FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 14-103079

Employee: Vincent Hegger (Deceased)

Dependents: Children of Vincent Hegger (Estate)

Employer: Valley Farm Dairy Co.

Insurers: Amerisure Insurance Company
Travelers Indemnity Co. of America

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, we find that the award of the administrative law judge (ALJ) denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Petitioner, the children of deceased employee Vincent Hegger, filed an application for review of the ALJ's award denying compensation. Petitioner accepts the ALJ's findings of fact and dispute only her interpretation of § 287.200.4(3)(a) RSMo.[1]

This is a case of first impression regarding the application of the optional enhanced mesothelioma liability benefit provided for in § 287.200.4(3)(a) by an employer who ceased to exist prior to the January 1, 2014, effective date of the statute.

We conclude that the enhanced mesothelioma benefits provided for in § 287.200.4(3)(a) are triggered only when an employer takes an affirmative action to accept the protections of the statute by purchasing a potentially separate policy of insurance for the new, enhanced mesothelioma benefit. We agree with the ALJ's conclusion that an employer who ceased to exist prior to the January 1, 2014, effective date of the enactment of § 287.200.4(3), could not have made a decision to take or accept liability thereunder.[2]

The insurance carrier with coverage as of the date of last exposure has been held liable for payment of traditional benefits. *Enyard v. Consolidated Underwriters,* 390 S.W.2d 417 (Mo. App. 1965). We question whether employer's failure (i.e. inability) to take the affirmative steps

[1] The brief filed on behalf of employer and insurer Amerisure Insurance Company attempts to raise the additional issue of whether, under §287.063, employee was last exposed to the hazards of asbestos in his work for Valley Farm Dairy Co. Petitioner correctly notes that because employer/insurers filed no application for review, this issue is not preserved for the Commission's review.

[2] We note that provisions of § 287.200.2(3)(a) relating to election of mesothelioma liability are not entirely clear. The subsection provides "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* (emphasis added)." Neither the subsection nor the Act defines the term "department." It may be inferred, based on the labor department director's membership on the Board of Trustees of the Missouri Mesothelioma Risk Management Fund pursuant to § 287.223.10 RSMo, that notice of an election to accept or reject mesothelioma liability would appropriately be filed with the DOLIR. Consistent with this logic, the Division of Workers' Compensation has promulgated forms WC-304-I and WC-304-G for employers to provide notice to the Division of Workers' Compensation, Department of Labor and Industrial Relations of their election to either reject or to accept mesothelioma liability by (1) the purchase of insurance coverage; (2) by self-insurance authority approved by the division; or (3) becoming a member of a group insurance pool that complies with the requirements of § 287.223 RSMo.

necessary to accept liability for the additional benefits provided under § 287.200.4(3) would relieve said insurer of liability for other benefits under the Act. This issue, however, is not before us.

In fact, it appears that § 287.200.4(3) may reasonably be interpreted as a specific exception to the general rule set forth in § 287.280, requiring that any policy of insurance cover employer's entire liability under the workers' compensation law. Section 287.200.4(5) provides that enhanced mesothelioma benefits unpaid at the time of an employee's death "are payable to the employee's spouse or children, natural, or adopted, legitimate or illegitimate, *in addition to benefits provided under section 287.240* (emphasis added)." Section 287.200.4(5) further uniquely provides that in the event the employee has no surviving spouse or children, any remaining additional enhanced mesothelioma benefits are to be paid as a single payment to the employee's estate. *Id.*

We affirm the ALJ's finding that administrative agencies such as the Division and this Commission are not invested with jurisdiction to resolve the issue of constitutionality of application of § 287.200.4(3). See *Tardus v. Missouri Bd of Pharmacy*, 849 S.W.2d 222,225 (Mo. App. 1993). We note, however, that employer and Amerisure Insurance Company have preserved their constitutional arguments for appeal.

Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 25, 2017, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 13th day of December 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

VACANT
Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee:	Vincent Hegger (Deceased)	Injury No.: 14-103079
Dependents:	Children of Vincent Hegger (Estate)	Before the **Division of Workers' Compensation**
Employer:	Valley Farm Dairy Co.	Department of Labor and Industrial Relations
Insurers:	Amerisure Insurance Company Travelers Indemnity Co. of America	Of Missouri Jefferson City, Missouri
Hearing Date:	October 25, 2016	Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No (as to enhanced benefits)
3. Was there an accident or incident of occupational disease under the Law? See Award
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? No (as to enhanced benefits)
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant worked with asbestos products, resulting in injury to the lungs.
12. Did accident or occupational disease cause death? Yes
13. Part(s) of body injured by accident or occupational disease: Lungs, Body as a whole
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: The parties stipulated the average weekly wage at the time of Employee's diagnosis of mesothelioma was $812.46.

19. Weekly compensation rate: N/A

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: $0.00

22. Second Injury Fund liability: N/A

23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Vincent Hegger (Deceased)	Injury No.: 14-103079
Dependents:	Children of Vincent Hegger (Estate)	Before the **Division of Workers' Compensation**
Employer:	Valley Farm Dairy Co.	Department of Labor and Industrial Relations
Insurers:	Amerisure Insurance Company Travelers Indemnity Co. of America	Of Missouri Jefferson City, Missouri
		Checked by: KOB

PRELIMINARIES

This case involves an alleged occupational disease due to toxic exposure diagnosed as mesothelioma arising from exposure to asbestos, which ultimately took the life of Vincent Hegger ("Employee") on June 7, 2015. It is a case of first impression[1] regarding the application of the so-called "enhanced benefit" provided in §287.200.4(3)(a) RSMo 2014[2] to an insurance policy predating the effective date of the statute.

An evidentiary hearing was held on October 25, 2016. Attorneys Thomas L. Stewart and Adam J. Reynolds represented Employee and his Estate (children Steven Hegger and Diane Hegger). The Estate is referred to in this award as "Claimants." Attorney Christopher Archer represented Valley Farm Dairy ("Employer") and Amerisure Insurance Company ("Amerisure"). Attorney Jaudon Godsey represented Travelers Insurance Company ("Travelers") who was an additional insurer[3] of Employer. The Division had jurisdiction to hear this case pursuant to §287.110.

The following exhibits were admitted into evidence:

Claimants Exhibits

1. Hearing Brief[4]
2. Stipulations of the Parties
3. Social Security Administration – employment records
4. Proof of Insurance Coverage for Valley Farms Dairy
5. Certificate of Death - Vincent Hegger
6. Barnes-Jewish Hospital – Surgical Pathology Report
7. Dr. Anthony Shen - report dated March 22, 2015, supplemental report of August 3, 2016, and Curriculum Vitae
8. Deposition of Employee taken on May 19, 2015
9. Record of State's average weekly wage for the period of July 1, 2013 to June 30, 2014

[1] As of the date of this Award, the only other decision addressing the new law was that of Administrative Law Judge Mark S. Siedlik in the matter of *Robert Casey*, Injury No. 14-102671. The underlying facts were significantly different in *Casey* because the employer had a policy that contained a specific endorsement under §287.200.4(3).
[2] All statutory references shall be to Chapter 287 RSMo 2014 unless otherwise noted.
[3] At times in this Award, Amerisure and Travelers may be referred to jointly as "Insurers."
[4] While not technically evidence, this brief was accepted at hearing as part of Claimant's post-trial brief.

Employer/Insurer Exhibits

Amerisure Exhibit A: Third-Party Releases[5]
Travelers Exhibit I: Excerpt from Employee's deposition from third party case

ISSUES

The parties stipulated the only benefits at issue are the "enhanced benefits" in §287.200.4(3)[6]. Accordingly, the parties identified the following as the issues for determination:

1. Was Employee's exposure to asbestos at work the prevailing factor for his diagnosis of mesothelioma?
2. Under §287.063, was Employee last exposed to the hazards of asbestos in his occupation working for Employer?
3. Is Amerisure or Travelers liable for payment of the "enhanced benefits"?
4. Does the Missouri Constitution prohibit the award of the "enhanced benefit" for mesothelioma as provided in §287.200.4(3) that became effective on January 1, 2014 to find a prior employer and its prior carrier liable for such benefits?

APPLICABLE LAW

Claimant seeks to recover the "enhanced benefits" of §287.200.4(3) created with the passage of Senate Bill 1 ("SB1"), effective as of January 1, 2014. Although much of SB1 focused on changes to the Second Injury Fund, the bill also addressed occupational diseases under the Missouri Workers' Compensation Act ("Act"). SB1 clarified the exclusivity of the Act applied to occupational diseases by adding "occupational diseases" to §287.210 which establishes the Act as workers' exclusive remedy and shields employers from civil liability.

Furthermore, SB1 added a new class of occupational diseases titled, "Occupational Diseases Due to Toxic Exposure." Section 287.020.11 provides:

> For the purposes of this chapter, "occupational diseases due to toxic exposure" shall only include the following: mesothelioma, asbestosis, berylliosis, coal worker's pneumoconiosis, brochiolitis obliterans, silicosis, silicotuberculosis, manganism, acute myelogenous leukemia, and myelodysplastic syndrome.

The benefits associated with occupational diseases due to toxic exposure are set forth in §287.200(4), which states in its entirety:

[5] Claimant's objection to the introduction of the third-party releases based upon relevancy is overruled. While settlements do not prove exposure per se, I find the releases relevant to the first issue in regards to the reliability of Employee's testimony regarding exposure to asbestos.

[6] Because this is a mesothelioma claim, the benefit is three hundred percent of the state's average weekly wage for two hundred twelve weeks. §287.200(4)(3)(a). Throughout this Award, any mention of the "enhanced benefit" refers to this provision.

For all claims filed 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:

(1) Notwithstanding any provision of law to the contrary, such amount as due to the employee during said employee's life as provided for under this chapter for an award of permanent total disability and death, except such amount shall only be paid when benefits under subdivisions (2) and (3) of this subsection have been exhausted;

(2) For occupational diseases due to toxic exposure, but not including mesothelioma, an amount equal to two hundred percent of the state's average weekly wage as of the date of diagnosis for one hundred weeks paid by the employer; and

(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. 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, 2038; or

(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; and

(4) The provisions of subdivision (2) and paragraph (a) of subdivision (3) of this subsection shall not be subject to suspension of benefits as provided in subsection 3 of this section; and

(5) Notwithstanding any other provision of this chapter to the contrary, should the employee die before the additional benefits provided for in subdivision (2) and paragraph (a) of subdivision (3) of this subsection are paid, the additional 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. If there is no surviving spouse or children and the employee has received less than the additional benefits provided for in subdivision (2) and paragraph (a) of subdivision (3) of this subsection the remainder of such additional benefits shall be paid as a single payment to the estate of the employee;

(6) The provisions of subdivision (1) of this subsection shall not be construed to affect the employee's ability to obtain medical treatment at the employer's expense or any other benefits otherwise available under this chapter.

FINDINGS OF FACT

The parties agreed to the following stipulations[7] at the time of the hearing of the case:

1. Mr. Hegger was first diagnosed with mesothelioma on March 19, 2014 by needle biopsy at Barnes-Jewish Hospital;
2. Mr. Hegger died of mesothelioma on June 7, 2015. At the time of his death, he was not married and he was survived by his natural adult children, including Steven Hegger;
3. Defendant, Valley Farms Dairy, is no longer in existence and has not been in existence since 1998;
4. Mr. Hegger was a full-time employee of defendant Valley Farm Dairy from 1968 until sometime in 1984;
5. Claimants are solely seeking the enhanced benefits as outlined in §287.200.4(3) RSMo;
6. Michigan Mutual Insurance Company (n/k/a Amerisure Insurance Company) had the workers' compensation coverage for Valley Farm Dairy from October 17, 1983 until October 17, 1984. Travelers Insurance had coverage for Valley Farm Dairy from October 17, 1984 until October 17, 1985;
7. Dr. Anthony Shen's medical report and addendum are admissible into evidence;
8. Claimants stipulated that the third-party settlement documents are authentic documents signed by Mr. Hegger (or members of his family), but preserve the right to object to admission of said documents on other grounds; and
9. The state average weekly wage at the time of Employee's diagnosis of mesothelioma was $812.46.

ADDITIONAL FINDINGS OF FACT

Based upon the parties' stipulations, the exhibits introduced into evidence, and the deposition testimony of the deceased, I make the following findings of facts:

During his 16-year employment at Valley Farm Dairy, Employee was responsible for maintaining industrial equipment, including ammonia compressors, air compressors, boilers and fireboxes. He hammered, tore off and replaced asbestos insulation in fireboxes and boilers, chopped off head gaskets, brushed and cleaned gaskets. Much of this work created asbestos dust, which he inhaled. As far as Employee knew, his work at Valley Farm Dairy in 1984 was the last time he worked with or was exposed to asbestos.

From sometime in 1984 to 1990, Employee worked[8] in maintenance at Care Unit Hospital, which is now Anheuser-Busch Eye Institute on Grand Avenue in the City of St. Louis. He performed lighter maintenance duties, such as checking and replacing light bulbs, working on the sprinkler system, shoveling snow, jump-starting cars and checking small appliances. He did

[7] Because the parties submitted these stipulations in writing, I have not used the defined terms such as "Employee" or "Amerisure" that are present in other sections of this Award.

[8] He had two consecutive employers: ServiceMaster and Care Tech.

some work in the cooling towers, describing his work as, "Just clean them out, drain all the water, and clean them out, put in clean water, they get mud in the bottom" (Exhibit 8, p.30, ll.8-10). He did not describe any contact or work with insulation, gaskets, packing or refractory cement in or around the cooling towers or any other equipment at Care Unit Hospital. He agreed the building was old and probably contained some asbestos insulation, although he never came in contact with it.

Employee subsequently performed delivery work where there was no asbestos exposure. In the distant past (between the 1940s and 1970s), it was thought Employee was exposed to asbestos in the Navy, working in an auto supply house and maintaining personal vehicles.

Employee was diagnosed with mesothelioma, a rare cancer caused by asbestos exposure, on March 24, 2014. Dr. Anthony Shen, his physician, concluded his employment was the dominant factor in Employee's development of mesothelioma, and noted the following in his report dated March 22, 2015:

> It can be established that Mr. Hegger is currently an 86-year-old white male who worked at many areas where he was exposed to asbestos. These include a brewery and generally manufacturing plants between the 1950s and '70s. There asbestos was in the form of insulation, asbestos gaskets, asbestos packing, and refractory cement in and around equipment, including boilers, compressors, pumps, valves, and cooling towers.

Employee died as a result of complications from mesothelioma on June 7, 2015. He was survived by his two adult children, Steven Joseph Hegger and Diane Elizabeth Hegger.

RULINGS OF LAW

I. Employee's exposure to asbestos at work is the prevailing factor for his diagnosis of mesothelioma.

An occupational disease is defined in §287.067.1 as "an identifiable disease arising with or without human fault out of and in the course of employment." Section 287.067.2 provides:

> An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.067.6 states "[d]isease of the lungs or respiratory tract . . . including carcinoma, may be recognized as occupational diseases for the purposes of this chapter and are defined to be disability due to exposure to smoke, gases, [and] carcinogens," amongst other hazards. Section 287.020.11 further explains "occupational diseases due to toxic exposure" include "mesothelioma [and] asbestosis," among other illnesses.

I find Employee was employed in an occupation or process (maintenance of a manufacturing facility) in which the hazards (asbestos) of an occupational disease due to toxic exposure (mesothelioma) existed. Dr. Shen, who is well qualified by education and experience

to speak to the critical issue of causation, provided clear and compelling evidence. He considered the entirety of Employee's vocational and relevant medical history, confirmed Employee suffered from asbestos-related mesothelioma, and explained the asbestos to which Employee was exposed was in the form of insulation, asbestos gaskets, asbestos packing and refractory cement in and around equipment (including cooling towers) in a brewery and manufacturing plants where he worked. Based on the medical evidence and the vocational history, Dr. Shen concluded, and I so find, Employee's employment was the prevailing[9] factor in his development of mesothelioma.

II. Employee was last exposed to the hazards of asbestos in his occupation working for Employer

The last exposure rule dictates that "the employer liable for compensation is the last employer to expose the employee to the occupational hazard prior to the filing of the claim." *Maxon v. Leggett & Platt,* 9 S.W.3d 725, 730 (Mo.App.S.D.2000).[10] The rule is codified in §287.063, which provides:

> 1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists.…;
> 2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

Brune v. Johnson Controls, 457 S.W.3d 372, 377 (Mo. Ct. App. 2015).

Employee's testimony on the issue of his exposure to asbestos products and asbestos dust was clear and credible. He described how he worked with insulation and asbestos gaskets (specific hazards identified by Dr. Shen) and created asbestos dust while working at Employer by hammering, chopping, ripping, tearing and cleaning asbestos covered parts. Employee unquestionably was exposed to asbestos while working as a maintenance man in Employer's manufacturing facility.

Employee's credible testimony establishes he was not subsequently[11] exposed to the hazards of the mesothelioma disease after his employment with Employer ended in 1984. Although one task he performed for a subsequent employer involved cleaning cooling towers, there is no evidence he was exposed to the specific hazards of the disease, which Dr. Shen identifies as insulation, asbestos gaskets, asbestos packing, and refractory cement. Based on the evidence in this case, Insurers cannot establish Employee was exposed to asbestos in the Care

[9] Dr. Shen used the word "dominant" which is defined in the Encarta Dictionary as "more important, effective, or prominent than others" and is listed in the corresponding Thesaurus as a synonym of "prevailing." All definitions and synonyms cited herein are taken from the Encarta Reference Series.
[10] This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 224-32(Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton*'s effect thereon.
[11] While there may have been other exposures, they are irrelevant for these purposes because they were either prior to his employment with Employer, or if subsequent, insignificant and not work related.

Unit cooling tower without some evidence he was exposed to any parts of the cooling tower that contained asbestos or created asbestos dust.

I find Employee was last exposed to asbestos while performing the work of a maintenance man for Employer.

III. Neither Amerisure nor Travelers is liable for payment of the "enhanced benefits."

The question at the crux of this matter is whether the insurer of a long-defunct employer can be held liable for the new "enhanced benefits" set forth in §287.200(4), which is quoted earlier in this Award. In his award in the matter of *Robert Casey*, Injury No. 14-102671, Judge Siedlick summarized the new mesothelioma benefit as follows:

> Prior to the 2014 amendments … there was no "enhanced benefit" for the toxic occupational disease of mesothelioma. As of January 1, 2014, an entirely new benefit was created… The statue also allowed the employer to elect to either have this new mesothelioma coverage or opt out of the coverage and subject itself to regular civil liability should one of its employees be stricken with mesothelioma.

I agree with Judge Siedlick's summary of the relevant 2014 amendments to the Act.

The claimant has the burden to prove all necessary elements of his claim. *Brown v. City of St. Louis*, 842 S.W.2d 163, 166 (Mo.App. E.D. 1992). One of those elements is that the employer was a covered employer under the statute. *Id.*; *see also McCaleb v. Greer*, 241 Mo. App. 736, 745, 267 S.W.2d 54, 59 (1954)(citations omitted)(court held that the burden of proof is upon the party claiming the applicability of the Act to bring himself under it). If Claimants cannot show all elements of recovery are met, their claim for enhanced benefits must be denied.

Early in the life of a statute, the courts are often required to apply statutory construction to determine if benefits are owed. When construing statutes, courts must endeavor to ascertain the intent of the legislature from the language used and, if possible, give effect to that intent. *State v. Plastec, Inc.*, 980 S.W.2d 152, 154–55 (Mo. Ct. App. 1998). Legislative intent should be determined by considering the plain and ordinary meaning of the terms in the statute. *Id.* Each word, clause, sentence, and section of a statute should be given meaning. *Id.*

In addition to general principles of statutory interpretation, since 2005 the Act mandates strict construction. §287.800.1. "Strict construction of a statute presumes nothing that is not expressed." *Young v. Boone Elec. Coop.*, 462 S.W.3d 783, 792 (Mo. Ct. App. 2015) citing *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App.W.D.2010) (citation omitted). "The clear, plain, obvious or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions." *Young at* 792, *quoting* 3 Sutherland Statutory Construction §58:2 (6th ed.2008).

A review of the plain, ordinary and obvious meaning of each word, clause, sentence and section of the statue reveals specific requirements on the part of both employees and employers. The employee seeking recovery for mesothelioma under §287.200.4 must file the claim on or after January 1, 2014. The employee must also suffer from an occupational disease due to toxic

exposure that has been diagnosed to be mesothelioma which results in a permanent total disability or death. Claimants meet these initial requirements and fall clearly within the provisions.

The focus of §287.200(4)(3) then shifts to the employer's actions, for it is only "employers that have elected to accept[12] mesothelioma liability under this subsection" that are liable for the enhanced benefit. There are only two other sentences in subsection (3)(a) that address the employer's election. First, the statute dictates, "[e]mployers 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." After a three-sentence discussion regarding insurance pools, the statute returns to the employer's election, stating, "[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."

The next provision, §287.200(4)(3)(b), states, "[f]or employers who reject mesothelioma under this subsection, then the exclusive remedy provisions under section 287.120 shall not apply to such liability." Such language emphasizes the fact that an election of mesothelioma liability under §287.200(4)(3)(a) offers employers the exclusive remedy protection of the Missouri Workers' Compensation Act, while those who reject mesothelioma liability must take their chances in civil court, where judgments are historically much higher than under the Act. *Missouri All. for Retired Americans v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 683–84 (Mo. 2009) (citations omitted)("The workers' compensation law long has been described as a 'bargain' in which the employer forfeits common law defenses and assumes automatic liability. In return, the employee forfeits the right to a potentially higher common law judgment in return for assured compensation").

Claimants have not met their burden of proving entitlement to enhanced benefits. I find Employer, Valley Farm Dairy, is not an employer that has elected to accept mesothelioma liability under subsection §287.200(4)(3) because it did not go about "insuring their liability" for mesothelioma. The plain meaning of the word "elect" is to make a decision to do something, and "accept" is to take something that 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. Similarly, such a defunct employer could not and did not provide

---

[12] The phrase "elect to accept" has a long history in Workers' Compensation Law. In his descent in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 18-19 (Mo. Ct. App. 2011), Judge Welsh provided a comprehensive overview of the history of the Act and the optional nature of occupational disease coverage. It is from his opinion that I draw the following:

When Missouri voters passed the original version of the Act in 1926, accidental injuries were covered and occupational diseases were specifically excluded. In 1931, the legislature added language providing for the election of occupational disease coverage. Amendments in 1959 set forth a procedure for an employer's and employee's election of occupational disease coverage and notice of election requirements. It was not until 1974 that the legislature made coverage for occupational diseases mandatory. Specifically, Judge Welsh noted:

> The legislature deleted the language in section 287.063 allowing employer and employees to elect coverage for occupational disease, and it deleted language in section 287.120 stating that only employers who elected to accept the provisions of Chapter 287 were required to furnish compensation under the Act. §§287.063 and 287.120.1 RSMo 1978.

State ex rel. KCP & L at 32-37. Thus, cases arising prior to 1974 often dealt with whether a party "elected to accept" the Act, which is a phrase mirrored in SB1 and §287.200.4.

the department with mandatory notice[13] of such an election in a manner established by the department. [14]

Because Claimants cannot show Employer elected to accept mesothelioma liability under subsection §287.200(4)(3), or followed the statutory notice procedure, neither Employer nor either of its Insurers can be liable for the enhanced benefits.

Claimants suggest Employer has gone about insuring liability for the enhanced benefits under subsection §287.200(4)(3) because Employer had a policy that arguably covered occupational diseases in 1984. This position, although cleverly argued, is untenable. First, the enhanced benefits are not, as Claimants assert, an increase in the amount of benefits for total disability and death. Section 287.200(4)(1) establishes the "enhanced benefits" are in addition to existing PTD/Death benefits, which remain payable. To say that a statute applies "notwithstanding any other provision of the law" is to say that no other provisions of law can be held in conflict with it. *Earth Island Inst. v. Union Elec. Co*., 456 S.W.3d 27, 33–34 (Mo. 2015). Thus, the enhanced benefits are of a new[15] type or class, not the same as have long existed in Missouri, or the same as purportedly covered by the 1984 policies issued by Insurers.

Secondly, Claimants' interpretation renders language in the 2014 amendments regarding mesothelioma liability meaningless. Since 1974, all employers in Missouri subject to the Act have been obligated to insure their entire liability under the workers' compensation law, including occupational diseases. *See* §287.280.1 (1983). If Claimants' interpretation that any policy covering occupational diseases covers mesothelioma liability were true, then all employers 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. When the legislature amends a statute, it is presumed that its intent was to bring about some change in the existing law. *Kolar v. First Student, Inc.,* 470 S.W.3d 770, 777 (Mo. Ct. App. 2015). A Court should never construe a statute in a manner that would moot the legislative changes, because the legislature is never presumed to have committed a useless act. *Id. at* 777. If the legislature wanted any existing policy covering occupational diseases to cover mesothelioma liability, it would have included mesothelioma with the other occupational diseases due to toxic exposure, where no election to accept is required.

Furthermore, §287.200(4)(3) requires employers to elect to accept mesothelioma liability "**under this subsection."** (Emphasis added). Claimants conveniently ignore this phrase. Claimants' argument also disregards the mandate that 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." §287.200(4)(3)(a). One must presume that the legislature intended that each word, clause, sentence, and provision of a statute have effect and should be

[13] By stating the employer **shall** provide the department with notice in order to make such an election, the legislature issued a mandate. The use of "shall" in a statute is indicative of a mandate to act. *Welch v. Eastwind Care Ctr.*, 890 S.W.2d 395, 397 (Mo. Ct. App. 1995). The general rule is that use of "shall" is mandatory and not permissive. *Id.*

[14] There is historical precedent for requiring such affirmative steps to come under the coverage of the Act. For example, in *Selvey v. Robertson*, 468 S.W.2d 212, 216 (Mo. Ct. App. 1971) the court noted two statutory ways for an employer to bring himself within the provisions of the Compensation Law s 287.090. 2 (RSMo 1969, V.A.M.S.): (1) by filing with the Division of Workmen's Compensation notice of his election so to do, or (2) by purchasing and accepting a valid compensation insurance policy, the terms of which showed such intent.

[15] This is consistent with Judge Siedlick's ruling in *Robert Casey*, Injury No. 14-102671, quoted above.

given meaning. *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. Ct. App. 2007). Conversely, we presume that the legislature did not insert superfluous language or idle verbiage in a statute. *Id.* A construction that fails to give each word, clause, sentence and provision of the statue meaning cannot stand.

In addition to a faulty statutory construction argument, Claimants' argument the legislature intended to give mesothelioma patients greater benefits because that disease is more debilitating is unfounded. A well-established rule of statutory construction is that a statute must be construed in the light of what it seeks to remedy and in light of the conditions at the time of its enactment. *Glanville v. Hickory Cty. Reorganized Sch. Dist. No. I*, 637 S.W.2d 328, 330 (Mo. Ct. App. 1982). The 2014 amendments to the Act were passed in the aftermath of *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 18-19 (Mo. Ct. App. 2011). There, the Western District Court of Appeals held that following the 2005 amendments to the Act, the exclusive-remedy provisions of the Workers' Compensation Law did not apply to employee's mesothelioma, an occupational disease and, thus, did not preclude his common law claims against his employer based on premises liability and negligence. Given the legislature acted after the *State ex rel. KCP & L* decision finding the Act did not protect Missouri employers from occupational diseases in general, and mesothelioma cases in particular, it is much more likely the legislature intended to protect employers from the risk of greater civil liability, not to maximize workers' recovery. Since a defunct employer would not need protection from civil liability, the construction set forth above is consistent with the remedial purpose of the amended statute.

IV. Constitutionality.

By virtue of Article V, § 3 of the Missouri Constitution, the Supreme Court has exclusive jurisdiction in all cases involving the constitutional validity of a statute. *Higgins v. Treasurer of State of Missouri*, 140 S.W.3d 94, 98 (Mo. Ct. App. 2004).

CONCLUSION

Claimants have not met their burden of establishing their right to the "enhanced benefits" created with the passage of SB1 that are codified in §287.200.4(3)(a) RSMo 2014. Employer Valley Farm Dairy is not an employer that has elected to accept mesothelioma liability under subsection §287.200(4)(3). Therefore, neither Amerisure nor Travelers can be held liable for the enhanced benefits.

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation