

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

Injury No.: 06-055610

Employee: Karen McCarthy

Employer: Concentra Health Services, Inc.

Insurer: Travelers Property Casualty Company

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 12, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued May 12, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6<sup>th</sup> day of October 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED  
John J. Hickey, Member

Attest:

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Secretary

Employee: Karen McCarthy

### **SEPARATE OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the denial of the administrative law judge should be affirmed, but for very different reasons.

The administrative law judge determined that employee failed to meet her burden of proving that she sustained an occupational disease arising out of and in the course and scope of her employment, and that her work was the cause of her medical condition.

Section 287.067.1 RSMo defines an occupational disease as:

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

Section 287.067.2 RSMo provides that for an occupational disease to be compensable, it must be "the prevailing factor causing both the resulting medical condition and disability." Further, "[t]he 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable."

In determining what the medical cause of employee's disability is, there are two issues: 1) the impact of employee's risk factors; and 2) the impact of employee's work activities. It is clear from the record that employee has diabetes, is going through menopause, is obese, and has high blood pressure. The three primary doctors in the case all had differing opinions as to the effect these factors had on employee's development of carpal tunnel. Dr. Haueisen's records indicate that because employee has been diagnosed with these risk factors, he cannot state that work is the major causative factor in her development of carpal tunnel. Dr. Crandall does not believe work is the prevailing factor in her condition based on her risk factors. Lastly, Dr. Cohen opined that employee's work activities were the prevailing factor in her development of carpal tunnel syndrome and subsequent disabilities, not her risk factors.

First of all, I do not find Dr. Haueisen's opinion credible because he did not even have all of employee's medical history or records at the time he provided his opinion. I find Dr. Cohen's testimony the most persuasive. Dr. Cohen acknowledged the risk factors that Dr. Crandall relies upon, yet Dr. Cohen took the extra step in distinguishing the difference between the risk factors and the presence of abnormal pathology that would, if present, indicate that the risk factors, not employee's duties, were the cause of her

Employee: Karen McCarthy

- 2 -

carpal tunnel syndrome. By explaining the need for clinical evidence to document the causal relationship between a risk factor and a condition, and in the absence thereof, how employment would be the causative factor, Dr. Cohen's opinion is the most credible with respect to whether employee's work duties were the primary factor in her development of carpal tunnel syndrome.

As for employee's work activities, employee's work included pushing down with her hands and getting letters into envelopes and putting them into the postage machine, folding papers, and typing. Employee credibly testified that she did not experience any symptoms of pain or numbness in her hands prior to her employment with employer. Employee stated that, while employed with employer, her hands would go numb following several hours of folding envelopes. Dr. Cohen testified that employee's employment duties were the prevailing factor in the development of her carpal tunnel disease. There was no evidence of outside activities that would have led to employee's carpal tunnel syndrome. Further, as stated above, Dr. Cohen more credibly testified that employee's risk factors did not medically cause employee's carpal tunnel syndrome, but rather her work activities did. Therefore, it follows that the substantial and competent evidence demonstrates that the employee's carpal tunnel syndrome arose out of and in the course of her employment.

Having stated the above, I still concur with the decision to deny compensation, but not because employee failed to prove that her condition arose out of and in the course of her employment, as the majority concludes. I deny compensation because the Missouri Workers' Compensation Law (Law) does not describe any benefits to be paid on account of occupational diseases. It is my hope that the Missouri courts and others smarter than me find authority in the plain language of the Law for the payment of benefits to occupational disease claimants. Strictly construing the statute, I found none.

### **2005 Amendments to the Workers' Compensation Law**

Section 287.800.1 RSMo (2005) provides that, "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo. banc 1999) and all cases citing, interpreting, applying, or following those cases.

"The language in section 287.020.10...serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended

Employee: Karen McCarthy

- 3 -

definitions contained in section 287.020... [I]t appears from the plain language of the statute, the legislature...intended to clarify its intent to amend the definitions and apply those definitions prospectively.” *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. 2007). Of particular interest in the instant case is the legislature’s specific abrogation of all earlier case law interpretations of the phrases “accident” and “occupational disease.”

### **Blank Slate**

As to the phrases appearing in § 287.020.10, the legislature has given us a blank slate. “The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.” *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. banc 1991) (citations omitted).

In light of the directives of § 287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Law giving the words and phrases their ordinary and usual meaning.

“The fundamental question in all compensation cases is whether the claimant is entitled to compensation...” *Harris v. Pine Cleaners, Inc.*, 296 S.W.2d 27, 29 (Mo. 1956). “In a workers' compensation proceeding, liability is not fixed until it is determined from whom the employee is entitled to recover.” *Mikel v. Pott Indus.*, 896 S.W.2d 624, 626 (Mo. 1995) (citation omitted). “[L]iability is not fixed until it is determined who is entitled to what from whom.” *Highley v. Martin*, 784 S.W.2d 612, 617 (Mo. App. 1989) (citations omitted). The “who” is the employee. The “whom” is the employer/insurer or the Second Injury Fund. See §§ 287.063.2, 287.067.8 and 287.220.1 RSMo. The “what” poses greater difficulties.

### **History of Occupational Disease Coverage under the Workers’ Compensation Law**

At the heart of the Law is “the bargain” found in § 287.120 RSMo, which provides, in relevant part:

1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.
2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at

Employee: Karen McCarthy

- 4 -

common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

In exchange for a speedy and sure remedy for work-related injuries, employees gave up the right (in most instances) to sue their employers in civil suits. Employers, on the other hand, gave up their traditional defenses against such injury claims in exchange for certain liability under the Law and a release from all other liability. Section 287.120.1 imposes upon all employers the obligation to provide the benefits spelled out in Chapter 287. As will be shown, Chapter 287 spells out no benefits for occupational disease claimants.

When the Missouri Workman's Compensation Law was originally adopted by referendum by the citizens of Missouri, occupational diseases were explicitly excluded from its coverage. Section 3301 RSMo (1929) provided for compensation only for personal injuries by accident. Section 3305(b) RSMo (1929) specifically excluded occupational diseases from the definition of "injury" and "personal injuries." Section 3305(b) provided, in relevant part:

The term "injury" and "personal injuries" shall mean violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case 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 workman is at work... *Provided*, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases.

In 1931, the legislature amended section 3305(b) of the Law to allow employers and employees to elect coverage for occupational diseases:

*Provided*, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases, **unless the employer shall file with the commission a written notice that he elects to bring himself with respect to occupational disease within the provisions of this act and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the commission, and any employee entering the services of such employer and any employee remaining in such service thirty days after the posting of such notice shall be conclusively presumed to have elected to accept this section unless he shall have filed with the commission and his employer a written notice that he elects to reject this act.** (Bold emphasis added).

Notwithstanding the addition of language to § 3305(b) to add optional coverage for occupational diseases, the legislature did not modify § 3301 to expressly provide that employers were liable to pay compensation for occupational diseases irrespective of

Employee: Karen McCarthy

- 5 -

negligence or that employers were released from other liability arising from occupational diseases.

### **Compensability of Occupational Disease Claims**

In order to determine the benefits provided to occupational disease claimants under the Law, I must consider 1) whether the Law, as amended, applies to occupational diseases; 2) the meaning of "occupational disease" under the Law, as amended; 3) whether occupational diseases are compensable under the Law, as amended; and, 4) if so, what amount of compensation is due on account of occupational disease.

1) Does the Law apply to occupational diseases? It clearly does. Section 287.110 RSMo provides:

1. This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law.
2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

2) What is the meaning of "occupational disease" under the Law? Section 287.067.1 RSMo defines "occupational disease."

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

It is worthy of note, by definition, occupational diseases are causally connected to work.

3) Are occupational diseases compensable under the Law? By the express language of § 287.067, injuries sustained by occupational disease or repetitive motion are compensable subject to the restrictions set forth in the various sections of § 287.067, including the "prevailing factor" restriction.

Employee: Karen McCarthy

- 6 -

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

...

7. Any employee who is exposed to and contracts any contagious or communicable disease arising out of and in the course of his or her employment shall be eligible for benefits under this chapter as an occupational disease.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

4) What amount of compensation is due on account of occupational diseases? Section 287.067 says many things but it does not specify, quantify, or describe any amount of compensation (the "*what*") due for the occupational diseases described. Section 287.063 also deals with occupational diseases. That section provides, in part:

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, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability,

Employee: Karen McCarthy

- 7 -

regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

3. 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 an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

Despite the empty promise in subsection 2 of "compensation in this section provided," § 287.063 does not specify, quantify, or describe any amount of compensation (the "what") due for the occupational diseases described.

Because §§ 287.063 and 287.067 do not describe *what* workers' compensation benefits are due an occupational disease claimant, I must move on through Chapter 287 looking for a statute spelling out the compensation due for the contraction of an occupational disease.

Section 287.120.1 sets forth the basic right of recovery for workers' compensation. That section provides that an employer is liable to an employee for workers' compensation benefits if the employee sustained personal injury *by accident* arising out of and in the course of his employment. Accident is clearly defined in §287.020.2:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

The definitional requirement that an injury by accident must be caused by a specific event during a single work shift excludes occupational diseases from the reach of § 287.120 RSMo.

I next visit the statutory sections defining and quantifying particular workers' compensation benefits to see if they set out *what* compensation is due an occupational disease claimant. Relevant portions of selected statutes are set forth below.

*287.140.1 -- Medical Care* "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical,...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the **injury.**"

*287.170.1 -- Temporary Total Disability* "For temporary total disability the employer shall pay compensation...at the weekly rate of compensation in effect under this section on the date of the **injury** for which compensation is being made. The amount of such compensation shall be computed as

Employee: Karen McCarthy

- 8 -

follows... (4) For all **injuries** occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the **injury**; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage; 287.190.1 -- *Permanent Partial Disability* "For permanent partial disability... the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the **injury** for which compensation is being made..."

287.200.1 -- *Permanent Total Disability* "Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the **injury** for which compensation is being made. The amount of such compensation shall be computed as follows:... (4) For all **injuries** occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the **injury**..."

Each section quoted above specifies *what* benefit is due on account of and in relation to *injuries*. A review of §§ 287.240 (burial and death benefits), 287.241 (rehabilitation benefits), 287.190 (temporary partial disability), and 287.220 (Second Injury Fund benefits) reveals they are only available for injuries, too.

So, is an occupational disease an injury? Section 287.020(5), the modern-day incarnation of §3305 RSMo (1929), defines "injury":

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. (Emphasis added).

My review of Chapter 287 reveals no statutes wherein the legislature specifically provided that "injury" or "personal injuries" include occupational disease. I find the phrases "injury by occupational disease" and "injury by repetitive trauma" in § 287.067. My natural inclination is to interpret these phrases in such a manner as to effectuate what I believe may have been the legislature's intent (to specifically state that injury includes occupational disease for some purposes). However, the phrases are not

Employee: Karen McCarthy

- 9 -

ambiguous so under the strict construction mandate of § 287.800, I must apply them as they read.

Chapter 287, §§ 140, 170, 180, 190, 200, 220, 240, and 241, all set out benefits due on account of injuries. Injuries for purposes of the Law expressly do not include occupational diseases and they never have.

The Workmen's Compensation Act, as it was originally passed in this State, expressly excluded occupational disease and covered accidental injuries only. The words "accident," "injury," and "personal injuries" were carefully defined in the original Act, but, of course, were not intended to apply to occupational disease in any form because such disease was specifically excluded from the operation of the Act. [Sec. 3305, R. S. Mo. 1929 (Mo. Stat. Anno., sec. 3305, pp. 8238, 8239).] In 1931 the Legislature amended the above section of the Act by providing that an employer could elect to come under the Act as to occupational diseases. The amendment, however, did not change the definitions contained in said section and did not define "occupational diseases." **It is, therefore, the duty of the courts to determine and apply the meaning of the terms mentioned in the above section in connection with occupational disease cases, even though they were not originally intended to apply to such cases.**

*Renfro v. Pittsburgh Plate Glass Co.*, 130 S.W.2d 165, 171 (Mo. App. 1939) (determining the meaning of "accident," "injury," and "personal injuries.") (Emphasis added). The above-referenced sections setting forth the benefits due for injuries do not set out *what* compensation is due on account of occupational diseases.

Could it be that the legislature has repeatedly forgotten to explicitly declare *what* compensation an employer owes to an employee who sustains an occupational disease under the Law? Indeed, successive legislatures – including the legislature that first extended the Law to occupational diseases in 1931 – have repeatedly failed to explicitly so declare.

In 1957, the Missouri Supreme Court pointed out that the plain language of the Law does not explicitly set out compensation for occupational diseases. In *Staples v. A. P. Green Fire Brick Co.*, 307 S.W.2d 457 (Mo. 1957), the Court was asked to rule that deaths from occupational diseases were not subject to the 300-week limit found in § 287.020(4), because that limit explicitly applied to deaths occurring within three hundred weeks "after the accident." In rejecting the contention that "accident" should be so narrowly construed, the Court pointed out that even the basic right of recovery under the Law is limited to injury or death "by accident" and does not explicitly extend to occupational diseases.

[I]t might be held with equal logic that there could be no recovery of weekly compensation at all in occupational disease cases, for § 287.120(1) which provides the basic right of recovery of compensation

Employee: Karen McCarthy

- 10 -

under the Act specifies that compensable injury or death shall be "by accident."

*Id.* at 463.

Until now, Missouri courts have saved the populace from the General Assembly's repeated failure to explicitly provide workers' compensation benefits to occupational disease claimants. Under the liberal interpretation permissible under the Law until August 28, 2005, the courts were allowed to effect legislative intent through common sense interpretations of the Law. "Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ.*, 217 S.W.3d 301, 305 (Mo. banc 2007) (citation omitted). It indeed would have been an absurd result if the *Renfro* court or the *Staples* court had concluded that the Law did not provide compensation for occupational diseases in light of the 1931 occupational disease amendment. It would be nice to rely on the wisdom of the *Staples* court now but I cannot because the legislature abrogated all cases interpreting the meaning of "accident." I have been specifically directed by the legislature "to construe the provisions of [Chapter 287] strictly," so that is what I will do.

"The legislature is presumed to know the existing case law when it enacts a statute." *Hudson v. Dir. of Revenue*, 216 S.W.3d 216, 222-223 (Mo. App. 2007) (citation omitted). Therefore, I must presume that when the legislature abrogated the cases that expanded the definition of "injury" and "accident" to bring occupational diseases within the breadth of Chapter 287, and § 287.120 in particular, the legislature was aware the courts had already pointed out that the plain language of § 287.120 did not provide for the payment of workers' compensation benefits on account of occupational diseases or for the release of employer from other liability resulting therefrom. The legislature's failure to so provide when amending the Law must be presumed purposeful.

The Law, as amended, does not set forth any compensation due on account of occupational diseases.

### **Conclusion**

It is clear the Law provides for occupational diseases. See § 287.110. "We do not understand the words 'provided for' to mean 'compensated for.' ...It follows that, if a right or remedy be completely destroyed by the act, it would be 'provided for' or 'prescribed' or 'defined,' as we interpret those words." *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 622 (Mo. 1936). Unfortunately for claimant, and countless workers like her, what the legislature *provided* to those sustaining non-accidental harm to their bodies arising out of and in the course of employment is nothing. Occupational disease claimants may have to resort to the courts to recover damages for their personal injuries.

Claimants will not bear the inconvenience alone. Although employers may initially rejoice upon discovering that § 287.120.1 does not make an employer liable for workers' compensation benefits to an occupational disease claimant, that joy may be tempered when employers discover that they are liable to occupational disease claimants under

Employee: Karen McCarthy

- 11 -

§§ 287.063 and 287.067 without the benefit of the release from other liability set out in § 287.120.2. Then again, employers will be somewhat comforted upon learning that the compensation they owe under Chapter 287 is zero dollars.

Arguably, the result of the 2005 changes to the Missouri Workers' Compensation Law, including the blanket abrogation of common law interpretations, is that Missouri law regarding recovery for occupational diseases has reverted to what it was in the early twentieth-century, when occupational disease cases were pursued in the courts through personal injury lawsuits.

For the foregoing reasons, I begrudgingly concur in the decision to deny compensation.

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John J. Hickey, Member