insurance pool method.

This conclusion is confirmed by the statute's use of the term "such" twice in the sentence stating the statute's notice provision. The term "such" functions as a demonstrative adjective in the sentence and necessarily refers to the statute's election requirement stated at the beginning of Section 287.200.4(3). *See* GARNER'S DICTIONARY OF LEGAL USAGE 859 (3d ed. 2011). In the statute, the clear antecedent to the phrase "such an election" is the statute's election requirement, which includes three methods of election, and not the statute's discussion of group insurance pools.

Further, Employee's argument that the notice provision only applies to the group insurance pool election method cannot be reconciled with the legislature's purpose in enacting the statute as expressed by the provision's plain wording, namely, "[i]n order for the employer to make such an election, the employer shall provide the department with notice of such election in a manner established by the department."

The notice provision is mandatory. The word "shall" admits no other purpose. *Bauer v. Transitional School Dist. Of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003). Absent notice to the department, an employer cannot make the requisite statutory election

to accept liability. It would, therefore, defy logic to conclude the legislature mandated notice to the department only when an employer joined a group insurance pool for purposes of accepting mesothelioma liability under the statute, and not the other two election methods. The clear purpose of the election requirement is to ensure there is a record as to whether the employer has elected to accept mesothelioma liability or not. This record is important, regardless of the election method chosen by the employer, because the employer's election determines the substantive rights of employees and the obligations of employers in mesothelioma claims, including the forum for deciding the employer's claim, whether under Chapter 287 or at common law in the civil courts.

Further, the Department of Labor and Industrial Relations has prescribed the manner for employers to give notice of their elections under the statute. The Division of Workers' Compensation, which is part of the Department of Labor and Industrial Relations, has promulgated forms for employers to give notice of their election to either accept or reject mesothelioma liability under the statute by: (1) the purchase of insurance coverage; (2) self-insurance authority approved by the division; or (3) becoming a member of a group insurance pool that complies with the requirements of MO. REV. STAT. § 287.223. (RA23) These forms, WC-304-I and WC-304-G, which apply to employers self-insuring their liability under the statute or becoming members of a group insurance pool, may be accessed on the Department's website.[5] The Court may take judicial notice of this information. *See Kansas City v. City of Raytown*, 421 S.W.2d 504, 513 (Mo. 1967) (The Supreme Court

[5] labor.mo.gov/DWC/Employers/mesothelioma.

may take judicial notice of public records of the Missouri State Auditor); *Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835, 837 (Mo. 1943) (The Supreme Court may take judicial notice of public records of the Missouri State Highway Department); and *Buhendwa v. Reg'l Transp. Dist.*, 82 F.Supp.3d 1259, 1263 n.1 (D. Colo. 2015) (court may take judicial notice of the contents of a public agency's website).

For employers insuring their election for optional mesothelioma liability under the statute, they may do so by purchasing workers' compensation insurance from an insurance company that is authorized to insure this optional liability in Missouri by the Missouri Department of Commerce and Insurance ("DCI").[6] The Division of Workers' Compensation verifies the employer's proof of insurance coverage through the National Council of Compensation Insurance ("NCCI"), which serves as Missouri's approved advisory organization under MO. REV. STAT. § 287.955. (RA45) To this end, the NCCI developed forms, which the DCI approved, that address an employer's decision to accept or reject the statutory mesothelioma liability, namely, Form WC 24 03 02, which is entitled, "Missouri Notification of Additional Mesothelioma Benefits Endorsement," and Form WC 24 93 03, which is entitled, "Missouri Exclusion of Additional Mesothelioma Benefits Endorsement."[7]

This Court addressed Form WC 24 03 02 in its *Casey* decision, and quoted, at length from the endorsement, which states:

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[6] *Id.*

[7] insurance.mo.gov/consumers/wc/documents/04-MO-2013.

> 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.

Accident Fund Ins. Co. v. Casey, 550 S.W.3d 76, 79 (Mo. banc 2018).

Form WC 24 03 02 also contains additional language, not quoted by the Court in *Casey*, which expressly addresses Section 287.200.4(3)'s election provisions, and the consequences of an employer's decision to reject liability under the statute.

> If you reject liability for mesothelioma additional benefits provided under Section 287.200.4, subdivision (3), of the Missouri Revised Statutes, you must notify us of 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.[8]

The foregoing forms and policy provisions demonstrate the Department of Labor and Industrial Relations has prescribed the manner by which employers may give notice to the Department of their election to accept or reject mesothelioma liability under Section 287.200.4(3). The existence of these procedures confirms the conclusion that Employee is not entitled to recover the enhanced mesothelioma benefits under the statute. His long-defunct Employer did not, and could not, elect such liability under the statute in the manner prescribed by the Department or procure insurance coverage for the liability in manner approved by the DCI.

[8] insurance.mo.gov/consumers/wc/documents/04-MO-2013, Form WC 24 03 02.

These forms and policy provisions also defeat Employee's argument that Employer's insurance coverage at last exposure provides coverage for this optional liability for enhanced mesothelioma liability because the policies insure Employer's "entire liability" for workers' compensation. This too is an impossibility. Here, there was no election. And, the endorsement form necessary to add insurance coverage to cover an employer's election to accept liability under the statute, namely, the Missouri Notification of Additional Mesothelioma Benefits Endorsement, was not approved by the DCI until January 2014.[9] Simply put, insurance coverage for the optional mesothelioma liability under Section 287.200.4(3) did not exist in 1984 because liability for the enhanced mesothelioma benefits did not exist at the time.

Finally, contrary to Employee's argument, he did have the burden to show compliance with Section 287.200.4(3)'s notice requirements. The statute makes plain that absent notice by the employer of its election in the manner prescribed by the Department of Labor and Industrial Relations, an employer cannot be shown to have made the requisite election. Restated, under the statute, proof of notice is inextricably linked to proof of an election to pay the enhanced benefits. Therefore, since Employee had the burden to show every element of his claim, he necessarily had the burden to show that an election occurred in the manner required by the statute. *Brown v. City of St. Louis*, 842 S.W.2d 163, 166 (Mo. App. E.D. 1992); MO. REV. STAT. § 287.808. Here, Employee could not sustain his burden

[9] *Id.*

because Employer, which was long defunct in 2014, did not, and could not, elect to accept optional mesothelioma liability under the statute.

Employee's second point on appeal should be denied. The Commission did not err in concluding Employee was not entitled to the enhanced mesothelioma benefits under Section 287.200.4(3). His claim fails for want of an election by Employer to accept mesothelioma liability under the statute. Since Employer ceased to exist before January 1, 2014, the statute's effective date, Employer did not make, and could not have made, a decision to accept optional mesothelioma liability under the statute, much less give the requisite notice of the election to the Department.

CONCLUSION

Respondents Amerisure Insurance Company, Valley Farm Dairy Company, and The Travelers Indemnity Company respectfully request the Court to affirm the final award of the Missouri Labor and Industrial Relations Commission.

Respectfully submitted,

/s/ T. Michael Ward
T. Michael Ward, # 32816
Elaine M. Moss, #44674
BROWN & JAMES, P.C.
800 Market Street, Suite 1100
St. Louis, Missouri 63101-2501
(314) 421-3400
(314) 421-3128 – Facsimile
mward@bjpc.com
emoss@bjpc.com

Attorneys for Respondent
Amerisure Insurance Company

and

/s/ Christopher T. Archer
Christopher T. Archer, #37692
ARCHER & LASSA, LLC
906 Olive Street, Suite 420
St. Louis, MO 63101
314-241-2481- Phone
314-241-1145 – Facsimile
chris@askarcher.com

Attorneys for Respondents
Valley Farm Dairy Company and
Amerisure Insurance Company

and

/s/ Jaudon R. Godsey

Jaudon R. Godsey, #48693
MORROW, WILLNAUER, CHURCH, LLC
500 N. Broadway, Suite 1500
St. Louis, MO 63102
314-282-9800 –Phone
314-875-9215 – Facsimile
jgodsey@mwcattorneys.com

Attorney for Respondent
The Travelers Indemnity Company

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2019, the foregoing was electronically filed using the Missouri e-Filing system, which will send notice of electronic filing to all registered attorneys of record.

/s/ T. Michael Ward

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. Respondents' Substitute Brief includes the information required by Rule 55.03.

2. Respondents' Substitute Brief complies with the limitations contained in Rule 84.06;

3. Respondents' Substitute Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 11,745 words, as determined by the word-count tool contained in the Microsoft Word 2013 software with which this Respondents' Brief was prepared; and

4. Respondents' Substitute Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ T. Michael Ward

CERTIFICATION UNDER RULE 55.03(A)

Pursuant to Rule 55.03(a) of the Missouri Rules of Civil Procedure, the undersigned hereby certifies that he/she signed an original of this pleading and that an original of this pleading shall be maintained for a period not less than the maximum allowable time to complete the appellate process.

/s/ T. Michael Ward

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