Summary of SC97993, *Vincent Hegger (Deceased), et al. v. Valley Farm Dairy Company, et al.*

Appeal from the labor and industrial relations commission
Argued and submitted December 11, 2019; opinion issued February 18, 2020

Attorneys: The claimants were represented by Thomas L. Stewart, Adam J. Reynolds and Andrea A. O'Brien of O'Brien Law Firm PC in St. Louis, (314) 588-0558. Valley Farm was represented by Christopher T. Archer of Archer & Lassa LLC in St. Louis, (314) 241-2481. Amerisure Insurance Company was represented by T. Michael Ward and Elaine M. Moss of Brown & James PC in St. Louis, (314) 421-3400; and Travelers Indemnity Company of America was represented by Jaudon R. Godsey of Morrow, Willnauer, Church LLC in St. Louis, (314) 282-9800.

The American Property Casualty Insurance Association and the Missouri Insurance Coalition, which submitted a brief as friends of the Court, were represented by Lisa A. Pake of Haar & Woods LLP in St. Louis, (314) 241-2224.

This summary is not part of the opinion of the Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Claimants appeal the labor and industrial relations commission's denial of enhanced mesothelioma benefits under the workers' compensation law for an employee's exposure to asbestos while working at a now-defunct company. In a 5-2 decision written by Judge W. Brent Powell, the Supreme Court of Missouri affirms the decision. Because the company ceased operations 16 years before the enhanced benefit statute took effect, it could not affirmatively elect to accept liability for the enhanced benefit as the statute requires.

Chief Justice George W. Draper III dissents. He would hold the company affirmatively purchased workers' compensation insurance providing coverage for the employee's future occupational injury, reverse the commission's decision and remand (send back) the case.

Facts: From 1968 until 1984, Vincent Hegger was employed by Valley Farm Dairy Company, where his work servicing industrial machinery exposed him to inhalable asbestos fibers. The company, which ceased operations in 1998, maintained workers' compensation insurance coverage for occupational disease throughout Hegger's employment. Section 287.400.4(3), RSMo – providing enhanced mesothelioma benefits – took effect in 2014, the same year Hegger was diagnosed with mesothelioma. He and two of his children (collectively, the claimants) subsequently filed a workers' compensation claim. Hegger died from the disease in 2015. Following a hearing, an administrative law judge denied the claim for enhanced mesothelioma benefits. The claimants appealed to the labor and industrial relations commission, which affirmed the denial of benefits. The claimants appeal.

AFFIRMED.

Court en banc holds: (1) The commission did not err in finding that electing to accept enhanced mesothelioma liability under section 287.200.4(3) requires an affirmative act by the employer. The term "elect" is the operative verb in the statute, and the term's dictionary definitions indicate the legislature intended to require employers to take some affirmative action with respect to enhanced benefits to accept enhanced mesothelioma liability. A business that ceased operations 16 years before the statute took effect could not affirmatively elect to accept enhanced mesothelioma liability. Simply maintaining a workers' compensation insurance policy – secured prior to 2014 and not contemplating coverage for the enhanced benefit – is not sufficient.

(2) Now-defunct employers facing claims for workers' compensation benefits for mesothelioma caused by toxic exposure are not deemed to have elected to accept enhanced liability under section 287.200.4(3)(a) solely by virtue of having workers' compensation coverage at the time of an employee's last exposure to asbestos. Under the statute's plain language, employers not making an affirmative election are deemed to have rejected such liability under section 287.200.4(3)(b) and, thereby, are exposed to civil liability outside the context of workers' compensation statutes.

Dissenting opinion by Chief Justice Draper: The author would hold the company's affirmative decision to purchase workers' compensation insurance covered Hegger's future occupational injury; therefore, the claimants are entitled to compensation. Under the last exposure rule, the company would have procured insurance policies providing coverage throughout the time an occupational disease would manifest and be compensable. Hegger is entitled to the compensation to which he was entitled in 2014, when his injury was diagnosed. The author would reverse the commission's decision and remand the case for a determination of which insurer provided coverage when Hegger last was exposed to asbestos.