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## Missouri Workers' Compensation Enhanced Benefits for Mesothelioma Victims: Too Crispy or Too Chewy?

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## NOTE

### **Missouri Workers' Compensation Enhanced Benefits for Mesothelioma Victims: Too Crispy or Too Chewy?**

*Hegger v. Valley Farm Dairy Co.*, 596 S.W.3d 128 (Mo. 2020) (en banc).

Grace Hambuchen\*

#### I. INTRODUCTION

One of the most polarizing debates in history surrounds the best chocolate chip cookie recipe.<sup>1</sup> With all controversial, highly opinionated topics, certain parties, or sides, arise. Some argue the ideal cookie is soft and chewy, while others opt for the crispy and crunchy. However, most dedicated cookie enthusiasts argue the objectively best cookie is a compromise – soft in the middle with a slight crunch on the edges. Baking involves precision. If too much or too little of a simple ingredient is added, the entire cookie changes. The cookie might be “fine,” and still edible, but it is not the “best.” This compromise involves a delicate procedure of harmonizing components.

A similar compromise consisting of complicated mechanisms is workers' compensation law. The legislature strives to find the perfect balance between compensating the vulnerable employee for their injuries and protecting employers from financially crippling liability.<sup>2</sup> One particularly susceptible area of the workforce is employees who are diagnosed with

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1. David Leite, *Perfection? Hint: It's Warm and Has a Secret*, NY TIMES (July 9, 2008), [https://www.nytimes.com/2008/07/09/dining/09chip.html?\\_r=2&emc=tnt&tntemail0=y&oref=slogin&oref=slogin](https://www.nytimes.com/2008/07/09/dining/09chip.html?_r=2&emc=tnt&tntemail0=y&oref=slogin&oref=slogin) [https://perma.cc/7Q3K-J24J].

2. Ann Clayton, *Workers' Compensation: A Background for Social Security Professionals*, SOC. SEC. ADMIN., <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p7.html> [https://perma.cc/523F-66YY] (last visited Mar. 7, 2021).

mesothelioma where victims see a slim survival rate.<sup>3</sup> Mesothelioma is an aggressive, deadly form of cancer with no cure and few productive treatments.<sup>4</sup> Workers' compensation reform sought to provide enhanced benefits for those victims to compensate for his or her extreme suffering, but also insulate employers from the million-dollar verdicts arising in court.<sup>5</sup> However, this compromise proves only to be "fine," protecting some employees and employers, but it is not the "best." According to a recent Supreme Court of Missouri decision in *Hegger v. Valley Farm Dairy Co.*, the particular language of "elect to accept" in the enhanced benefits provision leaves a certain vulnerable class of employees with shaky compensation and employers with almost no protections.<sup>6</sup>

Part II of this Note first explores the facts and holding of *Hegger*. Next, Part III analyzes the legal background surrounding workers' compensation law generally, and dives specifically into the impact of mesothelioma on the law. Then, Part IV discusses the majority opinion and dissenting opinion of the Supreme Court of Missouri on *Hegger*. Finally, Part V analyzes the impact the present interpretation of the enhanced benefits statute has on workers' compensation law, mesothelioma victims, and employers at risk for mesothelioma litigation. This Note ultimately argues the enhanced mesothelioma statute as it stands is scant, only helping some of those it explicitly sought to protect. The Missouri legislature should not settle with such deficiency considering the gravity of the consequences.

## II. FACTS AND HOLDING

The late Vincent Hegger worked for Valley Farm Dairy Company ("Valley Farm") from 1968 to 1984.<sup>7</sup> Hegger mostly serviced industrial machinery, resulting in exposure to asbestos gaskets, asbestos insulation, and other components emitting inhalable asbestos fibers.<sup>8</sup> In 2014, Hegger's physician diagnosed him with mesothelioma caused by toxic asbestos

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3. Gideon Mark, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 874 (1983).

4. *Mesothelioma*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/mesothelioma/symptoms-causes/syc-20375022> [<https://perma.cc/9VSW-TSZT>] (last visited Feb. 13, 2021).

5. Kimberly D. Sandner, *Have Another Round On Me: Missouri Court Awards Workers' Compensation Benefits to Intoxicated Employees*, 67 MO. L. REV. 945, 952–53 (2002).

6. *Hegger v. Valley Farm Dairy Co.*, 596 S.W.3d 128, 133 (Mo. 2020) (en banc).

7. *Id.* at 129.

8. *Id.*

exposure.<sup>9</sup> Hegger died from the cancer in 2015.<sup>10</sup> Valley Farm retained a workers' compensation insurance policy "covering its entire liability for occupational disease during Hegger's employment" until it ceased operations in 1998.<sup>11</sup> Before his death, Hegger and his two adult children ("the Family") filed a claim for workers' compensation benefits.<sup>12</sup> Specifically, the Family sought enhanced benefits under Section 287.200.4(3)(a) of the Missouri Revised Statutes.<sup>13</sup> This Section reads as follows:

(3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:

(a) For employers that have *elected to accept mesothelioma liability* under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer or group of employers such employer is a member of. *Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool.*<sup>14</sup>

In brief, this Section concerning enhanced benefits allows for mesothelioma victims to recover additional benefits in addition to the benefits recovered under a traditional workers' compensation claim.<sup>15</sup>

After an evidentiary hearing on the matter,<sup>16</sup> an administrative law judge ruled Hegger's exposure to asbestos during his work at Valley Farm was the

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9. *Hegger v. Valley Farm Dairy Co.*, No. ED 106278, 2019 WL 2181663, at \*1 (Mo. Ct. App. May 21, 2019), *reh'g and/or transfer denied* (June 24, 2019), *transferred to Mo. S.Ct.*, 596 S.W.3d 128 (Mo. 2020).

10. *Hegger*, 596 S.W.3d at 129.

11. *Id.* Valley Farm's original policy covering Hegger did not explicitly cover mesothelioma. *Id.*

12. *Id.*

13. *Id.*; MO. REV. STAT. §§ 287.200.4(1), (3)(a) (2013).

14. MO. REV. STAT. §§ 287.200.4(3)(a) (emphasis added).

15. *Id.*

16. An evidentiary hearing is, in essence, a workers' compensation trial. *If Your Case Goes to Trial*, MO. DEP'T OF LAB. & INDUS. REL., [https://labor.mo.gov/DWC/Injured\\_Workers/expect\\_trial](https://labor.mo.gov/DWC/Injured_Workers/expect_trial) [<https://perma.cc/CLB4-3PB4>] (last visited Nov. 4, 2020). Most workers' compensation cases do not go to trial but are resolved by a settlement agreement. *Id.* Approximately 5% of workers' compensation cases actually go to trial. *Id.* The administrative law judge oversees the trial, listening to the evidence and ruling objections, and "decide[s] the case based upon the admissible evidence and the law." *Id.*

reason for Hegger’s mesothelioma diagnosis.<sup>17</sup> But the administrative law judge denied the claim regarding the Family’s request for enhanced benefits, and the Family appealed the decision.<sup>18</sup> The Labor and Industrial Relations Commission affirmed the denial of the benefits and incorporated the administrative law judge’s decision.<sup>19</sup> The Commission held the Family was not entitled to recover the enhanced benefit because “an employer that ceased operations sixteen years before [S]ection 287.4(3)(a) took effect could not have elected to accept enhanced liability under” the statute.<sup>20</sup>

The Family appealed the case to the Missouri Court of Appeals, Eastern District.<sup>21</sup> The appellate court found for the Family by interpreting the intent of the legislature in its creation of the enhanced benefits statute through a consideration of the plain and ordinary meaning of the statute’s terms, and gave effect to said intent.<sup>22</sup> The appellate court interpreted “elect to accept” to be defined as a constraint on the options by which an employer can “elect to accept” mesothelioma liability.<sup>23</sup> Thus, the appellate court held, under the first method, Valley Farm “elected to accept by insuring their liability.”<sup>24</sup> In other words, because Valley Farm’s insurance policy covered Valley Farm’s entire liability, regardless of the length of time, Valley Farm “elected to accept” the enhanced benefits by insuring their liability.<sup>25</sup> Moreover, the appellate court reasoned this interpretation of the enhanced benefits statute gives effect to the intent of the legislature in enacting the statute, which recognized the severity of mesothelioma requiring increased benefits for employees and limiting potential civil liability for employers.<sup>26</sup> This interpretation allows victims like Hegger to recover the enhanced benefits as

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17. *Hegger v. Valley Farm Dairy Co.*, No. ED 106278, 2019 WL 2181663, at \*1 (Mo. Ct. App. May 21, 2019).

18. *Hegger*, 596 S.W.3d at 129–30.

19. *Id.*; *Hegger*, 2019 WL 2181663, at \*1.

20. *Hegger*, 596 S.W.3d at 129–30.

21. *Id.*

22. *Id.*; *Hegger*, 2019 WL 2181663, at \*4, \*6.

23. *Hegger*, 596 S.W.3d at 129–30; *Hegger*, 2019 WL 2181663, at \*4, \*7. The court reasoned that “section 287.200.4(3)(a) provides three methods by which an employer may ‘elect to accept’ mesothelioma liability: (1) ‘insuring their liability,’ (2) qualifying as a self-insurer, or (3) becoming a member of a group insurance pool.” *Id.*

24. *Hegger*, 596 S.W.3d at 129–30.; *Hegger*, 2019 WL 2181663, at \*5 (quoting MO. REV. STAT. § 287.200.4(3)(a) (2013)) (internal quotations omitted).

25. *Hegger*, 596 S.W.3d at 129–30; *Hegger*, 2019 WL 2181663, at \*5.

26. *Hegger*, 596 S.W.3d at 129–30; *Hegger*, 2019 WL 2181663, at \*6.

their exclusive remedy, thus shielding Valley Farm from any civil liability.<sup>27</sup> Valley Farm appealed.<sup>28</sup>

The Supreme Court of Missouri held the Family was not entitled to the enhanced benefits because Valley Farm could not have affirmatively elected to accept such liability, as required by Section 287.200.4(3)(a), since Valley Farm ceased operations sixteen years before the statute was enacted by the legislature.<sup>29</sup>

### III. LEGAL BACKGROUND

Mesothelioma, or malignant mesothelioma, is a cancer of the tissue lining the lungs, stomach, heart, or other organs.<sup>30</sup> It has become one of the most prominent categories of workers' compensation claims.<sup>31</sup> There are approximately 3,000 new mesothelioma diagnoses and about 2,500 mesothelioma-related deaths in the United States each year.<sup>32</sup> Research suggests twenty million people in the United States risk developing mesothelioma at some point in their lives.<sup>33</sup> Typically, the cancer starts in the lungs.<sup>34</sup> Most people diagnosed with mesothelioma worked jobs where they inhaled asbestos particles.<sup>35</sup> After asbestos exposure, the cancer usually

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27. *Hegger*, 596 S.W.3d at 129–30; *Hegger*, 2019 WL 2181663, at \*6. The exclusive remedy provision limits a victim to only recovering benefits through the Workers' Compensation system. *Hegger*, 2019 WL 2181663, at \*2.

28. *Hegger*, 596 S.W.3d at 130.

29. *Id.* at 129.

30. *Mesothelioma*, MEDLINE PLUS, <https://medlineplus.gov/mesothelioma.html> [<https://perma.cc/7C8M-MZN3>] (last visited Sept. 20, 2020).

31. Linda Molinari, *Mesothelioma Statistics & Facts*, MESOTHELIOMA.COM, <https://www.mesothelioma.com/mesothelioma/statistics/#:~:text=57%2C657%20cases%20of%20mesothelioma%20were,2%2C651%20deaths%20reported%20in%202017> [<https://perma.cc/M9NX-CV9L>] (last visited Nov. 14, 2020).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* The following is a list of occupations where employees may have been at risk for asbestos exposure: Aerospace and missile production workers; Aircraft manufacturing production workers; Aircraft mechanics; Asbestos textile mill workers; Automobile manufacturing production workers (including automobile mechanics and brake repairers); Boilermakers; Brake and clutch manufacturing and assembly workers; Building engineers; Building materials products manufacturers; Cement plant production workers; Coast guardsmen; Construction workers (including insulators, boilermakers, laborers, steel/ironworkers, plumbers, steamfitters, plasterers, drywallers, cement and masonry workers, roofers, tile/linoleum installers, carpenters, HVAC mechanics, and welders); Custodians; Demolition and wrecking crews; Electrical workers (including electricians, electrical linemen, and telephone

develops approximately fifteen to thirty years later.<sup>36</sup> This time gap is known as the latency period.<sup>37</sup> Tragically, mesothelioma is uniformly fatal with a life expectancy of twelve to twenty-one months from diagnosis.<sup>38</sup> The cost of mesothelioma treatment could average between \$11,000 to \$12,000 per month including chemotherapy, surgery, and radiation.<sup>39</sup>

One of the more provocative aspects of mesothelioma is the timeline concerning when employers knew of asbestos exposure danger.<sup>40</sup> Case law suggests there was a known risk of exposure to asbestos by the mid-1930s.<sup>41</sup> A retroactive analysis may seem iniquitous, but a flood of asbestos litigation swamping the courts in the 1980s made the dangers to asbestos exposure general knowledge.<sup>42</sup>

With the serious aforementioned repercussions stemming from asbestos exposure in the workplace, victims sought compensation for their suffering, and employers sought protection from liability to ensure their companies

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linemen); Insulation manufacturing plant workers; Insulators; Longshoremen; Machinists; Merchant mariners; Packing and gasket manufacturing plant workers; Pipefitters; Powerhouse workers (including insulators and electric contractors); Protective clothing and glove makers; Railroad workers (including locomotive mechanics, car mechanics and rebuilders, and maintenance personnel); Refinery workers (including insulators and pipefitters); Refractory products plant workers; Rubber workers (including tire makers and hose makers); Sheetmetal workers; Shipyard workers (including electricians, insulators, laborers, ladders, painters, pipefitters, maintenance workers, and welders); Steamfitters; U.S. Navy personnel; Warehouse workers. 60 AM. JUR. TRIALS 73 (Originally published in 1996).

36. Piero Mustacchi, *Lung Cancer Latency and Asbestos Liability*, 17 J. LEGAL MED. 277, 284 (1996).

37. *Id.* at 277.

38. Mark, *supra* note 3, at 874.

39. Karen Selby, *Cost of Mesothelioma Treatment*, ASBESTOS.COM (Apr. 30, 2020), <https://www.asbestos.com/treatment/expenses/#:~:text=The%20cost%20of%20mesothelioma%20treatment,mesothelioma%20specialist%20may%20increase%20costs> [https://perma.cc/X5HU-H9W9]. Mesothelioma specialists may be more expensive. *Id.* According to the American Cancer Society's data from 2016, the average lung cancer patient's total annual cost of copays, coinsurance, deductibles, and insurance premiums was \$5,000 to \$10,000. *Id.*

40. Michelle Whitmer, *Asbestos Cover-Up*, ASBESTOS.COM, <https://www.asbestos.com/featured-stories/cover-up/> [https://perma.cc/4RGY-GHHC] (last visited Mar. 7, 2021).

41. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083–84 (5th Cir. 1973).

42. § 5:3. *How have courts handled asbestos cases?*, 1 Toxic Torts Prac. Guide § 5:3 (2020-2).

would not drown legally or financially.<sup>43</sup> Originally, in Missouri, an injured employee's only recourse for recovery was through common law tort subject to employer defenses which often undermined employee's claims.<sup>44</sup> Once the Missouri legislature ascertained data suggesting a majority of workers who suffered work-related injuries received no compensation, it enacted a workers' compensation statute in 1925.<sup>45</sup> The purpose of the statute was to "relieve society of the burden of supporting injured workers and their families, and place the cost and expense of production-related injuries on the consumer."<sup>46</sup> As a component of the functioning statute, employers purchase workers' compensation insurance to cover their liability for future employee injuries.<sup>47</sup> In theory, the consumer in the end pays the cost, but in practice, the employer purchases the insurance policy, providing a shield from future tort liability.<sup>48</sup>

In brief, the legislature struck a bargain.<sup>49</sup> The workers' compensation statute allowed injured employees to recover compensation for their work-related injuries without proving fault and ensured employers protection from future litigation.<sup>50</sup> This protection provides employees an exclusive remedy under workers' compensation.<sup>51</sup> In other words, in most cases, the employee may only recover damages via the workers' compensation legal system.<sup>52</sup>

In general, an employee files a claim and an administrative law judge, assigned by the Missouri Labor and Industrial Relations Commission, determines "whether the injury falls within the scope of the Act and the

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43. *Bass v. Nat'l Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. 1995).

44. Kimberly D. Sandner, *Have Another Round On Me: Missouri Court Awards Workers' Compensation Benefits to Intoxicated Employees*, 67 MO. L. REV. 945, 952 (2002).

45. *Id.*; *Bass*, 911 S.W.2d at 619.

46. Sandner, *supra* note 44 at 952; *see also* *Bethel v. Sunlight Janitor Serv.*, 551 S.W.2d 616, 618 (Mo. 1977); *Alexander v. Pin Oaks Nursing Home*, 625 S.W.2d 192, 193 (Mo. Ct. App. 1981) (overruled on unrelated grounds).

47. Erik Johnson, *Worker's Compensation for Farmworkers Long Overdue*, 39-FEB ADVOC (Idaho) 22 (1996).

48. *Id.*

49. N. Drew Kemp, Note, "Exclusively" Confusing: *Who Has Jurisdiction to Determine Jurisdiction Under the Missouri Workers' Compensation Law?*, 78 MO. L. REV. 897, 897 (2013).

50. *Id.*

51. *Wiley v. Shank & Flattery, Inc.*, 848 S.W.2d 2, 5 (Mo. Ct. App. 1992).

52. *Id.* Note, an employee may bring additional tortious actions concerning, for example, repercussions from filing a workers' compensation claim. *See* *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 385 (Mo. 2014), *as modified* (May 27, 2014).



employer's liability, if any."<sup>53</sup> In determining whether an employee may have a remedy under workers' compensation laws or under the common law is decided on a fact-specific case-by-case basis.<sup>54</sup> Generally, there must be an "accident" and an "injury," which fall under specific statutory definitions.<sup>55</sup> Under the statute, an "accident" is "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift."<sup>56</sup> After establishing an accident, "the employee must show [] the accident resulted in an injury and [] the injury arose out of, and in the course of, his [or her] employment."<sup>57</sup> An injury arises out of and is in the course of employment if:

- (a) [i]t is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) [i]t 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.<sup>58</sup>

The employee's compensation is typically "an amount equal to sixty-six and two-thirds percent of" their average weekly wage, with payment spanning a set period of time depending on the level of disability.<sup>59</sup>

If the work-related injury does not fall within the scope of the workers' compensation system, or if the workers' compensation law provides otherwise, the employee may file a common law claim against the employer.<sup>60</sup>

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53. Kemp, *supra* note 49, at 897.

54. 2A Mo. Prac. 4d *Methods of Prac.: Litigation Guide* § 27.4 (2020).

55. *Id.* Also note, the entire workers' compensation process is extensive, and substantially more complicated than just an "accident" and "injury," but for purposes of basic explanation, simplicity is preferred.

56. MO. REV. STAT. § 287.020.2 (2013).

57. 2A Mo. Prac. 4d *Methods of Prac.: Litigation Guide* § 27.4 (2020).

58. Schoen v. Mid-Missouri Mental Health Ctr., 597 S.W.3d 657, 660 (Mo. 2020) (citing MO. REV. STAT. § 287.020.3(2)(a)–(b)).

59. Mo. Rev. Stat. § 287.200 (2013). The levels of disability are typically divided as follows: temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability. *Benefits Available*, MO. DEPT. OF LAB. & INDUS. REL., [https://labor.mo.gov/DWC/Injured\\_Workers/benefits\\_available](https://labor.mo.gov/DWC/Injured_Workers/benefits_available) [<https://perma.cc/9KBY-RZHA>] (Feb. 13, 2021).

60. Kemp, *supra* note 49, at 897. Examples of specific injuries determined non-compensable include: where the employee tripped, slipped, fell, or injured themselves walking; where an employee is injured on a trip to or from work; where an assault was provoked by an employee or private quarrel; or where an employee had a heart attack during work, but was overweight, smoked, and did not exercise. *Annayeva v. SAB of*

Moreover, mesothelioma victims may qualify for alternative compensation including disability through the government, charities, suing the manufacturer, or trust funds.<sup>61</sup>

Originally, occupational diseases like mesothelioma fell under workers' compensation, meaning an employee's exclusive remedy was within workers' compensation law.<sup>62</sup> Early Missouri workers' compensation law was to be "liberally construed with a view to the public welfare."<sup>63</sup> Liberal construction allegedly increased the number of workers' compensation claims filed, increased insurance premiums for businesses, and increased fraudulent claims practices.<sup>64</sup> In 2005, Missouri workers' compensation law underwent major reform to address these issues.<sup>65</sup> Specifically, the amendment required "any reviewing courts shall construe the provisions of this chapter strictly."<sup>66</sup> Thus the definitions of work-related accidents and injuries were narrowed.<sup>67</sup> The goal of the narrowing was to "distinguish conditions that are truly a by-product of work as opposed to general health issues."<sup>68</sup> A consequence of this reform arose from the exclusivity provisions and the now tightly defined "accident"; in other words, the exclusive remedy defense for asbestos exposure was eliminated.<sup>69</sup> Thus, mesothelioma victims could bring common-law claims against their employers.<sup>70</sup> Legislative lobbyist groups for Missouri businesses were exceedingly concerned the latest reform would

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TSD of City of St. Louis, 597 S.W.3d 196, 200 (Mo. 2020); *Schoen*, 597 S.W.3d 657 at 661; *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 512 (Mo. 2012); *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 674 (Mo. 2009); *but see* Mo. Dep't of Soc. Servs. v. *Beem*, 478 S.W.3d 461, 468 (Mo. Ct. App. 2015) (holding employee's ankle injury from slipping on ice in company parking lot a compensable injury); *Gardner v. Contract Freighters, Inc.*, 165 S.W.3d 242, 246–47 (Mo. Ct. App. 2005); 2A Mo. Prac. 4d *Methods of Prac.: Litigation Guide* § 27.4 (2020).

61. *See infra* notes 153–62 and accompanying text.

62. *See* *Speck v. Union Elec. Co.*, 741 S.W.2d 280 (Mo. Ct. App. 1987).

63. *Dost v. Pevely Dairy Co.*, 273 S.W.2d 242, 244 (Mo. 1954).

64. Michael Banahan & Robert Hinson, *Missouri Lays Down the Law*, *INS. J.* (July 4, 2005), <https://www.insurancejournal.com/magazines/mag-features/2005/07/04/57762.htm#:~:text=The%20new%20Missouri%20legislation%20narrows,affecting%20an%20aging%20work%20force.&text=As%20redefined%20by%20the%202005,in%20the%20course%20of%2C%20employment> [https://perma.cc/4YRP-H5JC].

65. *Id.*

66. MO. REV. STAT. § 287.00.1 (2005).

67. Banahan & Hinson, *supra* note 64.

68. *Id.*

69. *State ex rel KCP&L Greater Missouri Operations Co.*, 353 S.W.3d 14, 30 (Mo. Ct. App. 2011).

70. *Id.* at 19–20.

expose employers to costly lawsuits, particularly mesothelioma cases.<sup>71</sup> For example, in June of 2009, a Missouri jury awarded \$4.5 million to the widow of an employee who died from mesothelioma contracted from installing ceiling tiles containing asbestos.<sup>72</sup> In Virginia, a jury awarded a victim of mesothelioma \$10.4 million.<sup>73</sup>

The legislature recognized the alarming consequence and in 2013 worked again to reform Missouri workers' compensation law.<sup>74</sup> Representing different interests of the injured workers and their employers, the Missouri Association of Trial Attorneys and the Missouri Chamber of Commerce and Industry assisted in drafting a compromise.<sup>75</sup> Senate Bill 1 ("SB 1") in 2013 sought to recategorize occupational diseases, such as mesothelioma, back into workers' compensation.<sup>76</sup> SB 1 "affirmatively states that occupational diseases are exclusively covered under workers' compensation laws."<sup>77</sup> But a question remained about suffering mesothelioma victims. Mesothelioma victim activists required the bill to also provide "an adequate remedy for people to recover money for serious diseases such as mesothelioma."<sup>78</sup> Thus, the legislation also provided an enhanced benefit provision specifically for employees diagnosed with mesothelioma.<sup>79</sup> Notably, as at issue in this Note,

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71. David A. Lieb, *Missouri Senate backs bill to replenish disability fund*, THE COLUMBIA MISSOURIAN (Feb. 12, 2013), [https://www.columbiamissourian.com/news/state\\_news/missouri-senate-backs-bill-to-replenish-disability-fund/article\\_4bd2eac0-be42-53b7-8b8c-9dfad509a146.html](https://www.columbiamissourian.com/news/state_news/missouri-senate-backs-bill-to-replenish-disability-fund/article_4bd2eac0-be42-53b7-8b8c-9dfad509a146.html) [https://perma.cc/27L9-SG2E].

72. 24-10 MEALEY'S LITIG. REP., ASBESTOS 2 (LexisNexis 2009). This case involved the widow suing the manufacturers of the ceiling tiles, but these large jury awards surrounding mesothelioma litigation concerned employers who were now susceptible to similar litigation. *See* Wagner v. Bondex Int'l, Inc., 368 S.W.3d 340, 345 (Mo. Ct. App. 2012).

73. John Crane, Inc. v. Jones, 274 Va. 581, 597, 650 S.E.2d 851, 853, 859 (2007). Again, this case involved a suit against the manufacturer of the asbestos laced products, but employers were still exposed to this costly litigation. *Id.*

74. David A. Lieb, *UPDATE: Missouri Senate backs bill aimed at injured workers*, THE COLUMBIA MISSOURIAN (May 15, 2013), [https://www.columbiamissourian.com/news/state\\_news/update-missouri-senate-backs-bill-aimed-at-injured-workers/article\\_a0c1ed8e-abd9-582d-89c5-133ba3e99e8d.html](https://www.columbiamissourian.com/news/state_news/update-missouri-senate-backs-bill-aimed-at-injured-workers/article_a0c1ed8e-abd9-582d-89c5-133ba3e99e8d.html) [https://perma.cc/RQ4Y-FGTU].

75. *Id.*

76. SB1, 2013 Leg., 113th Sess. (Mo. 2013).

77. *Id.*

78. Lieb, *supra* note 74.

79. MO. REV. STAT. § 287.200.4(3)(a) (2013).

in order to be shielded by workers' compensation law, the employers must "elect[] to accept mesothelioma liability."<sup>80</sup>

The enhanced benefits statute allows mesothelioma victims additional compensation, while also allowing employers a choice in how to handle potentially costly cases of mesothelioma.<sup>81</sup> Employers can cover their liability through the workers' compensation system or take their chances in court; seemingly because some employers' risk of exposing their employees to asbestos is low or nonexistent.<sup>82</sup> However, the "elect to accept" language raises legal questions because the term "elect" is not expressly defined in the statute.<sup>83</sup>

In *Accident Fund Insurance Co. v. Casey*, an employee for a construction contractor from 1984 to 1990 was exposed to asbestos and diagnosed with mesothelioma from which he died in 2014.<sup>84</sup> Before he died, the employee filed a workers' compensation claim for benefits against his previous employer, who was still in business.<sup>85</sup> The employer held an insurance policy with an endorsement which expressly contemplated enhanced compensation for mesothelioma claims under Section 287.200.4.<sup>86</sup> The court held the "[e]mployer elected to accept mesothelioma liability under [S]ection 287.200.4 [...] by selecting a policy that explicitly contemplated enhanced compensation for mesothelioma claims."<sup>87</sup> In other words, the employer affirmatively selected the insurance policy that explicitly covered the enhanced benefit after the statute took effect.<sup>88</sup> Thus, as interpreted in *Casey*, the statute requires an affirmative election.<sup>89</sup>

*Casey* addressed the situation where the still-operating employer selected an insurance policy which expressly adopts the enhanced benefits statute,<sup>90</sup> but it did not address the situation where the employer is no longer

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80. *Id.* See *supra* text accompanying note 14.

81. Lieb, *supra* note 74..

82. *Id.*

83. See *Hegger v. Valley Farm Dairy Co.*, 596 S.W.3d 128, 131–32 (Mo. 2020) (en banc); see also *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76, 80 (Mo. 2018) (en banc).

84. *Casey*, 550 S.W.3d at 78–79.

85. *Id.* at 79.

86. *Id.* at 80.

87. *Id.* .

88. *Hegger*, 596 S.W.3d at 132.

89. *Casey*, 550 S.W.3d at 80.

90. *Id.*

in business. Nor did it address the situation where the employer no longer operates in the state of Missouri.<sup>91</sup>

#### IV. INSTANT DECISION

The ultimate issue of *Hegger* is whether an employer, who is no longer in business, can “elect to accept mesothelioma liability” pursuant to a statute that did not exist until sixteen years after the company permanently ceased operations.<sup>92</sup> The majority opinion determined a now-defunct company could not have elected to accept mesothelioma liability because there is no default rule presuming election based solely on a company’s prior purchase of insurance.<sup>93</sup> The dissent pressed more emphasis on the company’s affirmative action to purchase insurance covering the company’s entire liability; thus, the employer must have anticipated covering future injuries arising out of the employee’s previous work.<sup>94</sup>

##### A. Majority Opinion

The majority opinion separated its reasoning into three main points: (1) Valley Farm could not elect to accept enhanced mesothelioma liability; (2) Legal precedent in *Casey* did not support the Family’s position; and (3) Now-defunct employers are not automatically deemed to have elected to accept enhanced liability per Section 287.200.4(3)(a) only by holding workers’ compensation insurance during an employee’s last exposure to asbestos.<sup>95</sup>

First, the majority determined Valley Farm could not elect to accept enhanced mesothelioma liability because the statute did not exist until sixteen years after the company ceased operations.<sup>96</sup> The operative, or functioning, verb in Section 287.200.4(3)(a) is the term “elect.”<sup>97</sup> Since the term is not explicitly defined in workers’ compensation law, the court gives the term its “plain and ordinary meaning as derived from the dictionary.”<sup>98</sup> The term

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91. Both situations are reasonably foreseeable considering the long latency period for mesothelioma to present (possibly 30 years), in which companies may close for many reasons, and the crippling litigation stemming from mesothelioma litigation potentially forcing employers out of business.

92. *Hegger*, 596 S.W.3d at 131.

93. *Id.* at 133.

94. *Id.* at 134–35 (Draper, J., dissenting).

95. *Id.* at 131–33 (majority opinion).

96. *Id.* at 131.

97. *Id.*

98. *Id.* at 131–32 (quoting *Mo. Pub. Serv. Comm’n v. Union Elec. Co.*, 552 S.W.3d 532, 541 (Mo. 2018) (en banc)).

“elect” means “to make a selection” or “to choose.”<sup>99</sup> Such terms require an affirmative act by the one selecting or choosing.<sup>100</sup> Thus, in applying the plain and ordinary meaning of the term elect to Section 287.200.4(3)(a), the legislature “intended to require employers to take some affirmative action with respect to the enhanced benefits to accept enhanced mesothelioma liability.”<sup>101</sup> It seems obvious an employer who no longer exists cannot affirmatively select or choose to do anything.<sup>102</sup> Therefore, Valley Farm could not affirmatively elect to accept liability to allow for the enhanced benefit, which took effect in 2014, because it ceased operations in 1998.<sup>103</sup>

Second, the majority determined the Family misinterpreted its previous decision in *Casey*.<sup>104</sup> In *Casey*, the employer affirmatively selected the insurance policy that explicitly covered the enhanced benefit after the statute took effect.<sup>105</sup> Valley Farm elected to purchase coverage against its “entire” workers’ compensation liability while Hegger was employed.<sup>106</sup> Unlike in *Casey*, Valley Farm’s policy did not expressly note coverage for the Section 287.200.4(3)(a) enhanced benefit.<sup>107</sup> Thus, the majority maintains Valley Farm could not have even contemplated such coverage because the company ceased operations sixteen years before the enhanced benefit under the statute took effect.<sup>108</sup>

Third, the majority held a now-defunct employer is not deemed to have affirmatively accepted enhanced liability under Section 287.200.4(3)(a) merely by having workers’ compensation insurance when the employee was last exposed to asbestos.<sup>109</sup> The majority reasoned a reading of the statutory language does not create a “default” rule.<sup>110</sup> Instead, under its plain language, the statute provides if the employer does not affirmatively elect to the enhanced mesothelioma liability, then the employer has rejected such liability.<sup>111</sup> The true default rule is without affirmative election, the company rejects enhanced mesothelioma liability.<sup>112</sup> Thus, just because a now-defunct

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99. *Id.* at 132 (quoting WEBSTER’S NEW INT’L DICTIONARY 731 (3d ed. 2002)).

100. *Id.* at 132.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 133.

110. *Id.*

111. *Id.*

112. *Id.*

employer held workers' compensation insurance covering all liability during the employee's last exposure to asbestos does not mean the company elected to accept enhanced liability under Section 287.200.4(3)(a).<sup>113</sup> Therefore, without the affirmative election, the company is exposed to civil liability with no protection under the workers' compensation statutes.<sup>114</sup>

### *B. The Dissent*

The dissent argued because Valley Farm affirmatively purchased workers' compensation insurance to cover future occupational injuries, the Family should be entitled to the enhanced mesothelioma benefits.<sup>115</sup> The focus was more on Valley Farm knowing the workers' compensation insurance it affirmatively purchased covered Valley Farm's entire liability for any employee's future injury, which covers occupational diseases.<sup>116</sup> Workers' compensation compensates an employer when the claimant has been injured, and in mesothelioma cases, when the claimant is diagnosed.<sup>117</sup> This insurance covers Valley Farm "regardless of the length of time" it took for an injury – the occupational disease – to manifest.<sup>118</sup> In other words, Valley Farm affirmatively purchased insurance to cover its future liability for such injuries, in this case, occupational diseases.<sup>119</sup> Thus, because Valley Farm affirmatively purchased insurance which covered its future liability for injuries, thus occupational diseases, Hegger should be provided enhanced mesothelioma benefits.<sup>120</sup>

## V. COMMENT

As Section 287.200.4 presently stands, it is deficient.<sup>121</sup> This Comment first recognizes the reasonableness of the Supreme Court of Missouri's interpretation of Section 287.200.4, but points to its patent unintended consequences. Asserting the existence of the unintended consequences is foreseeable considering the history of reform surrounding workers' compensation coupled with the original intentions surrounding the creation of enhanced benefits for mesothelioma patients. This Comment then challenges

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113. *Id.*

114. *Id.*

115. *Id.* at 134 (Draper, C.J., dissenting).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 135.

120. *Id.*

121. MO. REV. STAT. § 287.200.4 (2013).

the pattern of settling with the statute's present insufficiency through an analysis of the often cited alternatives for mesothelioma victims. Where the topic of a statute concerns physical and emotional human suffering, settling with a meager solution is wrong.

The *Hegger* dissenting opinion by the Missouri Court of Appeals, Eastern District, stated, "The Commission made a difficult decision from the human perspective, but the correct decision under the plain language of Section 287.200.4 and its legal obligation to apply the law as written—not as it would have it written."<sup>122</sup> This assessment is fair to the extent the purpose of the terminology "elect to accept" seems reasonable: employers can choose how to cover potential costly liability from mesothelioma either through the workers' compensation system via Section 287.200.4, or take a chance in court.<sup>123</sup> This reasoning stems from the idea that businesses may have never dealt with asbestos and their employees may have no risk of mesothelioma. Thus, the interpretation of the enhanced benefits statute by the Supreme Court of Missouri is reasonable because the "elect to accept" language was seemingly included to give employers an option to affirmatively elect to accept the enhanced benefits.

However, the dissent in the appellate court goes on to say:

The 2014 Amendment to the Act neither denies an employee suffering from mesothelioma traditional relief under the Act, nor forecloses that employee's right to pursue a civil claim for damages against the employer. *Hegger's* dilemma and unfortunate circumstance stem solely from the demise of his employer, Valley Farm, and not from an unintended consequence or oversight of the legislative revisions in 2014.<sup>124</sup>

Here lies the problematic impact of *Hegger* – there is an unintended consequence of the legislative revisions in 2014 with little attempt to expound on the issues and harmonize competing intentions. The enhanced benefits provision, as it stands, only protects some mesothelioma victims and some employers. As stated by the dissent, the reason for the scanty protections "stem[s] solely from the demise of his employer" not "from an unintended consequence or oversight of the legislative revisions in 2014."<sup>125</sup> Except it seems counterproductive to create a statute with the purpose of protecting a specific class of individuals, but then concede it does not protect some

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122. *Hegger v. Valley Farm Dairy Co.*, No. ED 106278, 2019 WL 2181663, at \*7 (Mo. Ct. App. May 21, 2019).

123. *Lieb*, *supra* note 74.

124. *Hegger*, 2019 WL 2181663, at \*16.

125. *Id.*



qualifying members of the intended class based solely on a circumstance out of the individual's control. Thus, it is sensible to at least posit the existence of an unintended consequence. Moreover, proposing the existence of an unintended consequence is reasonable considering the previously discussed history of the 2005 workers' compensation reforms.

From its conception, the enhanced benefit statute was the product of a compromise. On one side, the 2005 workers' compensation reform raised major concerns within the business communities due to the potential costly lawsuits swamping the courts.<sup>126</sup> On the other, sick employees needed an adequate remedy to recover money for such a serious disease as mesothelioma.<sup>127</sup> The commentary surrounding the statute supported the notion of a compromise. For example, Missouri Governor Nixon vetoed a bill in 2012 which would have solved the occupational disease problem of the 2005 reform, but he rejected the bill because it lacked adequate provisions regarding mesothelioma victim compensation.<sup>128</sup> Additionally, when asked about the nature of the statute, the Missouri Chamber of Commerce's president and CEO, Daniel P. Mehan, stated: "This is fair. If you have a claim, you're going to get taken care of."<sup>129</sup>

On its face and initial application, the enhanced benefits statute seems objectively fair. Again, an employer can choose to cover potentially costly mesothelioma claims through the workers' compensation system or take their chance in court. Thus, the injured employee can potentially recover enhanced benefits either way. Moreover, it is important to recognize these are enhanced benefits, the statute's purpose was to provide additional benefits to the injured employee's benefits he or she already recovers under a generic workers' compensation claim. These additional benefits sought to recognize the suffering involved when battling mesothelioma and the slow, painful death most mesothelioma victims face.<sup>130</sup> Simply put, the purpose of the enhanced benefits statute was to provide suffering mesothelioma victims with additional compensation for their agonizing situation, while also offering stability to the legal unknowns confronting employers dealing with potentially massive mesothelioma legal claims.<sup>131</sup>

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126. The Associated Press, *Missouri lawmakers pass changes to workers' comp claims*, THE COLUMBIA MISSOURIAN (May 16, 2013), [https://www.columbiaindianian.com/news/state\\_news/missouri-lawmakers-pass-changes-to-workers-comp-claims/article\\_6c5b77bb-15ab-5a9e-9bf8-ed7d8a225f25.html](https://www.columbiaindianian.com/news/state_news/missouri-lawmakers-pass-changes-to-workers-comp-claims/article_6c5b77bb-15ab-5a9e-9bf8-ed7d8a225f25.html) [<https://perma.cc/3KTK-3DMK>].

127. Lieb, *supra* note 74.

128. *Id.*

129. *Id.*

130. The Associated Press, *supra* note 127.

131. *Id.*

In application, the enhanced benefits statute is “fine” when levied against the original intentions of its creation; but not the “best.” The statute adequately fulfills its original intentions with two employee or employer situations: the employee with mesothelioma whose employer elected to accept the enhanced mesothelioma benefits and the employee with mesothelioma whose employer, still operating in Missouri, did not elect to accept the enhanced mesothelioma benefits. The employee whose employer elected to accept the enhanced benefits could potentially recover generic workers’ compensation benefits in addition to the enhanced benefits. The employee whose employer did not elect to accept the benefits could potentially recover generic workers’ compensation benefits and sue the employer in civil court for a hefty jury verdict.

However, two reasonably apparent employee or employer situations exist in direct opposition to the original enhanced benefits intentions, seemingly due to chance. First, there could be the employee with mesothelioma whose employer now operates in a different state. The employer, who potentially could not have known about the amended legislation, might not have affirmatively elected to accept and is now left vulnerable to uncertain, costly mesothelioma litigation. Second, as witnessed in *Hegger*, there could be the employee with mesothelioma whose employer is no longer operating. The employee may sue the employer, but if the employer has properly dissolved and closed the company, there is no one to sue in civil court.<sup>132</sup> The employee would only qualify to recover regular workers’ compensation benefits based on a fraction of their average weekly salary at the time of injury.<sup>133</sup> Hence, the enhanced benefits statute as written is “fine” because it does offer some compensation and some protection; but it is not the “best” because a seemingly common group of employees or employers are wholly excluded, solely by chance. In theory, these employees or employers squarely fit into the category of individuals the legislature intended to compensate or protect in its enactment of the enhanced benefits statute – compensate suffering mesothelioma employees and protect employers from costly litigation. However, the only reason they do not receive the benefits of the enhanced benefit statute is because the employer unfortunately chose to operate in a different state, or the employee unfortunately worked for a company which is now out of business.

The “it’s fine” mentality is consequentially hardened when vague arguments, as proposed in an amicus brief to the *Hegger* case, vindicate the statute’s insufficiency by claiming a significant number of mesothelioma victims will not be left without a remedy “given other available resources for

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132. MO. REV. STAT. § 347.139, 351.476 (2020).

133. *Benefits Available*, *supra* note 59.

compensating victims of asbestos-related disease.”<sup>134</sup> In light of the human perspective, an approximation of the different outcomes should be analyzed to determine the weight and reality of the aforementioned presumption.

Assume the mean Missouri Machinery Maintenance Worker’s hourly wage in 2014 was \$21.18 and average weekly wage was \$847.20.<sup>135</sup> Victim 1, a machinery maintenance worker, is diagnosed with mesothelioma and files a workers’ compensation claim. Victim 1 can recover traditional occupational disease benefits of approximately \$564.80 per week “based upon 66 2/3% of [Victim 1’s] average weekly earnings at the time of the injury [...]”<sup>136</sup> Moreover, Victim 1 seeks enhanced benefits under Section 287.200(4)(3)(a) because Victim 1’s employer elected to accept such benefits. Thus, Victim 1 may also recover “an amount equal to 300 percent of the state average weekly wage (“SAWW”) for 212 weeks.”<sup>137</sup> So, the amount equal to 300 percent of \$179,606.40 ( $\$847.20 \times 212$ ) is \$538,819.20. In sum, Victim 1, solely through workers’ compensation law, may recover approximately \$564.80 per week plus \$538,819.20 where Victim 1’s employer elected to accept the enhanced benefits under the statute.

Victim 2, also a machinery maintenance worker, is diagnosed with mesothelioma and files a workers’ compensation claim. Victim 2 can recover traditional occupational disease benefits of approximately \$564.80 per week “based upon 66 2/3% of [Victim 2’s] average weekly earnings at the time of the injury...”<sup>138</sup> However, Victim 2’s employer, still operating, did not elect to accept the enhanced benefits. So, Victim 2 files suit in civil court, as allowed by Section 287.200(4)(3)(b).<sup>139</sup> The average jury award for asbestos

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134. Brief of Amici Curiae American Property Casualty Insurance Ass’n and Missouri Insurance Coalition in Support of Respondents at 16, *Hegger v. Valley Farm Dairy Co.*, 596 S.W.3d 128 (Mo. 2020) (en banc) (No. SC97993), 2019 WL 5548018, at \*16.

135. *Occupational Employment and Wage Estimates (OES)*, MO. ECON. RES. AND INFO. CTR., <https://meric.mo.gov/data/occupation/occupational-employment-wages> [<https://perma.cc/PW8U-G6NK>] (last visited Nov. 14, 2020).

136. *Benefits Available*, *supra* note 59. These calculations are only a hypothetical and assume no other extraneous legal issues or claims arise.

137. *Id.* These calculations are only a hypothetical and assume no other extraneous legal issues or claims arise.

138. *Id.* These calculations are only a hypothetical and assume no other extraneous legal issues or claims arise.

139. MO. REV. STAT. 287.200.4(3)(b). (“For employers who reject mesothelioma under this subsection, then the exclusive remedy provisions under section 287.120 shall not apply to such liability. The provisions of this paragraph shall expire on December 31, 2038; and ...”).

related litigation in 2019 was \$4.3 million.<sup>140</sup> In 2019, mesothelioma awards ranged from \$2.38 million to \$25 million.<sup>141</sup> Additionally, the success rate for mesothelioma victims in court was about 32%.<sup>142</sup> Victim 2 could also settle with the employer, but settlement amounts depend on the individual case.<sup>143</sup> Thus, even taking into consideration litigation costs as well as attorney compensation, Victim 2's award in court could be massive, or potentially nothing more than the normal amount.

Victim 3, a machinery maintenance worker, is diagnosed with mesothelioma and files a workers' compensation claim. Victim 3 can recover traditional occupational disease benefits of approximately \$564.80 per week "based upon 66 2/3% of [Victim 3's] average weekly earnings at the time of the injury..."<sup>144</sup> However, Victim 3's employer did not affirmatively elect to accept the enhanced benefits and is no longer operating with no individual or entity to sue in civil court.<sup>145</sup> So, if Victim 3 were to end seeking more compensation here, Victim 3 would only recover through the traditional occupational disease benefits. These benefits are a fraction of what potential medical costs could be.<sup>146</sup> Victim 3 may have other options for supplemental benefits through assets outside of the tort system.<sup>147</sup> Victim 3 may be able to receive Social Security Disability Insurance or Supplemental Security Income, if Victim 3 qualifies.<sup>148</sup> There are several charities which may provide financial assistance for treatment, travel, or lodging for some mesothelioma victims.<sup>149</sup> Victim 3 may qualify for a clinical trial where the experimental treatment would be free.<sup>150</sup> Most notably, Victim 3 could seek out the manufacturer of the asbestos or asbestos-laden products which they

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140. *Asbestos Verdicts and Settlements: January 2019 – December 2019*, 35-13 MEALEY'S LITIG. REP.: ASBESTOS 18, Aug. 3, 2020. Note the 2019 numbers also include talc litigation, which has as of late been more prominent in asbestos litigation.

141. *Id.* Note the 2019 numbers also include talc litigation, which has as of late been more prominent in asbestos litigation.

142. *Id.* Note the 2019 numbers also include talc litigation, which has as of late been more prominent in asbestos litigation.

143. *Id.* Note the 2019 numbers also include talc litigation, which has as of late been more prominent in asbestos litigation.

144. *Benefits Available*, *supra* note 59. These calculations are only a hypothetical and assume no other extraneous legal issues or claims arise.

145. Assume the employer followed proper closing processes so there is no individual to sue on the company's behalf.

146. *See supra* text accompanying notes 132–40.

147. *See infra* notes 153–62 and accompanying text.

148. Selby, *supra* note 39.

149. *Id.*

150. *Id.*

were exposed to and sue for damages.<sup>151</sup> The lawsuits against asbestos manufacturers can potentially be substantial.<sup>152</sup> However, due to the massive jury awards to mesothelioma victims, a great number of the asbestos-laden product manufacturers were forced into bankruptcy.<sup>153</sup> But these manufacturers could still be held liable for the damage their asbestos products caused.<sup>154</sup> As a result of bankruptcy, coupled with the need for manufacturer accountability, asbestos trust funds were established so certain mesothelioma victims could be compensated.<sup>155</sup> Victims could be entitled to recover from multiple trust funds.<sup>156</sup> The average compensation from asbestos trust funds for mesothelioma claims is approximately \$180,000, but varies from person to person.<sup>157</sup> In the end, Victim 3 may be able to access these benefits, assuming Victim 3 has proper representation, qualifications, and finances. In comparison to the other two options, which fall under the enhanced benefits statute, Victim 3 could potentially see considerably less compensation solely because Victim 3's employer inadvertently stopped business operations.

Thus, the amicus brief's claim supports the "it's fine" approach because mesothelioma victims have some options for seeking remedies, assuming they have the access, representation, qualifications, and financial support to do so. Yet, this position loses veracity when situated alongside the original intentions of the enhanced benefits statute. The purpose of the compromise was to ensure employees suffering from mesothelioma could recover additional benefits in light of the cost of mesothelioma treatment, pain, and suffering.<sup>158</sup> The compromise was also designed to protect employers from the potential financially crippling litigation which was arising out of the court systems.<sup>159</sup> The application of the enhanced benefits statute, likely unintentionally, ignores a certain group of employees and employers.

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151. *Id.*

152. *Poage v. Crane Co.*, 523 S.W.3d 496, 506 (Mo. Ct. App. 2017) (awarding a widow \$11.5 million).

153. Cooper Smith, *The Costs of Mesothelioma*, MESOTHELIOMA HUB, <https://www.mesotheliomahub.com/legal-help/mesothelioma-costs/> [<https://perma.cc/BT9R-M9DJ>] (last visited Nov. 14, 2020).

154. *Id.*

155. *Id.*

156. Jennifer Lucarelli, *Mesothelioma and Asbestos Trust Funds*, MESOTHELIOMA.COM, <https://www.mesothelioma.com/lawyer/compensation/trusts/#author-bio> [<https://perma.cc/53FQ-Y8X4>] (last visited Nov. 14, 2020).

157. Stephanie Kidd, *Asbestos Trust Funds*, MESOTHELIOMA CANCER NETWORK, <https://www.asbestos.net/legal/asbestos-trust-funds/> [<https://perma.cc/Q72L-UTWK>] (last visited Nov. 14, 2020).

158. Lieb, *supra* note 74.

159. *Id.*

It should not be “fine” for parties whom the statute originally intended to compensate and protect to be excluded from benefitting almost purely by chance. Moreover, it should not be “fine” particularly when the parties involved are dying a slow, excruciating death from a cancer likely caused by toxic asbestos exposure at work, or are left exposed to unknown, financially crippling litigation.<sup>160</sup> Vincent Hegger’s case, where a mesothelioma victim did not receive enhanced benefits, is antithetic to the intentions of the enhanced benefits statute.

## VI. CONCLUSION

In creating the enhanced benefits provision to workers’ compensation, the legislature likely strived for “the best.” The intention for including the “elect to accept” language sought to create a wholistic compromise between compensating employees with mesothelioma, while also protecting employers. Nonetheless, in application, the language rejected certain mesothelioma victims and certain employers the statute initially sought to compensate and protect. The realization of this unintended consequence is reasonable, particularly in the light of the 2005 workers’ compensation reform. The legislature should not settle with an “it’s fine” mentality resulting from the *Hegger* litigation. The legacy of harmonious compromise existing in workers’ compensation law serves as a guide to reach the potential “best” legislation for mesothelioma victims and employers.

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160. *Id.*