

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE ex rel. KCP&L GREATER MISSOURI OPERATIONS COMPANY,**

**Relator,**

**v.**

**THE HONORABLE JACQUELINE COOK, CIRCUIT COURT JUDGE, 17TH  
JUDICIAL CIRCUIT COURT,**

**Respondent.**

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DOCKET NUMBER WD73462

**Date: September 13, 2011**

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Appeal from:  
Cass County Circuit Court  
The Honorable Jacqueline A. Cook, Judge

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Appellate Judges:  
Court En Banc: Welsh, P.J., James M. Smart, Joseph M. Ellis, Victor C. Howard, Alok Ahuja,  
Mark D. Pfeiffer, Karen King Mitchell, Gary D. Witt, JJ. and Rex Gabbert, Sp. J.

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Attorneys:  
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Kenneth B. McClain II, Independence, MO, for respondent.

# MISSOURI APPELLATE COURT OPINION SUMMARY

## COURT OF APPEALS -- WESTERN DISTRICT

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Monroe Gunter worked for KCP&L for thirty-four years before he retired in 1988. He was diagnosed with mesothelioma in February 2010. In April 2010, Gunter filed a lawsuit against KCP&L and other defendants, alleging that they were responsible for causing his illness. With respect to KCP&L, Gunter claimed that he was exposed to asbestos during the course of his employment for KCP&L and that this asbestos exposure directly and proximately caused him to develop mesothelioma. In two counts, he asserted KCP&L's liability for the alleged workplace exposure under premises liability and negligence theories.

Every defendant other than KCP&L was ultimately dismissed from the lawsuit by settlement or otherwise. KCP&L filed a motion for summary judgment based upon its affirmative defense that Gunter's claims against it are exclusively compensable in a workers' compensation proceeding before the Labor and Industrial Relations Commission. In response, Gunter argued that, pursuant to the 2005 amendments to the Act, only claims arising out of an "accident" as defined in § 287.020.2, RSMo, are subject to the Act's exclusivity provisions, and that his claims do not involve an accidental injury.

The circuit court entered an order denying KCP&L's summary judgment motion. KCP&L responded by filing a Petition for Writ of Prohibition in this Court. We issued a preliminary writ on January 28, 2011, and set the case for full briefing and argument.

### **PRELIMINARY WRIT OF PROHIBITION QUASHED.**

#### **Court en banc holds:**

The only statutory provisions which arguably bar Gunter from proceeding against KCP&L in the circuit court, and therefore the sole statutory basis for KCP&L's request for an extraordinary writ of prohibition, are §§ 287.120.1 and .2, which provide that the remedies afforded injured workers in the Workers' Compensation Law exclude other remedies with respect to any "personal injury or death of the employee *by accident*." The Act defines an

“accident” as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” § 287.020.2. KCP&L concedes that Gunter’s allegation that he was exposed to asbestos over the course of his employment with KCP&L, resulting in his diagnosis with mesothelioma in 2010, does not allege an injury caused by “accident” as that term is defined in § 287.020.2. Because § 287.120 only denies Gunter a common-law remedy for “personal injury or death of the employee *by accident*,” KCP&L’s concession that this case does *not* involve an “accident” defeats its reliance on § 287.120. This result is confirmed by the Supreme Court’s decision in *Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations*, 277 S.W.3d 670, 679-80 (Mo. banc 2009), by the canon of strict construction which we must now apply in interpreting the act, § 287.800, and by the principle that, unless a statute clearly abrogates the common law either expressly or by necessary implication, common law remedies remain available.

We recognize that, prior to the comprehensive 2005 amendments to the Workers’ Compensation Law, numerous judicial decisions, including most prominently the Missouri Supreme Court’s decision in *Staples v. A.P. Green Fire Brick Co.*, 307 S.W.2d 457 (Mo. banc 1957), held that occupational disease claims were subject to § 287.120’s exclusivity provisions, even though such claims did not arise from an “accident” as statutorily defined. The 2005 amendments, however, materially modified several provisions of the Act which prevent us from relying on this pre-2005 caselaw. In particular, the rule of liberal construction of the Act prevailing prior to 2005 was changed to a rule of strict construction of the Act’s terms, § 287.800, the definition of an “accident” was materially amended, § 287.020.2, the standards for compensability of occupational disease claims were revised to establish a compensability standard independent of the concept of an “accident,” § 287.067.2, and the 2005 amendments specifically “reject[ed] and abrogat[ed]” prior caselaw interpretations of the terms “accident” and “occupational disease.” § 287.020.10.

We also recognize that multiple provisions of the Act provide for the compensability of occupational disease claims, including repeat-exposure occupational disease claims, through the workers’ compensation system. However, the existence of a workers’ compensation remedy for such claims does not necessarily establish that the statutory remedy is exclusive. Examples exist in Missouri and other states where workers have been afforded the option of pursuing either an administrative or judicial remedy. While it may constitute a substantial departure from prior law, there is nothing absurd or irrational in finding that workers may prosecute civil actions to recover from their employers on occupational disease claims, even though they may also have an available workers’ compensation remedy for the same injury.

Before: Court En Banc: Welsh, P.J., James M. Smart, Joseph M. Ellis, Victor C. Howard, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Gary D. Witt, JJ. and Rex Gabbert, Sp. J.

**Majority Opinion by: Alok Ahuja, Judge**

**September 13, 2011**

**Judges Ellis, Howard, Pfeiffer, Mitchell, Witt and Gabbert concur.**

**Judge Welsh dissents in separate opinion, in which Judge Smart joins.**

**Judge Smart dissents in separate opinion, in which Judge Welsh joins.**

**Dissenting Opinion by Judge James Edward Welsh****September 13, 2011**

The majority's interpretation of the Workers' Compensation Act to allow employees with occupational diseases to proceed with claims for compensation under the common law is contrary to the legislature's intent, unwarranted in light of the Act's legislative history, and impermissible when considering the Act as a whole. The Act's exclusivity clause, section 287.120, RSMo Cum. Supp. 2010, makes an employer liable to furnish compensation for an employee's injury by accident and makes this compensation the employee's exclusive remedy for such accidental injury. To effectuate the legislature's express intent to include occupational diseases within the Act's coverage, the judiciary, historically, has interpreted the term "accident" to refer to both those events encompassed by the statutory definition of "accident" *and* occupational diseases. Over the years, the legislature has amended the Act many times without changing the statutory definition of "accident" to expressly include occupational diseases and without changing the exclusivity provision's language requiring accidental injury to trigger an employer's liability and the Act's exclusivity. It may be assumed that the legislature is aware of the judicial interpretation of the term "accident" and has found that no change is necessary to reflect a differing intent.

**Dissenting Opinion by Judge James M. Smart****September 13, 2011**

Judge Smart joins in the dissent of Judge Welsh, and writes a separate dissenting opinion to emphasize that the writ must be made absolute because the case must be referred to the Division of Workers' Compensation. Judge Smart notes that the General Assembly did not remove the category of occupational disease claims from the scope of the Act. This is a case in which the plaintiff pleads in his petition that he was an employee of KCP&L and that his occupational disease was related to his workplace exposure to asbestos, contributing to his malignant mesothelioma. Thus, the Division has exclusive statutory authority to address the matters related to causation, degree of exposure, extent of injury, and compensation.

**THESE SUMMARIES ARE UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.**