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MISSOURI WORKERS' COMPENSATION CASE LAW UPDATE

October 2017 – December 2017

Injury Not Compensable Because Claimant Made Multiple Inconsistent Statements of How and When Injury Occurred and Failed to Establish Injury Was Caused by a Compensable Accident

<u>Saine vs. Pepsi Beverages Company</u>, Injury No. 15-069886

The claimant alleged he sustained an injury to his neck and right arm while driving a tractor trailer in August 2015. His first Claim for Compensation alleged an injury to his right shoulder and arm that occurred on August 31, 2015. He subsequently amended the claim three times to allege injury to his neck, changed the date of injury to August 25, 2015, and then changed the date of injury back to August 31, 2015. The claimant testified at a Hearing that the injury actually occurred on August 15, 2015.

The claimant also made inconsistent statements regarding how the injury occurred. He told a nurse at work that his right shoulder pain was caused by tight steering in his work truck. He went on his own on September 10, 2015 to the hospital and reported right shoulder pain following a lifting injury. On May 3, 2016, he reported to Dr. Rutz that he sustained an injury by repeatedly backing into loading docks and twisting his body when unloading products off of his truck and then his symptoms became irritated when a car cut in front of him and he tried to avoid the collision.

At a Hearing, the ALJ found that the claimant failed to establish that his complaints were a result of an injury that he sustained as a result of an accident arising out of and in the course of his employment. The Judge noted that an accident is 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*. The ALJ noted that the claimant made multiple inconsistent statements regarding how and when the injury occurred and there was no relevant objective evidence of an issue with his work truck. Also, the employer's experts testified that none of the three possible versions given by the claimant of how his injury occurred would have caused his injury. Therefore, the ALJ found there was no single identifiable traumatic event or unusual strain that occurred during single work shift, and the claimant failed to show that his injury was caused by a compensable accident. On appeal, the Commission affirmed the ALJ's decision and Award denying benefits.

Appeal Transferred to Missouri Supreme Court to Determine Whether Applying Mesothelioma Statute to Claim with Last Exposure in 1990 Violates Missouri Constitution

E.J. Cody Company, Inc. vs. Casey, Case No. WD80470 consolidated with WD80481 and WD80525 (Mo. App. 2017)

FACTS: The claimant worked as a flooring installer applying vinyl asbestos tile from 1984 until April 1990, when he retired. He was diagnosed with mesothelioma on October 14, 2014 and died from the same on October 11, 2015. His diagnosis and the fact that mesothelioma was the prevailing cause of the claimant's death was not at issue. The insurer provided the employer with workers' compensation insurance with a mesothelioma endorsement, which was in effect as of the date the claimant was diagnosed with mesothelioma.

At a Hearing, the insurer argued that it was not responsible for paying benefits because the claimant was exposed to asbestos prior to the beginning of its insurance coverage and the responsible party was the insurer in 1990. However, the ALJ found that under the statute dealing with mesothelioma benefits, the date of diagnosis determines what insurer is liable for benefits under the statute, and reasoned that the provision in the insurance policy stating that the exposure must occur during the policy period is essentially voided by the endorsement, which provided coverage for mesothelioma benefits. On Appeal, the Commission modified the Award but ultimately agreed that the insurer was responsible for paying benefits. The Commission agreed with the ALJ that the insurer's mesothelioma endorsement applied to this claim because the date of diagnosis was after the amendments, which went into effect on January 1, 2014, and the claimant was diagnosed with mesothelioma during the insurer's policy.

On Appeal, both the insurer and employer argued that application of the new mesothelioma statute to the present case violated the Missouri Constitution's prohibition against retrospective laws because the employee's last exposure to the hazard predated the statute's effective date of January 1, 2014.

HOLDING: The Missouri Court of Appeals held that the Missouri Supreme Court had exclusive jurisdiction over this appeal in light of the constitutional issues raised, and it transferred the appeal to the Missouri Supreme Court.

Boatright is the Employer Because He Had Authority to Hire/Fire, Assign Driving Routes, and Determine Payment, and FFE is a For Hire Motor Carrier

Parr vs. Bobby Boatright and Frozen Food Express a/k/a FFE Transportation Services, Inc., Injury No. 08-124297

Boatright was a sole proprietor who owned trucks that he leased to FFE to transport frozen or refrigerated food between Chicago and Dallas. The contract provided that Boatright would supply drivers at his own expense who met requirements imposed by FFE's liability insurance carrier and Federal Law. Boatright did the hiring and firing and paid the drivers. FFE did not control the routes the drivers took to deliver or pick up loads, did not determine which driver was assigned to the route, and did not control the amount or frequency of payment to any driver. On February 16, 2008, the

claimant was driving his assigned route as an OTR truck driver when he was involved in a motor vehicle accident in Missouri.

At the Hearing, the issue was the claimant's employer. The ALJ found that Boatright was the employer, not FFE, and noted that Boatright had the right to hire and fire, determine the amount and frequency of payment, assign routes, provide the trucks and maintain the same. Additionally, because FFE was a for-hire motor carrier operating within a commercial zone, it was not a statutory employer of claimant under workers' compensation law. With respect to permanency, the ALJ did not find Boatright responsible for the same because the claimant did not hit his head or lose consciousness in the accident and did not seek treatment for three weeks after the accident, the damage to the vehicle was minimal, and there was no evidence suggesting that the work accident was the prevailing factor in causing any medical condition related to his current complaints. The ALJ denied payment of PTD, TTD, PPD, or future medical. On Appeal, the Commission affirmed the ALJ's Decision and Award.

Editor's Note: At the Hearing, the ALJ also found that under strict construction, 287.210.3 and 287.210.7 only apply to physician testimony. Therefore, certified treatment records that are not offered as a substitute for an expert's testimony would still be admissible, even if not provided to all parties at least seven days in advance of a Hearing.

Court Affirms Commission's Decision and Award Finding that Claimant's Work Conditions Were Not the Prevailing Cause of His Heart Attack and Death

<u>White vs. ConAgra Packaged Foods LLC</u>, Case No. SC96041 (Mo. Sup. Ct. 2017)

FACTS: The claimant worked as a machinist before he died on June 30, 2012 while at work. His autopsy showed severe coronary artery disease, and his death certificate listed his cause of death as acute myocardial infarction and heart failure. His surviving spouse filed for death benefits under workers' compensation. Testimony established that the claimant operated a lathe in a machine shop on the day of his death and the weather was extremely hot. Dr. Schuman testified on behalf of the surviving spouse and opined that the claimant's work was the prevailing factor in causing his death because the extreme heat combined with the claimant's physically demanding work duties and leg brace placed added stress on his already strained heart. Dr. Farrar testified on behalf of the employer that the claimant's death was caused by his coronary artery disease and other heart conditions and was not related to his work activities.

At a Hearing, the ALJ found that the claimant's surviving spouse failed to sustain her burden of proof that the claimant sustained an accident or occupational disease, and the claim was therefore not compensable. On Appeal, the Commission affirmed the ALJ's Award with a supplemental opinion. The Commission found that the claimant did suffer an accident because his death at work was an unexpected traumatic event. However, the Commission found there was no persuasive expert testimony on the issue of medical causation and ruled that the claimant's work was not the *prevailing factor* in causing his heart attack or death.

HOLDING: The claimant's surviving spouse appealed. The Court first held that the claimant suffered an accident, which was the unusual strain placed on him due to the extraordinary heat, and this accident resulted in an injury, which was his death. The Court held that the next step was to determine whether the unusual strain was the *prevailing factor* in causing the claimant's heart attack and death. The Court held that the Commission properly applied the prevailing factor standard, deferred to the Commission's findings of fact with respect to the persuasiveness of expert medical testimony, and affirmed the Commission's decision and Award.

Employer Responsible for Unauthorized Treatment Claimant Underwent During the Four Weeks Between the Date She Filed a Claim Demanding Additional Treatment and the Date She Was Evaluated by Employer's Doctor

<u>Boykins-Walls vs. Normandy School District</u>, Injury No. 13-098181

The claimant, a substitute teacher, sustained an injury to her bilateral knees on December 6, 2013, when she slipped and fell on ice while walking between buildings. She treated conservatively for contusions and underwent physical therapy and was released from care on December 26, 2013. She proceeded to treat on her own with Dr. Droege and then filed a Claim for Compensation demanding additional treatment on January 15, 2014. The employer directed her to Dr. Milne, and she was seen on February 10, 2014, just four weeks later. She was placed at MMI on April 1, 2014.

At a Hearing, the ALJ found that although the claimant sustained an accident, she did not sustain any permanent disability from the same. The ALJ denied all benefits.

On appeal, the Commission modified the ALJ's Award and decision with respect to unpaid past medical expenses. The Commission found that the claimant was not entitled to reimbursement for medical bills for any treatment she received after the employer directed her to Dr. Milne for additional treatment. However, the Commission did award past medical expenses for the treatment she underwent between the time she filed her Claim on January 15, 2014 and when she was seen by Dr. Milne on February 10, 2014. The Commission reasoned that the employer was notified of the claimant's need for additional medical treatment when she filed a Claim demanding the same. It also reasoned that the treatment provided by Dr. Droege during that period was reasonable and necessary and was consistent with the type of treatment that both of the authorized treating physicians recommended and ultimately provided. Therefore, the claimant was entitled to compensation in the amount of $783.00, referable to past medical expenses. Notably, the Commission opined that brief delays in scheduling appointments, other than in emergency situations, do not render an employer/insurer liable for unauthorized care.

Editor's Note: Therefore, it appears the Commission is suggesting that four weeks was too long to wait to schedule the claimant for a follow up evaluation.

Employer Liable for PTD Because Claimant Was Sleep Deprived Due to Pain and Had to Nap Several Times Per Day, Despite Fact that He Slept At Least Eight Hours Per Night and Did Not Take Any Medications to Attempt to Alleviate His Sleep Issues

<u>Wann vs. The Lawrence Group</u>, Injury No. 12-090608

The claimant, a 59-year-old carpenter and high school graduate, developed bilateral upper extremity pain, numbness, and tingling in November 2012. He underwent an arthroscopic surgery on the right shoulder on July 22, 2013, which was performed by Dr. Ritchie, who placed him at MMI, issued permanent lifting restrictions, and assessed 20% PPD of the right shoulder. The claimant never returned to work after surgery. Two years later, the employer directed the claimant back to Dr. Ritchie, who also diagnosed work-related chronic left shoulder impingement and probable labral pathology, bilateral carpal tunnel syndrome, and left elbow mild ulnar nerve neuropathy and opined the claimant would require carpal tunnel releases in the future.

The claimant was evaluated by Dr. Volarich, who noted that he awakened several times per night due to shoulder pain, although he was not taking any pain medications to alleviate the same, and the doctor recommended a vocational evaluation and opined that if the claimant were PTD, it was due to the primary injury alone. The claimant's vocational expert, Mr. England, opined that he was PTD as a result of his primary injury alone. He noted that if claimant got an adequate full night's sleep, he would be a candidate for some jobs, but he noted the claimant has sleep disturbance and takes no medication to help him sleep. The employer's vocational expert, Ms. Abrams, opined the claimant was able to work in the open labor market, but she admitted that if he did have to take several naps during the day, he may not be able to find and maintain a job.

At a Hearing, the claimant testified that he had sleep difficulties, although he slept over eight hours per night. He testified that he takes Ibuprofen a few times per month but no other pain medication. He had not worked since January 2013 and had not looked for other employment besides one position at a family member's company. The ALJ awarded PPD at the level of the bilateral shoulders and wrists but found that the claimant was not PTD. The ALJ noted that although he was not able to return to his former job as a carpenter, he had no ambulation problems, no need for narcotic pain medication, and was able to perform self-care. Although he had sleep deficits, he was making no attempt to alleviate the same, and his sleep issues were not noted in his treatment records, only in the expert reports. The ALJ also noted that the claimant was articulate and had transferable skills and no memory problems.

On appeal, the Commission opined it was plausible that someone with bilateral shoulder injuries may have difficulty sleeping comfortably, and this was noted in Dr. Volarich's report. It found Dr. Volarich's opinion most persuasive and disagreed with the ALJ regarding the claimant's credibility in light of the opinions of Dr. Volarich and Mr. England. The Commission held that the claimant's sleep difficulties rendered him PTD as a result of his primary injury alone and found the employer responsible for PTD and future medical.

Editor's Note: It does not appear that the Commission addressed the ALJ's rationale that the claimant made no efforts to alleviate his sleep issues.

Employer Responsible for PTD After Claimant Sustained Multiple Fractures to Bilateral Lower Extremities After Falling 25 Feet, Which Required Him to Spontaneously Recline Throughout The Day and Caused Sleep and Concentration Difficulties

Sanchez-Rivera vs. Jorge Calderon Construction and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 10-059076

The claimant, a 34-year-old construction worker, was working for employer on July 16, 2010, at which time he fell 25 feet from a ladder. Dr. Horton performed an ORIF of the bilateral tibial fractures on August 9, 2010 and two subsequent surgeries. The claimant's lumbar injuries were treated non-operatively. He was placed at MMI on August 18, 2011 but was restricted to seated work only. The claimant continues to undergo regular pain management. He did not return to work after his accident. He testified that he has to lie down throughout the day due to his pain and is unable to support his weight on his feet, sleep overnight, or concentrate due to his lack of sleep. He also now uses a cane.

At a Hearing, the claimant testified that he completed the seventh grade in Mexico and never returned to school, and he understands and speaks only a little English. He did not have a driver's license or any computer or typing skills.

The claimant was evaluated by Dr. Koprivica, who opined he was PTD as a result of his last injury alone. He recommended permanent restrictions of no working on uneven surfaces, climbing activities, standing and walking for less than 20 minutes only, sitting when necessary, and the ability to change positions frequently when needed. Mr. Dreiling, a vocational rehabilitation specialist, evaluated the claimant at the claimant's attorney's request, and he opined the claimant was not a candidate for any type of formal academic or vocational retraining because English was his second language and he did not have a high school degree or GED and no transferable job skills. He also opined that he would find the claimant PTD as a result of his last injury alone due to his need to spontaneously lie down throughout the day, even if his primary language was English.

At a Hearing, the ALJ found that the claimant was PTD because he testified credibly regarding his need to lie down throughout the day, his use of narcotic pain medication, and his lack of concentration and sleep. On appeal, the Commission affirmed the ALJ's decision and Award.

Fund Liable for PTD Because Prior Low Back Injury Caused Primary Low Back Injury to be More Severe Than Otherwise Would Have Been

Branham vs. Schrimpf Landscaping, Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury Number 06-077118

The claimant, a man of unspecified age with a GED, was working for the employer driving a tanker truck and operating a seed sprayer when he sustained an injury to his low back on July 17, 2006. He underwent surgery to repair an annular tear on May 10, 2007. He subsequently underwent two additional low back surgeries, including a three-level fusion on January 24, 2011 as well as a surgery to remove bone graft material from the stomach wall on February 1, 2012. The claimant has not worked since 2010.

The claimant previously sustained a low back injury in 2000 while working for a roofing company, after which he underwent surgery at L5-S1 and resolved his claim for 16.1% PPD of the body referable to the low back. He was unable to continue working as a roofer following his injury due to lifting limits and ongoing back and leg pain.

Dr. Volarich evaluated the claimant and opined that his prior low back injury was a hindrance to his employment and he was more disabled as a result of a combination of his two injuries because his lumbar spine was weakened after the first injury, which caused his 2006 injury to be more severe than it otherwise would have been. Dr. Volarich opined the claimant was PTD as a result of a combination of his 2000 and 2006 injuries. Vocational experts Mr. Weimholt and Mr. Cordray agreed that the claimant was unemployable as a result of a combination of both low back injuries. Mr. Hughes was the only rehabilitation counselor to opine that the claimant was able to continue working, although he noted that if the claimant were found PTD it would be as a result of both of his low back injuries.

At a hearing, the ALJ found the employer responsible for 45% PPD of the body referable to the low back as a result of the 2006 work injury as well as future medical. The ALJ also found the claimant was PTD as a result of a combination of both his low back injuries. On Appeal, the Commission affirmed the ALJ's decision and Award with respect to permanency and future medical, but they modified the Award with respect to the claimant's TTD and PTD rate.

Fund Liable for PTD Benefits After Claimant Forced to Change Jobs Following Prior Low Back Injury and Reported Ongoing Back Pain Prior to Primary Injury

Sanderson vs. Dolgen Corp., Inc. and Treasurer of Missouri as Custodian of Second Injury Fund, Injury No. 09-108286

The claimant, a 65-year-old warehouse worker, sustained an injury to his back on October 27, 2009 while working for the employer. He treated on his own and underwent physical therapy and an injection.

The claimant sustained a prior low back injury in 1998, which was settled for 11% PPD of the body referable to the lumbar spine. Dr. Levy evaluated the claimant and opined that he had 30% PPD to the body in 1998. It is not clear whether the claimant underwent surgery for the 1998 injury, but he testified he was forced to leave his job in security because he could no longer perform the physically demanding job duties. He also testified that he was unable to return to work for two years and continued to have intermittent low back pain leading up to his primary injury.

The claimant was evaluated by Dr. Volarich, who testified that he sustained 35% PPD to the body as a result of his primary injury and was PTD as a result of a combination of his 1998 and 2009 back injuries. Vocational experts Mr. Weimholt and Mr. Cordray agreed with Dr. Volarich. Mr. England testified on behalf of the Fund and opined that he was employable, although he agreed that the 1998 injury was a hindrance to his employment.

At a hearing, the ALJ found the claimant PTD as a result of a combination of his pre-existing low back injury and his primary injury and ordered the Fund to pay PTD benefits. The ALJ also found the employer responsible for 20% PPD of the body, past medical expenses, and future medical care. On Appeal, the Commission affirmed the ALJ's decision and Award.

Fund Not Liable for PTD Benefits Because Claimant PTD As a Result of Her Pre-Existing, Non-Work-Related Low Back Condition Considered Alone

Glasco vs. Treasurer of the State of Missouri Custodian of the Second Injury Fund, Case No. WD80186 (Mo. App. 2017)

FACTS: On April 27, 2011, the claimant fell at work and injured her left knee and was diagnosed with a strain. She treated with the employer's doctors and ultimately resolved her claim against the employer for 15% PPD of the knee.

The claimant had a significant pre-existing and non-work-related condition in her low back, for which she treated with Dr. Drisko. She underwent multiple back surgeries prior to 2008 and then a fusion. She was diagnosed with failed back syndrome and was referred to a pain specialist and psychiatrist. She was subsequently diagnosed with "Transition Syndrome" after she developed stenosis over the site of her prior surgery. She underwent additional injections. Dr. Drisko took her off work in May 2010 for her low back condition, and she did not return to work until April 12, 2011, at which time she returned to work with restrictions. She then only worked two weeks for the employer prior to sustaining her primary injury.

The claimant filed against the Fund for PTD benefits. Dr. Zimmerman, the claimant's expert, opined she was PTD as a result of a combination of her primary injury and pre-existing conditions. However, he did not review all of the claimant's prior medical records and did not have a complete history of her prior treatment and disability. Mr. Dreiling also testified on behalf of the claimant, and on cross-examination, he admitted that even assuming that her left knee was fine, she would be virtually unemployable due to her back condition. Dr. Drisko testified that she was PTD due to her progressive back problems alone.

At a Hearing, the ALJ found the Fund liable for PTD based on the combination of the claimant's primary injury and pre-existing disabilities. On Appeal, the Commission reversed and found that the Fund was not liable because the claimant was PTD as a result of her pre-existing low back condition, considered alone.

HOLDING: The claimant appealed to the Court, which affirmed the Commission's Award and Decision to deny benefits against the Fund. It held that questions of employability and when a claimant becomes permanently and totally disabled are issues of fact within the province of the Commission, and it deferred to the Commission's factual findings in this case.

Fund Liable for PTD Because Claimant Unemployable Due to Primary Injury Combined with Pre-Existing Right Leg Injury, Anxiety/Depression, and Need to Lie Down Throughout Day

Johnson vs. Direct TV Home Services and Treasurer of Missouri As Custodian of Second Injury Fund, Injury No. 12-100647

The claimant, a 48-year-old satellite technician, did not graduate high school or obtain a GED. On December 19, 2012, he fell in a customer's yard and sustained injuries to his right foot, right buttock, and low back. He underwent injections, and Dr. Rahman ultimately performed a microdiscectomy at L5-S1. He was released from treatment on December 17, 2013.

The claimant had pre-existing injuries. When he was two years old, he severed the muscles in his right leg below his buttocks, which required surgery. However, a nerve was nicked and resulted in paralysis of the right leg, which necessitated multiple additional surgeries and additional medical treatment over the next 10-12 years. Due to this condition, he developed anxiety and began taking Xanax when he was 35. His right leg never regained full function and mobility and he could not rotate his right ankle. His pre-existing conditions affected his employment prior to 2012. He was fired from a construction job because he was unable to climb on a roof without decking. He also had to stand on cardboard or mats while working as a welder, worked slower, and took more breaks as a result of his pre-existing injuries. He was not able to continue working as a truck driver after he began taking anti-anxiety medications. He also had difficulty keeping his right foot on the gas pedal for extended periods of time due to his right leg and foot injury. Even while working for the employer, he had trouble climbing on roofs and balancing on ladder rungs prior to his 2012 accident.

The claimant's attorney had him evaluated by Dr. Paul, who recommended permanent work restrictions, including no significant climbing, balancing, stooping, bending, kneeling, crouching, or crawling and that the claimant be able to lie down during the day. He opined the claimant was PTD as a result of his work accident in combination with his pre-existing conditions. Mr. Eldred, a vocational rehabilitation specialist, also opined that he was unemployable as a result of his work accident and pre-existing conditions. He believed that the claimant's need to lie down during the day would negate employment.

At a Hearing, the ALJ found the clamant to be PTD as a result of his work accident in combination with his pre-existing disabilities and ordered the Fund to pay PTD. The ALJ noted prior accommodations and limitations the claimant had as a result of his pre-existing disabilities for his 2012 work accident and also found the testimony of Dr. Paul and Mr. Eldred to be persuasive on the question of PTD. On Appeal, the Commission affirmed the ALJ's decision and Award.

Commission Decision Finding Fund Liable for PTD Benefits Supported by the Record Because Claimant's Expert Testified He Was PTD and Employer's Expert Testified He Had a Pre-Existing Disability

Barnes vs. Treasurer of Missouri as Custodian of Second Injury Fund and Park Express LLC, Case No. ED105508 (Mo. App. 2017)

FACTS: The claimant worked for the employer, an airport parking and shuttle company, and on November 11, 2009, while changing a tire on his shuttle bus, he sustained an injury to his lower back. He underwent injections and physical therapy and was released from care by Dr. Doll without

restrictions. The claimant subsequently treated on his own with Dr. Wilkey, who performed a two-level lumbar fusion at L4-5 and L5-S1. He recommended permanent restrictions that included taking a break to recline for 15 minutes every two hours, ongoing narcotic pain medication, and possibly missing work up to twice a month. The claimant had not returned to work since his 2011 surgery and was terminated by the employer when he was unable to return to work full duty.

The claimant suffered a prior low back injury in May 2000 and underwent surgery at L5-S1 in September 2000, including a right-sided laminectomy and discectomy. He returned to work without permanent restrictions and settled that claim for 25% of the body referable to the lower back.

The claimant's experts, Dr. Wilkey and Mr. Kaver, testified that the claimant was unemployable and PTD as a result of his 2009 work injury alone. The employer's expert, Dr. Lange, assessed 15% PPD of the body due to the 2009 injury and 25% PPD of the body from his prior injury in 2000. Dr. Lange concluded that the claimant's 2009 work accident was not the prevailing factor in causing his disability at L5-S1. Rather, his prior injury in 2000 was the prevailing factor in causing his disability.

At a Hearing, the ALJ found the claimant PTD as a result of his last work injury alone. On Appeal, the Commission modified the Award and found the Fund liable for PTD benefits as the claimant was PTD as a result of his last work injury in combination with his pre-existing low back injury.

HOLDING: The Fund appealed and argued that the Commission substituted its own determination of medical causation, which was unsupported by medical expert testimony because there was no single medical expert that testified that the claimant was PTD as a result of a combination of primary injury and pre-existing disabilities. The Court found that the Commission's decision was supported by the record because the claimant's experts testified that the claimant was permanently and totally disabled, and the employer's expert testified that there was pre-existing permanent disability to the claimant's low back. It held that there is no requirement that a single expert's testimony wholly support the Commission's determinations of both causation and the nature and extent of disability. The Court deferred to the Commission's factual findings and affirmed the Commission's decision and Award.

Claimant Not Entitled to Enhanced Benefits Under 287.200.4(3), Because Employer Went Out of Business More Than Fifteen Years Prior to When the Statute Became Effective on January 1, 2014 and Could Not Have Elected to Accept Mesothelioma Liability

<u>Hegger (Deceased) vs. Valley Farm Dairy Co.</u>, Injury No. 14-103079

The claimant worked for the employer from 1968 until 1984, during which time he was exposed to asbestos. The employer went out of business in 1998. The claimant worked for subsequent employers, but he credibly testified he was not exposed to asbestos during that employment. The claimant was diagnosed with mesothelioma in 2014 and died as a result on June 7, 2015.

At a Hearing, the ALJ addressed the sole issue of enhanced benefits under Section 287.200.4(3). The ALJ found that the claimant was last exposed to asbestos while working for the employer, and his

exposure was the prevailing factor for his diagnosis of mesothelioma which resulted in his death. However, neither of the insurers who insured the employer during the claimant's dates of employment were liable for paying enhanced benefits because the enhanced benefits provision did not go into effect until January 1, 2014. The employer could not possibly have elected to be held liable for the same, because it went out of business in 1998. Also, insuring its liability for occupational diseases in 1984 did not qualify as electing to be liable for enhanced benefits, which are separate and in addition to benefits otherwise payable for an occupational disease. Therefore, the claimant was not entitled to enhanced benefits. On Appeal, the Commission affirmed and adopted the ALJ's decision and Award.