

**FINAL AWARD ALLOWING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 02-157649

Employee: Paul Bennett  
Employer: Kansas City Power & Light  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated January 8, 2010. The award of Administrative Law Judge Mark S. Siedlik is attached hereto solely for reference.

**Issues Presented**

The primary issue to be decided is:

Did employee sustain an occupational disease that arose out of and in the course of employment?

If the Commission decides the primary issue in the affirmative, the following issues must be decided:

Employer's liability for permanent disability;  
Employer's liability for future medical care; and,  
Second Injury Fund liability.

**Findings of Fact**

Occupational Exposure

Northeast Power Plant

Employee worked for employer from 1970 until 2002. From 1970 through 1973, employee worked full-time as a maintenance mechanic at the Northeast Power Plant (NE Plant). Employee testified that being a maintenance mechanic was not a clean job. Employee testified that there was a white powder on the floors of the plant that employee identified as asbestos. The NE Plant had rooms full of bags containing the white powder that were labeled "asbestos." Employee observed the insulators mix the white powder with water and trowel it on the water lines, steam lines and valves to insulate them. The insulation would deteriorate and fall off the pipes and there were seldom crews that cleaned it up. In areas of the NE Plant that were not traversed, the white powder on the floor was 2-3 inches thick.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2000, unless otherwise indicated.

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Employee testified that, as a mechanic, he came into contact with the white powder on a regular basis because he worked all over the NE Plant. He thought he worked around the white powder more days of the week than not.

Employee also testified there was coal equipment at the NE Plant including ash pits. Coal dust was black and dirty and was in areas of the NE Plant where the coal equipment was located.

#### *LaCygne Kansas City Plant*

At the end of 1973, employee was moved to the LaCygne Kansas Plant (LaCygne Plant) as a maintenance mechanic. He described the LaCygne Plant as humongous with two boiler units, a large water treatment system, fly ash ponds, bottom ash ponds and a big lake. At the LaCygne Plant, many train car loads of coal were burned on a daily basis.

Unit 1 of the LyCygne Plant burned local coal that employee described as a high sulfur coal. The burned coal smelled like rotten eggs and created a blue haze. The smoke from the burning coal burned employee's eyes. Employee testified that the coal was so acidic that chunks expelled from the stacks would eat the paint off cars. In certain areas of the LaCygne Plant, workers would breathe the high sulfur fumes. He described working on the burner fronts as being bad in that there was blue smoke and sometimes areas would be shut down because of fumes. Employee testified that at some point, employer switched to Wyoming or Illinois coal. He testified that the effects of the imported coal were not nearly as bad as the local coal.

According to employee, employer told the workers there was no asbestos at the LaCygne Plant during the first few years employee worked there. Employee testified that one of his duties as a maintenance mechanic was repairing broken valves. Insulators would have to first remove the insulation from the valves so that employee could work on the valves.

Eventually, plant workers pressed employer to test the insulation for asbestos. Charlie Tack, employee's foreman, confirmed to employee that the tests revealed there was asbestos in the plant. Employer began providing information and training about asbestos in safety meetings.

At some point, employer started removing asbestos from the plant. Employer partitioned off areas of the plant where asbestos was being removed. Employee was not involved in the asbestos removal.

Employee became an electrician apprentice in 1980 and worked as an electrician until 2002.

There were many electrical cable trays holding wires throughout the LaCygne Plant. As an electrician, employee encountered significant dust in the cable trays on a regular basis. Because of the dust, employee had difficulty breathing on occasions. Employee recalled spitting up black stuff and blowing black stuff from his nose during the period he worked as an electrician. Masks and respirators were available; however, employer did not require employees to wear them.

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Employee also testified he was exposed to fumes that smelled of chlorine from the tanks and pump house.

In approximately 1993, employee testified that it got rougher and rougher for him to climb stairs due to shortness of breath. In 1996, employee had a physical performed by the LaCygne Plant but was not given any work restrictions. In the mid 1990s, he was assigned a job as a trouble shooter where he changed out motors. He also did predictive maintenance in the mid 1990s which involved more walking and he would cover the entire LaCygne Plant. He believes that his breathing worsened when he did the predictive maintenance job.

Employer urges us to find that employee failed to prove he was exposed to asbestos while working for employer because employee is not a chemist or otherwise specially-qualified to identify asbestos. Employee credibly testified the white powder in the NE Plant was stored in bags labeled "asbestos." Employer offered no evidence to the contrary. The only reasonable inference to be drawn is that the bags contained asbestos and we so find. We further find that the pipes and valves throughout the NE Plant were insulated with asbestos and that employee was frequently exposed to asbestos while working at the NE Plant.

We also find credible employee's testimony describing the presence of asbestos at the LaCygne Plant. We find employee was exposed to asbestos at both the NE Plant and the LaCygne Plant.

We further find credible employee's testimony regarding his exposure to various other pulmonary irritants and toxins while working for employer. Again, the record reveals no evidence contradicting his testimony. We find that employee was frequently exposed to industrial smoke, dust, and fumes while working for employer.

#### Medical Treatment

Employee first received medical treatment from Dr. Buie in July, 2001. Dr. Buie sent him to Dr. Devins who provided breathing medications, which employee started taking in 2001 and 2002. On May 30, 2002, employee returned to Dr. Buie and Dr. Buie recommended physical restrictions on employee's activities. In June 2002, employee was sent to Dr. Payne, employer's doctor. Ultimately, because of the restrictions placed on him by Dr. Buie and relied on by Dr. Payne, employee was sent home from the LaCygne Plant and was no longer allowed to work.

Diagnostic studies reveal that employee has pleural calcification (plaque) and pleural thickening in his left lung.

Employee last worked June 4, 2002, when employer sent him home because employer had no jobs within employee's physician restrictions. Although employee has received treatment since he last worked, there is no indication employee's condition has improved or that any of the evaluating or treating physicians believe his condition can improve.

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### Physical Restrictions

On June 4, 2002, Dr. Buie released employee to restricted duty with the restrictions of no lifting or carrying over 30 pounds, no repetitive stair climbing, and working only in environments of 30-80 degrees and less than 80% humidity. Dr. Payne agreed with these restrictions.

In October 2006, Dr. Beller recommended that employee avoid work with heavy lifting, extensive walking, climbing stairs or anything more than light to moderate activity. Dr. Beller did not believe employee could work full-time. By November 2006, Dr. Beller recommended that employee avoid exposure to fumes, dust, smoke and other respiratory irritants. He also believed employee should avoid situations where he would be in high humidity or cold weather. Dr. Beller believed employee would need frequent breaks in order to perform light to moderate activity on a regular basis.

### Current Complaints

Employee fatigues easily and suffers from reduced endurance. He has shortness of breath. He has periodic breathing difficulties of such seriousness that he must use a bronchodilator. Employee is unable to engage in any of the hobbies he previously enjoyed because they are simply too hard.

### Prior Injuries/Illnesses

Employee smoked cigarettes off and on for many years. Employee last smoked cigarettes in 1990. Employee noticed shortness of breath approximately 3 years after he quit smoking. Several medical professionals, including Dr. Parmet and Dr. Beller, believe that employee suffers from pulmonary emphysema and/or COPD as a result of smoking.

Employee suffers hearing loss. He testified that he was exposed to noise in excess of 100 decibels while working for employer. Employee testified that employer tested his hearing each year and that each year his hearing was worse than the year before.

Employee suffers from arthritis and gout.

### Expert Medical Opinions

Dr. Parmet diagnosed employee with mixed lung disease with chronic obstructive pulmonary disease, pleural plaques, and pleural fibrosis resulting in restrictive ventilatory defect. As to the causation of the pulmonary condition, Dr. Parmet concluded:

Mr. Bennett has a multifactorial cause for his pulmonary condition. He has a pulmonary emphysema due to his tobacco use. He has a significant restrictive ventilatory defect with associated pleural plaques and pleural fibrosis. He reports a significant history of exposure to asbestos and other pulmonary irritants and toxins and a chest x-ray findings are compatible with pleural scarring and he has a class three defect while on bronchodilators.

In conclusion, I believe that Mr. Bennett's work place exposure to various environmental contaminants which would include asbestos, coal dust, and other dust and fumes are the substantial cause of his current pulmonary

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condition. With a class three pulmonary defect, I would rate him at a 50% permanent partial disability to the body as a whole and restrict him to the sedentary level of labor.

The opinions of Dr. Beller are in accord.

Mr. Bennett has lung disease, which includes chronic obstructive pulmonary disease, pleural plaque and fibrosis. The chronic obstructive pulmonary disease is mixed, with features of both bronchitis and pulmonary emphysema. He has a restrictive ventilator defect associated with pleural plaques and calcification with pleural fibrosis. He is being treated with bronchodilator medication and also he may be receiving some benefit from the corticosteroid prescribed for his arthritis. If he has further deterioration in lung function in the future, he may require an intensified bronchodilator program and at some point possibly supplemental oxygen.

Though he could potentially work, I do not believe he could do more than perform light to moderate activity and it would be difficult for him to work on a full-time basis. He would not be able to do work that involved heavy lifting, extensive walking, climbing stairs or anything more than light to moderate activity.

The cause of Mr. Bennett's lung disease is multifactorial. He has been a smoker, which has contributed to the development of obstructive airway disease. However, he has also had significant fume exposure, which I believe has also caused substantial and significant impairment in respiratory function. The pleural abnormalities are likely related to asbestos exposure.

Future medical care would include periodic measurement of pulmonary function tests...It is quite likely in the future he may require more bronchodilator treatment with medications such as Spiriva and Advair...

Based on my overall evaluation, including clinical findings, chest x-ray and pulmonary function test results, his disability rating is 40% of the whole person. One-half of this amount is secondary to cigarette smoking and the other half due to work-related fume exposures in his employment at Kansas City Power and Light Company.

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Mr. Bennett has shortness of breath associated with chronic obstructive pulmonary disease. The cause of this is work-related fume exposure and prior cigarette smoking. In my opinion, the fume exposure at work is a substantial factor in the development of chronic obstructive pulmonary disease...Mr. Bennett stopped smoking when he was 46 years old; and in my opinion, the disability associated with this did pre-exist his last date of fume exposure at work. It is likely that there was synergism involved and

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that the combination of smoking and fume exposure resulted in a worse condition than either alone would produce.

During his deposition Dr. Beller testified that the future medical care that he recommended treats the COPD which has as its cause the history of smoking and the work exposures to harmful respiratory irritants. He further testified that employee's need for any future medications flows from his overall pulmonary condition. Dr. Beller believes the need does not relate solely to the smoking history or solely to the work exposure.

Even employer's expert Dr. Kerby attributes part of employee's pulmonary condition to occupational exposure to asbestos at work.

In summary, Mr. Bennett has a history of a significant asbestos exposure as a mechanic and electrician in power plants. He has extensive pleural calcification and pleural thickening over the left hemithorax. This could be caused by several things. However, there is no clear history of pneumonia, parapneumonic effusion or tuberculous effusion and I would conclude that it is likely the residual of an asbestos-induced pleural effusion. He also has moderate chronic obstructive pulmonary disease which is due predominantly to cigarette smoking but to which his chronic dust exposure probably made a minor contribution.

#### Expert Vocational Opinion

Vocational expert Mary Titterington evaluated employee from a vocational standpoint to determine his ability to compete for work in the open labor market. Ms. Titterington's opinion is the only expert vocational opinion in the record.

Ms. Titterington interviewed employee and conducted a variety of tests designed to assess employee's intellectual, academic, and vocational skills. In addition, Ms. Titterington reviewed the medical records of Drs. Buie, Devins, and Beller, as well as other medical records. The medical records reveal multiple physical restrictions as summarized previously. Ms. Titterington ultimately concluded as follows:

When his total functioning level is considered, [employee] is not employable in the open labor market. It is not reasonable to expect an ordinary employer to hire him for any position as it is customarily performed in the open labor market. [employee] is unemployable and given the nature of his impairments, there is no expectation that this will change in the future.

We find credible the opinion of Ms. Titterington.

#### **Conclusions of Law**

##### Statutory Construction

The administrative law judge denied compensation after concluding that employee did not meet his burden of proof on the issue of medical causation. We believe the administrative law judge misapplied the law.

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First, the administrative law judge's conclusion that employee failed to satisfy his burden of proof is founded upon an erroneous construction of the law. Without explanation or analysis, the administrative law retroactively applied the 2005 version of § 287.800 RSMo<sup>2</sup> when deciding this claim.

Employee was last exposed to the alleged respiratory irritants that he claims caused his condition and disability in June 2002. Employee filed his claim in 2004.

Statutes are generally presumed to operate prospectively, "unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication." *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982), appeal dismissed 459 U.S. 1094, 74 L. Ed. 2d 942, 103 S. Ct. 711. If the presumption normally favoring prospective operation is overcome, the inquiry focuses on whether the statute falls within the proscription against retrospective laws.

*Department of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. 1985).

We find nothing in the language of the 2005 version of § 287.800 to suggest that the legislature intended that we give the provision retroactive operation. The presumption of prospective operation is not overcome. The 2005 version of § 287.800 does not apply to the determination of this claim. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. 2007), *Missouri Real Estate Commission v. Rayford*, 307 S.W.3d 686 (Mo. App. 2010).

We will apply the Workers' Compensation Law liberally as required by § 287.800 RSMo (2000):

All of the provisions of this chapter shall be liberally construed with a view to the public welfare, and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the division and the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

### Occupational Disease

Section 287.067 RSMo provides, in part:

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable

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<sup>2</sup> "1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly. 2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts."

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disease arising with or without human fault out of and in the course of employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in the section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.

Missouri courts have interpreted what must be shown to establish causation of an occupational disease.

In proving a causal connection between the conditions of employment and the occupational disease, the claimant bears the burden of proof. "To prove causation it is sufficient to show 'a recognizable link between the disease and some distinctive feature of the job which is common to all jobs of that sort.'" And, "there must be evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease." However, the cause and development of an occupational disease is not a matter of common knowledge. There must be medical evidence of a direct causal connection. "The question of causation [is] one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence." "A claimant must submit medical evidence establishing a probability that working conditions caused the disease, although they need not be the sole cause." "Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee."

*Vickers v. Mo. Dep't of Pub. Safety*, 283 S.W.3d 287, 292 (Mo. App. 2009) (internal citations omitted).

Missouri law does not require a finding of which specific chemical caused the occupational disease in question in order to recover under the Workers' Compensation Act. To prove causation it is sufficient to show "a recognizable link between the disease and some distinctive feature of the job which is common to all jobs of that sort." *Polavarapu v. Gen. Motors Corp.*, 897 S.W.2d 63, 65 (Mo. App 1995).

*Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 869 (Mo. Ct. App. 2004)

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In summary, to prevail on a theory of occupational disease, employee must prove by substantial and competent evidence that:

1. He has contracted an occupational disease and not an ordinary disease of life by showing that:
  - a. his work creates exposure to the disease greater than or different from that which affects the public generally; and,
  - b. there is a recognizable link between the disease and a feature of jobs of employee 's job type.
2. A probability that the occupational disease was caused by conditions in the workplace.

See *Smith v. Climate Engineering*, 939 S.W.2d 429, 433 (Mo. App. 1996).<sup>3</sup>

We apply the above test to the facts of this case.

1. *Occupational Disease, not Ordinary Disease of Life*

a. *Exposure*: Employee was exposed to asbestos, coal dust, smoke, and fumes on a daily basis while working for employer. The record reveals no evidence to suggest that the general public is similarly exposed to asbestos, smoke or fumes on a daily basis.

b. *Recognizable Link*: Exposure to asbestos, coal dust, smoke and fumes was a feature of employee's job. All of the medical experts related employee's pleural thickening and scarring to the conditions of employee's job, particularly his exposure to asbestos. Dr. Beller attributed the progression of employee's COPD to the fumes to which employee was exposed at the plant. We believe the opinions of the medical experts clearly establish that there is a recognizable link between exposure to asbestos, coal dust, smoke and fumes and the pulmonary disorders of asbestosis and COPD.

2. *Probability*

Dr. Parmet is of the opinion that the pleural scarring seen on employee's diagnostic tests is compatible with employee's exposure to environmental contaminants such as asbestos, coal dust, and other dust and fumes. Dr. Kerby reports that the pleural calcification and pleural thickening found in employee's lungs is likely the result of asbestos exposure. Dr. Beller testified that employee's exposure to fumes while working for employer contributed to the progression of employee's disability related to chronic obstructive pulmonary disorder. Dr. Beller opines that employee's pleural abnormalities are likely related to asbestos exposure.

Dr. Beller opined that employee's exposure to coal dust, other dust, flue gas, mercury, occasional chlorine fumes, high-sulfur content coal, and asbestos was a substantial factor in causing employee's lung conditions. Dr. Parmet also opined that employee's workplace exposure to various environmental contaminants including asbestos, coal

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<sup>3</sup> The following cases cited herein were overruled on other grounds *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003): *Smith, Karoutzos, E.W., Messex, Carlson, and Vaught*.

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dust, and other dust and fumes are the substantial cause of employee's current pulmonary condition.

The opinions of the medical experts clearly establish the probability that his pulmonary conditions were caused by his workplace exposure.

We conclude that employee has established that he sustained occupational diseases arising out of and in the course of his employment by showing that he was exposed to pulmonary irritants and toxins while working for employer and the exposure was greater than that faced by the general public and by presenting medical testimony establishing the link between the irritants and toxins and his pulmonary conditions; chronic obstructive pulmonary disorder and asbestosis. Further, employee has established through expert medical opinions the probability that his pulmonary conditions were caused by his workplace exposure. Employee has established that his occupational disease is compensable under the Workers' Compensation Law. See *Kent*, supra.

#### *Nature and Extent of Employee's Overall Disability*

The test for permanent total disability is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 233-234 (Mo. App. 2003).

As we have previously indicated, we find credible the vocational opinion of Mary Titterington. Ms. Titterington concluded that employee was unable to compete for employment in the open labor market. In particular, Ms. Titterington concluded that it is not reasonable to expect an ordinary employer to hire employee for any position as it is customarily performed in the open labor market. There is no opinion to the contrary. We conclude that employee is permanently and totally disabled.

#### *Employer's Liability for Permanent Disability*

Dr. Parmet opined that employee has sustained a 50% permanent partial disability due to his pulmonary condition. Dr. Beller opined that employee sustained a 40% permanent partial disability due to his pulmonary condition. Dr. Beller attributes ½ of the disability to employee's past history of smoking and ½ of the disability to employee's work exposures. Dr. Kerby believes employee's overall permanent impairment under the American Medical Association guidelines is 20%. Dr. Kerby attributes one half of the impairment to the effects of smoking and the other half to the occupational effects of dust exposure and an asbestos-induced pleural effusion with subsequent fibrothorax and calcification.

We accept Dr. Beller's opinion that employee suffers an overall disability of 40% of the body as whole. We also accept the opinions of Drs. Beller and Kerby that one-half of employee's lung problems flow from his occupational diseases. Based upon the foregoing, we conclude that employee has sustained a 20% permanent partial disability of the body as a whole as a result of his compensable occupational diseases.

The parties have stipulated that employee's permanent partial disability rate is \$329.42.

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Future Medical Care

In order to receive future medical benefits under the Workers' Compensation Laws of Missouri, employee has the burden of proving there exists a reasonable probability future medical treatment is needed. *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 372 (Mo. App. 2005). The medical care in issue, to be compensable, must be shown to be related or due to the injury or condition which is the subject of the claim. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo. App. 2004). While the need for the treatment must flow from the work injury, the fact that it also benefits a noncompensable condition is irrelevant. *Id.* at 268.

Employee has established through the testimony of Dr. Beller and the opinion of Dr. Parmet that employee will need future medical care for his pulmonary conditions and that the need flows, at least in part, from the harmful work exposures.

We conclude employee has established he is entitled to future medical care to cure and relieve him of the effects of his work-related pulmonary conditions.

Second Injury Fund's Liability for Permanent Disability  
Generally

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted). "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

Hindrance or Obstacle

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999). To implicate the Second Injury Fund, the employee must have an actual and measurable preexisting disability at the time the work injury is sustained of such seriousness as to constitute a hindrance or obstacle to employment. *Section 287.220.1 RSMo.* "To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, 'the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.'" *E.W.*, 89 S.W.3d at 537, citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

Employee testified that he experienced difficulty breathing while walking at work in the early 1990s. Employee had to slow down the pace of his work as a result of his shortness of breath. Dr. Beller opined that the disability from employee's smoking-related lung condition preexisted the last date of employee's fume exposure at work.

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We find that employee has proven his pulmonary condition of chronic obstructive pulmonary disorder pre-existed his occupational disease and was a hindrance or obstacle to employee's employment or re-employment.

#### *Calculation of Liability*

Having determined that the Second Injury Fund is implicated in this matter, we must determine the amount of the Second Injury Fund liability.

[W]here a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.

*Vaught v. Vaughts, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo. App. 1997) (citations omitted).

We have already determined that employee is permanently and totally disabled and that employee sustained a permanent partial disability of 20% of the body as a whole attributable to his occupational disease.

Dr. Beller testified that employee's permanent disability is due to a combination of his smoking-induced COPD and the COPD and asbestosis caused by his work exposures. Dr. Parmet agrees with Ms. Titterington's opinion that employee is unemployable and Dr. Parmet attributes employee's lung condition to a combination of his tobacco use and his work exposures. Finally, Dr. Kerby opines that employee's lung condition is attributable to the effects of smoking combined with his harmful exposures at work.

The Second Injury Fund is liable for the payment of permanent total disability benefits to employee.

#### **Award**

We reverse the award of the administrative law judge.

We direct employer/insurer to pay to employee \$26,353.60 for permanent partial disability benefits ( $\$329.42 \times 80 = \$26,353.60$ ).

We direct employer to provide to employee future medical care as necessary to cure and relieve employee of the effects of his occupational disease.

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Employee is entitled to permanent total disability benefits from the Second Injury Fund. For the period beginning June 5, 2002 and continuing for 80 weeks, the Second Injury Fund owes to employee the weekly amount of \$299.48. Thereafter, the Second Injury Fund shall pay to employee a benefit of \$628.90 weekly for his lifetime, or until modified by law.

Michael A. Knepper, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

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**CONCURRING OPINION**

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of Commissioner Hickey.

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William F. Ringer, Chairman

Employee: Paul Bennett

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

Employee offered no testing of employer's plants to establish what chemicals or substances were present when employee worked in the plants. Employee offered no expert testimony to identify the chemicals or substances present in employer's plants when employee worked in the plants. Employee has not established that he was exposed to asbestos or any other particular chemical or substance while working for employer.

Employee had the burden of proving every element of his claim. He failed to prove any particular work exposure. His claim must fail.

I would affirm the award of the administrative law judge. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Alice A. Bartlett, Member

## FINAL AWARD

Employee: Paul Bennett Injury No. 02-157649  
Dependents: N/A  
Employer: Kansas City Power & Light  
Insurer: Kansas City Power & Light – Self-Insured  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: September 25, 2009 Checked by: MSS/pd

### 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.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: June 4, 2002.
5. State location where accident occurred or occupational disease was contracted: State of Missouri.
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes, Self-Insured c/o CCMSI.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Injury to lungs and body as a whole due to alleged exposure to asbestos and other contaminants.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Lungs, body as a whole.

14. Nature and extent of any permanent disability: None.
15. Compensation paid to date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: By stipulation.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: N/A
22. Second Injury Liability: N/A

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paul Bennett Injury No. 02-157649  
Dependents: N/A  
Employer: Kansas City Power & Light  
Insurer: Kansas City Power & Light – Self-Insured  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: September 25, 2009 Checked by: MSS/pd

### FINDINGS AND RULINGS

The parties convened on September 25, 2009, for purposes of conducting a final hearing. The Administrative Law Judge was asked to resolve the following issues: whether the employee sustained accidental injury or occupational disease arising out of and in the course and scope of his employment; the nature and extent of any disability; the liability of the Second Injury Fund and the liability for any future medical care. The Administrative Law Judge received the live testimony of claimant, Paul Bennett. Claimant also offered the deposition testimony of Dr. Paul Beller and a vocational expert, Mary Titterington. Additionally, the claimant offered the medical report of Dr. Allan Parmet along with various treatment records. The employer offered the medical report of Dr. Gerald Kerby.

Claimant Paul Bennett testified that he worked for Kansas City Power & Light (hereinafter referred to KCP&L) from 1970 until 2002. He worked full-time as a maintenance mechanic at the Northeast Power Plant. He testified that being a maintenance mechanic was not a clean job. He noticed white substance on the floors where he worked and he described it as a powdered substance that came out of a bag. He recalls seeing bags in the Plant that said “asbestos” on them. As a mechanic, he testified that he came into contact with the white powder on a regular basis because he worked all over the Plant. He thought he worked around the white powder more days of the week than not. He also testified there was coal equipment at the Plant including ash pits. Coal dust was black and dirty and was in those areas of the Plant. After working at the Northeast Power Plant, claimant was moved to the LaCygne Kansas Plant. He described this Plant as humongous with two boiler units, a large water treatment system, fly ash ponds, bottom ash ponds and a big lake. At the LaCygne Plant, many train car loads of coal were burned on a daily basis. He first started there as a maintenance mechanic then became an electrician apprentice in 1980. He was an electrician between 1980 and 2002. He worked on Units One and Two. Unit One burned what he described as a high sulfur coal that smelled like rotten eggs and had a blue haze. The smell of this coal was from local coal and it lasted until the company started using Wyoming coal and he did not recall when the coal was switched. In certain areas of the Plant, one would breathe the high sulfur fumes. He described working on the

burner fronts as being bad in that there was blue smoke and sometimes areas would be shut down because of fumes.

Plant personnel stated there was no asbestos during the first few years; Charlie Tack, a foreman, said there was asbestos and, at some point, KCP&L started removing asbestos from the Plant and would partition various areas of the Plant off for the removal process. Claimant was not involved in the removal process of asbestos. Claimant testified that asbestos would be talked about in safety meetings. He further testified that the various pipes and valves around the boiler were insulated and personnel he described as "insulators" would remove the insulation and, subsequently, claimant would work on the valves.

Claimant also believed he was exposed to a chlorine smell from the tanks and pump house. Masks and respirators were available; however, the Plant did not require employees to wear them. As an electrician, the claimant found dust in the electrical cable trays and there were miles and miles of cable trays. Because of the dust, it was tough to breathe on occasions. He also recalled spitting up black stuff and black stuff would come out of his nose when he would blow it.

Claimant admitted that he smoked cigarettes. He claimed that he last smoked cigarettes in 1990 and that he had smoked off and on for many years. He noticed shortness of breath before he quit smoking.

In approximately 1993, claimant testified that it got rougher and rougher for him to climb stairs in his occupation. In 1996, he had a physical performed by the Plant but was not given any work restrictions. In the mid 1990's, he was assigned a job as a trouble shooter where he changed out motors. He also did predictive maintenance in the mid 1990's which involved more walking and he would cover the entire plant at LaCygne. He believes that his breathing worsened when he did the predictive maintenance job.

His first medical treatment occurred with Dr. Buie in July, 2001. Dr. Buie sent him to Dr. Devins who provided breathing medications for him which claimant started taking in 2001 and 2002. On May 30, 2002 he returned to Dr. Buie and restrictions were placed on him. He was then sent to Dr. Payne, the KCP&L doctor in June 2002. Ultimately, because of the restrictions placed on him by Dr. Buie and relied on by Dr. Payne, claimant was sent home from the plant and was no longer allowed to work.

Claimant is not a chemistry expert, nor does he have any advanced education regarding the identification of asbestos. He is not an expert in the identification or analysis of asbestos or of any other substance that he alleges he was exposed to. Claimant did not have any type of expert examine either of the KCP&L plants where he worked to determine what, if any, asbestos was contained in the Plant. He also did not have any type of expert do any testing at either plant for any other substances he alleged he was exposed to. He did not have any expert evaluate the air quality of either Plant. To claimant's knowledge, neither Dr. Devins nor Dr. Buie examined either of the two Plants to determine what, if any, asbestos or other substances were there. Claimant acknowledged that when areas would be shut down he would not be working in the area. He does not know the effects of sulfur on his lungs. He does not know if Charlie Tack, the foreman, had any special expertise in asbestos. He is not an expert in the analysis of chlorine and doesn't know what effects it may have on his lungs.

Claimant noticed difficulties with walking the stairs not too long after he quit smoking in 1998. He does not recall discussing with Dr. Devins or Dr. Buie the type of environment he worked in, particularly, whether there was asbestos in that environment. He did not tell anyone at KCP&L that he thought his pulmonary and chest problems were related to work. Because of the restrictions placed on him by Dr. Buie, he had to retire. The KCP&L employment policy kept him off work for two years until June 2004, and then he began drawing retirement benefits. Between June 4, 2002 and June 3, 2004, claimant never told anyone a KCP&L that he thought his lung problems were related to his work.

The current treatment claimant receives is a once a year visit to Dr. Buie. Dr. Buie prescribes an Advair inhaler and Prednisone, however, claimant understands the Prednisone is both for his arthritis/gout and his pulmonary condition. He only uses the inhaler on an "as needed" basis and rarely takes the Prednisone because it upsets his stomach.

Dr. Thomas Beller, a pulmonologist, testified on behalf of the employee and gave the opinion that claimant's pulmonary problems were caused in part by exposure to asbestos and in part by his significant smoking history. He testified that claimant's exposure to various fumes as well as asbestos at KCP&L was a substantial factor in causing the pulmonary problems. He also testified that smoking was a substantial factor in causing a portion of Mr. Bennett's pulmonary problems. However, Dr Beller did not review any environmental studies relating to the KCP&L power plants and has no independent information about what claimant may have been exposed to other than what the claimant told him at the evaluation. Dr. Allen Parmet provided a report on behalf of the claimant. While Dr. Parmet opined that claimant's pulmonary problems were a result of his exposure to asbestos and various fumes at KCP&L, there was no independent study done by Dr. Parmet. In looking at Dr. Parmet's report, it is obvious that he relied solely on the history given him by the claimant, who is not an expert in the identification or analysis of asbestos or any other alleged contaminant.

An employee bears the burden of proving all essential elements of his claim. Thorsen v. Sach's Electric Company, 52 S.W.3d 611 (Mo.App., W.D. 2001). Where, as here, the employee is alleging exposure to asbestos as an occupational disease claim, a two step process is involved. First, claimant must prove there was exposure to the disease which was greater than or different from that which affects the public generally. Dawson vs. Associated Electric, 885 S.W.2d 712 (Mo.App., W.D. 1994). Secondly, the claimant must prove there was a recognizable link between his alleged exposure to asbestos and other fumes at the KCP&L Plants and some distinctive feature of his job which was common to all jobs of that sort. *Id.*, at 715. See also, Vickers v. Missouri Department of Public Safety, 283 S.W.3d 287 (Mo.App., W.D. 2009); Jackson vs. Risby Pallet and Lumber Company, Inc., 736 S.W.2d 575, 578 (Mo.App. 1987); Townser vs. First Data Corp., 215 S.W.2d 237 (Mo. App., E.D. 2007); Kelley vs. Banta & Stude Construction Company, Inc., 1 S.W.3d 43 (Mo. App., E.D. 1999). The elements for an occupational disease claim are generally proven through expert testimony based on probability that the occupational disease was caused by conditions in the work place. Townser vs. First Data Corp., 215 S.W.2d 237, 242 (Mo.App., E.D. 2007); Kelley, 1 S.W.3d at 48.

In reviewing the evidence before this tribunal, including the testimony of the claimant as well as the expert medical opinions, claimant has not met his burden of proof. Claimant has not shown how he was exposed, allegedly, to asbestos at any KCP&L plant. There were no

independent studies performed by any expert hired by claimant nor by any physician claimant saw. The expert opinions are based solely on the testimony of the claimant that he was exposed to asbestos, fumes and other contaminants while working at KCP&L. In reality, claimant's testimony identifies only "white" dust on the floors. He saw bags of some substance which were labeled asbestos. Plant personnel educated employees on the effects of asbestos. However, nowhere in the evidence is it shown how claimant was exposed to asbestos or any other fume of any type while in the employ of KCP&L. Nor is there any evidence of inhalation of asbestos fibers. Claimant has not put forth expert evidence to show that there was any distinctive feature of his job which is common to all jobs of that sort which would cause him to be subjected to exposure to asbestos, fumes or other contaminants from any of the plants where he worked. Similarly, claimant has put forth no evidence of a direct causal connection between the conditions under which his work was performed and the alleged occupational disease. Vickers, supra.

The provisions of Chapter 287 are to be strictly construed and this tribunal must weigh the evidence impartially without giving the benefit of the doubt to any party. §287.800, RSMo 2005. Having done that, claimant's evidentiary presentation fails to convince this tribunal that an occupational disease arising out of and in the scope and course of employment has been proven. There is no need to address the remaining issues. For the reasons stated above, compensation is denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Mark S. Siedlik  
Administrative Law Judge  
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_ 2009, by:

\_\_\_\_\_  
Naomi Pearson  
Division of Workers' Compensation