Toxic Exposure & Workers' Compensation in Missouri
The Claimant's Perspective

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Enhanced Remedy Benefits versus Traditional Benefits

There are two categories of enhanced remedy toxic exposure benefits:

1. Mesothelioma
2. Non-mesothelioma
    a. Asbestosis
    b. Berylliosis
    c. Coal workers' pneumoconiosis
    d. Bronchiolitis
    e. Obliterans
    f. Silicosis
    g. Silicotuberculosis
    h. Manganism
    i. Acute myelogenous leukemia
    j. Myelodysplastic syndrome

See R.S.Mo. 287.020.11.

Mesothelioma Enhanced Benefits

R.S.Mo. 287.200.4(3)

For employers that have elected to accept mesothelioma liability, 300% of the state's average weekly wage for 212 weeks shall be paid; for employers who reject mesothelioma worker's compensation coverage, the exclusive remedy provisions under Section 287.120 shall not apply.

If the employee dies before these benefits are paid, then the benefits are payable to the employee's spouse or children, natural or adopted, legitimate or illegitimate, in addition to benefits provided under Section 287.240 (death benefits and burial expenses). If there is no surviving spouse or children, then the enhanced benefits shall be payable as a single payment to the estate of the employee.

The provisions of this paragraph expire on December 31, 2038.

Non-Mesothelioma Enhanced Benefits

R.S.Mo. 287.200.4(2)

R.S.Mo. 287.200.4(2) provides that for toxic exposure occupational disease claims for any of the 10 non-mesothelioma diseases, 200% of the state's average weekly wage as of the date of diagnosis for 100 weeks shall be paid by the employer for permanent total disability claims. The employer/insurer will still be liable for medical care and permanent total disability benefits, which will commence 100 weeks after the date of diagnosis.

The provisions of this paragraph expire on December 31, 2038.

EXPOSURE

An employee shall be deemed to have been exposed to the hazards of an occupational disease when he or she is **employed in an occupation or process in which the hazard of the disease exists**. R.S.Mo. 287.063.

A claimant in a toxic exposure case has to prove that his or her job duties exposed him or her to the toxins that allegedly caused his or her disease. This can be established via affidavits, co-workers, the employee and/or others' depositions concerning any exposure, company records (usually obtained via a corporate representative deposition), job descriptions, and work locations.

Accident Fund Insurance Company; E. J. Cody Company v. E. Robert Casey, Employee/Delores Murphy - 550 S.W.3d 76 (Mo. Sup. Ct. 2018)

Facts:

Mr. Casey died from mesothelioma caused by repeated exposure to asbestos in his workplace. Before he died, Mr. Casey filed a claim for worker's compensation benefits with which his widow, Delores Murphy, proceeded following his death. Mr. Casey spent his career working as a floor tile installer for several different companies, and his last employer was E. J. Cody Company, Inc., a construction contractor in the business of installing acoustical ceiling and floor tiles. Mr. Casey worked for E. J. Cody Company from 1984 through 1990 and worked closely with asbestos-containing materials, primarily vinyl asbestos tile. Due to asbestos exposure, Mr. Casey was diagnosed with mesothelioma in 2014 and filed a claim for compensation against E. J. Cody Company in February 2015 seeking enhanced benefits pursuant to R.S.Mo. 287.200.4 only.

Accident Fund Insurance Company; E. J. Cody Company v. E. Robert Casey, Employee/Delores Murphy - 550 S.W.3d 76 (Mo. Sup. Ct. 2018)

ISSUES

1. Was the worker's compensation insurer liable for the Claimant's enhanced mesothelioma benefits?

2. Was R.S.Mo. 287.200 constitutional as applied?

3. Proper claimants

Accident Fund Insurance Company; E. J. Cody Company v. E. Robert Casey, Employee/Delores Murphy - 550 S.W.3d 76 (Mo. Sup. Ct. 2018)

1. Was the worker's compensation insurer liable for the Claimant's enhanced mesothelioma benefits?

E. J. Cody's worker's compensation carrier, Accident Fund Insurance Company, argued that it could not liable for the award of compensation because it did not insure Mr. Casey in 1990 when he was last exposed to asbestos.

The Missouri Supreme Court held that the **last exposure rule (Section 287.063.2)** which provides the "employer liable for (worker's compensation benefits) shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease" was **"immaterial here"** because the policy E. J. Cody Company purchased explicitly covered 287.200.4 benefits, and that Section 287.200.4 contains no qualifying language as to the date of last exposure or injury and limits coverage only by way of conditioning it on the filing of a claim after January 1, 2014. The Court further held that through the Accident Fund policy, E. J. Cody Company accepted, and the insurer provided, liability insurance for the enhanced benefits and **"the relevant inquiry in this matter is not under whose employment Mr. Casey was last exposed, but whether the terms of employer's policy provides coverage."** The Court explained that if recovery under 287.200.4 were limited to individuals who were last exposed to asbestos during the policy period, the policy's mesothelioma endorsement would be rendered essentially worthless.

Accident Fund Insurance Company; E. J. Cody Company v. E. Robert Casey, Employee/Delores Murphy - 550 S.W.3d 76 (Mo. Sup. Ct. 2018)

2. Is Section 287.200 constitutional as applied?

The insurer and employer argued that Section 287.200.4 was unconstitutional because it allowed Mr. Casey to retrospectively recover for a disease caused by asbestos exposure that occurred **decades before** the filing of his claim. The Supreme Court held that 287.200.4 is not a retrospective law and it does not create any new duty or obligation with regard to past transactions or give any past transactions a new legal effect. The statute provides additional benefits for new claims filed under the new law, and it was not until after the January 1, 2014 amendments went into effect that the insurer and employer contracted for coverage. It was only after they entered into that contract that Mr. Casey filed his claim seeking worker's compensation benefits under the new statutory provisions. Because the case operates on facts subsequent to the 2014 amendments, **Section 287.200 is not a retrospective law as applied to this claim**.

Accident Fund Insurance Company; E. J. Cody Company v. E. Robert Casey, Employee/Delores Murphy - 550 S.W.3d 76 (Mo. Sup. Ct. 2018)

3. Proper claimants

The Supreme Court cited 287.580, which provides that if a worker's compensation claimant dies while the claim is pending, the claim shall not abate "but on notice to the parties may be revived and proceed in favor of the successor to the rights or against the personal representative of the party liable, in like manner as in civil actions." Mr. Casey's widow, Delores Murphy, filed an amended claim naming herself and Mr. Casey's children as the claimants. The Court found that because the amended claim notified all of the parties of the original claim as death, it was a de facto suggestion of death and that clearly the insurer and employer were on notice of the substitution. Mrs. Murphy also made an oral motion for substitution at the outset of the Hearing before the Administrative Law Judge, which was within the 90 day window for such a motion under Rule 52.13. The Supreme Court also held that if the employee dies before the enhanced mesothelioma benefits are paid, R.S.Mo. 287.200.4(5) provides that the "benefits are payable to the employee's spouse or children." Note that the children do not need to be dependent to recover, and if there is no spouse or children, the enhanced remedy benefits go to the estate.

Vincent Hegger (deceased), et al. v. Valley Farm Dairy Company, et al., 596 S.W.3d 128

FACTS

Mr. Hegger worked for Valley Farm Dairy from 1968 through 1984; Valley Farm maintained a worker's compensation insurance policy covering its entire liability for occupational disease during Mr. Hegger's employment. Valley Farm ceased operations in 1998. Mr. Hegger was diagnosed with mesothelioma in 2014 and died in 2015. **Mr. Hegger's children sought enhanced remedy benefits only**.

Vincent Hegger (deceased), et al. v. Valley Farm Dairy Company, et al., 596 S.W.3d 128

ISSUE

1. Can a now defunct employer have elected to accept mesothelioma enhanced remedy benefits under Section 287.200.4(3)(a)?

The Missouri Supreme Court held that because Valley Farm did not "elect to accept mesothelioma liability," the claimants were not entitled to the enhanced benefit.

Vincent Hegger (deceased), et al. v. Valley Farm Dairy Company, et al., 596 S.W.3d 128

ISSUE

1. **Can a now defunct employer have elected to accept mesothelioma enhanced remedy benefits under Section 287.200.4(3)(a)?**

The Supreme Court was to decide whether a now defunct employer (Valley Farm Dairy) can "elect to accept mesothelioma liability" under a statute that did not take effect until 16 years after the company ceased operations. The Court cited the Webster's Dictionary's definition of "elect" which meant "to make a selection" or "to choose." Both selecting and choosing require an **affirmative act** by the one making the selection or doing the choosing. The Court held that it was "axiomatic that a business entity that no longer exists cannot affirmatively select or choose to do anything. Because Valley Farm ceased operations in 1998, and the enhanced benefit did not exist until 2014, Valley Farm could not have affirmatively elected to accept liability for the enhanced benefit under Section 287.200.4(3)(a).

Vincent Hegger (deceased), et al. v. Valley Farm Dairy Company, et al., 596 S.W.3d 128 ISSUE

1. Can a now defunct employer have elected to accept mesothelioma enhanced remedy benefits under Section 287.200.4(3)(a)? *Continued*

The Supreme Court also discussed the difference between the *Hegger* and *Casey* cases was that in *Casey*, the employer was still in business when Casey filed his claim, and Mr. Casey's employer (E. J. Cody) was covered under a policy of insurance that included a Missouri mesothelioma benefits endorsement. The employer in *Casey* affirmatively purchased insurance that expressly contemplated coverage for the enhanced benefit provided in 287.200.4(3)(a). While Valley Farm was covered by a policy of insurance against liability during Mr. Hegger's employment, Valley Farm's policy did not expressly contemplate coverage for the enhanced benefit provided by Section 287.200.4(3)(a) and Valley Farm's policy could not have contemplated such coverage because that enhanced benefit did not exist until 16 years after Valley Farm ceased operations. Thus, the Court held that now defunct employers are not deemed to have elected to accept enhanced liability under 287.200.4(3)(a) solely by virtue of having worker's compensation insurance at the time of the employee's last exposure to asbestos. If the employer does not affirmatively elect to accept liability for the enhanced benefit, then the employer has rejected enhanced mesothelioma liability under the plain language of the statute. The Court also held that under the plain language of 287.200.4(3)(a) that employers that do not make the requisite affirmative election to accept liability for the enhanced benefits are deemed to have rejected such liability **and thereby are exposed to civil liability outside the context of the worker's compensation statutes**.

Hayden v. Cut-Zaven, Ltd. and Papillion, Ltd., E.D. 108695 (Motion for Application to Transfer to Missouri Supreme Court was denied)

FACTS

Claimant Joan Moore Hayden is the surviving spouse of Marc Hayden, a former hairdresser who filed a claim seeking mesothelioma worker's compensation benefits on March 3, 2015. Mr. Hayden's claim alleged that he developed mesothelioma because he was exposed to asbestos from using asbestos-containing hairdryers throughout his employment as a hairdresser. Mr. Hayden died from mesothelioma on April 26, 2016 and his surviving spouse, Mrs. Hayden, was substituted on the claim. The Administrative Law Judge denied the Claim for Compensation, and the decision was affirmed by the Commission.

The Eastern District Court of Appeals held that the Commission acted without or in excess of its powers by failing to analyze medical causation, and Mr. Hayden's date of injury under the proper legal standard. The Eastern District also found that the Commission's award determining medical causation and Mr. Hayden's date of injury was not supported by sufficient competent evidence, was against the weight of the evidence, and the Commission's award was reversed and remanded.

Hayden v. Cut-Zaven, Ltd. and Papillion, Ltd., E.D. 108695 (Motion for Application to Transfer to Missouri Supreme Court was denied)

PRIMARY ISSUES

1. Medical causation – was Mr. Hayden's employment as a hairdresser the prevailing factor in causing his mesothelioma?

2. Date of injury

Hayden v. Cut-Zaven, Ltd. and Papillion, Ltd., E.D. 108695 (Motion for Application to Transfer to Missouri Supreme Court was denied)

1. Medical causation – was Mr. Hayden's employment as a hairdresser the prevailing factor in causing his mesothelioma?

The Eastern District held that to show a recognizable link between the occupational disease and the job, the claimant must produce evidence "establishing a **causal connection** between the conditions of employment and the occupational disease." There must be medical evidence that establishes **"a probability that working conditions caused the disease, although they need not be the sole cause."** The Court further held that the claimant **need not establish "by a medical certainty, that his or her injury was caused by an occupational disease in order to be eligible for compensation."** Citing *Smith v. Cap. Region Med. Ctr.*, 412 S.W.3d 252, 259-261. The Court addressed the **"prevailing factor"** issue, and held that the occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability (287.060.2), and that the prevailing factor "is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

In its analysis, the Court stated that Section 287.067.1 establishes no requirement in Missouri that the claimant must show "by a medical certainty, that his or her injury was caused by an occupational disease." Citing *Smith* at 259. Section 287.067.1 requires that expert opinion be based on medical evidence establishing **"a probability that working conditions caused the disease."** *Cheney v. City of Gladstone*, 567 S.W.3d 308, 315 (Mo. App. W.D. 2019).

Hayden v. Cut-Zaven, Ltd. and Papillion, Ltd., E.D. 108695 (Motion for Application to Transfer to Missouri Supreme Court was denied)

2. Date of Injury

R.S.Mo. 287.430 provides that no proceedings for compensation shall be maintained unless the claim is filed within two years after the date of injury or death, or the last payment made under Chapter 287 on account of the injury or death, except that if the report of injury or death is not filed by the employer as required by 287.430, the Claim for Compensation may be filed within three years after the date of injury, death, or last payment made under 287 on account of the injury or death.

Section 287.063.3, which sets forth when the statute of limitations begins running for an occupational disease claim, provides "the statute of limitations 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 Court, citing *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 416 (Mo. App. W.D. 1988) held that "an employee cannot be expected … **to institute a claim until he has reliable information that his condition is the result of his employment."** Further, given that there must be competent substantial evidence of this link, the **claimant is entitled to rely on a physician's diagnosis of his condition rather than his own impressions**. *Id*. The injurious exposure does not become a compensable injury until it becomes **disabling**. Mr. Hayden was diagnosed with malignant mesothelioma on June 26, 2014, and he continued working until one month after his diagnosis. The Eastern District held that the Commission's finding that Mr. Hayden's mesothelioma became disabling in November of 2013 (when he first suffered chest discomfort) was not supported by sufficient competent evidence and that Mr. Hayden did not suffer a compensable injury until his diagnosis on June 26, 2014.

Subrogation

Per R.S.Mo. 287.150.7, “Notwithstanding any other provision of this section, when a third person or party is liable to the employee, to the dependents of an employee, or to any person eligible to sue for the employee’s wrongful death as provided in Section 537.080 in a case where the employee suffers or suffered from an occupational disease due to toxic exposure and the employee, dependents, or persons eligible to sue for wrongful death are compensated under this chapter, **in no case shall the employer then be subrogated to the rights of employee, dependents, or persons eligible to sue for wrongful death against such third person or party when the occupational disease due to toxic exposure arose from the employee’s work for employer**.”

I believe that “no subrogation” means no subrogation, and that the employer/insurer has no subrogation for both the enhanced remedy benefits and the traditional benefits. The majority of defense attorneys that I have worked with on these claims have taken the position that they are entitled to subrogation for the “traditional benefits.”