

SUPREME COURT OF MISSOURI

JAMES WINBERRY, deceased)	
Barbara J. Winberry, Jacob Winberry,)	
Joshua Winberry, Hannah Winberry,)	
John Winberry, Heather Winberry, and)	
James Winberry,)	
)	
Appellants,)	Cause #: 88979
)	
vs.)	Eastern District #ED89770
)	
TREASURER OF THE STATE OF)	
MISSOURI, AS CUSTODIAN OF)	
THE SECOND INJURY FUND,)	
)	
Respondent.)	

SUBSTITUTE BRIEF OF APPELLANTS, JAMES WINBERRY, et al.

GAULT & WARNER, LLC
Jeffrey P. Gault #28734
222 S. Central #500
Clayton, MO 63105
Phone: (314) 863-2230
Fax: (314) 863-2348
Attorney for Employee/Appellant
James Winberry, et al

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JURISDICTIONAL STATEMENT

This action involves the Appeal of an order from the Missouri Labor and Industrial Relations Commission (Commission) which failed to exercise jurisdiction and order a substitution of parties on a Workers' Compensation Award. Appellants requested continuation of permanent total disability payments from the Second Injury Fund pursuant to the recent Supreme Court holding of Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007) after the death of the Employee, James Winberry. The Court of Appeals Eastern District entered its Order affirming the Commission's denial of jurisdiction but transferred the case to this Court. The Supreme Court of Missouri has jurisdiction of this matter pursuant to Missouri Supreme Court Rule 83.02, because this case was ordered transferred to the Supreme Court by the Missouri Court of Appeals Eastern District, due to the general interest and importance of the issue concerning the application of Schoemehl to the transfer of permanent total disability benefits to dependents. Therefore, this action involves the construction of the Workers' Compensation Laws of this State.

STATEMENT OF FACTS

James Winberry was an employee of Ford Motor Company (Ford) for approximately 20 years, starting work in 1977 and stopping in 1997 (TR. 12). Winberry was hired at Ford as an assembly line worker in 1977 and performed heavy overhead work which required using heavy power tools, holding pieces of automobile frames and equipment, and constantly working overhead (TR. 13). Winberry developed pain in his neck and shoulder areas from the strenuous overhead work and eventually reached a point where he could no longer raise his arms above his head (TR. 17-18). After significant medical treatment Winberry was unable to return to work after March 14, 1997; a point at which he could no longer perform any work due to the pain in his neck and shoulders (TR. 20-21). Winberry was diagnosed with a herniated disc in his cervical spine (TR. 598) a torn left rotator cuff, and chronic impingement of his right shoulder (TR. 546- 548) all caused by his overhead work, which was corroborated by medical testimony (TR. 600-603, TR. 558). Winberry also exhibited significant prior disabilities of: (1) flat feet causing him to lose balance when he walked (TR. 24,25); (2) bilateral carpal tunnel syndrome affecting his hands and arms (TR. 25,26); (3) a fractured left wrist causing left arm weakness (TR. 26,27); and (4) sleep apnea causing him to be constantly tired (TR. 28,29, TR. 257-298).

Winberry was adjudicated permanently and totally disabled by the Administrative Law Judge who heard his case, with the award on hearing ordered May 24, 2000 (LF. 16-32). The award determined his primary injury to his neck and shoulders as the cause of his total disability; awarding permanent total disability (PTD) benefits to Winberry and against

the Employer, Ford (LF. 16-32). Ford appealed the decision to the Labor and Industrial Relations Commission (Commission) which, on December 7, 2000, affirmed the finding of PTD but modified the award to a finding of permanent partial disability against Ford and PTD against the Second Injury Fund (LF. 41-60). No further appeal was taken to the Court of Appeals. The Commission's award became final and payments to Winberry commenced.

Winberry died on February 16, 2006 of causes unrelated to his work injury (LF. 61). As his death was unknown to the Treasurer, the Second Injury Fund continued depositing checks to Winberry's account following his death for a period of approximately 9 months (LF. 65-82). At the Treasurer's request all post death payments were returned by Winberry's widow, Barbara (LF. 65-82).

On December 13, 2006, the Commission issued an Order to Show Cause as to why the file should not be terminated allowing thirty days for a response. (L.F.62). In response, on January 11, 2007, Barbara Winberry, for herself, and her minor children, plus her two adult disabled children Heather and James Jr., requested that the presumed dependants and actual dependants of James Winberry be substituted as the parties to receive continuing payments following her husband's death in accordance with the recent Supreme Court holding of Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007) (LF. 63-64). On May 2, 2007 the Commission entered its Order which refused to order continuation of PTD benefits citing a lack of statutory authority and lack of jurisdiction (LF. 86).

The dependents of James Winberry, deceased, next appealed to the Missouri Court of Appeals, Eastern District, which affirmed the holding of the Commission on December 4, 2007 (ED #89770), but transferred the case to the Supreme Court pursuant to Rule 83.02 due to the general interest and importance of the issue concerning the application of Schoemehl to the continuation of PTD benefits to dependents.

POINT RELIED ON

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN REFUSING TO ACCEPT JURISDICTION OF APPELLANTS' MOTION TO TRANSFER PERMANENT TOTAL DISABILITY PAYMENTS BECAUSE MO. REV. STAT. §287.200(2) (2000) REQUIRES THAT THE DIVISION OF WORKERS' COMPENSATION AND THE COMMISSION RETAIN JURISDICTION DURING THE LIFETIME OF AN INJURED EMPLOYEE WHO HAS RECEIVED AN AWARD OF PERMANENT TOTAL DISABILITY IN THAT THE COMMISSION HAS FAILED TO EXERCISE A POWER GRANTED TO IT BY STATUTE WHICH REQUIRES APPELLANTS AS EMPLOYEE'S DEPENDENTS TO BE SUBSTITUTED IN EMPLOYEE'S PLACE AND RECEIVE HIS PERMANENT TOTAL DISABILITY PAYMENTS BY VIRTUE OF THE HOLDING OF SCHOEMEHL V. TREASURER OF THE STATE OF MISSOURI, 217 S.W.3d 900 (MO. 2007).

Mo. Rev. Stat. §287.200 (2) (2000)

Mo. Rev. Stat. §287.020(1) (2000)

Schoemehl v. Treasurer Of The State Of Missouri, 217 S.W.3d 900 (Mo. 2007)

Smith v. Ozark Lead Co., 741 S.W.2d 802 (Mo.App.S.D. 1988) overruled on other grounds in Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)

ARGUMENT

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN REFUSING TO ACCEPT JURISDICTION OF APPELLANTS' MOTION TO TRANSFER PERMANENT TOTAL DISABILITY PAYMENTS BECAUSE MO. REV. STAT. §287.200 (2) (2000) REQUIRES THAT THE DIVISION OF WORKERS' COMPENSATION AND THE COMMISSION RETAIN JURISDICTION DURING THE LIFETIME OF AN INJURED EMPLOYEE WHO HAS RECEIVED AN AWARD OF PERMANENT TOTAL DISABILITY IN THAT THE COMMISSION HAS FAILED TO EXERCISE A POWER GRANTED TO IT BY STATUTE WHICH REQUIRES APPELLANTS AS EMPLOYEE'S DEPENDENTS TO BE SUBSTITUTED IN EMPLOYEE'S PLACE AND RECEIVE HIS PERMANENT TOTAL DISABILITY PAYMENTS BY VIRTUE OF THE HOLDING OF SCHOEMEHL V. TREASURER OF THE STATE OF MISSOURI, 217 S.W.3d 900 (MO. 2007).

By its Order of May 2, 2007 the Labor and Industrial Relations Commission has refused to extend jurisdiction to the issues raised by Appellants in their Motion to Substitute Parties and Request For Transfer of Payments (LF. 86). By failing to exercise jurisdiction the Commission has failed to perform a power granted to it by Statute. One Statute which grants that authority is Mo. Rev. Stat. §287.200 (2) (2000) which states in pertinent part as follows:

2. All claims for permanent total disability shall be determined in accordance with the facts. When an injured employee receives an award for permanent

total disability but by the use of glasses, prosthetic appliances, or physical rehabilitation the employee is restored to his regular work or its equivalent, the life payment mentioned in subsection 1 of this section shall be suspended during the time in which the employee is restored to his regular work or its equivalent. **The Employer and the Division shall keep the file open in the case during the lifetime of any injured Employee who has received an award of permanent total disability.** In any case where the life payment is suspended under this subsection, the Commission may at reasonable times review the case and either the Employee or Employer may request an informal conference with the Commission relative to the resumption of the Employee's weekly life payment in the case. (Emphasis added)

This Statute clearly vests jurisdiction with the Commission in cases involving lifetime PTD payments. The Court of Appeals decided that the jurisdiction extended by this statute is limited to those situations where the Employee is able to return to employment, which does not apply to the present fact situation. Appellant's position is that the statute is not so limited. In Smith v Ozark Lead Co., 741 S.W.2d 802, 810(Mo.App. S.D.1987) overruled on other grounds in Hampton v. Big Boy Steel Erection, (121 S.W.3d 220 (Mo. 2003) the Southern District Court of Appeals interpreted §287.200(2) to apply to any injured employee receiving an award of PTD. The Court stated:

Those characteristics, however, are inherent in any award where there is total permanent disability. Section 287.200.2, RSMo Cum.Supp. 1975,

supra, provides that when an injured employee receives an award for permanent total disability but by the use of prosthetic appliances or physical rehabilitation is restored to his regular work or its equivalent, the life payment of compensation shall be suspended. That is evidently one of the purposes of the requirement in said statute that the employer and the division keep the file open in the case during the lifetime of any injured employee receiving an award of total permanent disability.

It is also noteworthy that §287.470, RSMo 1978, authorizes the Commission to review any award on the ground of a change in condition, and on such review to make an award ending, diminishing or increasing the compensation previously awarded.

The Smith case provides that all PTD cases require its file be “kept open” and therefore jurisdiction retained by the Commission. To limit jurisdiction to only those cases in which an employee is restored to work, as the Eastern District Opinion herein suggests, requires a case to be placed in a jurisdictional no-man’s land which can only have issues determined if an Employee in a PTD case is restored to work. If the Commission only receives jurisdiction when an Employee is returned to work, then the other statutory provisions which provide jurisdiction also would not apply in those cases. The Commission clearly has been provided jurisdiction by several other statutes or regulations to resolve factual questions after a final award has been issued. Smith, supra, 741 S.W.2d at 810, acknowledges Mo. Rev. Stat §287.470 (2000) which provides that the Commission may review any award on the grounds of a change of condition. Smith stands for the

proposition that any award which includes ongoing benefits is subject to modification from time to time as ongoing awards are not said to lapse. Smith supra, 741 S.W.2d 802, 810. As Mo. Rev. Stat §287.470 provides that the Commission may review the award “at any time” upon a change of condition, then death of the Employee should qualify as such a change of condition. Additionally, the Courts have held that the “at any time” language of §287.470 means before payment of the award or before the expiration of the time during which the award is to be paid, whichever is later, Holman v. Normandy Osteopathic Hospital, 691 S.W.2d 360 (Mo.App.E.D. 1985). The Schoemehl holding has clearly extended the time during which payment is to be made to the dependents of James Winberry. This general rule granting jurisdiction is followed by several other specific provisions and rules which similarly allow for the taking of additional evidence: Mo. Rev. Stat. §287.203 (2000) (Commission may hold hearings concerning an employer’s termination of permanent total disability); 8 C.S.R. 20-3.010(4) (Commission may hold hearings to modify the payment of benefits to dependents after a final award has been issued).

In this case all necessary elements required to confer jurisdiction through §287.200(2) have been met. PTD benefits were awarded (LF. 41-60); and the file was not terminated before the request to substitute parties was filed (LF. 86). The Commission’s order refusing jurisdiction fails to exercise a clearly established power granted to it by Statute which requires the Commission to rule on the issues of dependency and transfer of payments. The Commission’s failure to accept jurisdiction and rule on this issue is therefore contrary to the power granted to it by Statute. The Commission apparently

determined that it retained adequate jurisdiction in this case in order to issue the Show Cause Order of December 13, 2006 (L.F. 62), and also determined that it retained adequate jurisdiction to terminate the file if no response was filed (L.F. 62). The Commission also determined that it maintained adequate jurisdiction to not terminate the file in its order of May 2, 2007 (L.F. 86). Only after the Schoemehl holding directed the Commission to transfer payments to dependents did the Commission determine that jurisdiction did not exist. To allow the Commission to arbitrarily decide when it has jurisdiction (such as to issue Show Cause Orders and to terminate a file), and when it does not have jurisdiction (to determine dependency in accordance with Schoemehl) produces an anomaly. If the logic of the Court of Appeals Opinion herein is followed, a file which “must remain open in cases of permanent total disability” only remains open after a disabled worker returns to work, and never for any other reason. Appellants suggest and the Smith rationale provides that Mo. Rev. Stat. §287.200(2) requires that all files must remain open when PTD has been awarded because the award does not lapse.

By failing to exercise jurisdiction, the Commission has ignored the requirements of §287.200(2) to leave the file open and thereby left Appellants with no forum to bring their application for the transfer of benefits. The Workers’ Compensation Act does allow for the filing of a certified copy of an Administrative Order pursuant to Mo. Rev. Stat. §287.500 (2000) in Circuit Court in order to register the Administrative Order as a judgment. This remedy, however, merely enters the judgment as a Circuit Court judgment and provides the Circuit Court with no discretion to change or modify the award; it may

only enter judgment in accordance with the Commission's Award, Taylor v. St. John's Regional Health Center, 161 S.W.3d 868 (Mo. App. S.D. 2005)

In Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007) the Supreme Court of Missouri ordered that payments to a deceased Employee from the Second Injury Fund be transferred to the deceased Employee's dependents. The Supreme Court reasoned that by virtue of the language contained in Mo. Rev. Stat. §287.230(2) (2000) that a surviving dependent at the time of an Employee's death prevents the cessation of benefits. The Court stated that since Mo. Rev. Stat. §287.230(2) states that when an Employee dies from a cause other than his or her work injury, compensation ceases "unless there are surviving dependents at the time of death". In making this interpretation, the Supreme Court has decreed that when dependents survive a deceased Employee who was receiving PTD benefits, the cessation of those benefits is prevented and therefore, no other enforcement actions are required. The Schoemehl decision also analyzes the language of another Statute in addition to Mo. Rev. Stat. §287.230(2) which provides the basis to award continuing payments to the dependents. Particularly important to the Schoemehl decision is the definition section of Mo. Rev. Stat. §287.020 (1) (2000) which provides that:

Any reference to any Employee who has been injured shall, when the Employee is dead, also include his dependents and other persons to whom compensation may be payable.

The Schoemehl Court concluded that since Mo. Rev. Stat. §287.230 (2) provides that when the Employee is entitled to Compensation and death ensues, compensation

ceases when the Employee dies from a cause other than his or her work injury, “unless there are surviving dependents at the time of death.” Similarly, combining the definition contained in §287.020(1) above with the “unless there are surviving dependents” language of §287.230(2), also requires the Commission to determine the issue of dependency and correspondingly transfer any payments to the deceased Employee’s dependents according to Schoemehl. As the Circuit Court is unable to affect or change an award, only register it, Taylor, *Supra*, the Commission is therefore the only body capable of entering the order declaring dependency and ordering payment thereon. In cases where dependents survive the Employee, compensation clearly shall not cease according to the Schoemehl ruling. In this case, the dependents of James Winberry, deceased, are entitled to receive his Permanent Total Disability payments, simply because they were Winberry’s surviving dependents at the time of his death, without requiring any further Circuit Court enforcement actions.

The Court of Appeals Opinion herein and the Commission’s Order of May 2, 2007 (L.F.86) cites Falk v. Barry, Inc., 158 S.W. 3d 327 (Mo. App. W.D. 2005) as authority that the Commission is unable to enforce a Workers’ Compensation Award and must leave that power to the Judiciary (LF. 86). Certainly, Falk stands for the rule that enforcement proceedings such as garnishment or collections must be filed in Circuit Court outside of the Administrative process. Falk, a death case, decided that the Commission’s authority to amend an award had expired, because the time to appeal the death award to the Commission had expired, thereby leaving the Commission without jurisdictional authority to amend the award based on the time limit which provided that jurisdiction. There is no

time limit issue in the present case because the Commission by its own order exercised jurisdiction to not terminate the file (L.F. 86). The limitations defined by Falk do not address the issue raised in the present case, because the authority and therefore jurisdiction to keep the file open is found in the Schoemehl decision and by virtue of §287.200(2) which requires it. By granting the Commission the authority to keep a file open to any injured Employee who has received a lifetime payment, jurisdiction is naturally extended to the Employee's dependents by the operation of Mo. Rev. Stat. §287.020(1), §287.230(2) and the Schoemehl holding. No requirement to enforce that order by collection or garnishment is required and the Commission must be ordered on remand to enter its order transferring PTD payments to Winberry's dependents.

CONCLUSION

Schoemehl, Supra, extended the requirement that dependents of a deceased Employee continue to receive the deceased Employee's PTD payments following his death. No further Circuit Court action is required to transfer those payments other than the Commission's order to do so. The Commission's failure to exercise jurisdiction amounts to a refusal to act, and is therefore contrary not only to the statutory authority found in Mo. Rev. Stat. §287.200 (2) (2000), but also is contrary to the Schoemehl decision and the reasoning found in Smith, supra. Jurisdiction is not limited to only those cases involving a return to work, as any case may potentially involve that issue, and therefore all PTD files must remain open. All PTD cases must maintain an "open file" because a PTD award is ongoing and does not lapse, Smith, supra. The Commission's and the Eastern District's reliance on Falk to deny jurisdiction also fails to consider the precise issue raised in this Appeal, which requires this Court to remand the case back to the Commission with directions to enter an Order consistent with the evidence transferring payments to Winberry's dependents. The Commission must be ordered to exercise jurisdiction; enter its order declaring dependency; and order resumption of payments both retroactive and prospective to James Winberry's surviving dependents. The Commission's Order of May 2, 2007 incorrectly concluded that the Appellants requested enforcement of the Award, when in fact the Appellants were simply requesting the Commission to exercise the authority granted to it by Statute and due to the Schoemehl decision, its requirement to determine dependency and enter its order for continuing benefits to the Appellants.

Respectfully Submitted,

JEFFREY P. GAULT #28734
222 S. Central, #500
Clayton, MO 63105
Phone: (314) 863-2230
Fax: (314) 863-2348
Attorney for Appellant,
James L. Winberry, deceased, et al

CERTIFICATE OF SERVICE

Ten (10) copies of the foregoing Appellants James L. Winberry, deceased, et al, Brief and Appendix and 3 ½” computer diskette were delivered by Federal Express this _____ day of _____ 2007, to the Supreme Court of Missouri 207 W. High St., Jefferson City, MO 65101 and two (2) copies by regular U.S. Mail to Respondent’s attorney, Ms. Carol Barnard, Assistant Attorney General, P.O. Box 861, St. Louis, MO 63188

JEFFREY P. GAULT #28734
222 S. Central, #500
Clayton, MO 63105
Phone: (314) 863-2230
Fax: (314) 863-2348
Attorney for Appellant, James L.
Winberry, deceased, et al.

CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 84.06(b) and 84.06(c) and contains 3,218 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus free.

JEFFREY P. GAULT #28734
222 S. Central, #500
Clayton, MO 63105
Phone: (314) 863-2230
Fax: (314) 863-2348
Attorney for Appellant, James L.
Winberry, deceased, et al.

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