

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

Injury No.: 78-143023

Employee: Charles W. Lute

Employer: BGM Industries, Inc.
Insurer: CNA Insurance Company

Employer: Kessinger Hunter & Company
Insurers: Royal Insurance
Travelers Indemnity Company
Kemper Insurance Company n/k/a Broadspire

Employer: Penn Valley Management
Insurer: Travelers Indemnity Company

Date of Accident: October 1, 1978

Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 22, 2006. The award and decision of Administrative Law Judge Rebecca S. Magruder, issued December 22, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 19th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles W. Lute

Injury No: 78-143023

Dependents: N/A

Employers: BGM Industries, Inc.
Penn Valley Management
Kessinger Hunter & Company

Insurers: Royal Insurance
C.N.A. Insurance Company
Travelers Indemnity Company

Additional Party: N/A

Hearing Date: November 21, 2006

Checked by: RSM/lh

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Mr. Charles Lute's claim for employment related asbestos exposure, No. 78-143023, was heard on November 21, 2006. Mr. Lute filed a claim in the workers' compensation proceeding for employment related asbestos exposure injury against three separate employers: Kessinger Hunter & Company, Inc., BGM Industries, Inc., and Penn Valley Management. No appearance was made on behalf of BGM Industries, Inc., nor on behalf of Penn Valley Management at the hearing. Kessinger Hunter & Company, Inc., appeared here today by attorneys representing three separate insurers of Kessinger Hunter & Company, Inc. Kemper Insurance Company and Broadspire Insurance were represented today by attorney Howard Gosnell. Travelers Insurance Company was represented here today by attorney Pete Chung as well as attorney ????. Royals Insurance Company was represented today by Tim Piatchek. And the Claimant appeared in person and was represented by attorney Thomas Stein.

At the beginning of the hearing, the parties entered into several stipulations, including the dates of workers' compensation coverage of Kessinger Hunter & Company, Inc. Kemper Insurance Company admitted that they carried workers' compensation coverage on Kessinger Hunter from February 2, 1998 through February 2, 1999. Royal Insurance Company admitted they had workers' compensation coverage of Kessinger Hunter from February 2, 1999 through February 2, 2000. And, finally, Travelers Insurance Company admitted that they had coverage of Kessinger Hunter & Company from February 2, 2000 through Claimant's last employment date in October of 2001. Kessinger Hunter & Company, Inc., also stipulated that during all relevant time periods it was an employer operating under the provisions of the Missouri workers' compensation law. The parties further admitted that the first claim for compensation in this case was filed on May 5, 2000, and that said claim was timely filed against each of the insurance carriers represented at the hearing as well as the one employer Kessinger Hunter. Although the parties admit that the Claimant was an employee of Kessinger Hunter & Company, Inc., from 1995 through

October of 2001, Kessinger Hunter has asserted from early on in this case that BMA, Business Men's Assurance, that was a statutory employer and should have been brought under §287.040. I will summarily deal with that issue before proceeding to the other contested issues in this case.

The evidence in the case demonstrated without question that the Claimant had worked as a maintenance engineer at the BMA Tower for over 29 years. As a maintenance engineer, he was responsible for new construction, maintenance and repair of the BMA Tower building. His direct employer or immediate employer from 1978 to 1984-85 was Penn Valley Management after that BG Maintenance was his direct or immediate employer from 1985 to 1995. And, lastly, Kessinger Hunter was his direct or immediate employer from 1995 to October of 2001. There clearly was an employer/employee relationship with all the essential elements of that legal relationship established at the trial, but since the parties stipulated to the employer/employee relationship, there is no need to analyze that relationship. Based on my review of the entire legal file, I do not believe that the issue of statutory employment relationship between the Claimant and BMA is relevant in the proceeding nor should it have been addressed. I allowed the attorney for Kessinger submit his evidence with regard to that issue in the way of a quasi offer of proof but advised the parties I would not rule on that evidence. Because I paid virtually no attention to the factual evidence relative to that singular issue, I clearly will make no findings of fact with reference of whether the Claimant was in fact a statutory employee of BMA. The reason I rejected the Claimant's making that an issue is found in §287.040(3) wherein it states: "No such employer shall be liable as in this section provided, if the employee was injured by his immediate or any intermediate employer." 287.040 RSMo 2000. Because the Claimant's admitted immediate employer, Kessinger Hunter & Company, carried workers' compensation insurance for all relevant periods, it seems to me to be an exercise of futility to determine whether or not BMA was a statutory employer of the Claimant. The issue in this proceeding involved the relationship between the Claimant and his alleged employers under the Missouri workers' compensation law and their liability to the Claimant under Chapter 287. Arguments by Kessinger Hunter are contained in the legal file in this case to the contrary but I reject those arguments at this point in time. Other issues to be determined for which evidence was taken at the hearing on November 21, 2006, are as follows:

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- 1) Whether Charles Lute sustained an injury by occupational disease arising out of and in the course of his employment;
- 2) The applicable compensation rate;
- 3) Liability for past medical bills in the amount of \$2,421.00;

- 4) The nature and extent of any permanent disability resulting from the alleged occupational exposure; and,
- 5) Liability for future medical aid.

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The evidence consisted of the testimony of the Claimant and medical records and reports, as well as deposition testimony of three medical doctors: Daniel Zimmerman, Michael J. Poppa, and William Barkman, Jr.

Based on the evidence presented, I make the following findings of fact and conclusions of law: I find that the Claimant worked as a maintenance engineer at the BMA Tower for over 29 years, and that as a maintenance engineer he was responsible for new construction, maintenance and repair of the BMA Tower building. I further find that during this period of time he was periodically exposed to asbestos at his worksite, including direct hands-on contact with asbestos material. I further find that the Claimant did not wear a personal respirator until the late 1980s or early '90s, and that he was last exposed to asbestos prior to the filing of his claim when he was employed by Kessinger Hunter & Company, Incorporated. I find that Travelers Insurance Company was the insurance company on the risk at the time his claim was filed in May of 2000. I further find based on all the credible medical testimony and evidence in this case, that the Claimant has pleural plaques that were caused by his employment-related asbestos exposure. I relied primarily on Dr. Barkman's opinions and testimony in this case because he as a board certified physician in internal medicine and pulmonary and critical care who practices as a pulmonologist at K.U. Medical Center was in my opinion the most qualified expert in the case. Dr. Barkman testified that the Claimant did indeed have pleural plaque caused by asbestos exposure. Dr. Barkman did indicate that ordinarily there are no symptoms or impairments with pleural plaques, but that more serious diseases or injury could occur over time. In other words, an individual with pleural plaques could later have pleural thickening and which could develop into much more serious conditions such as asbestosis or mesothelioma. While Dr. Barkman, as well, as the other experts clearly stated that the Claimant had pleural plaque caused by asbestos exposure. Little testimony was elicited regarding Dr. Barkman's statement that an x-ray taken of the Claimant showed a little pleural thickening on the left side. While the evidence made clear that there is usually no impairment with pleural plaques, the evidence also was clear that there certainly could be impairment with pleural thickening. However, I do not find that all of the evidence taken together, including Claimant's testimony and the various records and reports demonstrate that the Claimant had any symptoms in relation to his pleural thickening. Again, based primarily on Dr. Barkman's testimony but also based on other medical records in the case and the Claimant's testimony, I do not find that the Claimant necessarily has any impairment due to his asbestos exposure at this time. Therefore, I do not think the Claimant has any permanent disability yet in this case. However, because I have found that the Claimant has pleural plaques related to his asbestos exposure and possibly has pleural thickening, medical should be left open in this case for the remainder of the Claimant's

life.

The responsible party for providing medical treatment to cure and relieve the Claimant from the affects of this exposure is his employer Kessinger Hunter & Company, Inc., and their insurer who was last on the risk at the time the claim was filed, Travelers Insurance Company. See Endicott v Display Technologies, Inc., 77 SW3d 612 (Mo Banc 2002); Johnson v. Denton, 911 SW2d 286 (Mo.Banc 1995). I also find that the medical bills incurred in the amount of \$2,421.00 were reasonable bills and were necessary for diagnosis and/or treatment of the Claimant's employment related condition. Therefore, Travelers Insurance Company is ordered to pay the Claimant \$2,421.00 for satisfaction of those bills.

I do not, however, find that the Claimant has sustained in permanent disability as a result of his exposure to the asbestos. While Dr. Zimmerman and Dr. Poppa found permanent disability, I did not find their testimony as persuasive as the testimony of Dr. Barkman, the practicing pulmonologist in this case. Therefore, I had deferred to and relied upon his opinions on causation, diagnosis, and permanent disability. Because I have not found any permanent disability, there is no need to determine the issue of the applicable wage rate.

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