

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

Injury No.: 05-143993

Employee: William Franken (deceased)

Claimant: Carson Franken, surviving spouse  
Kristen Thomas, Kaitlyn Thomas, dependent children

Employer: Honeywell FMT f/k/a Bendix Corporation Allied Signal

Insurer: Ace American Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) accident or occupational disease; (2) notice; (3) whether the event arose out of and in the course and scope of employment; (4) medical causation; (5) the nature and extent or cause of death; (6) statute of limitations; and (7) claimant's motion to strike the 60-day submission of employer's medical expert testimony.

The administrative law judge concluded as follows: (1) employee's injury would have been reasonably discoverable at least by October 28, 2004, and the two-year filing period is applicable, so the claim filed on May 11, 2007, is barred by the statute of limitations; (2) the testimony of employer's medical expert is admitted into evidence; and (3) employee's cancer was not causally related to his employment.

Employee filed a timely application for review alleging the administrative law judge erred: (1) in ruling the statute of limitations barred the claim; (2) in ruling that employee's cancer was not causally related to his employment; and (3) in admitting the testimony of employer's medical expert into evidence.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

**Findings of Fact**

Employer contracts with the federal government to manufacture non-nuclear components of nuclear weapons. The principal products produced at employer's facility include arming systems; fusing and firing systems; radars; power supplies; rubber, plastic, and foam parts; and outer casings. Employer's operations utilize radiation as one of the analytical tools to accurately manufacture, fabricate, and inspect non-nuclear components of nuclear weapons. The primary radiation sources in employer's facility involve analytical laboratory technologies for the manufacturing and testing of electronic and mechanical devices. Employer's operations can generate small quantities of low-level radioactive waste.

Employee: William Franken (deceased)

- 2 -

Beginning in the early 2000s, employer attempted to contact every current and former employee who worked in employer's facility for the purpose of testing them for exposure to beryllium, a highly toxic element used in employer's processes. Numerous employees were found to have been sensitized to beryllium, meaning they were exposed, and were at risk for developing occupational illnesses, including an incurable respiratory illness known as chronic berylliosis. Notably, even employees whose duties had never involved the actual handling of beryllium, such as office or clerical workers, were found to have been exposed to this substance.

Employee worked as an electronic fabricator and senior analyst for employer (then known as the Bendix Corporation) from January 1968 to January 1972. Employee's work as a fabricator involved the layout, fabrication, and modification of electronic, electro-mechanical, and pressure-type products, test equipment, meters, and special resistors. Employee's work as an analyst involved the calibration and repair of instruments used to measure the materials involved in employer's manufacturing processes. This latter work took place in employer's metrology lab. Employee presented the testimony of Dennis Shepherd, who worked as a security guard for employer from October 27, 1970, until January 31, 2007. Mr. Shepherd persuasively testified (and we so find) that, at least in the more recent years prior to Mr. Shepherd's retirement, the door to the metrology lab included warnings that the lab contained, or had contained in the past, various hazardous materials, including beryllium, asbestos, trichloroethylene, and radiology/x-ray equipment. Mr. Shepherd was unable to remember, however, whether the door to the metrology lab had such warnings during the specific time period that employee worked for employer.

Employer, on the other hand, presented the testimony of its industrial hygienist, William Frede, who indicated that working in employer's metrology lab would not likely involve exposure to any dangerous chemicals, substances, or processes. However, on cross-examination, Mr. Frede conceded that he started working for employer in 1977, and thus had no firsthand knowledge of the working conditions in employer's metrology lab from 1968 to 1972. He also specifically conceded that employee could have been exposed to beryllium in employer's metrology lab, although he maintained that, in his opinion, such (possible) exposure should not be considered dangerous. Mr. Frede did not directly rebut the testimony from Mr. Shepherd that the door to the metrology lab included warnings that the lab contained, or had contained in the past, various hazardous materials including beryllium, asbestos, trichloroethylene, and radiology/x-ray equipment.

For reasons explained more fully below in our discussion of the expert medical testimony advanced by the parties, we do not deem the testimony from Mr. Frede to persuasively establish that employee's job duties would not have posed any risk of exposure to dangerous substances, chemicals, or processes. Instead, we find that workers at employer's plant, including metrology workers such as employee, were subjected to the risk of exposure to the numerous toxic and carcinogenic substances employer kept on-site, including trichloroethylene, beryllium, and ionizing radiation.

Employee: William Franken (deceased)

- 3 -

The claimed work injury

Employee was born on May 12, 1941. He was a lifelong nonsmoker.<sup>1</sup> Employee served in the Air Force Reserves for 20 years, with some periods of active duty, during which he worked on aircraft as an electrical technician. As part of a medical evaluation to which he was subjected before going to work for employer, employee indicated on a questionnaire that he had previously worked with small quantities of plutonium, titanium, and radium, which were used as sources to calibrate radio devices. After leaving his position with employer, employee went to work for the Kansas City School District as an industrial arts teacher. Employee later went to work for Metropolitan Community College, teaching electronics, technology, and math. There is no evidence on this record to suggest that employee was exposed to any toxic substances or processes in these subsequent employments in the educational field.

In September 1994, employee saw Dr. John Shockley complaining of a chronic, dry cough lasting the previous two months. Dr. Shockley diagnosed asthmatic bronchitis, and prescribed a Medrol Dosepak, Amoxil, and Tessalon Perles. By December 1994, employee reported to Dr. Shockley that these medications had helped clear his congestion and cough. Dr. Shockley noted that elevated blood tests suggested an allergic problem or other abnormality was behind employee's respiratory symptoms.

In January 1997, employee sought emergency treatment when he was unable to produce urine. He was catheterized in the emergency room. Employee's primary care physician at that time, Dr. Herbert Dempsey, concluded employee's recent use of cold medicine had likely aggravated a preexisting condition of benign prostatic hypertrophy.

In July 1997, employee saw Dr. Dempsey for complaints of shortness of breath. Dr. Dempsey prescribed a number of different inhalers for what he diagnosed as a recent exacerbation of preexisting asthma. In January 1998, Dr. Dempsey noted employee continued to use the inhalers without improvement, and diagnosed acute bronchitis. Dr. Dempsey prescribed an antibiotic and a cough medicine, and recommended that employee continue to use his inhalers.

Employee returned to Dr. Dempsey in November 1999, complaining of three months of worsening respiratory symptoms, which woke him multiple times per night with coughing and shortness of breath. Dr. Dempsey concluded employee's asthma was not adequately controlled with his current treatments, and provided employee with samples of a new medication, Accolate.

On October 5, 2004, employee saw Dr. Floyd Freiden, an urologist, to address a progressively worsening difficulty with urinating. Dr. Freiden noted employee had recently passed something bloody in his urine. He recommended an intravenous pyelogram and cystoscopy, which he performed on October 19, 2004. Dr. Freiden found what he believed to be a sizable transitional cell carcinoma within a large diverticulum of the bladder wall.

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<sup>1</sup> On this point, we deem the stray, contrary indication contained in the November 9, 2004, pre-operative report from Dr. Floyd Freiden to be an apparent clerical error, as it contradicts Dr. Freiden's other notes, claimant's testimony, and the voluminous medical treatment records which consistently indicate employee was never a smoker. See, e.g., *Transcript*, pages 885, 1010, 1019, 1170, 1217, 1534, etc.

Employee: William Franken (deceased)

- 4 -

On October 22, 2004, employee underwent a follow-up CT scan to rule out a kidney tumor; this study confirmed the presence of two large diverticula within the bladder, one of which held the tumor seen by Dr. Freiden. On November 9, 2004, Dr. Freiden performed an excision of bladder diverticuli, and biopsied the tumor, which was pathologically identified as a small-cell neuroendocrine carcinosarcoma.

In December 2004, employee came under the care of an oncologist, Dr. William Stephenson. Employee underwent four cycles of chemotherapy, which he tolerated well. On June 16, 2005, employee saw Dr. Stephenson complaining of intermittently severe pelvic pain. On June 17, 2005, employee underwent a CT scan of the abdomen, which revealed two new low density masses within the right lobe of the liver, suspicious for hepatic metastases.

On July 1, 2005, employee underwent a liver biopsy, which confirmed that the lesions seen in his liver represented high-grade metastatic carcinosarcoma of the type previously found in employee's bladder. On July 7, 2005, employee returned to Dr. Stephenson, who prescribed methadone and Percocet to treat the abdominal pain employee was suffering in connection with the metastasized cancer. Dr. Stephenson also referred employee to the M.D. Anderson cancer center in Houston, Texas.

Employee arrived and checked into the M.D. Anderson center on July 12, 2005. On July 13, 2005, employee took his first and only dose of methadone while in his hotel room, and immediately developed shortness of breath. Attending emergency personnel transported him to the M.D. Anderson center, where attending physicians administered epinephrine and intubated employee in an attempt to reverse what appeared to be an allergic reaction to the methadone. This was ineffective however, and employee was deemed to be in a state of septic shock with multiple organ failure. Despite an attempted emergency hemodialysis, employee died on July 14, 2005, of septic shock and metastatic bladder cancer.

On July 15, 2005, Drs. Anais Malpica and Cesar Moran conducted an autopsy of the lungs, which revealed employee was suffering from pneumonia at the time of his death. These practitioners deemed the lung autopsy to be generally negative for granulomatous disease or emphysematous changes; although Dr. Moran noted that beryllium exposure could not be excluded. The autopsy did reveal a small focus of metastatic small cell carcinoma in the right upper lung.

On December 21, 2005, Dr. Freiden wrote a letter indicating that beryllium exposure during employee's work for employer was a potential risk factor for the development of his bladder cancer. Although employee and claimant had discussed the possibility of various occupational exposures before, it appears from this record that this was the first time a diagnostician positively identified a likely causal link between employee's work for employer and the development of the claimed work injury. We find, therefore, that December 21, 2005, was the first date upon which it was reasonably discoverable or apparent to claimant that employee's fatal bladder cancer was the product of a

Employee: William Franken (deceased)

- 5 -

compensable work injury by occupational disease.<sup>2</sup> Claimant filed her claim for compensation on May 11, 2007.

On May 9, 2007, Dr. Dempsey wrote a letter indicating that the possibility of beryllium exposure should be reconsidered as the probable cause of employee's lung condition. Dr. Dempsey noted that employee's chronic cough had previously been diagnosed as asthma or COPD (which Dr. Dempsey deemed interesting, due to employee's history of being a lifetime non-smoker), but that it had recently come to his attention that workers in employer's facility, including employee, were likely exposed to beryllium. Dr. Dempsey noted that the treatment employee received for his chronic pulmonary complaints had been only mildly successful.

Expert medical testimony

Claimant presents the expert medical testimony of the occupational physician Dr. Allen Parmet, who believes that employee's cancer was occupationally related to his exposure while working for employer, and that such exposure was a substantial factor in causing employee's cancer. Dr. Parmet pointed to the risk of employee's exposure to dangerous substances which were documented to have been present at employer's facility; the absence of any other known exposure or significant risk factors for developing bladder cancer; the compatibility of the typical latency period of 20 to 30 years with the timeline of employee's period of employment and subsequent development of bladder symptoms; the fact that the type of cancer found in employee's bladder is extremely rare and is seen more often in occupational exposure cases; and his opinion that occupational exposures, after smoking, are the most common cause of bladder cancers.

At his deposition, Dr. Parmet made clear that he was not linking employee's cancer to beryllium exposure specifically, but instead his opinion turned on the documented presence of multiple dangerous substances at employer's facility, including beryllium, trichloroethylene, and ionizing radiation. Dr. Parmet also discussed his firsthand experience with dangerous substances at employer's facility; specifically, Dr. Parmet helped develop employer's beryllium surveillance program in the late 1990s, and discovered through this work and through seeing patients in a clinical capacity that numerous patients were exposed while working at employer's facility. Notably, Dr. Parmet credibly testified that individuals who did not process beryllium as part of their job duties, such as office or clerical workers, were found to have been exposed to beryllium while working in employer's facility. On cross-examination, Dr. Parmet conceded he had no direct information about any specific exposures that employee may have had during his work for employer; that he was thus unable to identify any specific amounts or durations of

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<sup>2</sup> We acknowledge the evidence suggesting that claimant filed a claim under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) on or about November 23, 2005, seeking benefits on a theory that employee may have suffered illnesses that were linked to his work for employer. The record before us fails to disclose the type of evidentiary basis necessary to file and/or prevail upon such a claim, or whether such is comparable, in any way, to the standards under Chapter 287 for proving a compensable occupational disease. For this reason, we decline to make a finding that claimant's (apparent) belief, as of November 2005, that she may have been entitled to benefits under the EEOICPA translated to a reasonably apparent understanding on her part that employee's bladder cancer constituted a compensable occupational disease for purposes of the Missouri Workers' Compensation Law. It is notable that claimant's EEOICPA claim was ultimately denied for lack of sufficient evidence.

Employee: William Franken (deceased)

- 6 -

such exposures; and that his opinion was premised instead upon the likely *risk* of employee's exposure to various chemical agents known or suspected of causing bladder cancer.

Claimant also presents the expert medical opinion of Dr. Robert Nadig, an occupational physician and medical toxicologist. Dr. Nadig believes employee's history of lung problems is consistent with a diagnosis of chronic beryllium disease; he noted that the autopsy findings, which failed to include a histopathologic survey of the lung parenchyma that contained granulomata and chronic interstitial lung scarring, could not be deemed as ruling out chronic beryllium disease. In Dr. Nadig's view, employee had chronic beryllium disease, not asthma, and this condition was the "route to death," as it left employee more prone to developing pneumonia. Dr. Nadig also agreed with Dr. Parmet that employee's work for employer exposed him to substances that posed a risk for the development of bladder cancer, and opined that it was more likely than not that employee's bladder cancer was caused by his work for employer. Notably, he confirmed that the type of cancer found in employee's bladder was extremely rare. However, Dr. Nadig ultimately identified Benzidine as the likely substance that caused employee's bladder cancer; relying upon his (incorrect) understanding that employee worked in employer's metallurgy department.

Claimant also presents the expert medical opinion of Dr. Andrew Schneider, an oncologist, who agreed with Drs. Nadig and Parmet that carcinosarcoma of the bladder is an extremely rare disease, accounting for only .11% of all bladder tumors. Dr. Schneider believes that employee's exposure to beryllium during his work for employer was a substantial causative factor for his development of carcinosarcoma of the bladder, which in turn caused his death. In Dr. Schneider's view, there is no doubt that beryllium can cause sarcoma, and the fact that employee was found with this exceedingly rare type of tumor is compelling evidence that his work for employer caused this condition.

Employer, on the other hand, presents the expert medical opinion of Dr. Michael Kosnett, an occupational physician and medical toxicologist.<sup>3</sup> Dr. Kosnett believes that occupational exposures sustained at employer's plant cannot be established as a cause or substantial contributing factor in employee's bladder cancer or his death. Dr. Kosnett noted the absence of what he deems to be the requisite diagnostic criteria for chronic beryllium disease, and made clear his express disagreement with Dr. Nadig in this regard. Dr. Kosnett also took issue with Dr. Parmet's findings, noting that Dr. Parmet did not identify a specific carcinogenic agent or quantify the magnitude of exposure to which employee may have been subjected at employer's plant. Finally, Dr. Kosnett faulted Dr. Schneider for the same reasons (failure to identify the magnitude, frequency, or duration of employee's exposure to beryllium) and for relying upon a study that concerned the effects of beryllium silicate in rabbits. In Dr. Kosnett's view, no medical studies have associated beryllium exposure with the development of bladder cancer in humans.

We are faced with the unenviable task of determining which of these expert medical opinions is more persuasive. To that end, we have carefully reviewed the relevant case

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<sup>3</sup> As explained below in our conclusions of law, we are not persuaded by claimant's objection to employer's offer of Exhibit 9, which consists of Dr. Kosnett's report and related materials; thus, we have considered this evidence.

Employee: William Franken (deceased)

- 7 -

law, namely *Vickers v. Mo. Dep't of Pub. Safety*, 283 S.W.3d 287, 295 (Mo. App. 2009) and *Smith v. Capital Region Med. Ctr.*, 412 S.W.3d 252 (Mo. App. 2013). As these cases make abundantly clear, identification of a specific injurious exposure is not a prerequisite in occupational disease claims, as our task is not to identify, to a medical certainty, the actual cause of employee's bladder cancer:

Chapter 287 does not require a claimant to establish, by a medical certainty, that his or her injury was caused by an occupational disease in order to be eligible for compensation. ... Indeed, a single medical expert's opinion may be competent and substantial evidence in support of an award of benefits, even where the causes of the occupational disease are indeterminate.

*Smith v. Capital Region Med. Ctr.*, 412 S.W.3d 252, 261 (Mo. App. 2013)(citations omitted).

Accordingly, it appears to us that Dr. Kosnett's primary criticism is not particularly relevant for our purposes, as it was not necessary for claimant or her experts to establish the magnitude, frequency, or duration of employee's injurious exposures. Turning to Dr. Kosnett's alternative criticism that no studies associate beryllium exposure with any type of bladder cancer in humans, we note once again that Dr. Parmet did not limit his causation opinion to beryllium *specifically* and instead highlighted employee's risk of exposure to a number of dangerous substances at employer's facility. Dr. Kosnett thus fails, by pointing merely to the absence of studies linking beryllium exposure to bladder cancer in humans, to directly rebut this testimony from Dr. Parmet. Dr. Kosnett did not identify any other basis for rejecting this occupational disease claim on the issue of causation.<sup>4</sup>

Thus, it appears that we are left to consider whether the opinions from employee's experts are persuasive on their own merits, without referencing Dr. Kosnett's criticism regarding their failure to identify or quantify a specific exposure. Dr. Nadig does appear to have misunderstood employee's job duties (working in the metrology lab as opposed to the metallurgy lab), but after careful consideration, we discern no compelling basis to reject the opinions from Drs. Parmet and Schneider. Dr. Parmet, in particular, persuasively established the case for causation, in that he has firsthand experience with toxic exposures at employer's facility.

Further discussion with regard to the *Vickers* and *Smith* cases follows in our conclusions of law set forth below, but ultimately, we find more relevant, persuasive, and compelling the expert opinions from Drs. Parmet and Schneider; we hereby adopt them, therefore, as our own.

#### Dependency

Employee married Carson Franken, the claimant herein, on October 7, 1994, in Miami, Oklahoma. The two remained married continuously and lived in the same household until the date of employee's death on July 14, 2005. Claimant has not remarried since

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<sup>4</sup> Dr. Kosnett was not deposed for this case and apparently was never confronted with the fact that evidence of actual exposure is not required under the relevant Missouri case law.

Employee: William Franken (deceased)

- 8 -

employee's death. No children were born of the marriage between claimant and employee.

On May 23, 2002, the Circuit Court of Lafayette County, Missouri, issued to claimant and employee letters of guardianship over claimant's granddaughters, Kristen Thomas, born December 7, 1997, and Kaitlyn Thomas, born June 18, 2000. The two were dependent upon employee for their entire support, and were living with employee and claimant on July 14, 2005. On that date, Kristen Thomas was seven years of age and Kaitlyn Thomas was five years of age. On November 10, 2005, the Circuit Court of Jackson County, Missouri, entered its judgment authorizing claimant's adoption of the two children.

Besides claimant, Kristen Thomas, and Kaitlyn Thomas, there are no other persons who might be considered a dependent of the employee as of July 14, 2005.

### **Conclusions of Law**

#### **Admissibility of employer's Exhibit 9**

Claimant argues that employer's Exhibit 9 should be excluded from evidence because Dr. Kosnett did not just disagree with the opinions from claimant's experts, but attacked their credibility, which is prohibited by Missouri law. Claimant cites *Holliman v. Cabanne*, 43 Mo. 568 (Mo. 1869); *Stone v. City of Columbia*, 885 S.W.2d 744 (Mo. App. 1994); and *State v. Link*, 25 S.W.3d 136 (Mo. 2000). We have carefully reviewed these authorities in light of claimant's objection to employer's Exhibit 9.

Section 287.550 RSMo provides, in relevant part, that "[a]ll proceedings before the commission or any commissioner shall be simple, informal, and summary, and without regard to the technical rules of evidence, and in accordance with section 287.800." On the other hand, Division Rule 8 CSR 50-2.010(14) provides, in relevant part, that "[h]earings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply." As we read these (somewhat contradictory) provisions, it appears that the rules of evidence applicable in civil cases are *generally* applicable in hearings before administrative law judges pursuant to Chapter 287, but such rules should not be applied so technically or automatically that they deprive the parties the "simple, informal, and summary" hearing guaranteed by statute.

Dr. Kosnett did provide significant commentary regarding the findings, methodology, and opinions from employee's experts, and his choice of words occasionally bordered upon outright disdain for their conclusions. However, even if we were to strictly apply the rule cited by claimant prohibiting witnesses from commenting upon the credibility or truthfulness of other witnesses, we do not deem Dr. Kosnett's commentary in this regard to cross the line into the realm of the clearly improper. More importantly, we believe it is more in keeping with the spirit of § 287.550 to admit this evidence and to evaluate it in reaching our decision herein.

Accordingly, the objection is overruled. Employer's Exhibit 9 is admitted into evidence.

Employee: William Franken (deceased)

- 9 -

Statute of limitations

Section 287.430 RSMo provides, in relevant part, as follows:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. ... The statute of limitations contained in this section is one of extinction and not of repose.

Section 287.063.3 RSMo additionally provides as follows with regard to the statute of limitations applicable to claims of injury by occupational disease:

The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained...

The courts have provided guidance as to how we are to analyze this provision:

The standard for beginning the running of the statute of limitations, as developed in the cases, requires (1) a disability or injury, (2) that is compensable. Compensability, as noted, turns on establishing a direct causal connection between the disease or injury and the conditions under when the work is performed. Logically, an employee cannot be expected and certainly cannot be required to institute claim until he has reliable information that his condition is the result of his employment. Just as logically, given that there must be competent and substantial evidence of this link, the claimant is entitled to rely on a physician's diagnosis of his condition rather than his own impressions.

*Lawrence v. Anheuser Busch Cos.*, 310 S.W.3d 248, 252 (Mo. App. 2010)(citation omitted).

We have found that Dr. Freiden's letter of December 21, 2005, was the first time a diagnostician made a direct causal link between employee's work for employer and his bladder cancer. Given that the cause of employee's bladder cancer is unquestionably beyond the realm of lay understanding, we are persuaded that claimant was entitled to rely on this opinion from Dr. Freiden, rather than her own lay impressions or any earlier discussions with employee regarding the possibility that any occupational exposures may have played a role in the development of his bladder cancer. Accordingly, we have found that it was first reasonably discoverable and apparent to claimant that employee's bladder cancer possibly represented a compensable injury by occupational disease on

Employee: William Franken (deceased)

- 10 -

December 21, 2005. Claimant filed her claim for compensation on May 11, 2007, within the applicable two-year limitation period set forth above. We conclude that this claim is not barred by the statute of limitations.

Occupational disease arising out of and in the course of employment

Section 287.063 RSMo provides, in relevant part, as follows:

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...

Section 287.067 RSMo provides, in relevant part, as follows:

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.

The foregoing refers us to the "requirements of an injury which is compensable" under subsections 2 and 3 of § 287.020 RSMo, which provide as follows:

2. The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

- (2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and

Employee: William Franken (deceased)

- 11 -

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

(3) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

The courts have provided some guidance as to how we are to analyze the question of causation in an occupational disease case:

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove a direct causal connection between the conditions under which the work is performed and the occupational disease. However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate...

*Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 48-9 (Mo. App. 1999).

Chapter 287 does not require a claimant to establish, by a *medical certainty*, that his or her injury was caused by an occupational disease in order to be eligible for compensation.

*Vickers v. Mo. Dep't of Pub. Safety*, 283 S.W.3d 287, 295 (Mo. App. 2009)(emphasis in original).

Employee: William Franken (deceased)

- 12 -

In the *Vickers* case, the court reversed a Commission award denying benefits to an employee who claimed she contracted clostridium difficile (C. diff) as a result of an occupational exposure to feces-covered bed sheets at her employer's nursing home. 283 S.W.3d at 289-90. Notably, the court overturned a credibility call by the Commission which had accepted the theory from the employer's expert that it was difficult to say employee contracted C. diff in the absence of evidence of any specific exposure at work. *Id.* at 293-94. In concluding employee was "entitled to benefits" on the evidence presented, the court strongly suggested that this defense theory was insufficient, as a matter of law, to rebut the testimony from employee's expert that employee more likely than not contracted C. diff at work. *Id.* at 295-96.

In the more recent case of *Smith v. Capital Region Med. Ctr.*, 412 S.W.3d 252 (Mo. App. 2013), the Commission concluded a phlebotomist employee's fatal hepatitis C was not a compensable injury by occupational disease on the basis there was no evidence that anyone with hepatitis C was ever present in the workplace, or provided a blood sample handled by the employee. Once again, the court reversed, holding that evidence of a specific type and/or magnitude of exposure is not necessary in occupational disease cases; instead, employee's expert needed only establish there was a *probability* that working conditions caused the disease. *Id.* at 261. In a subsequent appeal in the same case, the court made clear that our focus in occupational disease claims must be on whether the evidence persuasively establishes a *risk* of sustaining the claimed injury in the employment at issue, as opposed to a conclusive identification of the particular causative source(s) for the claimed injury. *Smith v. Capital Region Med. Ctr.*, 458 S.W.3d 406, 416 (Mo. App. 2014).

As we have noted, claimant presents Drs. Parmet, Schneider, and Nadig, who collectively opine that employee's work for employer posed a risk of exposure to various chemicals and substances known or suspected to cause bladder cancer, and that employee's work was a substantial factor in causing his claimed injury and death. Employer, on the other hand, presents Dr. Kosnett, who believes the lack of specific information regarding the magnitude, frequency, and duration of employee's exposure to beryllium or other chemicals prevents him from making a causative link between employee's work and his cancer.<sup>5</sup> Following the decisions in *Vickers* and *Smith*, it would appear that Dr. Kosnett's overarching theory against causation is insufficient, as a matter of law, to rebut the testimony from employee's doctors. In any event, we have carefully analyzed the expert medical testimony and have found that Drs. Parmet and Schneider provided the more relevant and persuasive testimony.

We turn now to the statutory requirements. The evidence overwhelmingly suggests (and we so conclude) that employee's carcinosarcoma of the bladder was not an ordinary disease of life to which the general public is exposed outside of the employment; given that this type of bladder tumor is extremely rare, and because employee was a lifelong

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<sup>5</sup> We acknowledge employer's alternative argument that employee's prior employments and/or military service may have exposed him to hydrocarbons or other carcinogenic agents, but this argument is unavailing on its face, because of the last exposure rule. See § 287.063.2 RSMo. There is no evidence on this record that any of employee's jobs after he left his work for employer involved a risk of exposure to substances known or suspected to cause bladder cancer.

Employee: William Franken (deceased)

- 13 -

nonsmoker, it appears that an occupational exposure is the most likely source of this disease. We conclude, given the credible testimony from Drs. Parmet and Schneider, that employee's work involving exposure to numerous toxic and carcinogenic substances, including trichloroethylene, beryllium, and ionizing radiation, posed a risk for the contraction of occupational cancers greater than or different than that which affects the public generally, that employee's carcinosarcoma of the bladder had its origin in a risk connected with his employment for employer, and that it flowed from this risk source as a rational consequence.

We further conclude that there is a recognizable link between the development of occupational cancers and distinctive features of employee's job, namely employee's work in employer's metrology lab, which exposed him to these dangerous substances. We conclude that such exposures were common to all employees who worked in employer's facility, and specifically the metrology lab. We conclude that there is a direct causal connection between the conditions under which employee performed his work and the development of occupational cancers, and that work was a substantial factor in causing employee to suffer the resulting medical conditions of metastatic bladder cancer, multiple organ failure, and death.

In sum, we deem each of the statutory and case law criteria to have been satisfied in this case. We conclude that employee suffered injury by occupational disease arising out of and in the course of his employment in the form of metastatic bladder cancer.

*Medical causation; nature and extent or cause of death*

At the hearing before the administrative law judge, the parties placed in dispute the separate issues of "medical causation" and the "nature and extent or cause of death." *Transcript*, page 5. It would appear that these issues are inextricably intertwined with our analysis immediately above with regard to the issue of occupational disease, as we have already addressed the relevant statute. However, in the interest of clarity and to give effect to each of the parties' stipulations at trial, we will briefly return to § 287.020.2 RSMo, and note that the applicable standard for medical causation is as follows:

An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

We have concluded that employee's metastatic bladder cancer amounted to a compensable occupational disease arising out of and in the course of employment. We have found that employee died of septic shock and multiple organ failure resulting from his metastatic bladder cancer.<sup>6</sup> Employer has not provided any expert medical testimony that would suggest (much less persuasively demonstrate) that employee's death was the result

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<sup>6</sup> As we have noted, the dose of methadone that appears to have triggered employee's respiratory distress and consequent multiple organ failure on July 13, 2005, was prescribed to treat pain referable to his occupational injury. Thus, even if employee's reaction to the methadone were seen as a proximate cause of his death, the relevant Missouri cases would support a finding that employee's death is compensable as a natural consequence of the work injury. See, e.g., *Pace v. City of St. Joseph*, 367 S.W.3d 137, 147 (Mo. App. 2012); *Wilson v. Emery Bird Thayer Co.*, 403 S.W.2d 953, 959 (Mo. App. 1966); and *Manley v. American Packing Co.*, 253 S.W.2d 165 (Mo. 1952).

Employee: William Franken (deceased)

- 14 -

of anything other than septic shock referable to his metastatic bladder cancer and treatment therefor; employer's expert, Dr. Kosnett, specifically conceded that employee's development of fatal septic shock was a "direct consequence" of complications referable to metastatic cancer. *Transcript*, page 1906. We conclude, therefore, that employee's work was a substantial factor in causing his death.

### Notice

The parties placed in dispute the issue whether employee's claim for compensation is barred by the notice requirement of § 287.420 RSMo, but the courts have explicitly held that this statutory requirement is not applicable to claims of injury by occupational disease. *Endicott v. Display Techs.*, 77 S.W.3d 612, 616 (Mo. 2002). We must conclude, therefore, that this claim is not barred by any failure to provide notice to employer of employee's injuries.<sup>7</sup>

### Burial expenses and death benefits

Section 287.240 RSMo provides, in relevant part, as follows:

If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

(1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding five thousand dollars.

We have determined that employee's injury by occupational disease resulted in his death. However, claimant did not submit any evidence of her burial expenses. Accordingly, we cannot make an award of burial expenses herein.

However, claimant and her adopted daughters are entitled to weekly death benefits pursuant to § 287.240(2) RSMo if the evidence shows that they were employee's dependents at the time of his injury. Section 287.240(4) provides, in relevant part, as follows:

The word "dependent" as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband with whom she lives or who is legally liable for her support, and a husband upon a wife with whom he lives or who is legally liable for his support; provided that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total

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<sup>7</sup> The courts have made clear that the date of injury controls which version of Chapter 287 applies, see, e.g., *Meyers v. Wildcat, Inc.*, 258 S.W.3d 77, 80 (Mo. App. 2008). Employee died on July 14, 2005, so we have applied the law as it existed prior to the 2005 amendments to the Missouri Workers' Compensation Law.

Employee: William Franken (deceased)

- 15 -

dependents entitled to any death benefits under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter, in which event the periodic benefits to which such widow or widower would have been entitled had he or she not died or remarried shall be divided among such other total dependents and paid to them during their period of entitlement under this chapter;

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent legally liable for the support or with whom he, she, or they are living at the time of the death of the parent. ... In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefit shall be divided equally among them. The payment of death benefits to a child or other dependent as provided in this paragraph shall cease when the dependent dies, attains the age of eighteen years, or becomes physically and mentally capable of wage earning over that age, or until twenty-two years of age if the child of the deceased is in attendance and remains as a full-time student in any accredited educational institution, or if at eighteen years of age the dependent child is a member of the Armed Forces of the United States on active duty; provided, however, that such dependent child shall be entitled to compensation during four years of full-time attendance at a fully accredited educational institution to commence prior to twenty-three years of age and immediately upon cessation of his active duty in the Armed Forces, unless there are other total dependents entitled to the death benefit under this chapter;

We have found that employee and Carson Franken were married on October 7, 1994, and that the two remained married continuously and lived in the same household until the date of employee's death on July 14, 2005. We have also found that in May 2002, claimant and employee were issued letters of guardianship over claimant's granddaughters, Kristen Thomas, born December 7, 1997, and Kaitlyn Thomas, born June 18, 2000; that the two were dependent upon employee for their entire support, and were living with employee and claimant on July 14, 2005; that on that date, Kristen Thomas was seven years of age and Kaitlyn Thomas was five years of age; and that on November 10, 2005, the Circuit Court of Jackson County, Missouri, entered its judgment authorizing claimant's adoption of the two children. Finally, we have found that apart from claimant, Kristen Thomas, and Kaitlyn Thomas, there are no other persons who might be considered a dependent of the employee as of July 14, 2005.

Applying the statutory provisions set forth above, we conclude that the claimant herein, Carson Franken, was employee's total dependent at the time of his death. We further conclude that Kristen Thomas and Kaitlyn Thomas were employee's total dependents, as

Employee: William Franken (deceased)

such is supported by the uncontested facts before us; namely, that employee and claimant had secured court-authorized guardianship over them at the time of employee's death, and that claimant subsequently adopted the children. Accordingly, we conclude that claimant, Kristen Thomas, and Kaitlyn Thomas are entitled to death benefits at the stipulated weekly death benefit rate of \$100.00.

The weekly death benefits are due beginning July 14, 2005, and shall continue thereafter in accordance with the terms of § 287.240 RSMo. The dependents are each entitled to an equal share of the death benefit. At least until they are emancipated, or until otherwise provided by law, the weekly share owing to the two dependent children, Kristen Thomas and Kaitlyn Thomas, shall be payable to claimant, to be used for their care and support.

**Award**

We reverse the award of the administrative law judge. We conclude employee's work was a substantial factor causing him to suffer injury by occupational disease culminating in his death.

Claimant, Kristen Thomas, and Kaitlyn Thomas are entitled to, and employer is hereby ordered to pay, weekly death benefits beginning July 14, 2005, in the amount of \$100.00 per week. Said payments shall continue until modified by law in accordance with the provisions of § 287.240 RSMo.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued November 17, 2015, is attached hereto solely for reference.

This award is subject to a lien in favor of Jerry Kenter, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of November 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## FINAL AWARD

Employee: William Franken (Deceased) Injury No. 05-143993  
Dependents: Carson Franken (Spouse)  
Employer: Honeywell FMT/fka Bendix Corporation Allied Signal  
Insurer: Ace American Insurance Company  
Additional Party: N/A  
Hearing Date: July 14, 2015 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: October 2004
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? No
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? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Mr. Franken alleges that he was exposed to Beryllium within the scope and course of his employment between 1967 and 1972.
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: N/A

14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? \$0.00
18. Employee's average weekly wages: \$150
19. Weekly compensation rate: \$100
20. Method wages computation: By stipulation.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: N/A
22. Second Injury Liability: N/A
23. Future requirements awarded: \$0.00

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: William Franken (Deceased) Injury No. 05-143993  
Dependents: Carson Franken (Spouse)  
Employer: Honeywell FMT  
FKA Bendix Corporation Allied Signal/ESIS  
Insurer: Ace American Insurance Company  
Additional Party: N/A  
Hearing Date: July 14, 2015 Checked by: MSS/pd

### **FINDINGS OF FACT and RULINGS OF LAW**

A hearing for award was held regarding the above referenced workers' compensation claim by the undersigned Administrative Law Judge on July 14, 2015. Attorney Jerry Kenter represented Carson Franken (Claimant.) Honeywell FMT is insured by Ace American Insurance Company and their claims are administered by ESIS. Honeywell FMT is represented by attorney M. Joan Klosterman.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: statute of limitations, arising out of and in the course and scope of employment, occupational disease, notice, and causation. Claimant offered exhibits A-Q. Exhibit M was withdrawn. Employer offered exhibits 1-12. Claimant objected to Employer's Exhibit 9 and 12, the report of Dr. Michael Kosnett and the personnel file of William C. Franken. Those objections are overruled. All offered exhibits were admitted into the record. As such, all offered exhibits were entered into the record.

## STIPULATIONS

The parties stipulated to:

1. William Franken worked for Employer between 1967 and January of 1971
2. William Franken and Employer operated under the Missouri Workers' Compensation Law;
3. Employer's liability was fully insured;
4. Claimant's rate for Death Benefits is \$100.00.
5. Claimant died on July 14 of 2005 from metastatic bladder cancer and sepsis.

## ISSUES

The issues to be determined are:

1. Did claimant provide timely notice of the claim to the employer
2. Did claimant file a timely claim for compensation per Missouri law
3. Did William Franken die as a result of cancer caused by his employment with Employer

## FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Mr. Franken was employed by Bendix Corporation, now known as Honeywell FMT, from sometime in 1967 to January of 1971. Claimant worked in the Metrology Lab. (Resume of William Franken, Exhibit 2)
2. Prior to working for Bendix, Mr. Franken was in the U.S. Air Force working as a metrologist. Mr. Franken worked on jets and traveled and served internationally. (Deposition of Carson Franken) Resume of William Franken, Exhibit 2)
3. Mr. Franken told his treating physicians that he had been exposed to Hydrocarbons and had worked in the international oil business prior to his employment with Honeywell (Deposition of Alan Parmet, M.D)
4. Hydrocarbon exposure has a strong link to bladder cancer (Deposition of Alan Parmet, M.D)
5. Mr. Franken was not exposed to known cancer causing agents during his time at Bendix/Honeywell. (Testimony of Bill Freed)
6. Following his employment with Bendix, Mr. Franken went on to work as a teacher in the Kansas City Missouri school district and as a teacher at a community college in Kansas City, Missouri. Mr. Franken also traveled internationally doing training of engineers in the field of Metrology. (Resume of William Franken, Exhibit 2)

7. Mr. Franken married Carson Franken in 1994. Carson Franken did not know Mr. Franken at the time of his employment with Bendix Corporation.(Testimony of Carson Franken)
8. Prior to his death, Mr. Franken and his wife Carson Franken began adoption proceedings to adopt Mrs. Carson's granddaughters, Kristin and Kaitlyn. The adoption was completed following the death of Mr. Franken. (Testimony of Carson Franken)
9. Mr. Franken became ill in the fall of 2004. He was diagnosed with bladder cancer in November of 2004 and underwent surgery to remove the bladder tumor. Mr. Franken underwent chemotherapy in the beginning of 2005. Following his treatment he was able to help install a swimming pool at his home and perform various other physical tasks. He did not complain of shortness of breath or difficulty breathing. Due to pain in his back he visited the doctor in June of 2005 and was diagnosed with metastasized cancer. Mr. Franken and his wife chose to travel to Houston, Texas to the M.D. Anderson Cancer Center. They arrived at the Center on July 13, 2005. Mr. Franken was seen by the doctors at M.D Anderson shortly after his arrival in Houston and scheduled to return in one week for treatment. The day following his initial evaluation, Mr. Franken became gravely ill. (Testimony of Carson Franken) (Medical Records of MD Anderson Hospital, Exhibit A)
10. Claimant, William Franken, died on July 14, 2005 from complications due to metastatic bladder cancer. Mr. Franken was born on May 12, 1941 making him 64 years old on the date of his death. (Testimony of Carson Franken, Medical Records of MD Anderson Hospital Exhibit A)
11. Mr. Franken discussed his disease being related to exposure to chemicals with his oncologist in the fall of 2004. (Medical records of Dr. Frieden, Ex.1)
12. Mr. Franken and his wife discussed his possible exposures while employed at Honeywell which may have caused his cancer shortly after his diagnosis with bladder cancer in 2004 or early 2005 (Testimony of Carson Franken)
13. Mr. Franken's cause of death was bladder cancer and sepsis. Carson Franken was asked by the physicians at M.D. Anderson Cancer Center whether she wished to have her husband's body autopsied and she indicated that she only wanted an autopsy of Mr. Franken's lungs. (Pathology Report, Exhibit 7) (Testimony of Carson Franken)
14. Mr. Franken's autopsy did not show any evidence of beryllium disease or lung cancer. (Pathology Report, Exhibit 7)
15. No examination was made of any other internal organ during the autopsy per the instructions of Carson Franken. (Testimony of Carson Franken)
16. Carson Franken filed her claim for compensation on May 11, 2007. (Missouri Claim for Compensation)

17. Honeywell FMT filed their Report of Injury on May 31, 2007 within 30 days of their notice of claimant's injury. (Missouri Division of Workers' Compensation records)

### **SUMMARY OF EVIDENCE**

William Franken's bladder cancer was diagnosed in October of 2004, some 32 years after his last day of employment with Honeywell. Prior to his employment with Bendix/Honeywell, Mr. Franklin served in the United States Air Force. By his own admission he was potentially exposed to Hydrocarbons and also to other substances and chemicals. Between Mr. Franken's employment with Honeywell and his cancer diagnosis Mr. Franken worked a various jobs and traveled internationally for those positions. Mr. Franken's job in the Metrology Lab at Honeywell would not have exposed him to hydrocarbons or other chemicals with cancer causing properties. As a matter of fact, there is no evidence that Mr. Franken was exposed to any substance which would cause his bladder cancer and none of claimant's experts can credibly testify that Mr. Franken's death was caused by his employment with Honeywell.

Mrs. Carson Franken and Mr. Franken discussed the possibility that Mr. Franken was exposed to chemicals or other substances which caused his cancer. These conversations took place shortly after Mr. Franken's cancer diagnosis which was in October of 2004.

Mr. Franken died on July 14, 2005. Mrs. Franken provided no notice to Honeywell that her husband suffered an occupational disease during his employment with Honeywell until she filed, and Honeywell received the claim for compensation in May of 2007. Honeywell filed its report of injury on May 31, 2007, less than 30 days following their notice of injury.

### **LAY WITNESSES**

Ms. Carson Franken, Mr. Franken's wife at the time of his death, testified live. Ms. Franken was married to Mr. Franken from 1994 until his death in 2005. She first met him in 1987 or 1988. Mrs. Franken did not know Mr. Franken during the time period he worked for Honeywell. Ms. Franken testified that she and Mr. Franken discussed that he may have had exposure while employed at Honeywell which could have caused his cancer 32 years later. These discussions took place after his diagnosis with kidney cancer in 2004 and early 2005. Ms. Franken did not know the difference between the Metrology department and the Metallurgy department at Honeywell. Ms. Franken also testified that she recognized Mr. Franken's handwriting on Exhibit 10A, a Medical History Questionnaire which was filled out on January 16, 1968 as part of Mr. Franken's application process at Bendix/Honeywell indicating that Mr. Franken had been exposed to ionizing radiation during a previous employment and identified the substances as plutonium, titanium and radium. Just before Mr. Franken's death, Mr. Franken was able to play tennis and help with moving gravel for the family's new swimming pool. During his intake interview in Houston at MD Anderson Hospital, one day before his death, Mr. Franken reported no shortness of breath and his examination revealed normal lung sounds. Following Mr. Franken's death, Ms. Franken only authorized an autopsy of Mr. Franken's lungs. No granulomas or evidence of Beryllium disease were found following the autopsy. There was no evidence of emphysema. The certificate of death listed the cause of Mr. Franken's death as bladder cancer and sepsis. Ms. Franken filed her Claim for Compensation with the Division of Workers' Compensation in May of 2007. Prior to filing her claim for compensation she had no conversations with anyone at Honeywell regarding her husband's illness or death and/or that she

believed that he suffered an injury while employed with Honeywell some 32 years prior to his death.

Mr. Dennis Shepherd testified via deposition. Mr. Shepherd is a former employee of Honeywell. He worked in the security department at Honeywell from October of 1970 until his retirement in 2007. Mr. Shepherd met Mr. Franken in September of 2004, through their daughter's friendship, just prior to Mr. Franken's cancer diagnosis. Mr. Shepherd did not know or know of Mr. Franken prior to 2004. According to Mr. Shepherd, Mr. Franken told him that he worked in the metrology area at Honeywell between 1968 and 1972. Mr. Shepherd did not recall whether there were any warnings about dangerous chemicals on the door of the metrology lab during the time frame that he and Mr. Franken both worked at Honeywell but he did recall that there were some warnings "the last few years" before Mr. Shepherd's retirement. Any warning signs Mr. Shepherd may have seen were subsequent to the year 2000 but he had no memory regarding any signs or warnings during the years 1970-1972. As a personal favor to Mrs. Franken following the death of Mr. Franken, Mr. Shepherd reviewed the personnel records of Mr. Franken to determine the dates that he worked at the plant. Mr. Shepherd had no firsthand knowledge of any job duties or exposures Mr. Franken may have had at Honeywell. During their friendship Mr. Franken told Mr. Shepherd that Mr. Franken put out hay and baled hay off of about 20 acres of land he and Mrs. Carson owned and he took care of about 20 horses on their property.

Ms. Peggy Poling testified via deposition. Mr. Franken worked with Ms. Poling in 1990 while in Turkey. Ms. Poling had no information as to what jobs Mr. Franken had during his adult life prior to when she worked with him. She did not know whether he worked in the international oil business before she met him in 1990. Mr. Franken did not discuss with Ms. Poling the type of work he did for Bendix or Honeywell and in fact did not even know that he had ever worked for those companies. Ms. Poling had no contact with Mr. Franken after 1995.

Ms. Linda Taylor testified live for Honeywell. Ms. Taylor is a senior safety analyst and has worked at the Honeywell plant for 35 years. Under her title she handles the workers' compensation claims for the plant. She is familiar with a program through the Department of Energy known as the Energy Employees Occupational Illness Compensation Program Act. This program was designed to compensate Department of Energy Employees who are diagnosed with Chronic Beryllium Disease. At certain times, Honeywell receives requests from the Department of Labor to provide documents related to former employees who have applied for benefits under that program. Honeywell's responsibility is to gather the documents requested and send them off to the Department of Labor. The Department of Labor relies partially on those documents to determine whether an employee is entitled to benefits due to exposure during their tenure of employment. The Department of Labor does not communicate with Honeywell regarding their findings or their decisions relating to exposures or benefits. Ms. Taylor never received a call from Carson Franken or anyone on her behalf reporting that Mr. Franken had suffered an occupational disease during his employment with Honeywell. The first notice Honeywell received that Mr. Franken alleged he suffered an occupational disease due to his employment at Honeywell was when Honeywell received Mrs. Franken's Claim for Compensation in May of 2007. Ms. Taylor filed the Report of Injury on May 31, 2007.

Mr. William Frede testified on behalf of the Employer. Mr. Frede has worked for Honeywell for 37 years. He is an industrial hygienist. His official title is Senior Safety

Manager. He testified that Mr. Franken worked in the metrology lab and that metrology was the study of measurements and calibration. Mr. Frede testified that he was not aware of any time period that Mr. Franken worked in the metallurgy department or metallurgy lab. Mr. Frede testified that metrology might use a few chemicals in its processes but not many. Perhaps some cleaning agents are used because all measurements have to be precise. If beryllium were used in the metrology department it would not be "processed" to where it would cause exposure such as in a machine shop.

### EXPERT WITNESSES

The report of Dr. Michael Kosnett was entered into evidence by the Employer. Dr. Kosnett is an Associate Clinical Professor in the Division of Clinical Pharmacology and Toxicology, Department of Medicine at the University of Colorado, School of Medicine and the Department of Environmental and Occupational Health at the Colorado School of Public Health. He received his MD at the University of California, San Francisco and his Masters of Public Health at the University of California at Berkeley. Dr. Kosnett concluded that the only "lung" disease for which Mr. Franken had diagnostic support was asthma but that his asthma had no causal relationship to his employment at the Kansas City Honeywell plant. Mr. Franken's asthma was diagnosed in 1994, more than 20 years after he left his employment at Honeywell. The clinical symptoms Mr. Franken described in his medical records were typical of allergic asthma with seasonal exacerbations characterized by cough or wheezing and with improvement with inhaled bronchodilators and corticosteroids. Dr. Kosnett pointed to the medical records which showed that Mr. Franken's asthma symptoms were "quiescent" in the year prior to his death.

Dr. Kosnett also pointed out that there is no evidence whatsoever that Mr. Franken was exposed to beryllium during his time at Honeywell nor was there any evidence that Mr. Franken was exposed to any agent whatsoever that would cause bladder cancer. Dr. Kosnett noted that Dr. Allen Parmet, an expert who testified on behalf of Mr. Franken, testified that "a scientific connection between beryllium exposure and Mr. Franken's subsequent lung disease cannot be made." Dr. Kosnett reported that no data were cited to support the conclusion that Mr. Franken sustained any degree of occupational exposure at the Honeywell plant to any agent known to cause carcinosarcoma of the bladder.

Dr. Robert Nadig, who prepared a report on behalf of Mr. Franken, concluded that it was "reasonably probable that the working conditions around Beryllium and other chemical agents was a substantial factor in causing the bladder [sic] pulmonary infection (bronchopneumonia) and septic shock ultimately resulting in the death of the injured Employee." Dr. Nadig assumed, as basis for his opinions, that Mr. Franken worked in the *Metallurgy* department at Honeywell, as opposed to the *Metrology* department where he was actually employed. Based on his incorrect assumption, Dr. Nadig opined that Mr. Franken would have been exposed to benzidine, a known bladder carcinogen which was, based on DOE records reviewed, present in the *Metallurgy* department. Based on the incorrect assumptions made by Dr. Nadig in arriving at his opinions, his opinions need not be considered in this case.

Dr. Steven Schneider wrote a report on behalf of the claimant. Dr. Schneider's report was submitted in to evidence. Dr. Schneider based his opinions on the fact that Mr. Franken was exposed to Beryllium while employed with Bendix/Honeywell between 1968 and 1971. Dr. Schneider obtained the information regarding the beryllium exposure from evidence based on Dennis Shephard's deposition. Dennis Shephard produced no evidence that Mr. Franken was

exposed to Beryllium between 1968 and 1971. He cited no other source for his assumption that Mr. Franken was exposed to Beryllium while employed with Bendix/Honeywell.

Dr. Allen Parmet testified on behalf of Mr. Franken. Dr. Parmet is a board certified Medical Examiner. He is on the Board of Preventive Medicine and a Diplomat of Aerospace Medicine and Occupational Medicine. Dr. Parmet testified that Mr. Franken was not diagnosed with Chronic Beryllium disease either prior to or after his death and that there was "not sufficient information in the medical records to make a diagnosis of chronic berylliosis of the lung." Dr. Parmet admitted that he could not make a scientific connection between Mr. Franken's beryllium exposure and his subsequent lung disease." Dr. Parmet testified that it was his opinion that some type of exposure at Honeywell was a substantial contributor to Mr. Franken's bladder cancer. He testified that exposure to hydrocarbons is a known cause of bladder cancer. When questioned as to whether or not Mr. Franken could have been exposed to hydrocarbons he testified that there were no known exposures. However, Mr. Franken himself told his oncologist, Dr. Frieden, that he may have been exposed to hydrocarbons in the Middle East while working for international oil companies. Despite this evidence in the medical records reviewed by Dr. Parmet in forming his opinions, this information was not considered in his opinion that Mr. Franken had no known exposure to hydrocarbons. Dr. Parmet admitted that he had no direct information about any specific exposures that Mr. Franken may have been exposed to during his work time at Honeywell between 1968 and 1972. Without any evidence whatsoever that Mr. Franken was exposed to cancer causing agents at all, much less what those agents would have been, Dr. Parnet cannot support his conclusion that Mr. Franken's bladder cancer was caused by exposure at Honeywell between 1968 and 1972.

## **RULINGS OF LAW**

### **STATUTE OF LIMITATIONS AND NOTICE**

Mr. Franken was diagnosed with bladder cancer on October 19, 2004 by Dr. Floyd Freiden (Exhibit 1.). Following his diagnosis, Mr. and Mrs. Franken discussed the possible exposure to cancer causing agents while he was employed at Bendix (Honeywell) (Testimony of Carson Franken.) As such, William Franken and his wife, the claimant, considered the possibility that Mr. Franken's cancer was caused by his exposures while he was employed at Bendix more than two years before filing the claim for compensation.

Claimant filed her claim for compensation on May 11, 2007. This was the first notice received by Honeywell regarding Mrs. Carson's claim (testimony of Linda Taylor). The Employer filed a Report of Injury on May 31, 2007, within 30 days from the date the employer received notice of the injury.

"[I]t is a well-established principle that the law in effect on the date of the injury governs a claim under the Workers' Compensation Law." See, e.g., *Busby v. D.C. Cycle Ltd.*, 292 S.W.3d 546, 549 (Mo. App. 2009). Under § 287.020.3(3), RSMo (2004), the terms "injury" and "personal injuries" shall mean violence to the physical structure of the body . . . ."

William Franken was diagnosed with bladder cancer in October of 2004. Therefore, the 2004 Workers' Compensation Statutes apply to Claimant's case.

### Statute of Limitations

Section 287.430, RSMo (2004) provides a statute of limitations period barring claims that are not filed “with the division within two years after the date of injury or death . . . .” Under § 287.063, RSMo (2004), the statute of limitations referred to in § 287.430 “shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained . . . .” When an injury is reasonably apparent and discoverable is a question of fact to be determined by the ALJ. See, e.g., *Weniger v. Pulitzer Publishing Co.*, 860 S.W.2d 359, 362 (Mo. App. 1993).

In this case, at least by October 28, 2004, when Dr. Freiden had a conversation with Claimant regarding his possible exposure to hydrocarbons, it was reasonably discoverable that a compensable injury had been sustained. At that time, Mr. Franken knew that he had contracted disabling bladder cancer. Dr. Freiden also noted that Mr. Franken had indicated that Mr. Franken had been in the “Petrochemical business” and, at least in part, attributed his bladder cancer to “hydrocarbon exposure” connected with his prior occupations. “A compensable injury occurs when the disease causes the employee to become disabled and unable to work.” *Hinton v. National Lock Corp.*, 879 S.W.2d 713, 717 (Mo. App. 1994). The plain language of § 287.063.3 does not require a medical or expert opinion linking the cause of a claimant’s disability to their employment, where the injury’s compensability is reasonably discoverable and readily apparent. *Id.* In this case, Mr. Franken clearly attributed the cause of his bladder cancer to exposure to toxic materials, which he believed were contracted while traveling in the Middle East or through a past occupation.

It is undisputable that Mr. Franken was aware of his past occupations, and the evidence demonstrates that he was aware that exposure to toxic substances could have caused his bladder cancer. In fact, Mrs. Franken testified that she and her husband discussed the possibility that he had been exposed to something at Honeywell that caused his bladder cancer. Mr. Franken discussed the possible exposure with Dr. Frieden in October of 2004. Thus, at least by October 28, 2004, Mr. Franken’s injury would have been reasonably discoverable and the statute of limitations began to run, and the last day to file a claim for Workers’ Compensation pursuant to § 287.430, RSMo (2004) was October 28, 2006. Claimant filed this claim with the Division on May 11, 2007, well after the applicable statute of limitations had passed.

### **Employer Was Not Required to File a Report of Injury Pursuant to § 287.380, RSMo (2004) and, Thus, the Two-Year Statute Was Not Extended by Another Year**

Claimant’s claim was not timely filed under § 287.430, because Claimant did not file her Claim for Compensation within three years of the time Mr. Franken’s injury became reasonably discoverable. That statute provides, in pertinent part: “except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.” Section 287.430, RSMo (2004) (emphasis added).

However, that statute expressly provides that the extension of the two-year statute of limitations to a three-year statute of limitations only applies where the employer does not file a report of the injury “as required by section 287.380” and § 287.380, by its express language, only applies where an employer has “knowledge of an accident resulting in personal injury to any employee . . . .” Section 287.380.1, RSMo (2004). This section does not apply to a claim for an

occupational disease, only an accident resulting in “personal injury.” Furthermore, § 287.020.3(3), RSMo (2004) is clear:

The terms “injury and “personal injuries” shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

Furthermore, § 287.020.2, RSMo (2004) provides, in the pertinent part:

The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

The extension of the statute of limitations only applies where an employer fails to file a Report of Injury as required by § 287.380. Section 287.430. An employer is only required to file a report when it has knowledge “of an accident resulting in personal injury to an employee” as expressly provided by § 287.380.1. Section 287.380.1. Knowledge of an occupational disease is not knowledge of an “accident” resulting in “personal injury” to an employee, as those terms are defined by § 287.020.2 and .3. Section 287.020.1 & .3(3), RSMo (2004). Therefore, the § 287.430 extension for an employer’s failure to file a Report of Injury within thirty (30) days of obtaining knowledge of an accident resulting in personal injury does not apply to occupational diseases under the express provisions of the 2004 statute. In fact, the definition of “personal injury” in § 287.020.3(3) specifically excludes occupational diseases from inclusion in such injuries. Thus, Claimant cannot find reprieve in the extension provisions of § 287.430, and is bound by the two-year statute of limitations period, which expired on or before October 28, 2006. Claimant’s untimely filed Claim for Compensation is barred by the statute of limitations, and her claim is not entitled to compensation.

**Even if § 287.430 and § 287.380 Applied to Employer, Employer Did Not Have Knowledge of Mr. Franken’s Injury Prior to Claimant’s Filing of Her Claim in 2007, and Timely Filed Its Report of Injury**

Even if § 287.380 requires Employer to file a Report of Injury within one month after knowledge of an accident resulting in personal injury to an employee, or the statute of limitations under § 287.430 is extended from two years to three years, Employer in this case did not have knowledge of Mr. Franken’s injury until Claimant filed her Claim for Compensation with the Division on May 11, 2007. The evidence in this case shows that claimant Carson Franken filed a claim with the EEIOCPA on behalf of Mr. Franken on November 20, 2005. Mr. Franken did not notify Employer of his injury at any time prior to Claimant filing her Claim for Compensation with the Division.

Although Claimant attempted to equate the filing of her EEIOCPA claim as somehow imparting to Employer knowledge of Mr. Franken’s injury, such claim is not supported by any

evidence. The evidence in the case shows that Employer received a request from the United States Department of Labor for information regarding Mr. Franken's employment at Bendix, to which it responded by sending the requested information. None of the requests regarding Mr. Franken's employment at Bendix imparted to Employer any knowledge of Mr. Franken's injury. Employer received no notice from Claimant or from Mr. Franken. Employer did not receive any information about why the United States Department of Labor was requesting information, and certainly did not receive specific information regarding Mr. Franken's bladder cancer.

It is endemic to an Employer's knowledge of such an injury that such knowledge include knowledge of "the time and cause of the accident," as well as "the nature and extent of the injury" as this information is specifically required to be included in such a Report to the Division pursuant to § 287.380.1, RSMo (2004). Without such information, and without knowledge of such information, an Employer would be forced to file a Report of Injury stating that none of the details were known, but that it suspected that a former Employee might have been injured in some way. In this case, Employer did not have knowledge of Mr. Franken's bladder cancer until it received notice of Claimant's Claim for Compensation filed with the division, on March 11, 2007. Employer timely filed its Report of Injury with the Division on May 31, 2007, within one month of obtaining knowledge of Mr. Franken's injury. Thus, Claimant's Claim for Compensation is subject to the two-year statute of limitations, and was untimely filed.

**DR. MICHAEL KOSNETT'S OPINION IS ADMITTED INTO EVIDENCE**  
**PURSUANT TO RSMo SECTOIN 287.210**

Employee/Claimant filed her Objection to Submission Under Section 287.210.7 By The Employer/Insurer of the Medical Report of Michael Kosnett, M.D. ("Employee's Objection"), "for the reason that Dr. Kosnett comments on the credibility of the employee's experts, Drs. Nadig and Schneider." However, a cursory review of Dr. Kosnett's Report dated August 28, 2012, p. 12, demonstrates that Dr. Kosnett does not comment on the credibility of either Dr. Nadig or Dr. Schneider, but rather he permissibly disagrees with their conclusions and the basis for those conclusions. (See, e.g., Dr. Kosnett's August 28, 2012 Report at p. 12-14).

It is permissible for an expert to disagree with the scientific conclusions of other experts such as Dr. Nadig and Dr. Schneider "As noted, direct comments relating to the truthfulness or credibility of a witness are generally inadmissible." *State v. Link*, 25 S.W.3d 136, 143 (Mo. banc 2000). "However, an expert witness may testify that he disagrees with the scientific conclusions reached by another expert witness." *Id.*

Dr. Kosnett's opinion merely disagrees with Claimant's experts' opinions. His opinions are not a comment on the credibility or truthfulness of the experts but it is merely a rebuttal of Dr. Nadig and Dr. Schenider's facts and opinions. Nowhere in his report does Dr. Kosnett indicate that he does not "believe" that Dr. Nadig or Dr. Schneider are telling the truth or that they do not have the capacity to tell the truth. Instead, Dr. Kosnett has asserted his disagreement with the medical conclusions of Employee's experts and the suppositions on which those were based.

Dr. Kosnett has stated that, in his medical opinion, based on the evidence reviewed by him in this case, "I respectfully disagree with Dr. Nadig's conclusions and many of the suppositions on which his conclusions were apparently based." (Dr. Kosnett's Report at 12). Dr.

Kosnett has pointed out that Dr. Nadig's conclusions were based upon a factual assumption that Mr. Franken worked in the Metallurgy department, when in fact Mr. Franken did not work in the Metallurgy department but in the Metrology department. Dr. Nadig based his conclusions upon the express assumption that Mr. Franken worked in the Metallurgy department, and the work performed there. Dr. Kosnett is not saying that Dr. Nadig is lying, only that his conclusion is incorrect, in part, because it is based upon an assumed fact that is not in evidence. Furthermore, Dr. Kosnett's report explains why his disagreement with Dr. Nadig's conclusions is not supported by the scientific methodology used by scientists in the field. This is particularly within the accepted parameters and, indeed, purpose of expert testimony. *See, e.g. State v. Cochran*, 365 S.W.3d 628, 633 (Mo. App. 2012) ("The general purpose of expert testimony is to aid the jury in areas that are outside the everyday experience of the layperson.")

Dr. Kosnett also disagreed with the conclusions of Dr. Schneider, on the basis that Dr. Schneider's conclusions were not supportable by accepted methodologies in the medical community and were not the product of underlying basis in evidence for which necessary information was required. (Dr. Kosnett's Report at 14) ("Dr. Schneider identified no epidemiological or experimental studies that establish that inhalation of beryllium causes carcinosarcoma of the bladder. Instead, he cited a study by Tapp, et al (1966) that reported that when a single large dose of zinc beryllium silicate was injected directly into the bone of 12 rabbits, 4 of them developed osteogenic sarcomas at the site of the injection. Experiments of this nature do not establish that inhalation of beryllium causes carcinosarcoma of the bladder in humans.").

As set out in *Bray v. Bi-State* "[a] party is entitled to introduce evidence to rebut that of his adversary, and for this purpose any competent evidence to explain, repel, counteract, or disprove the adversary's proof is admissible." *See, e.g. Bray v. Bi-State Dev. Corp.*, 949 S.W.2d 93, 101 (Mo. App. 1997). That is what Dr. Kosnett's testimony does—it simply disproves the conclusions of Employee's experts, Dr. Nadig and Dr. Schneider, and explains the scientific and medical basis for disagreeing with them.

**MR. FRANKEN'S CANCER WAS NOT CAUSALLY  
RELATED TO HIS EMPLOYMENT AT HONEYWELL AND DID NOT ARISE  
OUT OF THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH HONEYWELL**

Claimant has the burden to prove that his injury was causally related to his employment. "The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." *Royal v. Advantica Rest. Grp., Inc.*, 194 S.W.3d 371, 376 (Mo. App. W.D. 2006) (citations and quotations omitted). Claimant has not shown that his bladder cancer or the sepsis which were the medical causes of his death, were in any way causally related to his work at Honeywell. In *Vickers v. Missouri Department of Public Safety*, 283 SW 3<sup>rd</sup> 287 (Mo. App 2009) the Court of Appeals stated:

"In proving a causal connection between the conditions of employment and the occupational disease, the claimant bears the burden of proof. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo. App. 1999) (overruled in part on other grounds). '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.' *Kent*, 147 S.W.2d at 869 (quoting *Polavarapu v. Gen. Motors Corp.*, 897 S.W.2d 63, 65 (Mo. App. 1995)). And, 'there must be evidence of a

direct causal connection between the conditions under which the work is performed and the occupational disease.’ *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo. App. 1978). However, the cause and development of an occupational disease is not a matter of common knowledge. See *Jackson v. H.D. Lee Co.*, 772 S.W.2d 742 (Mo. App. 1989). There must be medical evidence of a direct causal connection. *Jacobs*, 991 S.W.2d at 698. ‘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.’ *Id.* at 696 (internal quotation omitted). ‘A claimant must submit medical evidence establishing a *probability* that working conditions caused the disease, although they need not be the sole cause.’ *Id.* at 698 (emphasis added.)”

In this case, neither Dr. Nadig, Dr. Schneider nor Dr. Parmet has met the claimant’s burden to show a “recognizable link and some distinctive feature of the job which is common to all jobs of that sort.” Mr. Franken worked in the metrology department at Honeywell in 1968 to 1972. None of the physicians was aware of what, if any, carcinogens Mr. Franken was exposed to during his tenure at Honeywell. In fact, Dr. Nadig based his opinions on the assumption that Mr. Franken worked in the metallurgy lab as opposed to the metrology lab where he actually worked. Nonetheless, none of claimant’s expert physicians was able to identify any substance or condition Mr. Franken was exposed to at Honeywell which was a substantial factor in causing either his kidney cancer or the sepsis which were identified as the causes of his death in 2005. The only evidence regarding what kinds or types of substances Mr. Franken may have been exposed to in the metrology lab came from William Frede, the industrial hygienist, who testified that none of those substances are carcinogens or known to cause cancer.

## CONCLUSION

Claimant failed to give proper notice to Honeywell that William Franken suffered an occupational injury during the course and scope of his employment. In addition, Claimant failed to file her claim within the two year statute of limitations. Notwithstanding Claimant’s failure to provide timely notice or file a timely Claim for Compensation, Claimant failed to prove that William Franken died as a result of his employment at Honeywell. Claimant’s claim for death benefits is hereby denied.

Made by: \_\_\_\_\_  
Mark S. Siedlik  
Administrative Law Judge  
Division of Workers' Compensation