

**FINAL AWARD ALLOWING COMPENSATION**

(After Mandate from the Missouri Court of Appeals, Western District)

Injury No.: 05-140833

Employee: Stephen Smith, deceased  
Substituted Claimant: Dorothy Smith, widow  
Employer: Capital Region Medical Center  
Insurer: Self-Insured

**Procedural History**

On March 16, 2012, the Labor and Industrial Relations Commission (Commission) issued a final award denying compensation in this workers' compensation case. Employee filed an appeal with the Missouri Court of Appeals, Western District. In its decision filed March 26, 2013, the Court reversed the Commission's decision. *Smith v. Capital Region Medical Center*, WD75078 (March 26, 2013). The Court held that the Commission employed an incorrect standard in determining the claimant's burden of production in regard to causation. *Id.* at pg. \*18. By mandate dated August 14, 2013, the Court remanded this matter to the Commission for further proceedings consistent with the Court's opinion. Pursuant to the Court's mandate and decision, we issue this award.

**Findings of Fact**

Employee's work duties

Employee worked for employer from 1969 until 2006 as a lab technician whose duties involved the daily handling of blood and body products. Until the 1980s and 1990s, the dangers of blood-borne pathogens were neither scientifically recognized nor popularly understood, and so lab employees did not use face shields, gloves, safety glasses, or gowns in the course of performing duties that placed them at risk of contamination from the blood and body products of hospital patients.

For example, lab employees used a pipette, or graduated glass tube, to withdraw blood samples from vacuum tubes. This task involved placing one's mouth upon the dry end of the pipette and applying sucking pressure to draw blood into the glass tube. Employees would sometimes accidentally get patients' blood in their mouths while performing this task.

Lab employees also worked with needles and syringes and were required to replace the caps on needles by hand without any protective devices. "Needle sticks" were a common risk for lab employees; this occurred when an employee attempting to put a cap on a syringe contaminated with blood or body products accidentally stabbed their fingers or hands with the needle. Before the advent of precautionary measures, employer did not require the reporting or documentation of needle sticks, and lab employees had no way of knowing whether the needle that stuck them was contaminated with blood-borne pathogens.

Lab employees also put blood into centrifuges and onto glass slides for purposes of conducting tests. During the performance of these and other tasks, there was a risk of blood or body products splattering onto the employees. Due to the natural inclination to avoid contact with these substances, employees generally used gauze when opening

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containers of blood or urine, but there was no requirement that employees do so, and employees with open cuts or wounds were not prohibited from performing such tasks.

Claimant presented the testimony of Susan Hill, a medical technologist who has worked for employer since 1973. Ms. Hill credibly testified (and we so find) that she personally suffered needle sticks and got blood in her mouth while using a pipette, and that these were risks faced by all lab employees working for employer before the advent of precautionary measures. Ms. Hill was employee's supervisor in the 1990s. She could not remember employee reporting a needle stick to her when she was his supervisor, but did observe employee with blood splatter on his clothing and lab coat.

Claimant also presented the testimony of Dorsey Shackelford, a part-time medical technologist who worked as employee's supervisor in the 1970s. Mr. Shackelford credibly testified (and we so find) that he has personally suffered contamination of patients' blood onto and into his person, and that this is a risk that is incidental to working as a lab employee. Mr. Shackelford could not remember a specific time that employee reported a needle stick or contact with body fluids, but he also testified that it would have been unusual for employees to report needle sticks before the advent of precautionary measures in connection with the handling of blood and body products. Mr. Shackelford believes it was the late 1970s or early 1980s before these new safety devices and procedures began to be implemented.

#### The hepatitis C virus

There is no evidence on this record that would suggest employee was ever a user of illicit intravenous drugs, or that employee ever got a tattoo, or that employee was a diabetic who self-administered insulin.

In 1970, employee accidentally shot himself in the leg while hunting. Employee underwent surgery and received a 6-unit blood transfusion in connection with his injuries.

On December 30, 1991, employee was admitted to the Still Regional Medical Center with complaints of severe epigastric pain. Treating doctors noted elevated liver function studies and diagnosed employee with hepatitis, later classified as the hepatitis C virus (HCV). Upon employee's discharge from the hospital on January 3, 1992, Dr. Loretta Feeler noted that no definitive etiology for the hepatitis had been made.

The medical records suggest that antiviral therapies with Ribavirin and Interferon were unsuccessful in treating employee's HCV, owing to problems with marrow suppression, leukopenia, and anemia. The records also suggest that between 1992 and 2004, employee was generally asymptomatic with regard to HCV, although he underwent regular diagnostic testing to monitor progression of the disease, and in February 1999 experienced an episode of abdominal pain that Dr. Charles Ludy suspected was a possible early flare-up of hepatitis.

In June 2004, employee underwent a liver biopsy that revealed acute inflammation, bridging fibrosis, and cirrhosis. In July 2004, diagnostic imaging studies of employee's

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chest and abdomen revealed the presence of ascites. On December 31, 2004, employee sought treatment for fever, malaise, and nausea. Dr. Rodney Adkison indicated this was employee's third episode over the last year of fever without other significant symptoms, and noted the possibility that employee's fever was linked to spontaneous bacteremia referable to liver disease.

On April 20, 2005, claimant took employee to the emergency room after she noticed employee suffering from drastic changes in his mental status. Treating physicians diagnosed acute hepatic encephalopathy referable to HCV, admitted employee to the intensive care unit, and ordered diagnostic testing. The contemporaneous medical treatment records do not reveal how many days employee was hospitalized.

It appears that at some point after employee's April 2005 hospitalization, he underwent another attempt at antiviral therapy with Ribavirin, but Dr. McKnelly's notes suggest these measures were once again abandoned. Dr. McKnelly's notes also reveal that employee continued to suffer from a number of issues referable to HCV for which he sought follow-up treatment, and that employee's previously excellent work for employer began to suffer owing to cognitive difficulties and lethargy.

On December 5, 2005, Dr. Arthur Dick evaluated employee. In his report of that date, Dr. Dick indicated that employee's work was a potential source of his infection with HCV. From our review of the medical treatment records, this appears to be the first time that a diagnostician articulated the possibility that employee's work for employer may have caused his HCV. We note that claimant testified that Dr. McKnelly informed employee that work was a possible source of employee's infection *before* Dr. Dick did so, but after a careful review of Dr. McKnelly's records, we can find no indication that Dr. McKnelly formed such an impression or conveyed this possibility to employee. We note also that claimant admitted she could not remember a number of key dates; it appears to us that claimant's testimony is not particularly reliable as to issues of chronology.

Accordingly, we find less persuasive claimant's testimony that Dr. McKnelly told her and employee that work was a possible source of employee's infection before Dr. Dick discussed this with them. Instead, we find that employee was first alerted to the possibility that he may have contracted HCV through work on December 5, 2005, when Dr. Dick evaluated him and formed that impression. Employee filed a claim for compensation against employer on April 28, 2006, alleging an injury occurring on or about April 20, 2005, affecting the body as a whole. On June 8, 2006, employee filed an amended claim for compensation, which added the more specific allegation of injury to the hepatic system (liver) and body as a whole.

Employee continued to suffer a gradual worsening of symptoms related to HCV. Employee was on the liver transplant list, but did not receive a liver transplant. On February 27, 2007, employee died as a result of liver failure.

Claimant identified a bill from Freeman Mortuary and testified that she paid \$2,897.58 in satisfaction of those charges. On oral motion at the hearing before the administrative

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law judge, claimant requested that she be substituted as the claimant herein. Employer's counsel stated that employer had no objection to the motion, and the administrative law judge granted the motion and ordered a substitution of parties.

Expert medical testimony

Claimant presents expert medical opinion evidence from Dr. Allen Parmet, who testified as follows. Transfusions of blood or body products are the primary cause of infectious hepatitis in the United States. Hepatitis can also be transmitted sexually, but the transmission rate for hepatitis type C is very low. There is an incubation period between an initial exposure and development of an acute hepatitis syndrome; this averages about six weeks after the infection. The acute syndrome manifests in a generally flu-like illness with aches, pains, malaise, fevers, and very rarely jaundice. The acute syndrome is followed by a latency period where the virus is slowly growing and damaging the liver. The minimum time from infection to onset of liver disease is considered to be 7 years, while the average time is 15 years.

Dr. Parmet opined that employee's transfusion with 6 units of blood in 1970 would be considered a major risk factor, and estimated the statistical probability that employee contracted HCV from this source at around 6%. However, Dr. Parmet does not believe that the transfusion caused employee to contract HCV, because employee did not develop cirrhosis of the liver until after 2000. Dr. Parmet explained that very few people with HCV will experience a 30-year latency period for the development of cirrhosis. Dr. Parmet also believes, based on his clinical experience with many patients suffering from acute hepatitis, that the medical records show that employee was suffering from an episode of acute hepatitis in 1991.

Dr. Parmet identified employee's work for employer from 1969 through 2006 performing tasks that daily exposed him to the risk of contamination from the blood and body products of hospital patients as the largest risk factor and the most probable source of his infection with HCV. Dr. Parmet noted that employee performed his work as a lab technician for many years without any of the mandatory tools and precautionary methods now in place after the advent of OSHA standards in the mid-1990s. Dr. Parmet opined that the act of handling blood and body fluids and the risk of needle sticks are considered typical occupational hazards for such employees, and that employee's work as a laboratory technologist placed him at a significantly greater risk for HCV infection. Dr. Parmet opined that most people in employee's field suffer needle sticks quite frequently.

Ultimately, Dr. Parmet opined that it is more likely than not that employee acquired HCV due to occupational exposure in the course of his work for employer, either by a needle stick or by handling blood and body products, and that work is the prevailing factor in causing employee to develop HCV. Dr. Parmet also opined that employee's death was caused by liver failure from employee's HCV.

Employer, meanwhile, presents Dr. Bruce Bacon, who opined as follows. Employee's work potentially exposed him to blood products and possible needle sticks, but there is no record of employee ever reporting a needle stick or any blood product exposure while

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working for employer. The average time for progression from exposure to HCV to cirrhosis is usually 20 to 30 years. Laboratory studies from 1990 to 1992 showed that employee had elevated liver enzymes, which are consistent with chronic liver disease. There is no evidence that employee's illness in 1991 and 1992 was an acute infection with HCV; rather, the clinical findings from that time period are consistent with someone having been exposed at the time of the blood transfusion 20 years previously. Blood transfusions prior to 1992 were frequently contaminated with HCV, to the extent that 7 to 10% of individuals who received blood transfusions prior to 1992 contracted HCV. (We note that if we accept this latter opinion from Dr. Bacon, we must also infer that there is a 90 to 93% chance that employee did *not* contract HCV from the 1970 blood transfusion.)

Ultimately, Dr. Bacon opined that it is difficult to implicate employee's work as a source of his infection with HCV, because of the lack of documentation that employee ever suffered any needle sticks or blood exposures during employment. Instead, Dr. Bacon believes the likely scenario is that employee contracted HCV at the time of the 1970 blood transfusion, developed chronic liver disease by the time of his admission to the Still Regional Medical Center in 1991, and then developed complications that ultimately caused his death. Notably, Dr. Bacon did not rule out employee's work as a risk factor, but instead relied on his belief that documentation of a specific exposing event is necessary in order to establish that work was a causative factor in employee's infection with HCV.

After carefully and thoroughly reviewing the expert medical evidence in this matter in light of the Court's decision and its instructions on remand, we are unable to credit Dr. Bacon's theory that the lack of documentation of a specific incident of exposure means that work cannot be implicated as a causative factor, as the Court specifically held that such evidence is not required in these cases. *Smith v. Capital Region Medical Center*, WD75078 (August 19, 2013) at pg. \*17. Nor do we find persuasive Dr. Bacon's theory pointing to the 20 years between the 1970 blood transfusion and the findings of elevated liver enzymes in 1991; employee started working for employer in 1969, so Dr. Bacon's timeline equally supports a finding that work was a source of employee's infection. When these theories are removed from the analysis, Dr. Bacon's opinions strike us as conclusory and lacking in persuasive force.

In light of these considerations, we find most persuasive Dr. Parmet's opinion that employee's daily contact with blood and body products over a long period of time is the more likely cause of employee's infection. Consequently, we adopt Dr. Parmet's opinion that the act of handling blood and body products and the risk of needle sticks are typical occupational hazards for lab technicians such as employee, and that employee's work as a laboratory technologist placed him at a significantly greater risk for HCV infection. We further adopt Dr. Parmet's opinion that it is more likely than not that employee acquired HCV due to his occupational exposure in his work for employer, either by a needle stick or by handling blood and body products, and that work is the prevailing factor in causing employee to develop HCV. Finally, we adopt Dr. Parmet's opinion that employee's death was caused by liver failure resulting from employee's occupationally-acquired HCV.

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Temporary total disability

Employee's counsel stated at the hearing before the administrative law judge that the evidence would show that employee was temporarily and totally disabled for 46 weeks before his death, but claimant's briefs filed in this matter do not provide citations to any such evidence, and our review of the record does not reveal evidence supporting that contention.

Claimant responded affirmatively to several vague leading questions asking whether employee missed time from work after April 20, 2005, and March 16, 2006, but claimant also admitted she wasn't sure of the dates. The record includes one page that appears to be a faxed copy of an undated letter from the Social Security Administration indicating employee was found to be disabled on March 16, 2006, but this document is not particularly persuasive in that it is not accompanied by any certification, appears to be incomplete, does not explain the significance of the date of March 16, 2006, and does not reveal whether the Social Security Administration based their determination on employee's HCV or upon other factors that would not be relevant to our own analysis. This document also does not reveal whether employee was successful in returning to work for any time periods.

We were unable to determine from the contemporaneous medical records how much time employee missed from work in connection with his hospitalization of April 20, 2005, as the discharge summary is undated. Dr. McKnelly's treatment note of March 22, 2006, suggests employee had been placed on administrative leave as a result of cognitive issues and also includes Dr. McKnelly's recommendation that employee take off work for the next 10 to 14 days. But this note does not specifically indicate the dates that employee missed work, and it also suggests that employee's chronic insomnia played as much a part as employee's HCV in Dr. McKnelly's recommendation. In Dr. Dick's report of March 31, 2006, he indicated that employee's hepatic encephalopathy with cognitive changes would likely preclude his continuing to work in the hospital lab, but also recommended that employee discuss other possible employment options with the human resources department. While it is obvious that employee missed some time from work owing to HCV-related symptoms, the medical treatment records before us do not clearly indicate any specific time periods of temporary total disability.

Turning once again to the opinions of Dr. Parmet, we note that he found employee to be temporarily and totally disabled and unable to return to work as of the date of his evaluation on November 17, 2006. Dr. Parmet explained that, in light of employee's encephalopathy and cerebellar dysfunction, it was unlikely in the absence of a successful liver transplant that employee would ever recover and return to work. We find this opinion to be the most persuasive evidence of the timing and cause of employee's inability to work. We find that employee was unable to return to work after November 17, 2006, because of complications referable to his HCV, and that this inability to work continued until the date of employee's death on February 27, 2007.

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### Dependency

Employee married Dorothy Smith, the claimant herein, on June 4, 1971. The two remained married continuously and lived in the same household until the date of employee's death on February 27, 2007. Claimant has not remarried since employee's death. Employee and claimant adopted two sons, Kyle and Stephen. Kyle Smith was born on September 9, 1985, and Stephen Smith, Jr., was born on August 13, 1978. On April 20, 2005, the date claimant took employee to the emergency room with symptoms of hepatic encephalopathy, Kyle Smith was 19 years of age and Stephen Smith, Jr., was 26 years of age. Kyle Smith was living with employee as of April 20, 2005, but was not in the military or attending school, and was capable of working and earning an income. Stephen Smith, Jr., was capable of working and earning an income as of April 20, 2005. Besides Stephen Smith, Jr., and Kyle Smith, there are no other persons who might be considered a dependent of the employee as of April 20, 2005.

### **Conclusions of Law**

#### Date of injury and the 2005 amendments

The appropriate date of injury is a threshold consideration in this matter, as it controls whether we apply the 2005 amendments to the Missouri Workers' Compensation Law to the facts of this case. *Tillman v. Cam's Trucking, Inc.*, 20 S.W.3d 579, 585-86 (Mo. App. 2000). The courts have generally linked the "date of injury" in occupational disease cases to the date the disease first becomes "compensable," which has been interpreted to mean the date an employee first experiences some disability or loss of earning capacity from the condition. See *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 759 (Mo. App. 1997)(noting that "Missouri courts have interpreted section 287.063 to provide that an employee with an occupational disease is 'injured' ... when the disease causes a 'compensable injury'") and *Garrone v. Treasurer of State*, 157 S.W.3d 237, 242 (Mo. App. 2004)(holding that an employee's carpal tunnel syndrome did not become a "compensable injury" until the date he missed work for surgery, as he worked without restriction up until that date).

The claimed injury in this case is liver failure and subsequent death resulting from employee's infection with HCV. The treatment note from employee's visit to the emergency room on April 20, 2005, reveals considerable cognitive disability referable to liver failure, and also reveals that treating physicians hospitalized employee in the intensive care unit in order to provide further treatments and perform diagnostic tests. We are persuaded that employee first experienced some disability related to the claimed injury when he suffered a cognitive breakdown on April 20, 2005, and was subsequently hospitalized.

Accordingly, we find the appropriate date of injury to be April 20, 2005. As a result, we will apply the Missouri Workers' Compensation Law as it existed on April 20, 2005.

#### 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,

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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.

6. 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.

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

(d) It does not come from a hazard or risk unrelated to the employment to

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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).

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We note that § 287.063.1 sets forth a conclusive presumption that an employee was exposed to the hazards of an occupational disease when, for any length of time, the employee is employed in an occupation in which the hazard of the disease exists. And in this case, the Court has held that not only does claimant not need evidence of a specific exposure to a contagious or communicable disease, claimant does not need evidence that the contagious or communicable disease was ever present in the workplace. *Smith v. Capital Region Medical Center*, WD75078 (August 19, 2013). The Court explicitly held that the testimony from Dr. Parmet met employee's burden of production in this matter. *Id.* at pg. \*17.

We have carefully analyzed the expert medical testimony in light of the Court's decision and we have found that Dr. Parmet provided the more relevant and persuasive testimony. In light of our findings, the Court's decision, and the foregoing statutory provisions, we conclude that employee's work involving decades of daily exposure to blood and body products involved an exposure to HCV greater than or different than that which affects the public generally. We conclude that there is a recognizable link between HCV and needle sticks or blood splashes which are distinctive features of employee's job that are common to all jobs of that type. We conclude that there is a direct causal connection between the conditions under which employee performed his work and the occupational disease of HCV, and that the employment was a substantial factor in causing employee to suffer the occupational disease of HCV.

Consequently, we conclude that employee suffered injury by occupational disease arising out of and in the course of his employment in the form of HCV and resultant liver failure.

*Whether the occupational disease was a substantial factor in causing employee's death*

At the hearing before the administrative law judge, the parties placed in dispute the separate issue whether, if employee suffered an occupational disease, it was a substantial factor in causing his death. Accordingly, we 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 found that employee's HCV amounted to an occupational disease arising out of and in the course of employment. We have also found persuasive and adopted Dr. Parmet's opinion that employee's death was caused by liver failure resulting from HCV. Employer has not provided any expert medical testimony that would suggest (much less persuasively demonstrate) that employee's death was the result of anything other than liver failure referable to HCV; employer's expert, Dr. Bacon, appears to have conceded that employee's death was caused by complications from HCV. We conclude, therefore, that employee's work was a substantial factor in causing his death.

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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 employee was first alerted on December 5, 2005, to the possibility that he may have contracted HCV through his work for employer. Employee filed his claim for compensation alleging injury to the hepatic system and body as a whole on June 8, 2006, well within the applicable limitation period set forth above. The claim was subsequently amended on November 30, 2010, when claimant moved for a substitution of parties at the hearing before the administrative law judge, and when the parties asked the administrative law judge to determine whether employee's death resulted from an occupational disease. *Transcript*, pages 6, 7. We note that employer did not

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object to amendment of the claim or oppose claimant's motion in any way. *Id.* Nor did employer raise any objection to the administrative law judge hearing evidence on and determining the issue whether employee's death resulted from an occupational disease.

Because the November 30, 2010, amendment did not change the alleged nature or cause of employee's injuries but merely substituted employee's widow as the claimant herein and added the additional issue whether employee's death resulted from an occupational disease, we conclude the amendment relates back to the claim for compensation filed June 8, 2006. *Spencer v. SAC Osage Elec. Co-op, Inc.*, 302 S.W.3d 792, 803 (Mo. App. 2010). We conclude that this claim is not barred by the statute of limitations.

#### 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 the notice requirement of § 287.420 RSMo is not applicable to claims of injury by occupational disease. *Endicott v. Display Techs.*, 77 S.W.3d 612, 616 (Mo. 2002). We conclude, therefore, that this claim is not barred by any failure to provide notice to employer of employee's injuries.

#### Past medical expenses

At the hearing before the administrative law judge, the parties placed in dispute the issue whether employer is liable for any of employee's past medical expenses. Because we have determined that employee suffered a compensable injury, employer would be obligated under § 287.140 RSMo to pay those past medical expenses incurred in the course of medical treatment that was reasonably required to cure and relieve the effects of employee's injury.

But the parties did not stipulate an amount of such expenses, claimant did not testify about any past medical expenses, and there are no medical bills contained in the record. In the absence of any evidence of employee's past medical expenses, there is no basis for us to make an award of such, and we must conclude that claimant failed to meet her burden of proof as to this issue. Accordingly, we conclude that employer is not obligated to pay employee's past medical expenses.

#### Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ him during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition during the relevant time periods.

We have found persuasive and adopted the opinion from Dr. Parmet that employee was temporarily and totally disabled as of November 17, 2006, and that employee would likely remain unable to return to work in the absence of a successful liver transplant.

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Given this evidence of employee's physical condition, we conclude that no employer in the usual course of business would reasonably be expected to employ him from November 17, 2006, until the date of his death on February 27, 2007. Consequently, we conclude employer is liable for 14 and 4/7 weeks of temporary total disability benefits at the stipulated rate of \$675.90 per week, for a total of \$9,848.83.

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. We have found that claimant incurred burial expenses in the amount of \$2,897.58. We conclude that employer is liable under the foregoing section to pay claimant \$2,897.58 for reasonable burial expenses.

As we have determined that employee suffered a compensable work injury that resulted in his death, pursuant to § 287.240(2) RSMo, claimant is entitled to weekly death benefits if the evidence shows that she was employee's dependent. 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 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

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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 Dorothy Smith were married on June 4, 1971, and that the two remained married continuously and lived in the same household until the date of employee's death on February 27, 2007. We have found that employee's adopted son Stephen Smith, Jr., was 26 years of age on April 20, 2005, the date of injury herein, and that employee's adopted son Kyle Smith was 19 years of age at that time, and was not attending school, was not in the military, and was not physically or mentally incapacitated from wage earning. Finally, we have found that apart from claimant and employee's adopted sons Kyle Smith and Stephen Smith, Jr., there are no other persons who might be considered a dependent of the employee as of April 20, 2005.

Applying the statutory presumption pursuant to the foregoing section, we conclude that Dorothy Smith was employee's total dependent at the time of his death, but that Kyle Smith and Stephen Smith, Jr., were not dependents at the time of employee's death. Accordingly, we conclude that Dorothy Smith is entitled to death benefits in the amount of \$675.90 per week.

The weekly death benefits are due beginning February 27, 2007, and shall continue thereafter in accordance with the terms of § 287.240 RSMo.

Employee: Stephen Smith, deceased

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**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 is entitled to, and employer is ordered to pay, burial expenses in the amount of \$2,897.58, temporary total disability benefits in the amount of \$9,848.83, and weekly death benefits beginning February 27, 2007, in the amount of \$675.90 per week.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes issued February 18, 2011, is attached hereto solely for reference.

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

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

Substituted Claimant: Dorothy Smith

Employer: Capital Region Medical Center

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-insured

Hearing Date: November 30, 2010

Checked by: RJD/cs

### 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: N/A.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Cole County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? N/A.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? N/A.
10. Was employer insured by above insurer? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: It is alleged that Stephen Smith contracted hepatitis C in his years of working as a laboratory technologist.
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: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

18. Employee's average weekly wages: \$1,120.00.
19. Weekly compensation rate: \$675.90 for temporary total disability benefits and death benefits.
20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from Employer: None.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

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

Employee: Stephen Smith (Deceased)

Injury No: 05-140833

Substituted Claimant: Dorothy Smith

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Capital Region Medical Center

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

Insurer: Self-insured

Checked by: RJD/cs

### **ISSUES DECIDED**

An evidentiary hearing was held in this case on November 30, 2010 in Jefferson City. Counsel for the deceased employee, Stephen Smith, orally moved to substitute Dorothy Smith, widow of the deceased employee, as Claimant in this action, which oral motion was sustained. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on February 4, 2011. The hearing was held to determine the following issues:

1. Whether the deceased employee, Stephen Smith sustained an accident or occupational disease arising out of and in the course of his employment with Capital Region Medical Center on or about April 20, 2005;
2. Whether the death of Stephen Smith was caused by an accident or occupational disease arising out of and in the course of Stephen Smith's employment with Capital Region Medical Center;
3. Whether the statute of limitations, §287.430, RSMo, serves as a bar to this action;
4. Whether the alleged failure to comply with the notice requirement of §287.420, RSMo, serves as a bar to this action;
5. Whether Employer shall be ordered to reimburse substituted Claimant for certain medical bills incurred by the deceased employee, Stephen Smith;
6. Whether Employer shall be ordered to pay substituted Claimant for temporary total disability benefits allegedly owed to the deceased employee, Stephen Smith;
7. A determination as to who is/are the proper dependent(s) of the deceased employee, Stephen Smith, pursuant to §287.240, RSMo;
8. Whether Employer shall be ordered to reimburse substituted Claimant for burial expenses as set out in §287.240, RSMo; and

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

9. Whether Employer shall be ordered to pay weekly death benefits, pursuant to §287.240, RSMo, to substituted Claimant.

### **STIPULATIONS**

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Cole County;
3. That both Employer and Employee (i.e., Stephen Smith, now deceased) were covered under the Missouri Workers' Compensation Law at all relevant times;
4. That Employer has paid no medical benefits and no temporary disability benefits;
5. That Stephen Smith's average weekly wages were \$1,120.00, resulting in compensation rates of \$675.90/\$354.05; and
6. That Capital Region Medical Center was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

### **EVIDENCE**

The evidence consisted of the testimony of Dorothy Smith; the testimony of Susan Hill; the testimony of Dorsey Shackelford; marriage certificate; death certificate; funeral bill; medical records; copy of "Notice of Award" from the Social Security Administration; 1993 and 1994 job evaluations for Stephen Smith; claims for compensation; Employer's answers to claims; the deposition testimony and narrative reports of Dr. Allen Parmet; reports and correspondence from Dr. Bruce Bacon; and miscellaneous correspondence.

### **DISCUSSION**

The employee, Stephen Smith, filed a Claim for Compensation on April 28, 2006, alleging that on or about April 20, 2005, he suffered an accident, a series of accidents, or an occupational disease as a result of occupational exposure that caused an injury to his body as a whole. Employer filed a Motion for More Definite Statement, and an Amended Claim for Compensation was filed on June 8, 2006, identifying the injury as to the hepatic system (liver) body as a whole. A timely Answer to the Claim for Compensation was filed denying all allegations.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

Mr. Smith was diagnosed with hepatitis C in 1991. He worked until he became unable due to the condition in March of 2006. A Certificate of Death offered into evidence states that the employee, Stephen Smith, died on February 27, 2007. The cause of death was sepsis, hepatitis C, and acute tubular neurosis. A Marriage Certificate was offered into evidence indicating that Stephen Smith had married Dorothy Smith in 1971. Upon oral motion at the hearing, Dorothy Smith was allowed to substitute herself for Stephen Smith as Claimant. No new or Amended Claim for Compensation was ever filed naming Dorothy Smith or any other party as a claimant to this case, nor was a new or Amended Claim ever filed claiming death resulted from the alleged accident or occupational disease. Nevertheless, it was clear from the evidence (including, but not limited to, Employer's Exhibit 8) that the claim was being pursued as a claim for death benefits.

Stephen Smith worked for Employer, Capital Region Medical Center<sup>1</sup>, from 1969 until March 2006 as a laboratory technologist. He was described by Susan Hill and Dorsey Shackelford, both former supervisors of Stephen Smith, as a "very good worker" and "an excellent employee". In this position, Mr. Smith withdrew blood from patients every day. He worked with blood and blood products every day. For several years, Mr. Smith and his co-workers did not wear gloves while working. Thus, if Mr. Smith had a lesion of any kind on his hand, the possibility existed of blood coming into contact with that lesion. For several years, Mr. Smith and his co-workers prepared blood slides by use of a "pipette", essentially a narrow glass straw. Mr. Smith would place one end of the pipette into a vacuum tube of blood, and then place his mouth to the other end of the pipette to suction some of the blood into the pipette. Thus, the possibility of accidentally suctioning blood into the mouth also existed. The possibility of a needle stick or cut was present during Stephen Smith's entire tenure with Employer. Only a portion of the blood with which Mr. Smith and his colleagues worked was contaminated (i.e., carried a blood-borne illness such as hepatitis C); Mr. Smith and his colleagues did not know which blood samples were contaminated and which were not. For several years, Mr. Smith and his co-workers were not provided with face shields. Thus, the possibility existed of blood being splattered into Smith's face, particularly when blood was being centrifuged.

Witness Susan Hill worked alongside Stephen Smith for a portion of his tenure with Employer and also was his supervisor for a few years. Ms. Hill recalled that she got blood into her mouth one time when using a pipette. She was not aware of any occasion where Steve Smith got blood into his mouth. Ms. Hill did witness blood on Stephen Smith's lab coat on at least one occasion. She also testified that Stephen Smith would have been required to clean up blood spills. Ms. Hill was not aware of any Stephen Smith reporting a needle stick or needle cut. Ms. Hill testified that Stephen Smith was very skilled and very careful with needles and with blood. Ms. Hill socialized with Stephen and Dorothy Smith, and Ms. Hill believes that Mr. Smith did not engage in any activities outside of work that would have exposed him to blood or bodily fluids. Ms. Hill has not contracted hepatitis C.

Witness Dorsey Shackelford also worked with Stephen Smith for many years and was Smith's supervisor for several years. Shackelford testified that he had gotten blood into his

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<sup>1</sup> When Stephen Smith began his employment, the hospital was known as Still Hospital. At some later point in time, Still Hospital merged with another facility, and the name of both facilities was changed to Capital Region Medical Center.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

mouth using pipettes on at least one occasion. He also testified that he is sure he has had “nicks or needle sticks”. Shackelford testified that he worked alongside Stephen Smith “in the early days”, and while he is not aware of any incident involving Stephen Smith (such as needle sticks or blood in mouth), “the risk was there”. Mr. Shackelford has not contracted hepatitis C.

Dorothy Smith testified that she and Stephen Smith were married on June 4, 1971, and lived together continuously as husband and wife until Stephen Smith’s death. Mrs. Smith testified that she is a registered nurse and worked for Employer from 1968 to 1995. She testified that she was quite familiar with her husband’s work and how it was performed, as well as how the protocols changed over the years. She visited her husband in the lab over the years and witnessed how he performed his job. As a nurse at the same facility, she would perform blood draws, insert IV needles, give shots and perform dressing changes on patients. The precautions she used as a nurse, over the years, mirrored the precautions used by her husband and his colleagues in the lab, thus giving her additional familiarity with potential job-related risks faced by her husband. Mrs. Smith testified that she saw blood spots on Mr. Smith’s lab coat or shirt on several occasions. She also testified that she saw blood on her husband’s face on at least one occasion. She testified that her husband, away from his work, had no contact with bodily fluids, did not use IV drugs, had no tattoos, had not been in the military, and had not traveled to the Orient. Mrs. Smith also testified that she, personally, had experienced numerous needle sticks during her career, and she also had blood on her clothing or on her person at various times in her career. Mrs. Smith has not contracted hepatitis C.

Mrs. Smith testified that her husband was wounded with a shotgun in a hunting accident in 1970. He underwent surgery and was given blood transfusions, with six units of blood.

Mrs. Smith testified that her husband was diagnosed with hepatitis C in 1991. She testified her husband was diagnosed with hepatic encephalopathy in April 2005. She also testified that her husband began to lose time from work on or about April 20, 2005, when his symptoms became acute. She testified that she took her husband to the emergency room on April 20, 2005 when he became lethargic and confused. She testified that her husband continued to try to work after that time until he could no longer work in March 2006. She testified that she and her husband were not aware of the possibility or probability that her husband’s hepatitis C was work-related until a meeting with her husband’s physicians in 2005.

**Accident; occupational disease.** Mrs. Smith and her counsel do not suggest that Stephen Smith sustained an accident. They cannot point to an identifiable incident where Mr. Smith was likely exposed to the risk of contracting hepatitis C. The claim of Mrs. Smith hinges entirely on a finding of occupational disease.

While there is some suggestion by Employer that this case should be determined by under the “prevailing factor” standard under the current post-SB1 law, there is really no question that the occupational disease (if indeed sustained) would have been sustained prior to August 28, 2005, and that Claimant’s disability therefrom began no later than April 20, 2005. Therefore, this case must be analyzed using “a substantial factor” as the standard.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

At all times relevant herein, Section 287.067, defining occupational disease, provided, in pertinent part:

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

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

6. Any employee who is exposed to an 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.

At all times relevant herein, subsection 2 of section 287.020, provided, in pertinent part:

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.

At all times relevant herein, subsection 3 of section 287.020, provided, in pertinent part:

(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 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 accident 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
- (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.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

Testimony of Dr. Parmet. Dr. Allen Parmet testified by deposition on behalf of Mr. and Mrs. Smith. Dr. Parmet performed an independent medical examination on Stephen Smith prior to his death on November 17, 2006.

After reviewing the medical records and interviewing and examining Mr. Smith, Dr. Parmet concluded in his report that the *specific* source of hepatitis C infection could not be determined. The earliest laboratory test for hepatitis C was not even available until 1990, and while Mr. Smith might have had hepatitis C prior to 1991, this cannot be stated to a reasonable degree of medical certainty because no test for it existed before then. Potential sources of hepatitis C infection include transfusions, something Mr. Smith underwent in 1970. Dr. Parmet rated Mr. Smith's prior disability to the right leg at 40%, to the low back from his surgery in 2004 at 15% of the body as a whole, and to the low back following surgery in 2006 at 10% of the body as a whole. He did not rate any particular disability related to the hepatitis C infection. It was Dr. Parmet's opinion that Mr. Smith would not be able to return to gainful employment and would eventually be permanently and totally disabled.

Dr. Parmet testified that he participated in advance training in the area of hepatitis as a Public Health Officer for the military. He retired from the Army in 1992. Dr. Parmet worked at St. Luke's Hospital in Kansas City as the Employee Health Director from 1993 to 1995, and again from 2001 through the present.

The number one cause of hepatitis C is through the transfusion of blood or body products. It can also be transmitted by needle sticks, sexually, or from mother to newborn during the birthing process or breastfeeding.

The number one cause of hepatitis C is through the transfusion of blood or body products. It can also be transmitted by needle sticks, sexually, or from mother to newborn during the birthing process or breastfeeding. (Exhibit C, Dr. Parmet Depo. p. 11-12). The minimum time from infection of hepatitis C to actual liver disease is seven years, and the average is 15 years. (Exhibit C, Dr. Parmet Depo. p. 13-14). Mr. Smith suffered a gunshot wound in 1970 requiring a transfusion with six units of blood which would be considered a major risk factor. (Exhibit C, Dr. Parmet Depo. p. 15). Absent any symptoms of cirrhosis or liver disease prior to the 1990's, and no development of cirrhosis until after 2000, Dr. Parmet felt it highly improbable that the blood transfusion in 1970 would have been the cause of Stephen's Smith hepatitis C.

Dr. Parmet testified that he was involved in a San Francisco Combined Study in the late 1980's that looked at the statistical risk of inquiring infection comparing HIV/AIDS to hepatitis B/C. Dr. Parmet claimed that the study found that there was about a 2% risk of HIV/AIDS infection from a needle stick, whereas the risk of infection with hepatitis C was 10% to 20% per stick *with a known positive donor*. Dr. Parmet testified that according to this study, there is a 10% to 20% risk of hepatitis C, and even higher for hepatitis B (Exhibit C, Dr. Parmet Depo. p. 20).

According to Dr. Parmet, the risk of contracting hepatitis is 20% if you receive a needle stick from a known hepatitis C patient. (Exhibit C, Dr. Parmet Depo. p. 26). Not everyone who gets the infection develops acute syndrome. Half to two-thirds of people don't have anything at

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

all, or are completely asymptomatic, and never know when the initial infection was acquired. Mr. Smith had two known risk factors, the *assumed* blood to blood contamination in a hospital setting, and the *known* blood transfusions from 1970. (Exhibit C, Dr. Parmet Depo. p. 28). The latency minimum is seven years, and the average is 15 years. (Exhibit C, Dr. Parmet Depo. p. 29). On cross-examination, however, Dr. Parmet testified that the St. Luke's website is accurate, and it indicates that the average onset for infection to become symptomatic is 15 years, and liver damage and cirrhosis does not occur until 20 years. So half of the people become symptomatic before 15 years, and half become symptomatic after 15 years. (Exhibit C, Dr. Parmet Depo. p. 48-49). If Mr. Smith was one of those people who usually develop liver damage over a period of 20 years or longer, that would date back from his confirmed diagnosis in 1991 to 1971, practically the exact year that he underwent the blood transfusions. (Exhibit C, Dr. Parmet Depo. p. 52).

Dr. Parmet was not aware of any specific infected needle sticks that occurred to Mr. Smith. Mr. Smith was not aware of any specific infected needle sticks. (Exhibit C, Dr. Parmet Depo. p.53-54). Dr. Parmet testified that with no infected needle, the risk of contracting hepatitis C would be 0% after a needle stick. Dr. Parmet testified we are not aware of any specific instance where he was stuck by a needle and we do not know of any specific infected needle that he could have been stuck with. All we do know is that Mr. Smith had a blood transfusion in 1970, and was diagnosed with hepatitis 20 years later in 1991. (Exhibit C, Dr. Parmet Depo. p. 55-57).

Dr. Parmet testified: "It is more likely than not that Mr. Smith acquired his hepatitis C infection due to his occupational exposure at Capital Region Medical Center, either by a needle stick or by handling blood and body products." (Exhibit C, Dr. Parmet depo. p. 29). He further testified: "The work is clearly the largest risk factor and the most probable source." (Exhibit C, Dr. Parmet depo. p. 31).

Report of Dr. Bruce Bacon. Dr. Bruce Bacon reviewed Stephen Smith's medical records and produced a report dated January 7, 2009, which report is in evidence as a portion of Exhibit 3. Dr. Bacon's report is addressed to Richard Montgomery, Employer's counsel, and reads as follows:

I am in receipt of your request for a report on the above-mentioned case. I have had an opportunity to review the records that I received and I believe you and I discussed this case several months ago. To summarize briefly, Mr. Stephen Smith had chronic hepatitis C which progressed to cirrhosis and liver failure and he died of complications of chronic liver disease. As a younger man, he worked in a laboratory and had potential exposure to blood products and possible needle sticks. My understanding is that there is no record of him every (sic) reporting a needle stick or any blood product exposure while he was employed. It is also known that Mr. Smith had a blood transfusion following a gunshot wound back in 1970. At that time, he received 6 units of blood. It is well known that blood transfusions prior to 1992 were frequently contaminated with hepatitis C. In fact, 7% to 10% of individuals who received blood transfusions prior to 1992 contracted hepatitis C from the blood transfusion.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

Further, laboratory studies done of February 21, 1990, showed mildly elevated liver enzymes with an ALT of 64 and alkaline phosphatase of 112. At this same time, a liver scan was done which showed diffuse hepatocellular dysfunction and laboratory studies at the Still Regional Medical Center from a hospitalization in December of 1991 to January of 1992, showed a low albumin level of 3.0 with a total bilirubin level that was increased at 3.2. Both of these findings along with the elevated liver enzymes are consistent with chronic liver disease. His anti-HCV was found to be positive at that time, again indicating evidence to prior exposure to hepatitis C.

There is no evidence that this illness in 1991/1992 was an acute infection with hepatitis C. Rather, these findings are consistent with chronic hepatitis C and would be consistent with someone having been exposed at the time of blood transfusion 20 years previously. The average time for progression from exposure of hepatitis C to cirrhosis is usually on the order of 20 to 30 years. The natural history of hepatitis C infection is well described with a proportion of patients who are going to develop cirrhosis usually doing so within 20 to 30 years. Further complications and premature death occur when patients have had chronic liver disease for many years. In Mr. Smith's situation, the likely scenario is that he contracted hepatitis C at the time of blood transfusions in 1970, had developed chronic liver disease by the time of his admission to the Still Regional Medical Center in 1991 and then developed complications that ultimately caused his death in 2006. Since there is no documentation that there ever were any needle sticks or blood exposures during his employment, it is hard to implicate this as a possible cause of his infection with hepatitis C.

These opinions are to a reasonable degree of medical certainty and are based on my experience as a hepatologist of over 25 years, and the care of over 3,000 patients with hepatitis C.

Analysis. Despite there being no evidence whatsoever that Stephen Smith sustained even one potentially injurious exposure to the hepatitis C virus in his working career with Employer, the circumstantial evidence is overwhelming that Stephen Smith's work for Employer exposed him to the risk of potentially injurious exposure significantly greater than the risk to which the public at large is exposed. Thus, it is altogether possible that Stephen Smith contracted hepatitis C due to his work. In other words, the possibility of an occupational disease exists in this case. It is Mrs. Smith's burden to prove, with medical or scientific evidence that it is more likely than not that Stephen Smith's work exposure caused him to contract hepatitis C. A part of that proof is to exclude or minimize non-work risk factors. This is why Mrs. Smith's counsel presented evidence that Mr. Smith was not an IV drug user, did not have tattoos, had not traveled to the Orient, etc. While these other non-work risk factors did not exist, an extremely significant non-work risk factor did exist: Mr. Smith received a blood transfusion consisting of six units of blood in 1970 after being shot in a hunting accident. That significant non-work risk factor must be weighed against the work-related risk factor. Both Dr. Parmet and Dr. Bacon each attempted to do so and each came to opposite conclusions.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

At the risk of over-simplifying a complex case, it appears to me the issue is whether the 1970 blood transfusion or Mr. Smith's occupational exposure was the more likely cause of his hepatitis C. There are multiple factors in this analysis, including the timing of the exposures, Mr. Smith's symptoms in 1991 when the hepatitis C was first discovered, the results of the laboratory testing in 1991, a determination of the chronicity of the infection in 1991, the relative statistical risks of the exposures, the latency periods, and others. While both Dr. Parmet and Dr. Bacon considered, weighed and analyzed these factors, it is clear to me that Dr. Bacon's analysis is more likely correct. First of all, Dr. Bacon is clearly the more expert of the two in this area of medicine. Second, Dr. Parmet's analysis of the timeline, in order to exclude the 1970 blood transfusion as a probable cause, assumes incorrect latency periods, and is anchored by a belief that Mr. Smith's symptoms in 1991 evidenced an "acute" hepatitis viral syndrome, which belief is belied by the contemporaneous testing and laboratory results. Third, Dr. Bacon's analysis is consistent with the known medical facts, and is well-reasoned and well-explained.

I find that the 1970 blood transfusion is clearly the more likely cause of Stephen Smith's hepatitis C. I find that Stephen Smith's occupational exposure to the risk of hepatitis C infection was not a substantial factor in his contraction of hepatitis C. I find, therefore, that Stephen Smith did not sustain an occupational disease arising out of and in the course of his employment with Capital Region Medical Center.

Mootness of remaining issues. As Mr. Smith did not sustain a compensable accident or occupational disease, the remaining issues are moot.

### **FINDINGS OF FACT**

In addition to those facts to which the parties stipulated, I find the following facts:

1. Stephen Smith was diagnosed with hepatitis C in 1991;
2. Stephen Smith died on February 27, 2007 as a direct result of hepatitis C;
3. Stephen Smith worked for Employer from 1969 until March 2006 as a laboratory technologist;
4. In his job Stephen Smith was exposed on a daily basis to the risk of needle cuts, needle sticks, contact with blood, and contact with other bodily fluids;
5. There was no direct evidence adduced that Stephen Smith sustained a potentially injurious exposure to the hepatitis C virus in his working career with Employer; and
6. In 1970, Stephen Smith was shot with a shotgun in a hunting accident, underwent surgery and received blood transfusions consisting of six units of blood.

Employee: Stephen Smith (Deceased)

Injury No. 05-140833

**RULINGS OF LAW**

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. Stephen Smith did not sustain an accident arising out of and in the course of his employment with Capital Region Medical Center; and
2. Stephen Smith did not sustain an occupational disease arising out of and in the course of his employment with Capital Region Medical Center.

**ORDER**

The claim for compensation in this case is denied in full.

Date: February 18, 2011

Made by: /s/Robert J. Dierkes

**ROBERT J. DIERKES**  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*