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IN THE SUPREME COURT OF MISSOURI

VINCENT HEGGER (DECEASED), et al.,	)	
	)	
Appellant,	)	
	)	No.: SC97993
vs.	)	
	)	
VALLEY FARM DAIRY COMPANY, et al.,	)	
	)	
Respondents.	)	

APPELLANT'S SUBSTITUTE BRIEF

Appeal from the Labor and Industrial Relations Commission

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JURISDICTIONAL STATEMENT

Vincent Hegger filed a Claim for Compensation seeking mesothelioma benefits with the St. Louis Office of the Division of Workers' Compensation on March 3, 2015. L.F. at 1-2. Mr. Hegger passed away on June 7, 2015, and an amended claim substituting his son Steven Hegger as the claimant was filed on August 27, 2015. L.F. at 11-13; Tr. at 56. The Administrative Law Judge entered an award in favor of Respondents on January 25, 2017. L.F. at 24-37. Appellant timely filed his Application for Review with the Labor and Industrial Relations Commission on February 1, 2017. L.F. at 38-45. The Commission entered its Final Award Denying Compensation on December 13, 2017. L.F. at 60-73. Appellant timely filed his Notice of Appeal on January 4, 2018. L.F. at 74-93.

The Eastern District Court of Appeals issued an opinion reversing and remanding the Commission's decision on May 24, 2019. On September 3, 2019, this Court sustained the Respondents' application to transfer.

Jurisdiction is proper in this Court pursuant to Section 287.495 RSMo. and Article V, Section 18 of the Missouri Constitution because the Division of Workers' Compensation had original jurisdiction over this case, and jurisdiction is proper under Article V, Section 10 of the Missouri Constitution because this Court has exercised its authority to transfer the case after opinion by the Court of Appeals.

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STATEMENT OF FACTS

Vincent Hegger was diagnosed with mesothelioma on March 19, 2014 and passed away from his illness on June 7, 2015. Tr. at 56, 68-69. Mr. Hegger's mesothelioma was caused by decades of exposure to asbestos dust throughout his employment. *Id.* at 71-72. Vincent Hegger had a long career as a full-time maintenance worker at Valley Farm Dairy Company ("Valley Farm"). *Id.* at 86. Valley Farm utilized a variety of industrial equipment in the production of dairy products. *Id.* at 86-87. This equipment was incorporated with asbestos-containing gaskets and insulation. *Id.* at 86-88.

Mr. Hegger was routinely exposed to respirable asbestos dust from his removal and replacement of gaskets and insulation. He performed this work consistently from the time he began working at Valley Farm in 1968 until he left the company in early 1984. *Id.* at 86-87. Valley Farm ceased its business operations around 1998 and no longer existed at the time Mr. Hegger was diagnosed with mesothelioma. *Id.* at 56. However, the company was fully insured for occupational disease liability in early 1984 at the time of Mr. Hegger's last exposure to asbestos.

Mr. Hegger's social security records reflect a small amount of income at Valley Farm in 1984 compared to prior years, indicating that his employment ended early in the year. *Id.* at 62-63. Amerisure provided insurance coverage from October 17, 1983 until October 17, 1984, while Travelers provided insurance coverage from October 17, 1984 until October 17, 1985. *Id.* at 56-57, 65-67. Accordingly, it appears that Amerisure held the applicable insurance policy on the date of Mr. Hegger's last exposure to asbestos in early 1984. However, because the Commission found that an insurer at the time of an

employee's last exposure to asbestos cannot be liable for benefits under Section 287.200.4(3) as a matter of law, the Commission never explicitly determined which of these two insurers held coverage at the time of Mr. Hegger's last exposure to asbestos. L.F. at 57-73.

After leaving Valley Farm, Mr. Hegger worked as a maintenance man for two consecutive employers at Care Unit Hospital. Tr. at 89-90, 95-96. However, Mr. Hegger did not perform any maintenance on industrial equipment involving gaskets or insulation while working there. *Id.* at 90-91, 98-99. He had no knowledge of any asbestos-containing materials at Care Unit Hospital and never came into contact with dust. *Id.* at 98-99, 106-107.

On the basis of the above evidence, the Commission found that Mr. Hegger developed and died from mesothelioma and that Mr. Hegger's employment was the prevailing factor in causing his disease pursuant to Section 287.067.2. The Commission also found that Mr. Hegger was last exposed to the hazard of asbestos dust at Valley Farm in 1984, making Valley Farm the employer "liable for the compensation" pursuant to Section 287.063.2. L.F. at 57-73. Appellant does not dispute any of these findings of fact.

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POINTS RELIED ON

1. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD DENYING COMPENSATION BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT VALLEY FARM, THE LIABLE EMPLOYER OF LAST EXPOSURE, HAD ELECTED TO ACCEPT LIABILITY FOR THE BENEFITS ENUMERATED IN SECTION 287.200.4(3) UNDER A STRICT CONSTRUCTION OF THAT SUBSECTION.

§ 287.200.4, RSMo.

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

McGhee v. W.R. Grace & Co., 312 S.W.3d 447 (Mo. App. 2010)

Lewis v. Treasurer of State, 435 S.W.3d 144 (Mo. App. 2014)

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014)

2. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD DENYING COMPENSATION BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT VALLEY FARM, THE LIABLE EMPLOYER OF LAST EXPOSURE, WAS NOT REQUIRED TO PROVIDE THE DIVISION OF WORKERS' COMPENSATION WITH NOTICE OF AN ELECTION TO ACCEPT LIABILITY FOR THE BENEFITS ENUMERATED IN SECTION 287.200.4(3).

§ 287.200.4, RSMo.

Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126 (Mo. App. 2007)

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ARGUMENT

The Commission found that Vincent Hegger's liable employer of last exposure, Valley Farm, did not "elect to accept" mesothelioma liability under Section 287.200.4(3) because it had been defunct since 1998 and had not taken the "affirmative action" of "purchasing" a new insurance policy after Section 287.200.4 went into effect. L.F. at 60. The Commission therefore held that neither of Valley Farm's insurers (Respondents) could be liable for payment of the enumerated benefits. *Id.*

This decision was erroneous and should be reversed. 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. 2014) (emphasis added). The statute expresses ***nothing*** requiring an employer to take an "affirmative action" after the statute went into effect. The statute expresses ***nothing*** requiring an employer to "purchase" a new insurance policy.

Section 287.200.4(3) simply reads that an employer has "elected to accept" liability under this subsection if the employer is "insuring their liability" for these benefits. An employer is not required to purchase a second insurance policy covering the benefits in Section 287.200.4(3) when the employer already has a policy in effect from a solvent insurance company insuring their entire liability for all benefits under the Workers' Compensation Law.

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1. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD DENYING COMPENSATION BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT VALLEY FARM, THE LIABLE EMPLOYER OF LAST EXPOSURE, HAD ELECTED TO ACCEPT LIABILITY FOR THE BENEFITS ENUMERATED IN SECTION 287.200.4(3) UNDER A STRICT CONSTRUCTION OF THAT SUBSECTION.

An appellate court's review of decisions made by the Commission "is governed by article V, Section 18 of the Missouri Constitution and by section 287.495." *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 450 (Mo. App. 2010). This Court "may modify, reverse, remand for rehearing or set aside the award" on the ground that the Commission "acted without or in excess of its powers." *Id.* at 451. A decision of the Commission based upon an erroneous legal analysis constitutes an act in excess of the Commission's powers. *Bock v. City of Columbia*, 274 S.W.3d 555, 559 (Mo. App. 2008). While the Court will defer to the Commission on questions of fact, questions of law are reviewed *de novo*. *McGhee*, 312 S.W.3d at 451. When the Commission's decision incorporates the ALJ's opinion and decision, as the Commission's decision did here, the Court "will consider the commission's decision as including those of the Administrative Law Judge." *Id.*

A. The Background Of Section 287.200.4 And The Consequences Of The Commission's Statutory Construction.

The present case comes to the Court after a series of legislative and judicial overhauls affecting the Missouri Workers' Compensation Act. This began in 2005, when the Act underwent a number of legislative revisions. The most significant change 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, somewhat unexpectedly, removed the workers' compensation exclusivity provision from occupational disease claims.

In *State ex rel. KCP&L Greater Missouri Operations Company v. Cook*, 353 S.W.3d 14 (Mo. App. 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.

Employees suffering from mesothelioma now had the option of seeking redress against their employers in civil court. Unlike the rigid benefit structure that governs workers' compensation proceedings, employers found themselves subject to the possibility of boundless liability. Given the severity of mesothelioma as a fatal cancer and the negligent manner in which many employees were exposed to the well-known carcinogen asbestos, the potential liability facing employers in these new civil cases was often considerable. Unsurprisingly, employers were displeased with this prospect and a bill was soon drafted by the Missouri General Assembly to bring occupational diseases back within workers' compensation exclusivity.

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[1] Unless otherwise indicated, all references are to Missouri Revised Statutes, *et seq.* (2019).

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Workers' advocates, on the other hand, pointed out that mesothelioma victims had long been denied fair compensation under the Missouri Workers' Compensation Act. Unlike most employees whose work-related injury immediately follows an accident on the job, the latency period for mesothelioma regularly spans 30-40 years. By the time the claim accrues (i.e., when the disease is diagnosed), the employee (or his dependent spouse) is usually elderly and has few years remaining in which to receive benefits for permanent total disability (or death in the case of the spouse). Furthermore, the formula used to compute these benefits was linked to the employee's own earnings. *See McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 452 (Mo. App. 2010). Because the employee's earnings almost always occurred decades before current levels of inflation, the average weekly wage used to calculate weekly benefits was 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, even though a mesothelioma victim is invariably permanently and totally disabled and will inevitably 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 generally had far greater damages than common personal injury claims, these very same mesothelioma claims were conversely worth a trifling amount of benefits when brought in the Division of Workers' Compensation. It made little sense that victims of an extremely painful, debilitating and terminal illness should receive less compensation than an archetypal worker who suffers a temporary disability due to a broken bone. Advocates for workers and victims of mesothelioma therefore lobbied the General Assembly to pass

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legislation which would remedy these inherent flaws within the Missouri Workers' Compensation Act.

The result was a bill to increase compensation for victims of occupational diseases due to toxic exposure—especially mesothelioma—in recognition of these diseases' severity and the claims' higher value in civil court compared to common personal injury claims. In exchange, employers would once again receive workers' compensation exclusivity and be shielded from unlimited civil liability. This legislation went into effect on January 1, 2014 after being passed with considerable bipartisan support. It is against the backdrop of this compromise that the Labor and Industrial Relations Commission declined to award any benefits for Vincent Hegger's mesothelioma, the most severe of all the occupational diseases due to toxic exposure.

The Commission's decision not to award compensation was premised on the notion that the employer, Valley Farm, had not "elected to accept" mesothelioma liability under Section 287.200.4(3), and therefore neither of its insurers (Respondents) could be liable for payment of the enumerated benefits even though these insurers' policies provide full coverage for an occupational disease. The Commission's rationale was that an employer's "elect[ion] to accept" required an "affirmative action" of "purchasing new insurance" after Section 287.200.4(3) went into effect, and Valley Farm could not have taken any such affirmative action because the company had not existed since 1998. L.F. at 60.

The Commission's statutory construction will completely negate the new law in the many cases where the employer who last exposed the employee to asbestos no longer exists. The most common occupations to suffer asbestos exposure and develop asbestos-

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related diseases—i.e., asbestos workers, pipefitters, operating engineers, boilermakers, etc.—primarily worked for relatively small independent contractors who hired out of their local unions. By their nature, such employers generally had limited lifespans and dissolved when their owners retired.

Given the uniquely long latency period between an employee's exposure to asbestos and their 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. Non-existent employers are incapable of purchasing new insurance covering their liability on a claims-made basis. Accordingly, when a non-existent employer is the liable employer of last exposure pursuant to Section 287.063.2, the employee will be incapable of receiving the increased benefits enumerated in Section 287.200.4(3). This will ironically result in persistent denials of benefits to the very tradesmen who were most often exposed to asbestos in the course of their work and who suffer from its most significant disease.

However, this case is not just about the draconian results faced by employees under the Commission's interpretation of the statute. Although the Commission framed Appellant's interpretation of Section 287.200.4(3) as one that favors employees at the expense of employers, that is mistaken. L.F. at 73. The legal issue raised by this case could just as easily have arisen under an alternative, but substantively equivalent, set of facts which would have been far more distressing to employers.

Imagine that Valley Farm, instead of going out of business entirely in 1998, had simply moved its business operations to a different state. Because they had Missouri workers' compensation policies covering their entire liability throughout the timeframe

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they operated in Missouri, and because they had no reason to know of legal changes in a state where they no longer operated, Valley Farm did not take an "affirmative action" of "purchasing new insurance" after the January 1, 2014 amendments went into effect. Now imagine that Valley Farm has just been found liable in a civil trial in the city of St. Louis for causing the wrongful death of Mr. Hegger due to his asbestos-related mesothelioma. Due to Valley Farm's negligence in continually exposing Mr. Hegger to a highly toxic carcinogen and Mr. Hegger's extreme pain and suffering prior to death, the jury assesses damages against Valley Farm in the amount of $10,000,000.

In response to this civil verdict, Valley Farm files post-trial motions confidently pointing to an insurance policy from 1984 which plainly states that it covers Valley Farm's "entire liability" for workers' compensation benefits if the last exposure to the hazard of the disease takes place during the policy period. Valley Farm notes that Mr. Hegger's last exposure to asbestos took place during the relevant policy period in 1984, fulfilling this requirement and triggering the insurer's contractual obligation to cover Valley Farm's "entire liability" for workers' compensation. Consequently, Valley Farm contends that they did "elect to accept" mesothelioma liability under the strictly construed language of Section 287.200.4(3)(a)—they fulfilled one of the three statutory criteria that constitutes an election by having a policy insuring their entire liability, which naturally includes the subset of benefits enumerated in Section 287.200.4(3).

To Valley Farm's surprise, the trial court agrees with the plaintiff and denies their motions. The court holds that simply having a policy "insuring their liability" is not enough. Instead, the court holds that Section 287.200.4(3) requires an "express" election

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through Valley Farm's "affirmative action" of "purchasing new insurance" covering these benefits. The trial court further holds that the statute requires Valley Farm to be "insur***ing*** their liability" under this subsection, not having previously "insur***ed*** their liability." The court concludes that Valley Farm was required to purchase a second insurance policy with terms covering these benefits, and by failing to do so they have subjected themselves to civil liability.

In this hypothetical, Valley Farm would be incredulous at the trial court's ruling. Nowhere does the strictly construed Section 287.200.4(3) ever use the words "express," "affirmative," "action," "purchase," or "new." Although Valley Farm's liability was indeed "insur***ed***" by the 1984 insurer's policy in the past tense, this solvent insurer's policy remains in force and continues to provide ongoing coverage "insur***ing*** their liability" for benefits in the present tense (and in the future) if an occupational disease arises in which the last exposure occurred during the policy period.

Valley Farm would be stunned to find that their liberally construed insurance policy openly purporting to cover their "entire liability" for workers' compensation benefits did not, in fact, cover their entire liability for workers' compensation benefits. The Chamber of Commerce and related organizations would likely accuse the trial court of unbridled judicial activism in favor of the injured worker by reading non-existent language into a statute that is supposed to be strictly construed. They may very well have raised a constitutional argument that the legislature could not retroactively cap the level of coverage provided by Valley Farm's contract with the insurer.

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One wonders whether the Respondents would be quite so eager to advocate their position if the legal issue at hand had arisen under this alternative, but substantively indistinguishable, fact pattern. The out-of-state Valley Farm, just like the non-existent Valley Farm, failed to purchase a new claims-made policy with terms specifically referencing the benefits in Section 287.200.4(3). The out-of-state Valley Farm, just like the non-existent Valley Farm, still has an occurrence-based policy insuring their "entire liability" for benefits under the workers' compensation law if the last exposure occurred during the policy period. The out-of-state Valley Farm, just like the non-existent Valley Farm, took no "affirmative action" after Section 287.200.4(3) went into effect other than simply having this policy.

If the Respondents' position is correct, then out-of-state employers (and others) will inadvertently open themselves up to potentially unlimited liability in civil court.[2] Given the severity of mesothelioma as an extremely painful and inevitably terminal illness, and the negligent manner in which many employees were exposed to asbestos decades ago, this civil liability will often be substantial.

---

[2] Many former small business owners who operated in their individual capacity that still reside in-state but ceased business operations long ago will face the same problem. Such former small business owners would never think to purchase a new workers' compensation insurance policy covering dates after January 1, 2014 when they have not employed any workers for decades.

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Given the background of the January 1, 2014 amendments, did the legislature really mean to deny increased workers' compensation benefits to most employees suffering from mesothelioma, while subjecting some unlucky and unknowing employers to massive verdicts in civil court? Or did the legislature intend to increase workers' compensation benefits for the broadest class of employees suffering from mesothelioma, while simultaneously extending workers' compensation exclusivity to as many employers as possible? Did the legislature truly intend to require each and every employer that has ever operated in Missouri to purchase new policies of workers' compensation insurance in order to gain the protection of workers' compensation exclusivity, even when many of these employers already have viable policies covering their "entire liability" for workers' compensation? These are the questions posed by the present case.

B. An Insurance Policy Covering The Date Of An Employee's Last Exposure Provides Coverage For The Benefits In Section 287.200.4(3).

The threshold issue in this case is whether Valley Farm's insurance policy at the time of Mr. Hegger's last exposure to asbestos reads to cover the benefits enumerated in Section 287.200.4(3). The statute reads 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. . . .

(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."

Section 287.200.4(3) RSMo. (emphasis added).

The strictly construed statute provides that an employer "elect[s] to accept" in one of three ways, one of which is "insuring their liability." There is no other qualifying language. In interpreting the statute, full effect must be given to 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. 2006). Additionally, a "[s]trict construction requires that everything ***shall be excluded*** from [the statute's] operation which does not ***clearly*** come within the scope of the language used." *Allcorn v. Tap Enterprises*, 277 S.W.3d 823, 828 (Mo. App. 2009) (emphasis added). "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. 2014) (emphasis added).

Section 287.200.4(3) does not state that an employer must take an affirmative action of purchasing a brand-new policy "insuring their liability." The only inference that may be drawn under strict construction—without otherwise making presumptions not clearly expressed in the text—is that an employer is "insuring their liability" if a solvent insurance

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policy exists which reads to cover such liability. If such a policy is in force, then by the plain language of the statute Valley Farm has "elect[ed] to accept mesothelioma liability under this subsection" and its insurer is liable for payment of the benefits enumerated therein.

Since 1965, appellate cases interpreting the Missouri Workers' Compensation Law affixed sole liability for occupational disease benefits with the insurer who provided coverage at the time of the employee's last exposure. *See Enyard v. Consolidated Underwriters*, 390 S.W.2d 417, 429 (Mo. App. 1965); *White v. Scullin Steel Company*, 435 S.W.2d 711, 716 (Mo. App. 1968); *Tunstill v. Eagle Sheet Metal Works*, 870 S.W.2d 264, 273 (Mo. App. S.D. 1994); and *Feltrop v. Eskens Drywall & Insulation*, 957 S.W.2d 408, 414 (Mo. App. 1997). As a result, insurance policies written in the early 1980s (including Respondents' policies) were written as occurrence-based policies that provided 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. 1983) (noting that the insurance policy stated: "'This 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.'").

In addition, Respondents' policies were written to insure the employer's ***entire liability*** if the last exposure occurred during the policy period. Section 287.280.1 has long provided that "[e]very 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." *See* Section 287.280.1 RSMo. (emphasis added). Thus, "when an insurer undertakes

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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***.'" *See Allen v. Raftery*, 174 S.W.2d 345, 350 (Mo. App. 1943) (emphasis added). Because Respondents' policies were written to provide coverage for an occupational disease such as mesothelioma if the last exposure occurs during the policy period, and because they were written broadly to cover an employer's "entire liability," they read to provide coverage for the subset of benefits enumerated in Section 287.200.4(3).

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. 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, emphasis added). It is undoubtedly "reasonably possible" to interpret Respondents' policies as "insuring [Valley Farm's] liability" for the benefits in Section 287.200.4(3),[3] because these policies cover Valley Farm's "entire" liability if and when a compensable occupational disease arises.

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[3] The Commission found the phrase "under this subsection" in Section 287.200.4(3) especially significant to its statutory construction. L.F. at 61, 72. However, this phrase has no effect on the analysis. If an insurance policy covers an employer's entire liability, it logically covers that employer's liability "under [a particular] subsection" as well. There is no need for a policy to reference specific sections of the Workers' Compensation Act if

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Due to the passage of over three decades, the Division of Workers' Compensation was unable to locate copies of the Respondents' actual insurance policies within its archives. It instead found proof of coverage forms establishing that the Respondents provided insurance policies for Valley Farm during the relevant timeframe in 1984, when Mr. Hegger was last exposed. However, there is no question that Respondents' policies contain this language. The law required it.

Section 287.310.1 has long required that "[e]very policy of insurance against liability under this chapter shall be in accordance with the provisions of this chapter," and appellate courts have construed this language to mean that "the [workers' compensation] 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*, 174 S.W.2d at 350 (emphasis added). Accordingly, the terms in Respondents' 1984 policies automatically incorporated the terms of the Missouri Workers' Compensation Act. Because the Workers' Compensation Act has long been interpreted to require an insurer at the time of last exposure to cover the employer's entire liability for occupational disease, these terms were written into Respondents' policies covering the October 17, 1983 through October 17, 1985 timeframe by operation of law.

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it already covers the employer's "entire" liability. For instance, no one could argue that a workers' compensation policy does not cover an employee's medical expenses simply because the policy does not specifically reference Section 287.140.

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Thus, the fact that the actual policies have been lost to time and could not be entered as part of the record is irrelevant. Their terms can easily be reconstructed simply by looking to the terms of the Missouri Workers' Compensation Act. Even if the policies had survived and had purported to limit occupational disease coverage to a certain benefit level or to only cover certain occupational diseases, that language would have been void as a matter of law. The policies must have been written to insure the employer's entire liability for all occupational diseases if the employee's last exposure occurs during the policy period.

The analysis comes down to two steps. First, a strict construction of Section 287.200.4(3) indicates that an employer has "elected to accept" mesothelioma liability if the employer has a solvent insurance policy with language "insuring their liability" for benefits under this subsection, regardless of whether this is an occurrence-based policy or a claims-made policy. Second, a liberal construction of the language in Respondents' insurance policies indicates that they provide coverage for the benefits under Section 287.200.4(3) because they cover Valley Farm's "entire liability" as long as the last exposure occurred during the policy period.

By operation of law, Respondents' insurance policies could not have placed any limitation on the level of coverage they provided. "[A]n insurer cannot avoid certain liabilities by constructing its policy to exclude certain provisions of the workers' compensation statute and only cover the provisions it prefers." *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76, 80 (Mo. banc 2018). As the Commission appeared to recognize, the Respondents' policies undeniably cover liability for so-called "traditional benefits" under the Workers' Compensation Law. L.F. at 60-61. Accordingly, because there is no

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question that these policies provide coverage for some of the employer's liability, they must further provide coverage for the employer's entire liability. This includes liability for the benefits enumerated in Section 287.200.4(3). By law, the policy cannot cover only a portion of benefits. A workers' compensation insurance policy, whether occurrence-based or claims-made, either holds coverage for all benefits or no benefits. In other words, if Respondents' policies cover liability for a nickel, then they cover liability for a dime.

The Commission's decision appears to assume, without citation to any authority, that Respondents' policies cannot be read to cover the benefits in Section 287.200.4(3) because this subsection did not exist when the policies were written. This assumption was unfounded. The analysis does not focus on the benefit amounts which were enumerated in the Missouri Workers' Compensation Law at the time the policies were written, but entails an examination of the terms in these viable, in-force policies now that they are being invoked to provide coverage for a claim that accrued after the effective date of Section 287.200.4(3). The policy must cover benefit amounts that exist at the time of injury (i.e., when the claim accrues), not just those that existed in the early 1980s when the policies were written. *See Pavia v. Smitty's Supermarket*, 366 S.W.3d 542, 549 (Mo. App. 2012) (holding that "it is a well-established principle that the law in effect on the date of the injury governs a claim under the Workers' Compensation Law.").

An insurer's liability is not limited to benefit amounts that existed at the time of last exposure—rather, they are liable for benefit amounts existing at the time of injury. This issue has already been squarely addressed in *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 452 (Mo. App. 2010), an asbestosis case. There, the employee had last been exposed

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to asbestos in 1977, when Section 287.200 capped weekly disability benefits at a maximum of $95.00 per week. *Id.* at 452. However, by the time of the employee's asbestosis diagnosis in 2001 (i.e., by the time the claim accrued), this statutory benefit cap had been lifted and the employee's weekly disability benefits had increased to $161.91. *Id.*

Notably, the court did not hold that the employer's insurer's liability was limited to the benefit amounts which existed at the time of the employee's last exposure in 1977, when the policy was written. Rather, the court held that the insurer was liable for the benefit amounts which existed at the time of the employee's diagnosis and injury, when the claim accrued. *Id.* at 456, 460 (holding that the "date of injury" was when "[c]laimant ha[d] an occupational disease that was diagnosed in 2001" and that "it would contradict the plain language of the statute to hold that the 'date of injury' referred to in section 287.200 was the 'date of last exposure' or some other time period before the injury became compensable.")

The same principle holds true here. Respondents' insurance policies were written to provide full coverage for the employer's entire liability upon a diagnosis of an occupational disease, as long as the last exposure occurs during the policy period. The insurer in *McGhee* was liable to provide full coverage for the employer's entire liability under the Workers' Compensation Law upon the diagnosis of the occupational disease, because the employee's last exposure had occurred during the insurer's policy period. This was true even though the statutory provision which led to the insurer's increased liability did not exist when the insurer's policy was written, just as in the present case.

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Beyond Missouri, courts from across the country have consistently found that workers' compensation insurers or self-insurers covering the time of last exposure are liable for new benefit amounts that did not exist until the time an asbestos-related disease was diagnosed. *See, e.g.*, *Shifflett v. Powhattan Mining Co.*, 442 A.2d 980, 982 (Md. 1982) (holding that a 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. 1991) (holding that a statutory maximum wage rate in effect at time of asbestos-related lung cancer diagnosis governs, not wage rate in place on the date of last exposure); and *Liberty Mut. Ins. Co. v. Starnes*, 563 S.W.2d 178, 179 (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."). The Commission's apparent assumption that insurance coverage is limited to benefit amounts in place at the time the policy was written was devoid of any legal support.

"This Court gives the language in an insurance policy its plain meaning, 'or the meaning that would be attached by an ordinary purchaser of insurance.'" *Casey*, 550 S.W.3d at 80 (quoting *Doe Run Res. Corp. v. Am. Guar. & Liab. Ins.*, 531 S.W.3d 508, 511 (Mo. banc 2017)). By operation of law, the plain language of Respondents'

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occurrence-based insurance policies expressly state that they provide full coverage for the employer's entire liability if the last exposure occurs during the policy period. The Commission found that Mr. Hegger had last been exposed to asbestos in 1984. Thus, by their own terms, one of these 1984 expressly policies provides coverage for Valley Farm's entire liability, which includes the liability enumerated in Section 287.200.4(3).

It is no defense that the benefit amounts in Section 287.200.4 were not yet in effect when the Respondents' policies were written. After all, what is an insurance policy if not a contract to make payments for unknowable future events? For a latent disease that spans decades, highly sophisticated insurance companies such as the Respondents cannot seriously suggest they had no idea benefit amounts 30 to 40 years in the future might be greater than those in place in the early 1980s. As case law demonstrates, there cannot be limiting language in these policies stating that they only cover benefit amounts in effect at the time the policy was written. Rather, the policies must state that they cover the employer's entire liability for an occupational disease at the time the claim accrues. Entire liability means ***entire*** liability. Because Valley Farm has a policy "insuring their liability" for the benefits under Section 287.200.4(3), the employer has "elected to accept."

C. The Employer Is Not Required To Take An "Affirmative Action" Of "Purchasing New Insurance" In Order To Elect To Accept.

The Commission's statutory interpretation of Section 287.200.4(3) suffers from the mistaken premise that the phrase "elect to accept" must have an independent legal significance beyond that which the statute assigns to it. The Commission held that "the word 'elect' is to make a decision to do something, and 'accept' is to take something that

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is offered. It defies logic to suggest an entity that ceased to exist in the late 1990s could have made a decision to take or accept the protection of a statute that was not effective until 2014." L.F. at 71.

However, these layman definitions of the words "elect" and "accept" completely ignore—and are at odds with—the specific definition the phrase "elect to accept" was given within the strictly construed text of Section 287.200.4(3). The phrase "elect to accept" was unequivocally defined to comprise three unique scenarios, one of them being when the employer is "insuring their liability." If any one of these three criteria have been met, then the employer has "elected to accept" by the plain language of the statute.

To the extent the words "elect" and "accept" may have meanings that conflict with these clearly delineated criteria, those meanings are of no consequence. It is a well-known canon of statutory construction that "when 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) (emphasis added). Because the legislature defined "elect to accept" in terms of specific criteria that do not require an affirmative action, that is what must govern. The proper analysis of whether an employer has "elected to accept mesothelioma liability under [Section 287.200.4(3)]" should have focused exclusively on whether the employer is "insuring their liability."

"A strict construction of a statute presumes ***nothing*** that is not expressed." *Lewis*, 435 S.W.3d at 154-155 (emphasis added). There is no language in the statute whatsoever expressly requiring a "purchase of new insurance," a "purchase of an endorsement," or the

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taking of some "affirmative action" to cover these benefits. Nothing about the phrase "insuring their liability" required any affirmative action on the part of employers after the statute went into effect. An occurrence-based insurance policy may be "insuring [an employer's] liability" in the past, in the present, and in the future.

Here, Respondents' occurrence-based policies have insured Valley Farm for claims that may have arisen in the past, they are currently "insuring [Valley Farm's] liability" for this claim, and they will continue to insure Valley Farm's liability for any other occupational disease claims that may arise in the future. The triggering occurrence commencing liability coverage is that the employee's last exposure to the hazard of the disease must occur during the policy period. As long as these insurers remain solvent, and as long as workers who were last exposed during the policy period continue to develop occupational diseases, the coverage provided by these insurance policies will never expire.

There is no language in the statute that required Valley Farm to take any affirmative steps once the statute had gone into effect if they were already "insuring their liability" for all benefits. If the statute required Valley Farm to take an affirmative action to elect to accept, then under strict construction ***the statute would have to say so***. Such a requirement cannot be presumed in the absence of any textual support. Having a pre-existing occurrence-based policy "insuring their liability" satisfies this "elect to accept" criterion just as surely as affirmatively purchasing a new claims-made policy "insuring their liability" does.

The Commission went on to hold that "[i]f Claimants' interpretation that any policy covering occupational diseases covers mesothelioma liability were true, then all employers

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would have had a policy of insurance to cover mesothelioma liability when the amendments were authored. The words 'elect to accept' would be moot because insurance under the Act was and is mandatory." L.F. at 72. This conclusion was deeply flawed.

From a factual standpoint, the Commission's assumption is demonstrably false. Just because employers previously acquired insurance policies at the time of last exposure does not mean those policies will still provide coverage today. Like many employers who operated decades ago, some insurers who provided coverage decades ago no longer exist. For evidence of this, the Court need not look any further than its previous decision in *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018) (upholding award of benefits enumerated in Section 287.200.4(3) to a mesothelioma victim where employer's insurer at time of last exposure was insolvent but employer had purchased new claims-made policy with mesothelioma endorsement). If the employer in *Casey* had not purchased a new policy with an endorsement covering its mesothelioma liability on a claims-made basis, it would not have "elected to accept" mesothelioma liability. The employer's policy from the time of the employee's last exposure was no longer "insuring their liability" under Section 287.200.4(3) because the insurer that issued it was insolvent. *Id.* at 78 n.3.

This is not uncommon. Numerous insurance policies dating from decades ago either belong to insolvent insurers or cannot be located due to the passage of time. The Division's records of insurance from the 1970s and 1980s are riddled with gaps in coverage.[4] In cases

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[4] Indeed, Respondent Travelers is only a party to this case because it can be reasonably inferred that they held coverage from 10/17/1984-10/17/1985 based on a "renewal" box

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where no proof of coverage can be found or the insurer no longer exists, employers will not have automatically "elected to accept" because they will not have a policy "insuring their liability." Unless they purchase a new claims-made policy insuring their liability, the employer will have "reject[ed] mesothelioma liability" under Section 287.200.4(3)(b).

Furthermore, even if the Commission's factual assumption were correct (it is not), the Commission failed to cite any law for the proposition that the legislature is precluded from writing a statute in a manner that deems certain employers to have "elected to accept" from the effective date of the law. If that is how the strictly construed language reads, then that is what governs. After all, what possible reason would an employer have to ***not*** "elect to accept" mesothelioma liability under Section 287.200.4(3) when they already have a policy fully "insuring their liability" for these benefits? Why on earth would an employer "reject" these covered benefits and willingly risk the prospect of substantial civil liability, when they are already fully insured in the workers' compensation system and would pay nothing?

Although the Commission apparently believed that an employer with coverage for their entire liability might not want to take advantage of that coverage, this notion is nonsensical. It is largely akin to suggesting that someone at fault in a serious car accident with car insurance might nonetheless want the opportunity to voluntarily renounce that

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that was checked on a later proof of coverage form. In some cases, however, the gaps in coverage are so pervasive that no reasonable inferences can be drawn as to which insurance companies provided coverage for specific years.

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coverage and face the prospect of paying out of his or her own pocket for the damages caused. It is not as if an employer's election to accept through having a pre-existing policy "insuring their liability" works to the employer's detriment. To the contrary, it protects employers from the threat of significant civil liability while costing them absolutely nothing in the workers' compensation system. Here, because Valley Farm no longer exists at all, civil liability may not be a concern. However, it will certainly be a grave concern in equivalent fact patterns where the employer no longer exists in-state but still has business operations elsewhere.

Though this case may be styled "Vincent Hegger v. Valley Farm Dairy Company," it is important to realize that Valley Farm, a defunct entity, is not truly a party to this case—only its insurers are. When it comes to an interpretation of the "elect to accept" language in Section 287.200.4(3), the respective interests of an employer from the time of last exposure and an insurer from the time of last exposure are diametrically opposed. If Appellant's interpretation is correct, then the employer will be protected from civil liability and will pay nothing additional in the workers' compensation system, while the insurer will see an increase in the benefits it must pay mesothelioma victims. If the Respondents' interpretation is correct, then the employer faces a much greater likelihood of civil liability, while the insurer will continue to pay employees next to nothing. If an employer were truly a party to this case, that employer would surely embrace Appellant's interpretation of the new law wholeheartedly. Why would employers need or want the affirmative option to bizarrely disclaim the coverage provided by their own pre-paid insurance policies,

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particularly when doing so would subject them to the potential risk of unlimited liability in civil court?

The phrase "elect to accept" is in effect nothing but shorthand for the list of specific criteria that define it. Under strict construction, it must not be assigned further significance beyond the enumerated criteria, particularly when doing so would undermine the whole purpose of the law. Section 287.200.4(3) can functionally be read as "[f]or employers that [are insuring their liability]. . . 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." There is no need to determine whether the "elect to accept" language is "moot" when ***its own definition has been met***.

The Commission erred by substituting its own definitions of "elect" and "accept" in lieu of the statute's own strictly construed definition of the phrase "elect to accept." In essence, the Commission put the proverbial cart before the horse. In violation of strict construction, the Commission wrongly presumed that an employer must first make an express election to accept before an insurance policy can ever provide coverage by improperly reading variations of the words "affirmative," "action," and "purchase" into the statute. This presumption not only read language into the strictly construed statute that simply is not there, but it ignored the fact that an employer's election to accept is defined within the statute as simply "insuring their liability" in the first place. This legislative definition of "elect to accept" is not at all surprising, given the legislature's intent to protect employers from civil liability while increasing the benefits due to the broadest class of mesothelioma victims.

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D. Section 287.200.4 Does Not Create A New Class Of Benefits.

The Commission also held that Respondents' policies cannot cover the benefits under Section 287.200.4(3) because they are an entirely new "type or class" of benefit rather than an increase in so-called "traditional" benefits for permanent total disability or death. L.F. at 72. Even if this were correct (it is not), the Commission failed to explain how it would have any bearing on the analysis. Whether the benefits in Section 287.200.4(3) are characterized as an increase in benefits or an entirely new class of benefits is irrelevant. Either way, they are still a portion of Valley Farm's liability. Respondents' policies cover the employer's ***entire*** liability—their terms are not just limited to liability for permanent total disability or death. This superficial distinction has no significance.

At any rate, the benefits in Section 287.200.4(3) are in fact provided for permanent total disability and death. They represent an increase in the amount of a class of benefits which have long been provided under the Missouri Workers' Compensation Law. The newly enacted Section 287.200.4 states that all the enumerated benefits—including those in Section 287.200.4(3)—are "for occupational diseases due to toxic exposure which result in a ***permanent total disability or death***." *See* Section 287.200.4 RSMo. (emphasis added). The statute could not be any clearer. In order to become entitled to these benefits, the claimant must establish that the employee either became permanently and totally disabled or died from the disease.

The Commission nevertheless found that the benefits in Section 287.200.4(3) instead represent a new class of benefits because the "traditional" benefit amounts for permanent total disability or death remain payable in addition to them. L.F. at 72. It is true

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that these "traditional" benefits remain payable, as Section 287.200.4(1) states that they must be provided "[n]otwithstanding any provision of law to the contrary."[5] However, it is unclear how the fact that these benefits remain payable in addition to the increased benefits provided in Section 287.200.4(3) somehow renders the latter an entirely new "type or class" of benefits.

The Commission's conclusion seemingly comes down to these respective benefits being enumerated in different subsections. However, that is a meaningless distinction of form over substance. *See Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo. banc 1986) (holding that "[s]ubstance and not form should govern" as a canon of interpretation). An increase in the total amount of benefits for permanent total disability or death could have been accomplished by a single rate increase within a single statutory subsection or it could have been done by adding benefits enumerated in two separate subsections together. The fact that the legislature chose the latter method is of no substantive consequence. The end result is the same either way—the amount of benefits for an employee's permanent total disability or death has increased.

[5] The Commission stated that this "notwithstanding" language means that "no other provisions of law can be held in conflict with it." L.F. at 72. While that is a correct statement of law, it has no applicability to the issue at hand. Section 287.200.4(1) is not in conflict with Section 287.200.4(3). Section 287.200.4(1) just states that additional benefits must still be paid once the benefits in Section 287.200.4(3) are exhausted.

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E. The Overall Statutory Structure And Purpose Of Section 287.200.4.

Without question, the Commission's interpretation of Section 287.200.4(3) flies in the face of the January 1, 2014 amendments' purpose. This law was passed, in large part, so victims of mesothelioma would finally receive benefits commensurate with the magnitude of their harm, after long being denied adequate compensation under the old law. For a disease with a latency period spanning 30-40 years, a substantial number of employers, if not most, will inevitably be out of business by the time the employee is diagnosed.

Countless employees who develop mesothelioma—especially union tradesmen such as asbestos workers, pipefitters, operating engineers and boilermakers—will find that there is no employer to file a claim against for these benefits, despite the fact that their employer of last exposure still has solvent workers' compensation insurance policies covering their entire liability for mesothelioma dating from the time the employee was last poisoned by asbestos. This was not the legislature's intent, as is particularly evidenced by Section 287.200.4's treatment of claims for the other "occupational diseases due to toxic exposure." The manner in which the legislature increased benefits for these other diseases must be harmonized with the legislature's increase of mesothelioma benefits in Section 287.200.4(3).

"Provisions of an entire legislative act must be construed together and all provisions ***must be harmonized***, if reasonably possible to do so." *Oberreiter v. Fullbright Trucking Co.*, 117 S.W.3d 710, 714 (Mo. App. 2003) (internal citation omitted, emphasis added). "Statutes relating to the same subject matter are considered in pari materia. . . [w]hen one

statute deals with a subject in general terms and another statute deals with the same subject in a more specific way, the two statutes should be harmonized if possible." *KC Motorcycle Escorts, L.L.C. v. Easley*, 53 S.W.3d 184, 187 (Mo. App. 2001) (internal citations omitted). "'[T]he rule of 'strict construction'. . . is not the opposite of liberal construction, and it does not require such a strained or narrow interpretation of the language as to defeat the object. ***The primary purpose of all statutory construction is to determine the intent of the legislature***; and all such rules are but vassals to the liege sovereign intent.' And we have said that '***statutes relating to the same subject matter must be considered together***.'" *State ex rel. Schwab v. Riley*, 417 S.W.2d 1, 3-4 (Mo. banc 1967) (internal citations omitted, emphasis added).

Section 287.200.4(2) was enacted at the same time as Section 287.200.4(3). In fact, subdivision (2) is part of the ***very same sentence*** that begins subdivision (3).[6] When a certain subject matter is treated one way in a statute and is then referenced again within the same sentence, it means that this subject matter should be treated in a similar sense as its first treatment. *See, e.g.*, *Sayles v. Kansas City Structural Steel*, 128 S.W.2d 1046, 1052 (Mo. banc 1939) (holding, in a case interpreting a workers' compensation statute, that the legislature "clearly, we think, used the word 'persons' the second time ***in the same sense***

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[6] Section 287.200.4 opens with one long sentence that encompasses subdivisions (1), (2), and the start of (3), beginning with "[f]or all claims filed on or after January 1, 2014" and ending with "shall be paid by the employer or group of employers such employer is a member of."

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as previously used in the same sentence, viz., persons working under any contractor of hire. . .") (emphasis added).

Section 287.200.4(2) grants increased benefits for the other occupational diseases due to toxic exposure such as asbestosis.[7] Unlike Section 287.200.4(3), subdivision (2) makes no reference to the employer "insuring their liability" or to insurance coverage whatsoever. Because "[a] strict construction of a statute presumes ***nothing*** that is not expressed," Section 287.200.4(2) cannot modify the law regarding the insurer liable for occupational disease benefits. *See Lewis*, 435 S.W.3d at 154 (emphasis added). The increased benefits provided in Section 287.200.4(2) for asbestosis can only be governed by prior case law establishing that the insurer at the time of last exposure is ***solely*** liable. *See Enyard*, 390 S.W.2d at 429; and *Tunstill*, 870 S.W.2d at 272.

Thus, in cases involving the less severe, non-malignant disease of asbestosis, pre-existing insurance policies from the time of the employee's last exposure will undeniably cover these increased benefits. Indeed, they are the only policies that ***could*** cover these benefits without reading language into Section 287.200.4(2) that is not present (and thereby violating strict construction). The Commission openly recognized this, but nevertheless stated that "[i]f the legislature wanted any existing policy covering occupational diseases to cover mesothelioma liability, it would have included mesothelioma with the other

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[7] Asbestosis, a non-malignant latent disease caused by asbestos exposure, is included in the definition of an "occupational disease due to toxic exposure" under Section 287.020.11.

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occupational diseases due to toxic exposure, where no election to accept is required." L.F. at 72.

However, if policies at the time of last exposure do not similarly provide coverage for increased mesothelioma benefits, it would lead to a very odd dichotomy. It would treat the last exposure insurer's liability for asbestosis claims and mesothelioma claims completely differently, even though these two subdivisions address the same subject matter and are enumerated within the same sentence of the same legislative act. Why would the legislature set up a statutory scheme that pins ***sole*** liability for increased benefits on the insurer at the time of last exposure in cases of asbestosis, but then take away that same insurer's liability for increased benefits ***altogether*** in cases of mesothelioma? Likewise, why would the legislature allow employees diagnosed with asbestosis to recover these increased benefits regardless of whether the employer still exists, but then neglect to preserve that same safeguard for employees diagnosed with the far more severe and malignant disease of mesothelioma?

When these two subdivisions are examined in *pari materia*, as they must be, it is obvious that the legislature did not intend such an outcome. This result would be wholly irrational—the legislature intended to provide greater coverage for mesothelioma victims, as demonstrated by the much larger benefit amount allocated for mesothelioma claims compared to the other occupational diseases due to toxic exposure.

One of the great ironies of the Commission's decision is that if Mr. Hegger had instead suffered from the lesser disease of asbestosis rather than the fatal cancer mesothelioma, then the Commission would have awarded significant increased benefits

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under Section 287.200.4. Instead, because he suffered from a more severe and malignant disease that killed him, the Commission awarded nothing. This bizarre result cannot have been the legislature's intent.

As further evidence of this statutory structure, Section 287.200.5 even envisions a set-off for asbestosis victims who recover benefits under Section 287.200.4(2) and are later diagnosed with the more severe disease of mesothelioma. If insurance policies in place at the time of last exposure cannot similarly provide coverage for increased benefits in mesothelioma cases, however, then this set-off provision would be of little to no consequence. Most employees, such as Mr. Hegger, would only have been able to recover benefits for asbestosis in the first place. This subsection cannot simply be written off as meaningless, as it must be "presume[d] that the legislature did not insert superfluous or idle verbiage in a statute." *See Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. 2007).

There are reasons the legislature wrote Section 287.200.4(3) in terms of an "elect[ion] to accept" rather than its more direct imposition of increased benefits under Section 287.200.4(2). By providing that an employer elects to accept the benefits in Section 287.200.4(3) through the open-ended phrase "insuring their liability," the legislature broke from prior law affixing sole liability with the insurer at the time of last exposure. The legislature did this because it knew (or is presumed to have known) that policies covering the time of last exposure provided sole coverage for all occupational disease benefits and it foresaw fact patterns in which these policies would be lost or insolvent. *See Robertson*

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v. State, 392 S.W.3d 1, 6 (Mo. App. 2012) (holding that the legislature is "presumed to be aware of the state of the law at the time it enacts a statute.") (internal citations omitted).

Rather than automatically expose employers to civil liability in cases where the policy at the time of last exposure is lost or insolvent, the legislature gave employers in mesothelioma cases the ability to purchase new claims-made insurance to cover these heightened benefits and avoid civil liability. This legislative precaution is not surprising given the extraordinarily long latency period between an employee's asbestos exposure and eventual development of mesothelioma.

This was amply demonstrated in *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018), where this Court upheld an award of the benefits enumerated in Section 287.200.4(3). In *Casey*, the insurer covering the date of the employee's last exposure was insolvent but the employer had purchased a new claims-made insurance policy with an endorsement covering the benefits enumerated in Section 287.200.4(3). Had the legislature not given the employer the ability to purchase a new claims-made insurance policy with a mesothelioma endorsement, the employer might have found itself facing significant liability in civil court.

The legislature's provision of this safeguard for mesothelioma claims, however, should not conversely be used to negate the existence of insurance coverage in the far more common fact patterns where a relatively small employer no longer exists but a large insurance company is still solvent. By utilizing the "elect to accept" framework and allowing currently existing employers to purchase new insurance covering benefits on a claims-made basis, the legislature ensured that the broadest class of employees affected by

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the most severe occupational disease of mesothelioma would almost always have a remedy and that the maximum number of employers would have protection from civil liability. 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 it.

When Section 287.200.4(3) is examined in *pari materia* with Section 287.200.4(2) and Section 287.200.5, the legislature's intent becomes self-evident. The only way to harmonize all these provisions of Section 287.200.4 is to recognize that policies from the time of last exposure cover increased mesothelioma benefits. The legislature intended to increase the workers' compensation benefits due to the overall class of workers suffering from occupational diseases due to toxic exposure, and to especially heighten these benefits for victims of the terminal cancer mesothelioma.

For some reason, the Commission refused to believe this was a real legislative purpose behind the law. The Commission instead believed the legislature was solely motivated by a desire to protect employers from civil liability rather than to benefit workers, as if these two concepts were mutually exclusive.[8] L.F. at 73. Evidently, the

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[8] The Commission held that "it is much more likely the legislature intended to protect employers from the risk of greater civil liability, not to maximize workers' recovery." L.F. at 73. This belief lacked any logical foundation. The legislature could have simply written the law to reimpose workers' compensation exclusivity without any corresponding increase in benefits at all. It did not do so. The law increased the benefits to be paid for all occupational diseases due to toxic exposure, and especially heightened them for

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Commission believed that its decision was in furtherance of the legislature's sole motive to protect employers. *Id.* However, even if the legislature's lone concern was to protect employers from civil liability (it was not), the Commission's decision does absolutely nothing to further that goal—in fact, its decision sharply undercuts it.

Thirty to forty years ago, when employees such as Mr. Hegger were actively being exposed to asbestos in their workplaces, many industrial companies operated in Missouri. A substantial number of these companies have long since moved away and no longer had any presence in Missouri when the January 1, 2014 amendments went into effect, although they continue to conduct active business operations elsewhere. Additionally, many small business owners from decades ago operated in their individual capacity and took out workers' compensation insurance policies in their own name. When these owners retired prior to January 1, 2014, they stopped procuring workers' compensation policies because they were no longer employing anyone. All these employers are understandably unaware of the January 1, 2014 amendments to the Missouri Workers' Compensation Act, having not employed anyone in Missouri for years (sometimes decades) and therefore having no reason to follow developments in the Missouri Workers' Compensation Law.

These employers have not purchased any new Missouri workers' compensation insurance policies with mesothelioma endorsements since the January 1, 2014 amendments

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mesothelioma. The Commission's belief that the new law was only meant to provide protection to employers is incorrect. It was obviously passed as a compromise that both protects employers and increases workers' recovery.

went into effect. However, many of these employers will still have viable workers' compensation policies insuring their "entire liability" for workers' compensation benefits dating from the time of last exposure. These employers would obviously prefer to avail themselves of insurance policies covering their entire liability for all workers' compensation benefits—which they already paid for—rather than face a risky civil lawsuit.[9]

Under the Commission's decision, these employers will be unable to do so. Just like non-existent employers such as Valley Farm, these employers will have failed to take any "affirmative action" of "purchasing new insurance" after the law went into effect. Even though Section 287.200.4(3) does not reference the "purchase" of any "new insurance" nor the taking of any "affirmative action," these employers will be deemed to have "reject[ed]"

[9] The Respondents will likely balk at the notion that an employer need not pay an increased premium for a policy "insuring their liability" under Section 287.200.4(3). However, the insurer of last exposure in *McGhee* was equally unable to charge an increased premium for the increased benefits it had to pay. Insurers at the time of last exposure for the lesser diseases governed by Section 287.200.4(2) will similarly be unable to collect increased premiums. Moreover, interpreting Section 287.200.4(3) in a manner that will expose many employers to unlimited civil liability is far more troubling. How were these employers supposed to prepare for this massive increase in their potential liability? Ultimately, however, any speculative musings about premiums is devoid of any support in the record. Respondents did not present any evidence regarding the premiums they have charged.

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under Section 287.200.4(3)(b) and will find themselves subject to limitless civil liability. Just a few civil verdicts against such employers could quite easily be exponentially higher than a dozen awards of increased benefits under Section 287.200.4(3). If the Commission really believed that the legislature's main goal in enacting Section 287.200.4(3) was to protect employers from civil liability, then how exactly does its statutory interpretation help them?

Appellant understands that at first glance, without a thorough analysis, it may seem strange to hold that an employer has "elected to accept" liability for increased workers' compensation benefits when the employer no longer exists. However, this is where a strict construction of Section 287.200.4(3), a reading of this subsection in *pari materia* with the other provisions of Section 287.200.4, and an examination of the legislature's intent logically leads. To hold otherwise would be directly contrary to the January 1, 2014 amendments' purpose—many (if not most) employees suffering from mesothelioma would not receive any increased workers' compensation benefits while numerous employers would still be exposed to considerable civil liability.

Under the Commission's erroneous interpretation of Section 287.200.4(3), a mesothelioma victim's ability to affect a recovery for increased workers' compensation benefits—and an employer's protection from civil liability—will be left to sheer chance. An employee's potential compensation will depend entirely upon whether their former employer at the time of last exposure happens to still exist. An employer's protection from civil liability will depend entirely upon whether the employer happens to still conduct business in Missouri after the law went into effect.

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This arbitrary system is not what the legislature intended, and the Court should attempt to give effect to the intent of the legislature and avoid unreasonable outcomes. *See Honer*, 192 S.W.3d at 529 (noting that a court should "if possible, give effect to [legislative] intent" and that "[t]he law favors a statutory interpretation that tends to avert an unreasonable result."). It is unconscionable that only employees who were last exposed by a currently existing employer should receive the benefit of the January 1, 2014 amendments' compromise, while the many employees who were last exposed by a non-existent employer continue to receive next to nothing. It is also baffling that the legislature would craft the statute in a manner that randomly imposes substantial civil liability upon a significant number of currently existing employers. Fortunately, a correct strict construction of Section 287.200.4(3) gives effect to the true intent of the legislature and prevents both of these outcomes.

F. The Effect Of *Accident Fund Ins. Co. v. Casey*.

After the Commission rendered its decision denying benefits in the present case, this Court handed down the first appellate decision interpreting Section 287.200.4(3) in *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018). The fact pattern in *Casey* was the complete inverse of the present case. The employer still existed after the January 1, 2014 amendments went into effect and had purchased a claims-made policy with a mesothelioma endorsement, while the insurer covering the timeframe of the employee's last exposure was insolvent. *Id.* at 79. The insurer attempted to argue that ***only*** a policy in place at the time of the employee's last exposure could have provided coverage for increased benefits in Section 287.200.4(3). *Id.* at 79-80.

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This Court rejected the insurer's argument. In examining whether an "elect[ion] to accept" mesothelioma liability had occurred under Section 287.200.4(3), the Court held that "the relevant inquiry in this matter is. . . ***whether the terms of Employer's policy provide coverage***." *Id.* at 18 (emphasis added). This is completely consistent with Appellant's interpretation of Section 287.200.4(3). If there is a solvent insurance policy with terms that provide coverage for an employer's mesothelioma liability, then that employer has "elected to accept" under the statute's strictly construed language. Due to the broad and unqualified nature of the language "insuring their liability," the statute does not affix sole liability with any particular insurer—it logically envisions the possibility that multiple insurers may provide coverage for these benefits, as long as the employer's policy in question contains terms "insuring their liability."

In *Casey*, the policy that constituted an "elect[ion] to accept" happened to be a claims-made policy. *See id.* at 80 (holding that the policy's "triggering occurrence—the event commencing liability coverage—is the filing of a claim."). By its plain terms, the claims-made policy provided coverage for the benefits under Section 287.200.4(3) because it contained a "mesothelioma endorsement adopt[ing] section 287.200.4 and, as a result, adopt[ing] that section's provision of enhanced benefits. . . which contain[ed] no qualifying language as to the date of last exposure or injury and [which] limit[ed] coverage only by way of conditioning it on the filing of a claim after January 1, 2014." *Id.* at 80-81.

Here, the policy that constitutes an "elect[ion] to accept" happens to be an occurrence-based policy. The triggering occurrence—the event commencing liability coverage—is the employee's last exposure to the hazard, which must have occurred during

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the policy period. By operation of law, this occurrence-based policy's plain terms provide coverage for the benefits under Section 287.200.4(3) because it covers the employer's entire liability for an occupational disease when the last exposure occurred during the policy period.

Nothing in *Casey* remotely suggests that ***only a claims-made policy*** can constitute an election to accept through the "insuring their liability" criterion. The Court merely rejected the reverse argument—that ***only an occurrence-based policy*** from the time of last exposure can cover the benefits in Section 287.200.4(3). This Court was careful to narrowly confine its decision to the facts at hand.

G. The Constitutionality Of Section 287.200.4(3) As Applied To These Facts.

The Commission noted that the Respondents have preserved a constitutional argument for appeal. L.F. at 61. A Missouri statute is presumed to be constitutional and "will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *In Matter of the Care and Treatment of Murphy*, 477 S.W.3d 77, 83 (Mo. App. 2015) (citing *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009)). "[T]he burden to prove a statute unconstitutional rests upon the party bringing the challenge." *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000) (internal citations omitted). "This Court 'will resolve all doubt in favor of [an] act's validity' and 'make every reasonable intendment to sustain the constitutionality of the statute.'" *Reproductive Health Services of Planned Parenthood of*

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St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 688 (Mo. banc 2006) (internal citations omitted).

During the hearing on this claim, the Respondents indicated that their constitutional argument is based upon "applying [Section 287.200.4] retroactively to exposure that last occurred either in 1984 or 1990 when [Mr. Hegger] last worked for any entity." Tr. at 21. The Missouri Constitution's prohibition against retroactive laws simply states "[t]hat no. . . law. . . retrospective in its operation. . . can be enacted." *See* Mo. Const. art. V, § 13. This Court has held that "[t]he prohibition against laws that operate retrospectively 'does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be allowed to operate retrospectively so as to affect such past transactions ***to the substantial prejudice of parties interested***.'" *See Casey's Marketing Co. v. Land Clearance for Redevelopment Authority of Independence, Missouri*, 101 S.W.3d 23, 28-29 (Mo. App. 2003) (quoting *Fisher v. Reorganized Sch. Dist. No. R–V of Grundy County*, 567 S.W.2d 647, 649 (Mo. banc 1978)) (emphasis in original).

Because the Commission did not entertain this constitutional issue, Appellant can only make an educated guess as to the exact nature of Respondents' argument. If Appellant's statutory construction of Section 287.200.4(3) is correct, then the legislature imposed a benefit increase upon insurers holding coverage at the time of last exposure in mesothelioma claims, just as the legislature unquestionably did for insurers holding coverage at the time of last exposure in asbestosis claims governed by Section 287.200.4(2). The Respondents' constitutional argument under Mo. Const. art. V, § 13 appears to be that this benefit increase is unconstitutionally retroactive because a party is

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entitled to application of the law as it existed at the time of last exposure and not the law in place when the claim accrues.

i. Section 287.200.4(3) Is Not Retrospective When Applied To These Facts.

Appellant is unaware of any Missouri case holding that the law as it existed at the time of an employee's last exposure to a hazard governs the claim. Rather, Missouri case law repeatedly indicates that the law in place when a claim accrues (i.e., when the employee or plaintiff has developed and been diagnosed with a disease) governs. The Respondents' position regarding retroactivity constitutes a profound departure from how this issue has been treated by Missouri courts in the past.

For instance, if the Respondents were correct in their constitutional argument, how could the insurer in *McGhee v. W.R. Grace & Co.* have been subject to increased benefits at the time of the employee's diagnosis in 2001? At the time of the employee's last exposure in 1977, workers' compensation benefits were capped at $95.00 per week. *McGhee*, 312 S.W.3d at 452. The insurer's contract with the employer, just as in the present case, must have been written to insure the employer for their entire liability. *See* Section 287.280.1 RSMo.; and *Allen*, 174 S.W.2d at 350. If this "entire liability" were constitutionally capped at $95.00 per week (reflecting the law in place at the time of last exposure), then the insurer's liability could not have validly increased to $161.91 per week

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as the court held. *McGhee*, 312 S.W.3d at 452. There is no way to reconcile the Respondents' constitutional argument with the outcome in *McGhee*.[10]

Even more perplexing, if the Respondents' constitutional argument holds water, how could the employer in *State ex rel. KCP&L Greater Missouri Operations Company v. Cook* have lost the protection of the workers' compensation exclusivity bar and been subject to unlimited civil liability? At the time of the employee's last exposure in 1988, the employer was indisputably entitled to the protection of the workers' compensation exclusivity bar. *See Cook*, 353 S.W.3d at 16. Accordingly, at the time of last exposure, the employer's liability was limited to whatever benefit rate the workers' compensation system provided for occupational diseases.

If the Respondents' are correct in their constitutional argument, then the *Cook* court should not have held that strict construction removed occupational disease cases from workers' compensation exclusivity—rather, the court should have held that, while this was the correct statutory construction, it would be unconstitutionally retroactive to do so under Mo. Const. art. V, § 13. Compared to the limited benefit increase provided in Section

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[10] Moreover, if an insurer's liability for increased benefits in between the time of last exposure and a claim's accrual is unconstitutionally retroactive, then it would render Section 287.200.4(2) unconstitutional in its entirety. As previously explained, this subdivision outright imposes an increase in benefits for asbestosis. Unlike Section 287.200.4(3), it does not reference insurance coverage. Under strict construction, it cannot modify prior law establishing that the last exposure insurer is solely liable for all benefits.

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287.200.4(3), subjecting an employer to the prospect of unlimited civil liability is a far more drastic change in the law. In fact, *Cook* was not just a matter of an increase in the employer's liability, but it was a more fundamental change in the jurisdiction of the case from the Division of Workers' Compensation to civil court, along with all the different substantive elements of a claim that must be established for a tort as opposed to a workers' compensation claim. Nonetheless, not a single retroactivity concern was voiced throughout the entirety of the *Cook* court's opinion—not even in the extensive dissenting opinions of two judges. *See generally id.*

Indeed, if the Respondents are correct in their retroactivity argument, how can strict construction under Section 287.800 and the prevailing factor requirement in Section 287.067.2 apply to mesothelioma cases at all? At the time of last exposure, the law was liberally construed in favor of the employee and the employee only had to show that occupational exposure was a "substantial factor" in causing the occupational disease. The change to strict construction and to the prevailing factor requirement, which occurred in 2005, have both been characterized as substantive changes to the law which cannot be applied retrospectively. *See Eason v. Treasurer of State*, 371 S.W.3d 886, 889 (Mo. App. 2012) (holding that "the 2005 amendment imposing a strict construction standard is substantive and, therefore, retrospective application is prohibited."); and *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350 (Mo. App. 2007) (holding that "[t]he amended language, using the term 'prevailing factor,' resulted in a substantive change in the law which affected a claimant's right to compensation" and "[t]herefore, the law could not be applied retroactively[.]"). Nevertheless, courts have taken for granted that these legislative

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amendments govern mesothelioma claims even though the employee's last exposure occurred long before these changes went into effect. *See, e.g.*, *Cook*, 353 S.W.3d at 16, 20 (applying strict construction to mesothelioma claim even though the employee's last exposure had occurred in 1988).

Are all these decisions wrong? Is the law that governs mesothelioma claims simply stuck in the 1970s and 1980s? The clear answer, implicit in these cases, is no. To even implicate retroactivity concerns, "the matter must involve a vested right." *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 496 (Mo. banc 1995). "A vested right. . . must be something more than a mere expectation based upon an anticipated continuance of the existing law." *Id.* "[N]o one has a vested right that the law will remain unchanged." *Cannon v. Cannon*, 280 S.W.3d 79, 84-85 (Mo. banc 2009). This Court has recognized that "vested means fixed, ***accrued***, settled or absolute." *La-Z-Boy Chair Co. v. Dir. Of Econ. Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999) (emphasis added).

There is nothing retrospective or retroactive about application of Section 287.200.4(3) to this claim ***because the claim did not accrue until after the law went into effect on January 1, 2014***. The claim did not accrue at the time of Mr. Hegger's last exposure in 1984—it accrued when Mr. Hegger was diagnosed with mesothelioma cancer and suffered an injury in 2014. Because Mr. Hegger did not have mesothelioma in 1984, no claim could have been brought for mesothelioma in 1984.

"Missouri law does not declare that a cause of action originates when tortious conduct occurs." *State ex rel. Old Dominion Freight Line, Inc. v. Dally*, 369 S.W.3d 773, 778 (Mo. App. 2012). The cause of action does not accrue when the wrong is done, but

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rather when the damage resulting therefrom is sustained and is capable of ascertainment. *Id.* "[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*, 366 S.W.3d at 549.

In a workers' compensation claim for a latent disease, the "date of injury" is when the employee is diagnosed with an occupational disease. *See McGhee*, 312 S.W.3d at 456, 460 (holding that the "date of injury" is not "the 'date of last exposure' or some other time period before the injury became compensable."); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 416 (Mo. App. 1985) (holding that "[l]ogically, an employee cannot be expected and certainly cannot be required to institute claim until he has reliable information that his condition is the result of his employment. Just as logically, given that there must be competent and substantial evidence of this link, ***the claimant is entitled to rely on a physician's diagnosis of his condition*** rather than his own impressions.") (emphasis added); and Section 287.063.3 RSMo. (noting that "[t]he statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure[.]").

The parties' vested rights to application of the law did not become fixed until Mr. Hegger was injured by mesothelioma, which occurred at the time of his diagnosis in March 2014. Because this claim accrued after the January 1, 2014 amendments went into effect, there is no retrospective application of Section 287.200.4(3) as applied to these facts. To hold otherwise would invalidate a long line of prior holdings in Missouri case law, including the holding in *Cook* which removed occupational disease cases from workers'

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compensation exclusivity. Invalidating *Cook* would in turn call into question one of the very bases upon which the legislature enacted the January 1, 2014 amendments—namely, to return occupational disease cases to workers' compensation exclusivity. What was the point of returning these cases to workers' compensation exclusivity if it was unconstitutionally retroactive to have removed them in the first place?

The Respondents will likely point to language in this Court's *Casey* opinion in an attempt to support its position that the law in effect at the time of last exposure governs. In *Casey*, this Court held that "[i]t was not until after the amendments went into effect that Insurer and Employer contracted for coverage" and that "[b]ecause Insurer affirmatively assented to providing these enhanced benefits, the new law does not impair any vested right Employer or Insurer once held." *Casey*, 550 S.W.3d at 82.

These statements must be considered within the narrow context in which *Casey* was decided. *Casey* only addressed the limited question of whether it was constitutional to hold an insurer liable for increased benefits when they sold the employer a claims-made policy after the January 1, 2014 amendments went into effect. Because such an insurer has "affirmatively assented" to cover these increased benefits after the law went into effect, the Court held that there could hardly be any retroactive violation of the insurer's vested rights. While that is certainly correct—and it easily disposed of the narrow question presented—this does not mean an insurer's provision of a claims-made policy is the ***only*** fact pattern in which Section 287.200.4(3) may be constitutionally applied.

Although it was unnecessary, this Court could have more broadly held that no retroactivity concerns were implicated, and no vested rights were impaired, because Mr.

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Casey had not been "injured" by mesothelioma until 2015, after the effective date of Section 287.200.4(3). Nothing in *Casey* suggests that an entity ***must*** affirmatively assent to an increase in benefits (or to any other change in the law) in between the time of last exposure and the claim's accrual lest that entity's vested rights be violated. The Court was simply confining its decision to the limited facts before it.

After all, the insurer in *McGhee* did not affirmatively assent to provide increased benefits after the lifting of the 1977 benefit cap. The employer in *Cook* did not affirmatively assent to lose the exclusivity of jurisdiction in the Division of Workers' Compensation after the 2005 introduction of strict construction, and thereby be subjected to unlimited civil liability. Insurers of the other occupational diseases due to toxic exposure in Section 287.200.4(2) will not have affirmatively assented to provide the increased benefits enumerated in that subdivision. Why must the Respondent insurers affirmatively assent to provide increased benefits in this case?

If the Respondents were correct in their retroactivity argument, it would mean that virtually any attempt by the Missouri General Assembly to enact substantive legislation regarding any disease with a latency period spanning decades would be intrinsically unconstitutional. There would almost always be a vested right to application of the law at the time of last exposure from decades ago, continually preventing new legislation from taking effect.

The outcome in *Casey* would also be effectively destroyed if this Court finds that an increase in benefits upon an entity from the time of last exposure is unconstitutionally retroactive. Such a holding would logically invalidate the *Cook* case, because it would

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mean that employers have a vested right to the workers' compensation exclusivity they enjoyed at the time of last exposure. Consequently, they could not constitutionally be subject to civil liability. Currently existing employers would not continue to buy claims-made insurance policies with mesothelioma endorsements if they have no true risk of civil liability anyway. If Respondents' argument were accepted, the ultimate result would be a court-imposed reinstatement of workers' compensation exclusivity over all occupational disease claims with no corresponding benefit increase for workers.

The Respondents' concept of retroactivity represents an extremely radical break from how latent disease cases have historically been addressed. It finds no support in either Missouri law or the law of sister states. *See Shifflett*, 442 A.2d at 982 (Maryland case holding that a 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.") (emphasis added). If Respondents' retroactivity argument were accepted, it would have wide-ranging—and likely unintended—effects far beyond the confines of this case.

ii. Although This Case Does Not Involve A Retrospective Application Of Section 287.200.4(3), The Law Is Meant To Apply Retrospectively In Any Event.

This claim did not accrue, and the parties' respective rights did not become vested or fixed, until after the effective date of the January 1, 2014 amendments. Consequently, there is no retrospective application of the new law. The constitutional analysis need not proceed any further.

However, even if Mr. Hegger had been injured by mesothelioma before the January 1, 2014 amendments went into effect, Section 287.200.4(3) would still have applied. In that hypothetical, the claim would have accrued—and the parties' respective rights would have vested—prior to the effective date of the new law. This would have implicated colorable constitutional concerns regarding retroactivity under Mo. Const. art. V, § 13. However, even in that hypothetical, the retroactive application of Section 287.200.4(3) would not have been unconstitutional. The legislature wrote Section 287.200.4 to have a retrospective effect and the statute only involves a remedial increase in benefits rather than a change in substantive rights.

Courts utilize a two-step process to determine whether a law may be constitutionally applied retroactively. *See Murphy*, 477 S.W.3d at 83. First, a court must look to see whether the legislature intended for the law to apply retroactively. When the legislature provides such intent, "the second step of the analysis. . . requires [a court] to consider whether the retroactive application of the [statute] is unconstitutional." *Id.*

Here, the legislature directed that "[f]or all claims ***filed*** on or after January 1, 2014, for occupational diseases due to toxic exposure. . . benefits in this chapter ***shall*** be provided" in the manner laid out in subdivisions (2) and (3). *See* Section 287.200.4 RSMo. (emphasis added). Nothing in this language indicates that the claim must have "arose," "accrued" or "occurred" after January 1, 2014 for the increased benefits to apply. Instead, the text reads that these benefits "shall" be provided so long as the claim is "filed" after the law's effective date. The word "shall" has been consistently interpreted by Missouri courts to indicate a clear legislative command. *See Edwards v. City of Ellisville*, 426 S.W.3d 644,

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664 (Mo. App. 2013) (holding that "[t]he term 'shall' is used in laws, regulations, or directives to express what is mandatory."). (internal citations omitted).

The legislature knowingly drew a distinction between the date that claims accrue and the date that claims are filed within Section 287.200. For instance, in Section 287.200.1(4)—addressing the so-called "traditional" permanent total disability benefits—the text reads that "[f]or all injuries ***occurring*** on or after August 28, 1991. . . the weekly compensation ***shall***" be a given amount. *See* Section 287.200.1(4) RSMo. (emphasis added). Had the legislature intended for the date of injury to be the operative date for provision of the increased benefits in Section 287.200.4, it would have used similar language. The legislature's use of the word "filed" in place of "occurring" evidences the legislature's intent for the provisions of Section 287.200.4 to apply retroactively to claims that arose before January 1, 2014. Persuasive cases from other jurisdictions have addressed similar issues of statutory interpretation and have reached the same conclusion.

One analogous case is *Deck v. Peter Romein's Sons, Inc.*, 109 F.3d 383 (7th Cir. 1997). Prior to *Deck*, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) had allowed migrant workers that met certain statutory criteria to assert a private right of action for occupational injuries. *Id.* at 388. However, migrant workers that had separate remedies through state workers' compensation laws initially could not assert this private right of action against their employers. *Id.* A subsequent United States Supreme Court case interpreting the AWPA held that these injured employees could bring their claims in federal civil court even if they had separate workers' compensation remedies.

After that decision, Congress amended the AWPA so that workers' compensation exclusivity would bar those claims. *Id.*

The issue in *Deck* was whether claims which had accrued prior to the effective date of the new AWPA amendments (and had already been filed) could retroactively be subject to workers' compensation exclusivity and dismissed. *Id.* at 386. The Seventh Circuit looked to the plain language of the statute to discern Congress' intent. *Id.* at 387. The court held that:

> "[T]his is not a case where Congress has left us in the dark concerning its intentions as to the reach of the 1995 amendment. To the contrary, Congress stated quite clearly that the amendment '***shall*** apply to all cases in **w*hich a final judgment has not been entered***.' And, 'where the congressional intent is clear, it governs.' Thus we need not resort to judicial decision-making principles to determine Congress' intent as to whether the amendment should be given retroactive effect. Most notably, the ***presumption against statutory retroactivity***. . . relied on here by Deck, ***has no force in the present case because Congress has made its intention clear***[.]"

Id. (emphasis added, internal citations omitted).

Because no final judgment had been entered in Deck's pending case, it was subject to the retroactive effect of the new law even though the claim had accrued before the statute's effective date. *Id.* at 387-388.

There is very similar language between the federal workers' compensation provision at issue in *Deck* and Section 287.200.4, which reads that "[f]or all claims ***filed***

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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." *See* Section 287.200.4 RSMo. Each statute shares the same indicators of legislative intent in slightly different language. There is the word "shall" (followed by "apply" versus "be provided"), "all claims" versus "all cases," and the predicate event language of "final judgment has not been entered" versus "filed on or after January 1, 2014." Each statute is clear that the law is meant to apply to cases that have already accrued, as long as the case has not had a final judgment entered (in *Deck*) or as long as the case has been filed (in Section 287.200.4).

Another persuasive case is *Riofrio v. Del Monte Fresh Produce N.A., Inc.*, 2010 WL 4536794 (D. Or. 2010), in which the District of Oregon considered whether a statute was meant to apply retroactively. The court held that "[t]he statute expressly states that it is intended to apply to actions that are ***filed*** after the effective date of January 1, 2010. The plain meaning of that provision is that the legislature contemplated the possibility of suits that commenced after that date and that ***arise*** from conduct occurring prior to that date." *Id.* at 4 (emphasis added). By choosing the language "filed" rather than "arise," the Oregon legislature had indicated that the statute was meant to apply retroactively to claims that arose before the filing date. *Id.* Section 287.200.4 contains almost this exact same language.

The Iowa Supreme Court also provided a persuasive opinion on this issue in *Hershberger v. Buena Vista County*, 391 N.W.2d 217 (Iowa 1986). The *Hershberger* plaintiff was injured in a car accident and subsequently sued the county in which the accident occurred, alleging six separate grounds of the defendant county's negligence. *Id.*

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at 218. After the plaintiff was injured but before he filed his case, the Iowa legislature changed its laws regarding a county's duties to motorists. *Id.* As construed by the trial court, this change in the law effectively erased four of his six grounds of negligence. *Id.* at 218-219.

The new law stated that it applied "to all cases ***filed*** on or after [the law's effective date]," and the plaintiff had filed his case after this date. *Id.* at 219 (emphasis added). Because the plaintiff would only have two grounds of negligence if this change in the law were to apply, he attempted to argue that the law in place at the time of his accident should govern. The plaintiff "relie[d] on the rule of construction contained in Iowa Code section 4.5 (1983)," which provides that "a statute is presumed to be prospective in its operation unless expressly made retrospective." *Id.* The court rejected the plaintiff's argument. It held that the "filed on or after" language was "an ***express declaration*** of a legislative intent" for the new law to apply to all cases filed after that date, even though all the necessary events creating the plaintiff's cause of action had occurred prior to that date. *Id.*

The Missouri Court of Appeals' decision in *Latham v. Wal-Mart Stores, Inc.*, 818 S.W.2d 673 (Mo. App. 1991) comports with this analysis. In determining whether the trial court had erred in finding that a statute operated retroactively, the court looked to the statute's plain language and found that it was not intended to apply retroactively. *Id.* at 674-675. The court reached this conclusion because the statute at issue read that it "***shall*** apply to all causes of actions ***accruing*** after July 1, 1987." *Id.* at 674-675 (internal citations omitted, emphasis added). Although the plaintiff's claim was ***filed*** after July 1, 1987, the plaintiff's claim had ***accrued*** earlier when he was diagnosed with a disease known as

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psittacosis on February 24, 1987. The court's reasoning in *Latham* shows that when a statute says "accrued" rather than "filed," the legislature has made clear its intent that the statute should apply prospectively. The reverse implication, therefore, is that if the language had read "filed," it would have been meant to apply retroactively just as courts in other jurisdictions have found.

The present case cannot be distinguished from this authority. While Missouri courts have adopted a general presumption against retroactive laws, this presumption is overcome by a clear command from the legislature that the law at issue should apply retroactively, just as it was in *Deck*, *Riofrio*, and *Hershberger*. Here, the legislature expressly commanded that all cases "filed" after January 1, 2014 "shall" be accorded the enumerated benefits. Such language expressly indicates legislative intent and overcomes the presumption against retroactivity.

Having overcome the presumption against retroactivity, the second step in the analysis is whether a retrospective application of the law would be unconstitutional. A law is only "unconstitutionally retrospective if it creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *Murphy*, 477 S.W.3d at 83 (internal citations omitted). In contrast, "a law will not be considered unconstitutionally retrospective if the law 'relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation.'" *Id.* (citing *State ex rel. Schottel v. Harman*, 208 S.W.3d 889,

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802 (Mo. banc 2006)). "Missouri courts grappling with this distinction are guided by the Missouri Supreme Court's reasoning in *Doe v. Phillips*." *Id.*

In *Phillips*, this Court held that a retroactive law which would be subject to the constitutional ban is "one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired." *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006) (quoting *Squaw Creek Drainage Dist. v. Turney*, 138 S.W. 12, 16 (1911)). "The guiding instructive principle espoused in *Phillips* is that a retroactive law is unconstitutionally retrospective if it imposes an ***affirmative obligation or duty*** on an individual based solely on conduct preceding the effective date of the law, but is *not* unconstitutionally retrospective if the statute considers that past conduct only as a basis for future decision-making by the state." *Murphy*, 477 S.W.3d at 83 (emphasis added).

The nature of laws that impose affirmative obligations or duties was analyzed at length in *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758 (Mo. banc 2007). *Hess* involved the retroactive application of an amendment to the Missouri Merchandising Practices Act (MPA). *Id.* at 763. This act originally only allowed the State to bring claims against defendants "for misrepresentation in the sale of real estate" but it was amended in 2000 to allow for direct private claims against defendants "in addition to suit by the attorney general." *Id.* at 763, 768-769. The original cause of action allowed the attorney general to recover any "ascertainable loss" caused by the real estate misrepresentation, while the amended act allowed for a private litigant to recover their own "actual damages." *Id.* at

770. This new provision also "increased the defendant's potential liability by subjecting them to suit from ***both*** the government ***and*** the new class of plaintiffs." *Id.* at 778. (emphasis added). All events that led to the defendant's violation of the MPA occurred in 1999, before these new amendments, but a private party plaintiff nevertheless brought a private cause of action after the new law went into effect in 2000. *Id.* at 763, 769. The defendant argued that the amended MPA had created an entirely new cause of action based on events that had already occurred and that it would be unconstitutional to apply this new law retrospectively. *Id.* at 769.

The Court rejected that argument and provided a detailed discussion of what is meant by a new duty or affirmative obligation. The Court started its analysis by noting that a "cause of action is a group of operative facts giving rise to one or more bases for suing" and that in this case "[t]he operative facts that give rise to [the defendant's] liability are the same both before and after the amendment. . . the ***contours of the obligations*** imposed on sellers of real estate by section 407.020 ***are unchanged***." *Id.* at 769. (internal citations omitted). Indeed, "[r]ather than imposing a new duty on [the defendant], the amendment as a whole merely ***substitute[d] a new or more appropriate remedy for the enforcement of an existing right***." *Id.* (internal citations omitted). Because a private plaintiff would have to prove the exact same elements that the government was already required to prove in order to establish the defendant's liability, the "contours of the obligations" placed on the defendant had not been altered by the new law at all.

As in *Hess*, the increased mesothelioma benefits provided in Section 287.200.4(3) are wholly remedial in nature and do not impose any new duty or disability upon the

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Respondents. If Mr. Hegger had suffered his injury prior to the January 1, 2014 amendments,[11] a claim for workers' compensation benefits due to his mesothelioma would have already existed. That hypothetical claim would have had to establish the exact same elements that Appellant had to prove in the present claim—namely that Mr. Hegger's occupational exposures to asbestos caused his disease and that he suffered his last exposure during his employment with Valley Farm. There would be no new liability or affirmative obligation imposed upon the Respondents, because the substantive elements that establish their liability are the exact same. All that the January 1, 2014 amendments changed is the measure of benefits that are due. As illustrated in *Hess*, however, an increase in the measure of actual damages does not constitute a substantive change in the law.

After the Court rejected the *Hess* defendant's argument that the amended MPA had created a substantive new cause of action, the Court considered whether the new law was still unconstitutionally retrospective because it would result in a greater payment of actual damages. *Id.* at 770. Specifically, the defendant argued that the "actual damages" recoverable by a private plaintiff could be far greater than the "ascertainable loss[es]" recoverable by the government because each was defined differently. *Id.* Furthermore, this change in the law exposed the defendant to greater actual damage payments because both the government and private litigants could now recover. *Id.* at 778.

[11] Again, because Mr. Hegger's claim did not accrue until after the effective date of Section 287.200.4(3), there is no retrospective application of the statute in any event.

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The Court once again rejected the defendant's argument and explicitly held that "***Actual Damages Are not a Substantive Additional Disability***." *Id.* at 770. The Court noted that "[e]ven assuming for the sake of argument that the ***dollar amounts recoverable may vary*** under these two definitions in a particular factual situation, [the defendant] cites ***no authority that a mere change in how actual damages are measured requires a statute to be applied prospectively only***." *Id*. Unlike a change in the substantive law that affects a vested right, "a mere change in how damages are measured is not different from a change in the language of how damages are computed under the applicable Missouri approved instructions" as "[t]he nature of the duty and remedy are still the same." *Id.* at 770. Accordingly, the Court ruled that the "actual damage remedy. . . applie[d] retrospectively." *Id.* The Court further held that a new provision allowing for private litigants to recover attorney's fees could be retroactively applied even though those fees could be "greater" than those incurred by the attorney general (and even though these new fees could now be recovered in addition to the attorney general's fees). *Id.* at 763, 770-771.

Here, if Mr. Hegger's claim had accrued prior to the January 1, 2014 amendments (it did not), then it would be similar to *Hess*. The benefits for mesothelioma provided in Section 287.200.4(3) merely reflect a change in how the legislature has chosen to measure actual damages. Whether these benefits will result in a greater dollar amount paid by a particular entity in a given case is irrelevant. After the *Hess* decision, the actual damages a defendant may have been required to pay in an MPA case was considerable. A defendant would have to pay actual damages to both the government and an entire new class of multiple private plaintiffs (whose individual "actual" damages could be greater than the

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“ascertainable” losses collected by the government). This did not matter, however, because the nature of the duty and the remedy remained the same. The new damages were just reflections of the actual damages suffered by victims of real estate misrepresentation at the time the cause of action accrued.

Had Mr. Hegger’s claim accrued prior to the January 1, 2014 amendments (it did not), then a Respondent would have to pay a greater amount in actual damages than they would have had to pay when the cause of action accrued. However, this would have been no different than a defendant sued under the MPA after *Hess*. This Court was clear that it is the ***nature*** of the remedy, not the ***dollar amount*** of the remedy, that must be analyzed. The increased benefits provided in Section 287.200.4(3) are a remedial adjustment in the measure of an employee’s actual damages rather than a substantive change in the law.

Although Mr. Hegger’s claim clearly accrued after the effective date of the January 1, 2014 amendments—and therefore it does not implicate any retroactivity concerns at all—even if the claim had accrued prior to January 1, 2014, the increased benefits in Section 287.200.4(3) would still have been payable. The plain language of the statute is retrospective in operation and it is only remedial in nature. The increased benefits merely substitute a new or more appropriate remedy for the enforcement of an existing right.

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2. THE COMMISSION ERRED IN ENTERING ITS FINAL AWARD DENYING COMPENSATION BECAUSE THE COMMISSION ACTED WITHOUT OR IN EXCESS OF ITS POWERS IN THAT VALLEY FARM, THE LIABLE EMPLOYER OF LAST EXPOSURE, WAS NOT REQUIRED TO PROVIDE THE DIVISION OF WORKERS' COMPENSATION WITH NOTICE OF AN ELECTION TO ACCEPT LIABILITY FOR THE BENEFITS ENUMERATED IN SECTION 287.200.4(3).

The Commission also erroneously held that Section 287.200.4(3) requires an employer to provide the Division of Workers' Compensation with "notice" of an election to accept liability for the increased benefits enumerated therein. L.F. at 60, 71-72. The Commission reasoned that because Valley Farm no longer exists, it could not and did not provide the required statutory "notice." However, this was another fundamental misinterpretation of Section 287.200.4(3). This Court reviews questions of law *de novo*. *McGhee*, 312 S.W.3d at 451.

A. The Scope Of Section 287.200.4(3)'s "Notice" Provision.

Section 287.200.4(3)(a) does not require an employer to provide notice to the Division of any election to accept liability for increased benefits under the first two criteria which define an election. Rather, the statute only requires notice of "such" an election to join a group insurance pool. The statute reads as follows:

> "**(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

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> 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, 2018. . ."

Section 287.200.4(3) RSMo. (emphasis added).

The Commission noted that "[a]fter a three-sentence discussion regarding insurance pools, the statute returns to the employer's election." L.F. at 71. However, the sentence which "returns to the employer's election" concludes that "[i]n 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." *Id.* (emphasis added).

This notice provision only refers to the third election possibility of a group insurance pool, which is why it only came after three prior sentences discussing this group pool and it only referred to "***such*** an election" rather than "an election" generally. As the Commission correctly noted, "one must presume that the legislature intended ***each word***, clause, sentence, and provision of a statute [to] have effect and should be given meaning."

L.F. at 71 (citing *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. 2007)) (emphasis added). The statute's use of the word "such" is rendered superfluous under the Commission's interpretation. Nothing in the strictly construed statute indicates that an employer must provide notice for the first two types of an election.

If the statute had meant to refer to all three types of an election, it would have read "an election"—not "***such*** an election." The word "such" may be defined as "of the same class, ***type***, or sort." *See Such*, Merriam-Webster Online Dictionary. 2018. https://www.merriam-webster.com/dictionary/such. (emphasis added). The statute states that for an employer to make this particular "type" of an election—but only for this one type—notice must be provided. The legislature would not, and could not, have referred to a specific "type" of election if it meant for the notice provision to apply to all three types.

B. Any "Notice" Of An Election Must Be Done In A "Manner Established By The Department."

Even if Section 287.200.4(3)'s "notice" provision did apply to the first two types of an election to accept (it does not), it cannot be a barrier to compensation as applied to these facts. The statute states that "the employer shall provide the department with notice of such an election ***in a manner established by the department***." *See* Section 287.200.4(3)(a) RSMo. (emphasis added). Here, there is simply no evidence in the record establishing that any notification system has been set up in a "manner established by the department" for employers who elect to accept by "insuring their liability." The Commission acted in error with its *sua sponte* factual assumption that such a notification system has been established for these employers.

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Given the lack of any evidence supporting this assumption, this ostensible "notice" requirement cannot be applied. Even if there were a notice requirement for the first type of election (there is not), and even if Valley Farm had still been in existence and had purchased a claims-made policy insuring their liability (as the employer in *Casey* had done), the notice provision would still not have been triggered because there is no evidence in the record suggesting that Valley Farm would have been capable of providing notice of its election "in a manner established by the department."

If the Commission's interpretation of Section 287.200.4(3) requiring an employer to give "notice" of an election to the Division under any and all circumstances were to be upheld by this Court, it would mean that no mesothelioma victim could recover increased benefits when their employer has third-party insurance. There is no evidence that such employers have any ability to provide notice of an election "in a manner established by the department." This holds true regardless of whether these employers are "insuring their liability" through occurrence-based policies covering the time of last exposure or claims-made policies covering the time of filing.

C. The Nature of Forms WC-304-I And WC-304-G.

The Commission's only support for its speculative assumption that the Division of Workers' Compensation has been taking notice of elections from employers with third-party insurance was to reference two forms drafted by the Division. The Commission claimed in a footnote that the Division "has promulgated forms WC-304-I and WC-304-G for employers to provide notice to the Division. . . of their election to either reject or accept mesothelioma liability[.]" L.F. at 60. This was a fundamental misunderstanding of these

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two forms, neither of which was part of the record.[12] The Division has never required employers who are "insuring their liability" through third-party insurance to complete these forms or to provide any other type of notification of an election.

Form WC-304-G is entitled "Notice Of Employers [sic] Election To Become A Member Of A ***Group Insurance Pool***." (emphasis added). This is only a notification form by which an employer elects to accept by joining a group insurance pool. The form says nothing about the employer electing to accept by having a third-party policy "insuring their liability." This form reinforces Appellant's interpretation of Section 287.200.4(3)'s "notice" provision as only applying to "such" an election to accept by joining a group insurance pool. It does not serve as evidence that the Division has been taking notice of employers' elections to accept through having third-party insurance.

Similarly, Form WC-304-I is entitled "Mesothelioma Liability Election of ***Self-Insured Employer*** or ***Group Trust Member*** Pursuant to §287.200.4(3), RSMo" and it asks for the name of employers as it appears on their "Certificate of Self-Insurance Authority." (emphasis added). The Division only sent this form to a limited subset of employers who

[12] Not only were these two forms not part of the evidentiary record, but neither Respondent had even referenced them in their briefs before the Commission. In its decision denying compensation, the Commission cited to these forms *sua sponte* without allowing Appellant any opportunity to respond.

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currently self-insure their workers' compensation liability[13] or are members of a group insurance pool. Nowhere does Form WC-304-I indicate that it was ever given to (or received from) employers who insure their workers' compensation liability solely through third-party insurance.[14]

In their ***very own titles***, both of these forms state that they were ***only*** made available to group insurance pools and/or self-insurers. Neither form serves as evidence that the Division has been taking "notice" of an employer's election by "insuring their liability"

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[13] While there is no requirement in Section 287.200.4(3) that self-insured employers must provide notification of an election, the Division has established such a system by mailing out Form WC-304-I to employers who have been granted self-insured status. However, the Division only established this notification system because it is required to regulate self-insurers under Section 287.280 and the related regulation 8 CSR 50-3.010—not because Section 287.200.4(3) itself requires it. Section 287.280 and 8 CSR 50-3.010 require that the Division periodically examine various aspects of the financial viability of self-insured employers in order to receive certification, and whether self-insured employers cover the increased benefits in Section 287.200.4(3) is relevant to this inquiry.

[14] Although Form WC-304-I does allow employers to check a box indicating they have third-party insurance coverage for their mesothelioma liability, this form was only presented to employers who were already self-insured or were members of a group trust. It was not made available to employers who were insuring their liability through third-party insurance to begin with.

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through third-party insurance. The Commission completely misapprehended the nature of these two forms without the benefit of argument or evidence.

D. Showing "Notice" Of An Election Is Not An Element Of The Claim.

Neither the ALJ nor the Commission in *Casey* ever brought up this "notice" issue or considered it a substantive element of the claim, despite subjecting Appellant to this supposed requirement *sua sponte* in the present case. *See generally Employee: Robert Casey*, Injury No. 14-102671, 2017 WL 465992 (Mo. Lab. Ind. Rel. Com. 2017). This Court never referenced "notice" of an election as a potential obstacle to the *Casey* claim. The Court simply held that to show an election to accept, "the relevant inquiry in this matter is. . . ***whether the terms of Employer's policy provide coverage***." *Casey*, 550 S.W.3d at 81 (emphasis added). Neither the ALJ, the Commission, nor this Court placed any further requirement upon the claimant to show that the employer had provided "notice" of an election "in a manner established by the department." The reason for this is simple—no such requirement exists.

The Commission cannot just *sua sponte* raise a procedural requirement that the Respondents never pleaded or proved, make an erroneous legal interpretation of that supposed requirement, and then misconstrue forms outside the record to make false assumptions regarding the nature (and existence) of the Division's notification system. Appellant could not presciently rebut evidence that was never made part of the record under a supposed requirement that was never raised at the hearing. Appellant presented evidence that Valley Farm has a solvent policy "insuring their liability" for the benefits in Section 287.200.4(3), which is all that is required to show an employer's election to accept.

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CONCLUSION

In enacting Section 287.200.4, the Missouri General Assembly had three goals. First, they wanted to return occupational diseases to the exclusive jurisdiction of the Division of Workers' Compensation. Second, they wanted to increase the benefits for latent occupational diseases which take decades to manifest. Finally, the General Assembly wanted to give employers the option of purchasing new claims-made policies for mesothelioma claims, a precaution that reflects the heightened amount of increased benefits given to that particular class of occupational disease and the risk of civil liability.

There is absolutely nothing in Section 287.200.4(3) which requires or suggests that an employer who has an existing policy of insurance from the time of last exposure must "affirmatively purchase a new policy of insurance" in order to regain the protection of workers' compensation exclusivity. To the contrary, the General Assembly established a legislative scheme which affords workers' compensation exclusivity protection for all occupational diseases to ***all employers*** who have solvent policies of insurance in effect covering the time period in which they last exposed their employees to the hazard of the disease.

Mr. Hegger had an extensive amount of asbestos exposure during his employment with Valley Farm. Tragically, like many who work with and around asbestos, Mr. Hegger developed the most severe disease associated with that exposure and this disease claimed his life. Like any responsible employer, Valley Farm had previously purchased—and paid premiums for—insurance policies which were required by law to cover Valley Farm's entire liability for an occupational disease under the Workers' Compensation Law. While

Valley Farm is no longer in existence, those bought-and-paid-for insurance policies are still in force. It is these very policies which the Missouri legislature intended to act as a trigger granting exclusivity protection to all employers who have employed workers in Missouri. It is these very policies which the Missouri legislature intended to cover the increase in benefits payable to workers such as Mr. Hegger.

To suggest that an "elect[ion] to accept" the exclusivity protection of the Missouri Workers' Compensation Law requires anything more than the employer having a valid policy of insurance that is in force and reads to cover the employer's liability is fallacious. If the legislature truly meant for every employer to take an affirmative action of purchasing new insurance after the January 1, 2014 amendments went into effect in order to guard against civil liability, then why did it not just say so? All the legislature needed to do was simply insert a few additional words. It did not do so.

The Commission was determined to read this non-existent language into Section 287.200.4(3), even though doing so violated strict construction and undercut the legislative's purpose in enacting the law. The Commission's decision guts the impact of the new law for countless mesothelioma victims while simultaneously exposing a sizable number of employers to potentially massive civil verdicts. This is not how Section 287.200.4(3) reads, and it was certainly not the legislature's intent. Appellant's interpretation of Section 287.200.4(3) best comports with a strict construction of the statute, it harmonizes this subdivision with the other provisions of Section 287.200.4, and it furthers the public policy underlying both the January 1, 2014 amendments and the Missouri Workers' Compensation Law in general.

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For the foregoing reasons, the award of the Commission denying compensation should be reversed. This Court should remand to the Commission with instructions to determine which Respondent held coverage at the time of Mr. Hegger's last exposure to asbestos in 1984 and is therefore liable for the benefits enumerated in Section 287.200.4(3).

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document and the appendix were served on counsel of record through the Court's electronic notice system on September 23, 2019.

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 20,898, excluding the cover, signature block, appendix, and this certificate.

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