

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

Injury No.: 01-166433

Employee: David McGhee  
Employer: W. R. Grace & Co.  
Insurers: Self-Insured c/o Continental Casualty Company  
Excess Insurer: American Home Assurance Co.

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 October 14, 2008. The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued October 14, 2008, 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 12th day of August 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

SEPARATE OPINION

## CONCURRING IN PART AND DISSENTING IN PART

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

### Introduction

Because of their gradual development, occupational diseases present many issues not presented in the context of injuries by accident. It is often the case with an occupational disease that the harmful exposure giving rise to the disease occurs long before the physiological damage occurs.

Such is the case here. Employee worked for employer from 1964 to 1977. Employee was exposed to asbestos during his employment but the damage caused by the exposure to asbestos wreaked its physiological havoc gradually; so gradually, in fact, that the damage did not manifest itself through symptoms until 2000. Finally, in April 2001, employee was diagnosed with asbestosis.

Employee argues that his permanent total disability rate is calculated with reference solely to the permanent total disability statute in effect on the date employee received his asbestosis diagnosis. Employer argues that the employee's permanent total disability rate is subject to a permanent total disability cap that existed in the 1977 permanent total disability statute. The parties stipulate that employee's average weekly earnings were \$242.87 when he last worked for employer.

### Law

I reprint the relevant portions of the statutes implicated by the parties' arguments below.

#### Section 287.200 RSMo (1977)

1. Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee on the basis of sixty-six and two-thirds per cent of the average earnings of the employee, or as provided in section 287.160, computed in accordance with the rules given in section 287.250 but in no case shall the compensation exceed ninety-five dollars per week.

#### Section 287.200 RSMo (2000)

1. 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.

(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;

### Discussion

The administrative law judge found that employee is permanently and totally disabled. The administrative law judge concluded that *Enyard v. Consolidated Underwriters*, 390 S.W.2d 417 (Mo. App. 1965), stands for the proposition that for the purpose of determining the compensation rate in occupational disease cases, the "date of injury" is the date of employee's last injurious exposure. The administrative law judge then concluded the \$95 weekly benefit cap that appears in the 1977 statute applies to this case. The administrative law judge's reliance on the holding in *Enyard* is misplaced.

First, the *Enyard* decision was based upon a faulty reading of *Renfro v. Pittsburgh Plate Glass Co.*, 130

S.W.2d 165, 171 (Mo. App. 1939). The *Enyard* court distinguished *Renfro* on the ground that, "[i]n that case we were dealing primarily with the question of when the statute of limitations began to run." In fact, a primary issue in *Renfro* was whether employee's average annual wage should be computed based upon the wages in the year next preceding Mr. Renfro's last exposure to the hazard of silicosis or upon the wages in the year next preceding his disability. The *Renfro* court concluded the latter wages are to be used reasoning that "the purpose of a Workman's Compensation Act is not indemnity for any physical ailment, but for loss of earning power, disability to work. Id., at 71. "We are unable to perceive how it can logically or justly be held that there is a compensable injury in an occupational disease case until there is disability on the part of the employee which affects his earning power." Id., at 170.

Further, the main premise of the *Enyard* holding – that "the last *injurious* exposure marks the time of injury in an occupational disease case" – was recently explicitly rejected in *Copeland v. Associated Wholesale Grocers*, 207 S.W.3d 189 (Mo. App. 2006). Mr. Copeland developed carpal tunnel syndrome while working for Associated Wholesale Grocers (AWG). Mr. Copeland was treated for the condition and medically released before beginning work for Elite Logistics (Elite). Employee's work for Elite also exposed him to the hazards of developing carpal tunnel syndrome. A year later, Mr. Copeland filed a claim for compensation. The Commission concluded that liability was fixed with AWG because AWG was the last employer to injuriously expose Mr. Copeland to the hazard of carpal tunnel syndrome. The *Copeland* court reversed concluding the Commission erred in reading the word "injurious" into the statute. Even though it was undisputed that employment with Elite did not expose Mr. Copeland to the activities that actually caused Mr. Copeland's occupational disease (the *injurious* exposure), the Court found Elite liable for compensation.

Finally, the administrative law judge's ruling applies two versions of the Workers' Compensation Law to one claim. Employee's claim arose in April 2001. The 2000 version of the Workers' Compensation Law governs the determination of employer's liability for the claim. Even if the administrative law judge was correct that the "date of injury" for purposes of determining the permanent total disability rate was in 1977 – and she is not – that conclusion alone would not justify pulling out the 1977 Workers' Compensation Law to determine the permanent total disability rate. We would still look to the 2000 law to determine the rate. The administrative law judge condones the application of the 2000 Law for purposes of considering statute of limitations issues and the 1977 law for determining disability rates. It is error to do so.

The simple truth is this: Employee did not sustain injury to his body in 1977. Employee was exposed to a substance that had the potential to cause injury to him. Unfortunately for employee, the potential for injury was realized.

The majority rule regarding the proper benefit level – and the rule that should be applied under the Missouri statutes – is described below:

The question of which benefit level applies is encountered in its most acute form in long-latency occupational disease cases. If a worker's last injurious exposure was in 1965 and his disability appeared in 1995, the choice between date of exposure and date of disability might well mean the difference between \$50 and \$350 a week.

The majority rule, as a result of either judicial decision or statutory provision, is that the level at the time of exposure does not control; rather, the time of disability, knowledge, or manifestation is decisive.

Arthur L. Larson & Lex Larson, *Larson's Workers' Compensation Law*, § 53.05 (2009).

The majority rule is consistent with the legal principles enunciated in *Renfro* and *Copeland*. I would rule that the date of injury for purposes of determining employee's permanent total disability rate was in April 2001.

Employer argues that if we were to award compensation under the rates in effect in 2001, it would seem an "unfair and unjust result." What of it? Employee contracted a serious illness because of his service to employer. That probably seems unfair to employee. It probably also seems unjust to the employee that the administrative law judge determined \$95 per week is what Missouri law provides for his loss of earning capacity in 2001. It must have seemed awfully unfair and unjust to Elite Logistics when it learned it was liable for a disability that was diagnosed and treated before Mr. Copeland worked for Elite. See discussion of *Copeland*, supra. It is the insidious nature of occupational diseases that gives rise to any perceived or real inequities. It is the job of the legislature to address the inequities if it sees fit.

#### Conclusion

Applying § 287.200.1 RSMo (2000), I would award a weekly benefit of \$161.91 (66-2/3% of the stipulated average weekly earnings of \$242.87). For the foregoing reasons, I dissent from that portion of the administrative law judge's award capping employee's permanent total disability benefit at \$95.

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John J. Hickey, Member

### **AWARD**

Employee: David McGhee

Injury No. 01-166433

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: W.R. Grace & Co.

Additional Party: (Not Applicable)

Insurer: Self Insured/ Excess Insurer: American Home Assurance Co.

Hearing Date: August 8, 2008

Checked by: VRM/meb

### **FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: 2001.
5. State location where accident occurred or occupational disease was contracted:

St. Louis, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Loaded vermiculite based substances.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Lungs/ Body as a Whole.
14. Nature and extent of any permanent disability: Permanent Total Disability.
15. Compensation paid to-date for temporary disability: None.
16. Value of necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? \$35,309.31.
18. Employee's average weekly wage: \$242.87.
19. Weekly compensation rate: \$95.00.
21. Method of wage computation: Wage rate by agreement. Compensation rate determined by application of law.

### **COMPENSATION PAYABLE**

22. Amount of compensation payable:

For past medical expenses through February 15, 2008: \$35,309.31

For past Permanent Total Disability the sum of \$95.00  
per week for 357 and 4/7 weeks (10/1/2001 – 8/8/2008)

TOTAL:	<u>\$33,969.28</u> \$69,278.59
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23. Second Injury Fund liability: Not Applicable.
24. Future requirements awarded:

The sum of \$95.00 per week, beginning August 9, 2008 and continuing for the remainder of the employee's life. Subject to modification as provided by law.

Employer and its insurer shall pay medical bills that are reasonable and necessary to cure or relieve the effects of the employee's occupational disease. Employer may satisfy this requirement through a Medicare Set-Aside, as set forth in the Award.

All benefits awarded herein are to be increased by 15 percent. § 287.120.4, RSMo.

The compensation awarded to Claimant shall be subject to a lien of 25 percent of all payments in favor of the following attorney for necessary legal services rendered to Claimant: David Ray.

## **FINDINGS OF FACT AND RULINGS OF LAW**

Employee: David McGhee

Injury No. 01-166433

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: W.R. Grace & Co.

Additional Party: (Not Applicable)

Insurer: Self Insured/Excess Insurer: American Home Assurance Co.

Hearing Date: August 8, 2008.

Checked by: VRM/meb

### **PREFACE**

This is an occupational disease case involving Claimant David McGhee, who contracted asbestosis after having worked for W.R. Grace Company in St. Louis, Missouri, from August 1964 to February 1977. The self-insured W.R. Grace Company is now bankrupt, but excess insurance is through American Home Assurance Co. Hereafter, the employer and its excess insurer are referenced as "Employer." Employer is represented by Jennifer Arnett and D'Ambra M. Howard. The parties appeared before the undersigned Administrative Law Judge for a final hearing in this matter on August 8, 2008, in West Plains, Missouri. The parties presented the following stipulations.

### **STIPULATIONS**

Claimant sustained an occupational disease that arose out of and in the course of employment, which rendered Claimant permanently and totally disabled. Both parties were acting under and were subject to the Missouri Workers' Compensation Law. There is no dispute with respect to employment, causation, statute of limitations, notice, jurisdiction, or venue. Although no medical benefits have been provided to date, Employer does not dispute the reasonableness and necessity of Claimant's medical bills. Employer agrees to pay Claimant's related medical bills of \$7,539.84 for prescription medication through February 15, 2008, and \$27,769.47 in nonprescription medical treatment through October 23, 2007. The parties agree that a portion of the latter amount was paid by Medicare.

With respect to future medical, Employer agrees to be responsible for medical treatment reasonable and necessary to relieve Claimant's condition, which payments shall be made and treatment controlled by the Employer, unless that obligation is satisfied by a Medicare Set-Aside Trust Agreement, approved by all parties and by appropriate authorities. Employee's consent to, CMS approval of, and Employer's funding of

a Medicare Set-Aside Trust shall completely and forever terminate Employer and Insurer's liability for future medical treatment. Medical treatment shall include all services of healthcare providers, therapy, medicines, oxygen, rehabilitation, mileage, and other medical benefits to which Claimant may be entitled under the Missouri Workers' Compensation Law.

No temporary total disability has been claimed and none has been paid. The parties agree that Claimant earned an average weekly wage of \$242.87 at the time he left work in 1977. The parties seek resolution of the following issues:

#### ISSUES

1. Is the applicable Permanent Total Disability rate \$161.91, which is two-thirds of Claimant's last average weekly wage, or does the \$95.00 cap that was applicable on Permanent Total Disability in 1977 apply to limit Claimant's compensation rate?
2. On what date does Claimant's Permanent Total Disability begin?
3. Should a 15 percent penalty be assessed against Employer for safety violations?

#### EXHIBITS

The following exhibits were offered and admitted:

1. Deposition: David McGhee – 10/18/2004
2. Deposition: Thomas M. Hyers, M.D. – 6/13/2007, and exhibits contained therein
3. Deposition: Arthur Busch – 10/10/2007, and exhibits contained therein
4. Michael K. Lala – 10/30/07, and exhibits contained therein
5. Medical Records of David McGhee
6. Statement of expenses for prescription medications

The following exhibits were offered and excluded upon objection:

7. Claimant's Social Security Earnings Record
8. Statement of Social Security Disability Benefits

The following exhibits were offered only as demonstrative aids and not admitted as substantive evidence:

9. Medical Summary
10. Summary of Medical Expenses Paid by Medicare

#### FINDINGS OF FACT

During the 13 years he worked at the Zonolite plant for W.R. Grace in St. Louis, Missouri, Claimant received, bagged, and loaded trucks with a material known as Vermiculite. Vermiculite, an ore-like substance that is mined, expands when heated in a furnace, creating a type of insulation. The finished product includes asbestos, a known human carcinogen. Claimant testified in deposition that he knew the plant used a certain percentage of raw asbestos in mixing materials. The plant was dusty and Claimant breathed the offending dust throughout each work day. There is absolutely no evidence even suggesting that Claimant was exposed to asbestos in any other occupation or employment.

A report published by the United States Department of Health and Human Services, appended to the deposition of Arthur Busch, an environmental specialist, states that workers at the Zonolite W.R. Grace facility in St. Louis were exposed to airborne levels of Libby asbestos above current occupational standards between the years of 1940s and 1988. Although a safety officer visited the plant and performed breathing tests on the employees, no protective clothing or respirators of any kind were furnished to the employees until 1973. At that time, disposable face masks were provided, which Claimant said fit very poorly. A better quality face mask or respirator was provided at some unspecified later date. Prior to 1973, on several occasions, Claimant's union foreman requested safety equipment, but nothing was provided. Claimant quit working for W.R. Grace in 1977.

In 2000, Claimant experienced respiratory infections and saw his family physician in January of that year. He returned to his physician in February 2000 with chest pain, cough, wheezing and back pain in the right side. The assessment still was upper respiratory infection. A March 2000 chest x-ray showed right inferior pleural scarring and right diaphragmatic calcifications, the differential diagnosis was a prior inflammatory process or asbestos exposure.

On September 21, 2000, Claimant's family physician explained to Claimant exposure to asbestos in the

workplace and recommended that the x-ray be rechecked on October 11, 2000. Dr. Reddy saw Claimant on that date and diagnosed chronic bronchitis and asbestosis. On the recommendation of his family physician, Claimant underwent a CT scan of his chest on April 3, 2001. The results of that diagnostic test revealed pleural and diaphragmatic calcifications compatible with asbestosis, and an area of atelectasis from asbestos exposure, with an additional nodule in the right lower lobe of uncertain significance.

In deposition, Dr. Thomas Hyers explained that atelectasis is a focal collapse or compression of lung tissue which is seen in persons with Claimant's diagnosis. Dr. Hyers also described that the pattern of lung scarring and pleural effusion was typical of asbestos induced pleural disease, although anything that causes lung scarring can cause shortness of breath and cough. He made clear that asbestosis is not caused by skin contact or swallowing fibers. Rather, the condition is specific to the inhalation of fibers which eventually cause damage and later disease response in the lungs. The inhaled fibers "can't be transported out, so the fibrotic process, the scarring process tends to perpetuate in the lungs." (Ex. 2, p. 18). Claimant testified in deposition that he had no breathing difficulties until approximately six months after the first clear diagnosis of an asbestosis related disease occurred. That diagnosis occurred on April 3, 2001.

In his 2004 deposition, Claimant admitted that his family still maintained his cattle herd. But, he personally ceased performing physical labor on the farm in late 2001. Claimant testified consistently at hearing that about six months after his definitive diagnosis in April 2001, he ceased all physical labor. This would place the date of his permanent disability on or about October 1, 2001. Michael Lala, a vocational expert, stated that Claimant ceased physical labor in 2004 (Ex. 4, p. 13-14). In making his assessment, however, Mr. Lala said he relied, among other things, on Claimant's deposition testimony. I find credible Claimant's deposition and hearing testimony regarding the date of his permanent disability. I find that Mr. Lala simply was mistaken.

When Claimant quit working at W.R. Grace in 1977, the maximum Permanent Total Disability rate was \$95.00. In October 2001, when Claimant ceased performing physical labor and began experiencing severe breathing problems, the maximum Permanent Total Disability rate was \$599.96.

#### RULINGS OF LAW

##### Date of Compensation

No single positive declaration of permanency is required and permanency may be found from the whole record, including the testimony of lay witnesses. *Moore v. Carter Carburetor*, 628 S.W.2d 936, 940 (Mo. App. E.D. 1982). Claimant testified credibly that he ceased performing physical labor on his cattle farm in 2001. He credibly testified that his breathing problems became serious in October 2001, or six months after the definitive diagnosis of asbestosis. Mr. Lala's testimony as to the *date* of disability is disregarded as contradictory. Claimant's Permanent Total Disability began effective October 1, 2001. Employer is responsible for Permanent Total Disability from that date for the remainder of Claimant's life.

##### Rate of Compensation

Claimant relies on § 287.200 RSMo, for the proposition that the weekly compensation rate is to be calculated as of the "date of the injury for which compensation is being made...." Claimant argues that the date of injury for purposes of an occupational disease is when the disease becomes compensable or when the employee is disabled and unable to work, citing *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226 (Mo. App. E.D. 1988). The issue in *Prater*, however, was whether notice was sufficient. The *Prater* case does not discuss the applicable rate of compensation and Claimant cites no case in his brief that supports his proposition that the rate of compensation in an occupational disease case should be calculated as of the date of disability rather than the last date of his exposure.

Employer cites *Enyard v. Consolidated Underwriters*, 390 S.W.2d 417 (Mo. App. St. L. D. 1965), in which the worker had contracted silicosis 17 years after leaving his employment with Consolidated. Employer Consolidated stipulated to the workers' wage rate as of the last date of his exposure. The court then used Enyard's average weekly earnings from his last year of employment to determine the appropriate benefits due. While the issue of the wage rate was not truly in dispute in *Enyard*, Professor Larson has quoted *Enyard* in his treatise, noting that Missouri is one of a number of states that uses the "last exposure benefit rule" in affixing the rate of compensation in occupational disease cases. Arthur L. Larson & Lex

Larson, *Larson's Workers' Compensation*, § 53.05[1] (Desk Edition 2007). See also, *Mo. Workers' Compensation Law*, § 5.26 (3rd Ed. 2004) (noting that *Enyard* is the last definitive case relating to the calculation of the wage rate in occupational disease cases). Based on the authorities reviewed, as noted above, I conclude the rate of compensation is that which was in effect on the last date of Claimant's exposure to the hazards of his occupational disease. The maximum Permanent Total Disability benefit at that time was \$95.00.

#### Penalty Imposed

Section 287.120.4 RSMo, provides as follows:

4. Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

To be entitled to the 15 percent increase under § 287.120.4 RSMo, Claimant must demonstrate the existence of the statute or order, its violation, and a causal connection between the violation and the compensated injury. *Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 53 (Mo. banc 1998) *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Claimant contends that Employer failed to provide adequate safety devices or protective clothing, as required by the statutes in §§ 292.300 to 282.420 RSMo. Those statutes are part of an Act entitled "Prevention of Occupational Disease."

Section 292.300 RSMo, provides that every employer engaged in a work or process that may produce any illness or disease peculiar to such work or process is required to adopt and provide approved and effective devices for the prevention of such industrial or occupational disease.

Section 292.310 RSMo, declares that processes in which certain enumerated chemicals and metals or "any poisonous chemicals, minerals, acids, fumes, vapors, gases, or other substances, are generated or used, employed or handled by the employees in harmful quantities, or under harmful conditions, or come in contact with in a harmful way, are hereby declared to be especially dangerous to the health of employees."

Section 292.320 RSMo, prescribes that employers covered by §§ 292.300 to 282.420 RSMo, shall provide work clothes. And if the process or labor is productive of "noxious or poisonous dusts, adequate and approved respirators shall be furnished and maintained by the employer in good condition...."

These laws were in effect while Claimant was employed at W.R. Grace. There is no dispute in the record that Claimant repeatedly was exposed to asbestos. There is no dispute that Claimant now suffers from asbestosis. There is no evidence that Claimant was exposed to asbestos any place other than W.R. Grace. Claimant routinely handled asbestos. The level of asbestos was harmful, per the report attached to the deposition of Arthur Busch. The record as a whole establishes the causal connection between Claimant's exposure and his occupational disease of asbestosis. Dr. Hyers' testimony clearly indicates that it is the breathing of asbestos mineral fibers which causes damages and eventually disease in the lungs. Claimant's evidence is that W.R. Grace provided no protective clothing or respirators from 1964 until 1973, despite repeated requests for such equipment. Claimant indicated that the face masks initially provided were, at least in his opinion, ill-fitting and thus, inadequate. Causation was not challenged by Employer as an issue in this case. The purpose of the safety penalty in § 287.120.4, RSMo, is to encourage employers to comply with the laws governing safety. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 244 (Mo. App. S.D. 2003). The evidence is sufficient to support an award of a penalty on all benefits, which penalty would serve the purpose of the statute.

Employer, however, contends that the penalty should not apply because 1) there is no evidence that Employer should have been aware that it was engaged in work that had a propensity to produce illness or disease peculiar to the work, 2) there is no evidence that Claimant contracted the occupational disease as a result of his exposure prior to the date that respirators were provided, and 3) there is no evidence that the respirators provided in 1973 were inadequate.

First, assuming arguendo that such finding is required, Employer should have known that employment at W.R. Grace and the exposure to its raw and finished products posed the risk of occupational disease. A safety officer examined the employees at the plant, suggesting that someone suspected exposure to a hazard. Asbestosis is not a disease of recent discovery. See e.g., *Counts v. Bussman Mfg.*

Co., 298 S.W.2d 508, 510 (Mo.App.1957) (denying compensation when x-rays revealed no evidence of asbestosis). Claimant last worked for Employer 20 years after the *Counts* case. Moreover, the employees and their union representative requested respirators, prior to 1973, but were denied the same. There is no contrary evidence. Thus, even the lay people who worked at the plant suspected that the work environment posed them some threat of disease.

Second, even if Employer provided face masks beginning in 1973, Claimant had years of exposure prior to that date in which Employer provided no protection, despite requests for the same. Finally, it is no answer to say, without any medical support, that Claimant might have contracted asbestosis after the date that disposable face masks and later when respirators were provided. Claimant's medical evidence clearly demonstrates that Claimant contracted asbestosis as a result of breathing asbestos fibers that cannot be transported out of the body. Thus, it was the breathing of fibers throughout his tenure at W.R. Grace that exposed him to the hazards of the occupational disease. There is certainly nothing in the record that would support a finding that it was only the exposure after 1972 that caused the occupational disease.

This case arose prior to the enactment of the 2005 amendments that now require strict construction of the law. Employing a liberal construction with an eye toward the public welfare, as I am mandated to do in this case, I conclude that the safety penalty provision is applicable in this case.

In *Nolan v. Degussa AdMixtures*, 246 S.W.3d 1 (Mo. App. S.D. 2008), an Administrative Law Judge awarded a penalty as against weekly benefits due to the employee's violation of the drug and alcohol provisions of § 287.120.6, RSMo. The Labor and Industrial Relations Commission extended that penalty to medical benefits, as well. On appeal, the court rejected the claimant's argument that extending the penalty to medical benefits would have a "chilling effect" on medical care and the treatment of workers' compensation patients. 246 S.W.3d at 4. Because the language in § 287.120.6, RSMo, is nearly identical to § 287.120.4, RSMo, I am constrained to apply the penalty to all benefits, medical as well as weekly disability benefits.

#### Summary

Employer shall pay the following:

- For past medical expenses through February 15, 2008, the sum of \$35,309.31.
- For past Permanent Total Disability, the sum of \$33,969.28

(\$95.00 per week for 357 and 4/7 weeks for the period of October 1, 2001 through the date of hearing on August 8, 2008.).

- Permanent Total Disability beginning August 9, 2008, for the remainder of Claimant's life.
- Future medical treatment for the remainder of Claimant's lifetime. In the alternative, subject to the stipulation of the parties, the Employer may fund Claimant's future medical through an approved and fully funded Medicare Set Aside Trust agreement.

All benefits awarded herein are subject to a 15 percent penalty pursuant to § 287.120.4, RSMo.

Claimant's attorney R. David Ray is entitled to a lien in the amount of 25 percent as a reasonable fee for necessary legal services rendered.

This Award is subject to modification only as provided by law.

Date: October 14, 2008

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Jeffrey W. Buker  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*