

**IN THE
SUPREME COURT OF MISSOURI**

No. SC88992

JOHN COX, deceased, and BETTY COX,
Appellants,

v.

TREASURER OF THE STATE OF MISSOURI,
as Custodian of the Second Injury Fund,
Respondent.

Appeal from the Labor and Industrial
Relations Commission
#01-037458

**SUBSTITUTE BRIEF OF APPELLANTS JOHN COX (deceased) AND BETTY
COX**

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JURISDICTIONAL STATEMENT

This is a workers' compensation case involving the question of whether the Labor and Industrial Relations Commission has jurisdiction to determine the entitlement of dependents to the permanent total disability benefits of an injured worker upon the death of that worker, and hence involves the construction of the Missouri Workers' Compensation Act.

Mr. John Cox sought recovery from the Francis Howell School District (hereinafter "Employer") and the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund (hereinafter "Respondent") for injuries sustained by way of an accident which occurred on April 24, 2001. On July 11, 2003 an administrative law judge of the Division of Workers' Compensation entered judgment in favor of Mr. Cox, finding Employer liable for permanent partial disability, and finding Respondent liable for permanent total disability. Employer satisfied its portion of the judgment and is therefore not a party to this Appeal. Respondent paid weekly benefits to Mr. Cox until his death on February 25, 2006.

Following the cessation of benefits, counsel for Mr. and Mrs. Cox contacted the clerk with the Division of Workers' Compensation who is charged with the administration of payments in Second Injury Fund (hereinafter "Fund") permanent total disability claims. Correspondence was sent on April 5, 2006 and January 11, 2007, asserting that the death of Mr. Cox did not terminate the Fund's liability for benefits. Rather, it was asserted, Mrs. Cox was by law authorized to continue receiving Mr. Cox's permanent total disability benefits upon his death. Apparently, the clerk notified the Labor and Industrial Relations

Commission (hereinafter “Commission”) of the correspondence, as the Commission issued a letter on April 9, 2007 which provided Respondent with the opportunity to file a response. Respondent then filed its “Answer of the Missouri State Treasurer, as Custodian of the Second Injury Fund, to the Letter Requesting Reinstatement of Benefits.” The Commission followed with an Order issued on May 2, 2007 which found that it lacked jurisdiction to consider the matter. Appellants then perfected this Appeal by filing a Notice of Appeal with the Commission on May 22, 2007.

An appeal was then taken to the Missouri Court of Appeals, Eastern District, pursuant to the general appellate jurisdiction of the Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri, as amended 1970. The Eastern District ruled on December 4, 2007 that it would affirm the Commission’s dismissal for lack of jurisdiction, but nevertheless transferred the matter to the Supreme Court of Missouri due to the general importance of the case.

STATEMENT OF FACTS

The facts of this matter are largely, if not completely, undisputed. An administrative law judge with the Division of Workers' Compensation issued an Award on July 11, 2003. (Record on Appeal¹ p. 15-65). It was found that the Francis Howell School District (hereinafter "Employer") was liable for a ten percent (10%) disability to Mr. Cox on account of injuries sustained to his left shoulder. (ROA p. 16, 64). It was also found that Mr. Cox was rendered unemployable in the open labor market due to the combination of disabilities from his left shoulder and pre-existing medical conditions. (ROA p. 16, 64). As such, the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund (hereinafter "Respondent"), was found to be liable for providing permanent total disability benefits to Mr. Cox in the amount of \$417.06 per week. (ROA p. 16, 64). The Award was not appealed by any party. Rather, Employer paid its liability and closed its file, while Respondent first paid the past due amounts it owed, and then initiated a schedule of payments to Mr. Cox of \$417.06 per week.

Mr. Cox died on February 25, 2006. Shortly thereafter, counsel for Appellants placed a telephone call to the Division of Workers' Compensation clerk responsible for administration of Second Injury Fund permanent total disability payments. That clerk, Ms. Linda Koelling, responded by sending a letter dated March 9, 2006 to counsel for Appellants.

¹The Record on Appeal was submitted in two parts: 1) Record on Appeal (ROA), filed June 7, 2007; and 2) Supplemental Record on Appeal (Supp. ROA), filed August 6, 2007.

(Supp. ROA p. 1). She advised that she had made payments beyond Mr. Cox's date of death totaling \$1,298.24. (Supp. ROA p. 1). Ms. Koelling requested reimbursement for the claimed overpayment, and further requested that she be given a copy of Mr. Cox's death certificate. (Supp. ROA p. 1). The death certificate was never provided, but on April 5, 2006 counsel for Appellants forwarded checks sufficient to reimburse the payments made to Mr. Cox beyond his date of death. (Supp. ROA p. 2-4). Ms. Koelling was also advised at the time that it was Appellants' position that Second Injury Fund liability for permanent total disability benefits did not end with Mr. Cox's death. (Supp. ROA p. 2-4).

At the time of Mr. Cox's death, this Court's decision in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), had not yet issued.² It was eventually handed down on January 9, 2007, holding that liability for permanent total disability benefits does not necessarily end with the death of the injured worker. *Id.* On January 11, 2007 counsel for Appellants sent additional correspondence to Ms. Koelling, advising her of the decision in *Schoemehl*, and demanding that permanent total disability benefits be brought up to date, paid to Mrs. Cox, and continued for the remainder of her life. (ROA p. 66). Mrs. Cox decided at that time that if benefits were not reinstated, she would then file a Motion for

²On February 25, 2006, Ms. Schoemehl's claim had been denied by both the Division of Workers' Compensation and the Labor and Industrial Relations Commission. It was pending at the Missouri Court of Appeals, Southern District.

Determination of Surviving Dependents with the Labor and Industrial Relations Commission, just as soon as the Supreme Court issued its mandate in *Schoemehl*. That mandate was eventually issued on April 23, 2007. *Id.*

On April 9, 2007, two weeks before issuance of the *Schoemehl* mandate, the Commission sent a letter to the parties which stated that it had received a copy of Appellants' letter to Ms. Koelling of January 11, 2007. (Supp. ROA p. 14). The Commission forwarded a copy of the January 11th letter to Respondent, and gave Respondent ten days in which to file a response. (Supp. ROA p. 14). On or about April 17, 2007, Respondent filed a pleading entitled "Answer of the Missouri State Treasurer, as Custodian of the Second Injury Fund, to the Letter Requesting Reinstatement of Benefits." (ROA p. 67-69). The Commission followed with an Order issued on May 2, 2007, which found that: a final award had been issued; the Commission has no authority to further delineate the award or expound on its meaning; the Commission has no authority to enforce a workers' compensation award; and the "request of alleged dependent" must therefore be dismissed. (ROA p. 67-69). On May 22, 2007 Appellants filed their Notice of Appeal to the Missouri Court of Appeals, Eastern District. (ROA p. 71-77). The Eastern District affirmed the Order on December 4, 2007, but transferred the case to the Missouri Supreme Court due to the general importance of the matter involved. Appellants also filed a Motion with the Commission asking for a hearing to answer the two fact questions which are dispositive of the issue of whether permanent total disability benefits will cease, or will continue, as per §287.230.2. To date, that Motion has not been ruled upon.

POINT RELIED ON

The Labor and Industrial Relations Commission erred in finding that it does not have jurisdiction over Mrs. Cox's claim to a continuation of permanent total disability benefits following the death of Mr. Cox, because the Missouri Supreme Court stated in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007) that: 1) §287.230.2 of the Missouri Workers' Compensation Law establishes a right to a continuation of such benefits if the injured worker dies of causes unrelated to the work injury and leaves behind dependents; and 2) the determination of whether a worker's death is from unrelated causes, as well the determination of whether dependents have survived the worker, are questions of fact within the exclusive jurisdiction of the Commission; in that the Commission's finding leaves Mrs. Cox without legal means of determining her entitlement to benefits under the Missouri Workers' Compensation Act, and in that the Commission's finding creates a constitutional infirmity concerning matters of due process and equal protection; such that the Commission's finding should be reversed and remanded to the Commission with instructions to conduct such further hearings as may be necessary to determine Mrs. Cox's entitlement to a continuation of permanent total disability benefits.

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

Parmer v. Bean, 636 S.W.2d 691 (Mo. App. 1982).

Greenlee v. Dukes Plastering Service, 75 S.W.3d 273 (Mo. 2002).

Smith v. Semo Tank & Supply Co., 99 S.W.3d 11, 13 (Mo.App. 2002).

Mo. CODE REGS. ANN. 8, §20-3.010(4) (1993).

Mo. Const. Art. I, §2.

Mo. Const. Art. V, §18.

Mo. REV. STAT. §287.200.2 (1994).

Mo. REV. STAT. §287.203 (1994).

Mo. REV. STAT. §287.220 (1994).

Mo. REV. STAT. §287.230.2 (2004).

Mo. REV. STAT. §536.100 (2000).

U.S. Const. Amend. XIV.

ARGUMENT

The Labor and Industrial Relations Commission erred in finding that it does not have jurisdiction over Mrs. Cox's claim to a continuation of permanent total disability benefits following the death of Mr. Cox, because the Missouri Supreme Court stated in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007) that: 1) §287.230.2 of the Missouri Workers' Compensation Law establishes a right to a continuation of such benefits if the injured worker dies of causes unrelated to the work injury and leaves behind dependents; and 2) the determination of whether a worker's death is from unrelated causes, as well the determination of whether dependents have survived the worker, are questions of fact within the exclusive jurisdiction of the Commission; in that the Commission's finding leaves Mrs. Cox without legal means of determining her entitlement to benefits under the Missouri Workers' Compensation Act, and in that the Commission's finding creates a constitutional infirmity concerning matters of due process and equal protection; such that the Commission's finding should be reversed and remanded to the Commission with instructions to conduct such further hearings as may be necessary to determine Mrs. Cox's entitlement to a continuation of permanent total disability benefits.

I. Standard of Review

Appellants assert that the Labor and Industrial Relations Commission (hereinafter

“Commission”) erred in finding that it had no jurisdiction to determine whether Mrs. Cox was entitled to benefits as per §287.230.2 of the Missouri Workers’ Compensation Statutes, and in so doing, deprived Mrs. Cox of a forum in which to determine her eligibility to a continuance of the permanent total disability benefits that Mr. Cox was receiving prior to his death. Appellate courts review such issues without giving deference to the Commission’s judgment, so long as they are clearly interpretations or applications of law. *Pierson v. Treasurer of the State of Missouri, as custodian of the Second Injury Fund*, 126 S.W.3d 386, 387 (Mo. 2004). But review of questions of fact are different, requiring an affirmation of the Commission’s findings so long as they are supported by competent and substantial evidence, and so long as they are not clearly contrary to the overwhelming weight of the evidence. *Sutton v. Vee Jay Cement Co.*, 37 S.W.3d 803, 807 (Mo.App. 2000), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003). The Workers’ Compensation Law is to be liberally construed with a view to the public welfare, though substantial compliance with the statutes is sufficient to give effect to the Commission’s awards. *Pierson*, at 387-388; MO. REV. STAT. §287.800 (1993). And all doubts are to be resolved in favor of the employee. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 923 (Mo.App. 1982).

II. The Commission’s Order of May 2, 2007

A. The Genesis of the Current Dispute

The dispute in this matter arose when a worker, who had previously received an Award for permanent total disability benefits, died. Following his death, his wife sought to

“step into his shoes” and continue receiving his benefits, as per the Supreme Court’s ruling in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007). Respondent refused to continue payment of the benefits to Mrs. Cox, and the Commission thereafter issued an Order concluding it had no jurisdiction over the matter because a final award had been issued. (ROA p. 70). The Commission seemed to distinguish the current matter from that in *Schoemehl*, stating that a final award had been issued in this matter *before* Mr. Cox died. (ROA p. 70). In *Schoemehl* the administrative law judge did not issue an award until *after* Mr. Schoemehl died. *Id.*, at 901. The Commission therefore found that it had no jurisdiction to consider Mrs. Cox’s claim for benefits. (ROA p. 70).

B. The Genesis of the Commission’s Order

The Commission’s Order came about in a rather unusual fashion. Mr. Cox had been injured in a work-related accident on April 24, 2001. (ROA p. 20). His case went to trial, and on July 11, 2003, while Mr. Cox was still alive, an administrative law judge of the Division of Workers’ Compensation issued an award. (ROA p. 15-65). In that Award it was found that Mr. Cox had been rendered unemployable in the open labor market due to disabilities from his April 24, 2001 work accident combined with those from his pre-existing medical conditions. (ROA p. 16, 64). As such, Respondent was found to be responsible for payment of weekly permanent total disability benefits. (ROA p. 16, 64). The Administrative Law Judge’s Award was not appealed, and Respondent thereafter paid benefits until Mr. Cox’s death on February 25, 2006.

Respondent’s payment of weekly benefits was actually administered by a clerk with

the Division of Workers' Compensation named Linda Koelling. Ms. Koelling was contacted shortly after Mr. Cox's death and advised of his passing.³ She responded that checks had been issued to Mr. Cox beyond the date of his death, and that reimbursement should be made. (Supp. ROA p. 1). Mrs. Cox provided that reimbursement, but at the same time advised Ms. Koelling in a letter dated April 5, 2006 that she believed Respondent remained liable for weekly benefits. (Supp. ROA p. 2-4). Ms. Koelling did not respond.

With the lack of a response, Mrs. Cox decided that she would file appropriate pleadings with the Labor and Industrial Relations Commission to challenge the cessation of benefits, just as soon as a final decision had been rendered in a pending and pivotal case on point: *Schoemehl v. Treasurer of the State of Missouri*. The *Schoemehl* matter was docketed at the time with the Missouri Court of Appeals, Southern District. Both the Division of Workers' Compensation (hereinafter "Division") and the Commission had already denied Ms. Schoemehl's request for a continuation of her husband's permanent total disability benefits, and the Court of Appeals eventually did the same in a decision dated May 9, 2006.

On June 30, 2006 the Missouri Supreme Court accepted transfer of the *Schoemehl* matter, and on January 9, 2007 it issued its opinion in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), reversing the Commission and ruling that liability for permanent total disability benefits does not necessarily end with the injured worker's death. Two days later, Mrs. Cox referenced the *Schoemehl* decision in a second letter to Ms.

³No written record exists of this contact, as it was done over the telephone by counsel for Mrs. Cox.

Koelling, again asserting that the permanent total disability benefits should not have stopped. (ROA p. 66). When no response was received, Mrs. Cox determined that she would proceed with the filing of appropriate pleadings with the Commission to have the matter brought before them, just as soon as the Supreme Court's mandate was issued in *Schoemehl*. That mandate eventually issued on April 23, 2007. *Id.*

On April 9, 2007, two weeks *before* the *Schoemehl* mandate was issued, the Commission, without prompting, sent a letter to counsel in this matter. (Supp. ROA p. 1). That letter indicated that the Commission was in possession of the letter which counsel for Appellants sent to Ms. Koelling (of the Division of Workers' Compensation) on January 11, 2007. (Supp. ROA p. 1). The Commission provided *Respondent* with the opportunity to explain its position on the cessation of benefits. (Supp. ROA p. 1). Appellants were not given an opportunity to explain their position, and the explanation which Respondent provided contained material information which is untrue: it advised the Commission that a formal order had been issued by the Commission in March of 2006 -- after the death of Mr. Cox -- which terminated the case. (ROA p. 67-69). No such order had ever been issued, but the Commission, apparently operating under the assumption that it had, concluded in its May 2, 2007 Order that it had no further jurisdiction. (ROA p. 70). The Order concluded that the Commission no longer has jurisdiction over this matter because it has no authority to enforce or expound on a final award. (ROA p. 70). Appellants thereafter filed an appeal with the Missouri Court of Appeals, Eastern District. Appellants also filed a Motion with the Commission asking for a hearing to determine the two fact questions which are dispositive

of the issue of whether permanent total disability benefits will cease, or will continue, as per §287.230.2. To date, that Motion has not been ruled upon.

III. The Commission's Jurisdiction Over Questions of Fact

A. In General

The Labor and Industrial Relations Commission, as with all Missouri administrative agencies, is invested by law with jurisdiction to review issues and promulgate rules concerning matters falling within its purview. The Commission's purview, among other things, includes authority over injuries occurring in the workplace, because:

[s]ection 287.120 provides that the rights and remedies granted the employee under the Workers' Compensation Law are exclusive and preclude all common law remedies. *Parmer v. Bean*, 636 S.W.2d 691, 693 (Mo. App. 1982). Once the employer, the employee and the accident fall under the Workers' Compensation Law, the case is cognizable by the Labor and Industrial Relations Commission and the Commission's jurisdiction is original and exclusive. *Id.*; *Sheen v. DiBella*, 395 S.W.2d 296, 302 (Mo. App. 1965).

State ex rel J. E. Jones Constr. Co. v. Sanders, 875 S.W.2d 154, 156 (Mo.App. 1994). This, in essence, is the "doctrine of primary jurisdiction," which gives the Commission "all powers, duties and responsibilities conferred or imposed upon it by the workers' compensation law" when a situation presents which requires its special expertise. MO. REV. STAT. §286.060.1(3) (1995); see also *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 8 (Mo. 1992); *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 815 (Mo.App. 2002), *overruled*

on other grounds in Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo.banc 2003).

“Primary jurisdiction” is a doctrine:

based on a judicial policy of self-restraint [which] calls upon a court to defer and give an administrative agency the first right to consider and act upon a matter which calls for factual analysis or the employment of special expertise within the scope of the agency’s responsibility entrusted to it by the legislature.

Main Line Hauling Co., Inc. v. Public Serv. Commission, 577 S.W.2d 50, 51 (Mo.App. 1978). Therefore, since the Commission has been granted “special expertise” over the resolution of workers’ compensation factual issues, further court review is precluded until there has been an “exhaustion of administrative remedies.” Mo. Const. Art. V, §18; Mo. REV. STAT. §536.100 (2000); see also *Farm Bureau Town and Country Ins. Co. of Mo. v. Angoff*, 909 S.W.2d 348, 352 (Mo.banc 1995).

B. Factual Questions Which Arise Upon Death of Permanently and Totally Disabled Worker

The Supreme Court ruled in *Schoemehl* that dependents of permanently and totally disabled workers are entitled to continue receiving the injured worker’s permanent total disability benefits upon his death, *so long as*: 1) the injured worker died from causes unrelated to his workplace accident; and 2) the injured worker was survived by dependents. *Schoemehl*, 217 S.W.3d at 902. The ruling was based largely on the language of §287.230.2 of the Missouri Workers’ Compensation Law, which states:

[w]here an employee is entitled to compensation under this chapter for an injury received and death ensues for any cause not resulting from the injury for which he was entitled to compensation, payments of the unpaid accrued compensation shall be paid, but payments of the unpaid unaccrued balance for the injury shall cease and all liability therefore shall terminate unless there are surviving dependents at the time of death.

MO. REV. STAT. §287.230.2 (2004). Having so decided, the Supreme Court remanded the *Schoemehl* matter to the Labor and Industrial Relations Commission, which found that Ms. Schoemehl was an “employee” under the law, and therefore entitled to a continuation of benefits.

And so it is in the current matter, that when Mr. Cox died -- while he was receiving permanent total disability benefits -- questions of fact were raised which fall squarely within the primary and exclusive jurisdiction of the Labor and Industrial Relations Commission: 1) did Mr. Cox die from causes unrelated to his workplace accident; and 2) was Mr. Cox survived by dependents, as defined by the Workers’ Compensation Law? *Schoemehl*, 217 S.W.3d at 902.

IV. The Question of Whether the Worker’s Death was Unrelated to Work Injury

Anytime a worker dies from causes that are arguably “work related,” the determination of the cause of death is a factual question subsumed within the jurisdictional boundaries of the Labor and Industrial Relations Commission. *Lewis v. Champ Spring Co.*, 145 S.W.2d 758, 762 (Mo.App. 1941). The Court in *Lewis* stated:

the ultimate issue in the case largely resolves itself into one of which of the two conflicting medical or scientific theories to accept regarding the cause of [the worker's] death. *That, of course, was an issue peculiarly for the commission to determine*, and, as the scope of our review is restricted by the act, we may not interfere with the findings of the commission if supported by sufficient competent evidence. (*Emphasis added*).

Id., see also: *Cardwell v. White Baking Co.*, 299 S.W.2d 452 (Mo. 1957). And, as in all matters involving complex medical issues, the Commission is required to have the support of expert medical opinion before making a determination. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974).

And so, a pertinent and complex medical issue presented itself upon Mr. Cox's death: was his death related to his original work injury of April 24, 2001? If it was, then Mrs. Cox is not entitled to a continuation of Mr. Cox's permanent total disability benefits, because Missouri Law allows a continuation only when the death was *unrelated* to the work injury. MO. REV. STAT. §287.230.2 (2004). In other words, if the accident of April 24, 2001 was "a substantial factor"⁴ in the cause of Mr. Cox's death, then the *Schoemehl* ruling is inapplicable in this matter, and Respondent has no further liability for permanent total disability benefits. But as the matter stands, we don't know whether Respondent remains liable because the Commission refused to address the question, and other courts will invariably refuse to hear it when the statutorily mandated administrative remedies have not been exhausted. MO. REV.

⁴MO. REV. STAT. §287.020.2 (1994).

STAT. §536.100 (2000); *Kunzie v. City of Olivette*, 184 S.W.3d 570, 571 (Mo.banc 2006).

V. The Question of Whether there are Surviving Dependents

The second question which arose on the death of Mr. Cox was that of whether he was survived by any dependents, because this Court has said that any claimed dependents must not only have been actually dependent on the injured worker, but they must have been so at the time of injury. *Schoemehl*, at 902-903. It is clear that dependency questions are also questions of fact for the Commission, as:

[f]indings of fact on the question of dependency are for the industrial commission and not for this court to determine, (citation omitted), and like other findings of fact are not to be set aside except where clearly contrary to the overwhelming weight of the evidence.

Daniels v. Kroeger, 294 S.W.2d 562, 565 (Mo.App. 1956). Yes, there are issues related to dependency that the Commission does not have jurisdiction to determine, such as paternity; *Poole Truck Lines, Inc. v. Coates*, 833 S.W.2d 876 (Mo.App. 1992); but the question of who was actually dependent on an injured worker is a question of fact solely within the Commission's purview. See *Ricks v. H. K. Porter, Inc.*, 439 S.W.2d 164 (Mo. 1969); *Dykes v. Thorton*, 282 S.W.2d 451 (Mo. 1955). So the Commission is vested with the duty to determine who is -- and who is not -- a "dependent" within the meaning of the Workers' Compensation Law, and its failure to do so has left Mrs. Cox without a tribunal in which to seek relief.

VI. The Commission's "Show Cause" Orders

The Labor and Industrial Relations Commission has an established practice of issuing “show cause” orders in permanent total disability cases after a permanently and totally disabled worker has died. Their practice, after learning of a totally disabled worker’s death, has been to issue a show cause order, collect information, and then issue an Order terminating the case unless the evidence shows some reason why the case should remain open.

In this matter, it should be remembered that when Respondent filed its Answer to the Commission it stated that “[t]he Order terminating those benefits, based upon the death of Employee, was entered by the Commission in March 2006.” (ROA p. 68). In other words, Respondent advised the Commission that it had issued a ruling, one month after Mr. Cox had died, which terminated the permanent total disability benefits. This statement, apart from being false, seems illogical because Respondent has argued all along that the Commission has no jurisdiction over permanent total disability awards after an award is issued. In this case the Award was issued in 2003. So if the Commission lost jurisdiction in 2003, then how could it issue rulings and an Order in March of 2006?

The reasoning behind Respondent’s statement is Respondent’s assumption that an order of termination had been issued in this matter, because the Commission has an established practice of issuing such orders upon the death of permanently and totally disabled workers. For instance, the same three Commission members who denied jurisdiction over Mrs. Cox’s claim followed this practice in the matter of *John A. Scott, deceased v. Missouri Highway and Trans. Comm.*, Missouri Labor and Industrial Relations Commission, No. 96-

110731 (January 23, 2003). In that case, Mr. Scott had been found to be permanently and totally disabled in an Award dated January 23, 2003. *Id.* No appeal was taken, and Mr. Scott thereafter died on October 21, 2004. *Id.* The Commission received a copy of Mr. Scott's death certificate, and on November 23, 2005 it issued an Order to Show Cause as to why the Commission "should not enter an order terminating the award dated January 23, 2003." *Id.* After taking such evidence it decided not to terminate the Award, and instead returned it to the Division of Workers' Compensation. *Id.* Then, on February 27, 2006, the parties reached an agreement as to the termination of the award, and the Commission therefore terminated it "in its entirety." *Id.*

Another example is contained within a file currently pending before this Court. In *Winberry v. Treasurer of the State of Missouri*, #SC88979, the Commission similarly issued an Order to Show Cause as to why it should not terminate the award, after the death of Mr. Winberry. *Id.* Counsel for Mr. Winberry's dependents thereafter provided the Commission with evidence as to why the Award should remain open, and the Commission thereafter decided not to terminate it. *Id.*

Respondent assumed that the Commission had issued an order of termination because it incorrectly assumed that the Commission had issued a show cause order upon Mr. Cox's death. But no such order was ever issued, and the reason it wasn't issued was because of how this case has developed. Remember that after Mr. Cox died his counsel placed a telephone call to the Division of Workers' Compensation clerk who is responsible for administration of Second Injury Fund permanent total disability payments. That clerk

responded by requesting that she be given a copy of Mr. Cox's death certificate. (Supp. ROA p. 1). But counsel for Appellants never sent it. Instead, he advised the clerk that Appellants' were of the opinion that the Second Injury Fund remained liable for permanent total disability benefits. (Supp. ROA p. 2-4). The Commission therefore never issued a "show cause" order, and it never terminated the Award.

Respondent obviously believes that an order of termination is significant to the Commission's jurisdiction, because it raised the issue in its Answer to the Commission's request for information pertaining to its continuing jurisdiction. If the Commission can terminate its award, then it is not final. See *Smith v. Semo Tank & Supply Co.*, 99 S.W.3d 11, 13 (Mo.App. 2002). And since the Award was never terminated, the Commission should have accepted jurisdiction and answered the factual questions which arose on Mr. Cox's death.

VII. *Greenlee v. Dukes Plastering Service*

A proper handling of this matter would have been for the Commission to remand the matter to the Division of Workers' Compensation, which could then have given both parties the opportunity to seek and present expert witness testimony concerning the cause of Mr. Cox's death, as well as evidentiary testimony concerning dependency. This would have allowed the Commission to determine whether Mr. Cox died of causes related to his work accident, and whether he was survived by "dependents," as defined by the Workers' Compensation Law. Because in fact, the Commission has followed this same procedure in the past.

While there are no cases directly on point, because the *Schoemehl* decision did not exist until January 9, 2007, the matter of *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 274 (Mo. 2002), is very similar. Mr. Greenlee was injured when he fell from a scaffolding and injured his head and neck. He thereafter developed both depression and a seizure disorder. *Id.*, at 275. His case was tried before the Division of Workers' Compensation, and an administrative law judge found him to be permanently and totally disabled. *Id.* An appeal was filed to the Commission, but while it was pending Mr. Greenlee died from a self-inflicted gunshot wound. *Id.* The Commission's award on appeal was issued posthumously, in January 1996, and it affirmed the finding of permanent total disability. *Id.*

Mr. Greenlee's surviving spouse thereafter filed a new claim for compensation, based upon her husband's death. *Id.* She apparently believed Mr. Greenlee's fall caused his depression, and that his depression resulted in his suicide, so she alleged that she was entitled to receive death benefits. In January of 2000, four years after issuing its award of permanent total disability, the *Commission* suggested to Ms. Greenlee that filing a new claim was not the proper procedure, and that the correct procedure was to file a motion to modify the permanent total disability award which had issued four years earlier. *Id.* This, they said, was because an appeal had been pending before them at the time Mr. Greenlee died. *Id.*

So in approximately March of 2000 Ms. Greenlee filed such a motion. The Commission accepted jurisdiction and remanded the matter to the Division so that an administrative law judge could develop a record as to whether Mr. Greenlee's death was

related to his original work injury. *Id.* In other words, the Commission determined that factual questions arose -- four years after the issuance of the permanent total disability award -- that fell within its jurisdiction and allowed it to take additional evidence. *Greenlee* therefore stands for the fact that the Commission has jurisdiction, after issuance of a permanent total disability award, to develop a record and issue rulings on key questions of fact: 1) was Mr. Greenlee's death related to his original workplace accident; and 2) were there dependents who survived him?

Mrs. Cox asserts that the same two questions are relevant to a determination of her claim for a continuation of permanent total disability benefits, and Mrs. Cox is asking for nothing more than that which the Supreme Court granted to Ms. Greenlee.

VIII. The Effect of the Commission's Failure to Accept Jurisdiction

If the Commission does not accept jurisdiction over a matter that is within its primary jurisdiction, other courts cannot simply take up the matter and issue a ruling. Subject matter jurisdiction cannot be conferred on one tribunal if the matter falls within the jurisdiction of another, *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 72 (Mo.banc 1982), which means that a circuit court is not going to decide whether an injured workers' death was work-related, nor whether the worker was survived by dependents. Nor should they even be asked to do so. The exhaustion of remedies doctrine states:

[o]nly "final decisions, findings, rules and orders" of an administrative agency are subject to review as provided by law. Mo. Const. art. V, § 18. The relevant statute, § 536.100, provides for judicial review only by a "person who

has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case.”

Farm Bureau Town and Country Ins. Co. of Mo. v. Angoff, 909 S.W.2d 348, 352 (Mo. banc 1995); MO. REV. STAT. §536.100 (2000). And:

[t]he policy reasons for the exhaustion doctrine are clear. Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. *Weinberger v. Salfi*, 422 U.S. 749, 766, (1975).

Id.

So the Commission’s refusal to accept jurisdiction in this matter effectively allows Respondent (who was the losing party in *Schoemehl*) to nullify the Supreme Court’s *Schoemehl* decision, which, unfortunately, seems to be Respondent’s motive in this matter. This motive can be seen in the contradictory arguments made by Respondent in other permanent total disability cases issued since *Schoemehl*. On the one hand, in the current matter, Respondent’s argument has been one in which it basically states that it is “too late” to determine the issues of “cause of death” and “dependency,” because an award has been issued. But in a decision issued earlier this year by the Labor and Industrial Relations Commission, through the Division of Workers’ Compensation, Respondent argued -- *and the*

Commission ruled -- that these same questions cannot be answered until *after* the injured worker dies. *Thomas v. Milford Supply Company*, Missouri Labor and Industrial Relations Commission, No. 04-091950 (August 29, 2007). So if an injured worker cannot prove these issues before he dies, and his dependents cannot prove these issues after he dies, when can they be proven? The answer is “never,” and Respondent has effectively nullified this Court’s ruling in *Schoemehl*.

Respondent’s desire to nullify this Court’s ruling in *Schoemehl* has extended into its statements to the Missouri public concerning the decision. Shortly after the *Schoemehl* decision was entered, Respondent’s counsel filed a Motion for Rehearing and Suggestions in Support Thereof, arguing that the Court’s ruling cannot stand because:

[t]he Court’s decision created new law -- so new that we cannot accurately calculate its impact. But the rough information we have been able to gather in the short time allowed for filing a motion for rehearing demonstrates that the impact is vast, even as to the Fund alone.

Respondent’s Motion for Rehearing and Suggestions in Support Thereof, Schoemehl v. Treasurer of the State of Missouri, #SC87750. And counsel for Respondent later described just how vast the decision would be, when he implored the Governor to call a special legislative session to deal with the *Schoemehl* decision. *Attorney General Jay Nixon News Release* (June 26, 2007), <http://ago.mo.gov/newsreleases/2007/062607b.htm>. It was said that:

a continued lack of legislative action on this issue will result in an unnecessary

increase to the financial burdens on business, an unfortunate reduction in protection for injured workers, or both.

Id. It cited unnamed sources which estimated the *Schoemehl* impact to be thirty-five million dollars per year, and it claimed that any delay by the Governor and the General Assembly was resulting in increased liabilities “every month.” *Id.*

Conspicuously contrasting with Respondent’s thirty-five million dollar claim is the fact that Missouri’s State Auditor Susan Montee issued an actuarial study two months *earlier* which examined the effect of the *Schoemehl* decision. *Missouri State Auditor Report No. 2007-19* (April 2007). It determined that the precise financial impact could not be determined at the time, but that the decision’s impact on Second Injury Fund solvency “is likely to be minimal,” with increased expenditures in the neighborhood of \$300,000.00 yearly. *Id.* And then, a second study was commissioned by the Governor from an independent agency, and it too confirmed the minimal effect of the *Schoemehl* decision, concluding that “the impact of the *Schoemehl* decision has a relatively insignificant impact on expected calendar payments for the next five years,” and that any *Schoemehl* related losses would be “far out in the future.” *Actuarial Review of Missouri Second Injury Fund*, PricewaterhouseCoopers, L.L.P., Chicago, Illinois, (July 30, 2007).

The effect of the Commission’s refusal to accept jurisdiction in this matter has been confusion at the Division of Workers’ Compensation, which has been compounded by Respondent’s contradictory arguments. The administrative law judges, as well as the Commissioners, do not know if they are to consider issues of the cause of death, or not.

Thomas v. Milford Supply Company, Missouri Labor and Industrial Relations Commission, No. 04-091950 (August 29, 2007). It has lead to counsel for injured workers having to submit evidence at trial concerning death and dependency, when rulings on such matters cannot reasonably be determined until after the worker has died. And worst of all, the confusion has delayed benefits to the widows, widowers and children whom this Court has deemed to be entitled to benefits.

IV. The Commission's Continuing Jurisdiction

A. Basic Statutory Construction Guidelines

The primary rule of statutory construction is to ascertain the intent of the General Assembly from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Sheldon v. Board of Trustees*, 779 S.W.2d 553, 554 (Mo. 1989); *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988). The courts are to look to the object to be accomplished and the problems to be remedied by the statute, *State ex rel. Kemp v. Hodge*, 629 S.W.2d 353, 358 (Mo.banc 1982), and utilize rules of statutory construction “that subserve rather than subvert legislative intent.” *Oberreiter v. Fullbright Trucking Co.*, 117 S.W.3d 710 (Mo.App. 2003). In *Crest Communications v. Kuehle*, 754 S.W.2d 563, 566 (Mo. 1988), the Missouri Supreme Court stated that:

[p]rovisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized.

See also *Kincade v. Treasurer of the State of Missouri*, 92 S.W.3d 310, 311 (Mo.App. 2002).

And while they are being harmonized, the courts are to broadly and liberally interpret the law with a view to the public interest and with the understanding that the law is intended to benefit the largest possible class. *Id.* at 311-12.

B. Missouri Law on Finality of Permanent Total Disability Awards

The Commission refused to accept jurisdiction of this matter based on the conclusion that it has no authority to consider a matter which has become final. (ROA p. 70). First of all, in examining Missouri law on the subject, it needs to be understood that an award of permanent total disability is an appealable award. *Forkum v. Arvin Industries, Inc.*, 956 S.W.2d 359, 362 (1997). So for purposes of appeal, that *issue* carries *some* finality. But what Appellants are contending before this Court is that it is improper to equate “the issue is appealable,” with “the claim is closed.” That is the same as equating the doctrine of collateral estoppel with the doctrine of res judicata. It is simply improper to apply a “claims preclusion” theory to an “issue preclusion” situation.

Missouri case law holds that a “final award is one which disposes of the entire controversy between the parties to the claim.” *Smith v. Semo Tank & Supply Co.*, 99 S.W.3d 11, 13 (Mo.App. 2002). “Finality is found when the commission arrives at a terminal, complete resolution of the case before it,” and therefore “[a]n order lacks finality where it remains tentative, provisional, contingent subject to recall, revision or reconsideration by the commission.” *Id.* In the past the Courts have accepted jurisdiction in two basic situations, for purposes of determining “*appealability*,” not for purposes of *claim preclusion*:

[f]irst, where an award designated “temporary and partial” is not entered

pursuant to section 287.510 but is an award of permanent total disability pursuant to section 287.200.2, there is an appealable award. (Citation omitted). Second, “appellate courts have allowed limited review of temporary awards when the appellant contends that the claimant is not entitled to any award at all.”

Forkum v. Arvin Industries, Inc., 956 S.W.2d 359, 362 (1997); MO. REV. STAT. §§287.200.2 & 287.510 (1994).

It is wrong to conclude that a permanent total disability claim is closed simply because it is capable of being appealed. They are not “closed” awards. They are subject to “recall, revision or reconsideration by the commission,” *Smith v. Semo Tank & Supply Co.*, 99 S.W.3d at 13, as shown in the Commission’s own words in Mr. Cox’s Award:

[s]aid payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

(ROA p. 17). It seems strange that the Commission would assert that it may modify a permanent total disability award if it doesn’t have the jurisdiction to do so.

Past courts have established that, in general, *any* award which includes ongoing benefits is subject to modification from time to time, as ongoing awards are not said to lapse. *Smith v. Ozark Lead Co.*, 741 S.W.2d 802, 810 (Mo.App. 1987), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). And this lack of finality is echoed in the provisions of §287.200 of the Act, which acknowledge that while permanent total disability claims are labeled as “permanent,” there are situations in which the benefits

may be suspended. It says:

[t]he 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.

MO. REV. STAT. §287.200.2 (1994). Similarly, the Act also contains §287.203, which deals with the procedure to be followed when permanent total disability benefits have been terminated. It says, in part:

[w]hensoever the employer has provided compensation under section 287.170, 287.180 or 287.200, and terminates such compensation, the employer shall notify the employee of such termination and shall advise the employee of the reason for such termination. If the employee disputes the termination of such benefits, the employee may request a hearing before the division and the division shall set the matter for hearing within sixty days of such request and the division shall hear the matter on the date of hearing and no continuances or delays may be granted except upon a showing of good cause or by consent of the parties. The division shall render a decision within thirty days of the date of hearing. (*Emphasis added*).

MO. REV. STAT. §287.203 (1994).

Both §287.200 and §287.203 specifically refer to the “employer,” though it is clear from other provisions of the Law that they are not meant to be read so restrictively. For instance, the provision of the Act which establishes the Second Injury Fund is §287.220. And it states that the Second Injury Fund’s liability for permanent total disability benefits is governed by §287.200:

the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the “Second Injury Fund” . . .

MO. REV. STAT. §287.220.1 (1994). Further, §287.220 contains a provision which states that Second Injury Fund permanent total disability awards are subject to *the same procedural protections as in Employer permanent total disability awards*, stating:

[a]ll awards for permanent partial disability, permanent total disability, or death affecting the second injury fund shall be subject to the provisions of this chapter governing review and appeal.

MO. REV. STAT. §287.220.2 (1994). Of course, those procedural protections include the avenues of review and appeal discussed in §§287.200.2 & 287.203.

These provisions of the Missouri Workers’ Compensation Act establish that the Second Injury Fund may also be found liable for benefits pursuant to §287.200.2, and that whenever it is, the “employee” is thereafter entitled to notice and a hearing before benefits are terminated. These protections were unfortunately not afforded to Mrs. Cox in this case.

C. Death Case Analogy

Other provisions of the Act also enforce the conclusion that the legislature intended to provide a means for review of permanent total disability awards after the death of the injured worker. Comparing the situation with death benefit cases,⁵ the situations are similar. In death benefit cases, when a worker dies as a result of a work accident or disease, his or her beneficiaries thereafter receive weekly benefits. And even though the Commission may have issued an award to those beneficiaries years earlier, it still maintains jurisdiction over the case. This is seen in the fact that the Commission has promulgated rules for itself which establish the procedure for modifying death benefit awards:

[t]he commission shall have sole authority to modify final awards allowing death benefits to dependents. The commission may modify death benefit awards from time-to-time upon its own motion or upon motion by an interested party. All motions for modification of final awards shall be made to the commission and the movant shall submit proof of the change or condition or status of the parties receiving the benefits. Proof of the remarriage of the dependent surviving spouse shall be made by filing a copy of the marriage license of the remarried dependent surviving spouse or affidavit of the surviving spouse admitting remarriage. Proof of the death of any dependent shall be made by filing a copy of the death certificate of the dependent.

⁵See also discussion of the permanent total/death case of *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 274 (Mo. 2002), supra at p. 30-32.

Evidence of the remarriage of the dependent surviving spouse or the death of dependents maybe made by deposition or other evidence as the commission may specify.

Mo. CODE REGS. ANN. 8, §20-3.0109(4) (1993). There is nothing in the Missouri Workers' Compensation Act which specifically says the Commission has jurisdiction over a death benefit case after an award has been issued.⁶ And yet, not only does the Commission take jurisdiction, it has also promulgated a rule saying that it can do so.

Appellants assert that the Commission has full authority to promulgate a rule concerning the management of permanent total disability cases upon the death of the injured worker. And in actuality, it appears that the Commission already has an *unwritten* rule, as evidenced by its past practice of issuing “show cause” orders when totally disabled workers die. As with death benefit cases, *Schoemehl* has shown us that factual questions arise upon the death of permanently and totally disabled workers. The Commission should promulgate a rule for these cases which is similar to Mo. CODE REGS. ANN. 8, §20-3.010(4) (1993). This would make the management of permanent total disability claims less confusing than the current method of an unwritten “show cause” practice. And since simplification is the driving force behind the law, it would simplify the method of getting these benefits into the

⁶See, however, §287.580 which allows revival of claims if the employee dies “pending any proceedings.” Mo. REV. STAT. §287.580 (1994). This section is not limited to death benefit cases, and since Mr. Cox continued to receive benefits at the time he died, his claim is, in effect, a “pending proceeding.”

hands of the dependents. Appellants respectfully request that this Court clearly establish that the Commission has continuing jurisdiction over permanent total disability matters to determine whether any alleged dependents are entitled to a continuation of the same.

VII. Due Process

The Commission's refusal to hear and resolve these critical questions has the effect of violating the Due Process clauses of the United States and Missouri Constitutions by failing to afford Mrs. Cox with notice and a hearing before depriving her of her property right to a continuation of benefits. It is a fundamental principle of Constitutional law that an administrative agency may not deprive an individual of a property right without prior notice and an opportunity to be heard. See *Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue*, 195 S.W.3d 410 (Mo. 2006); *Yarber v. McHenry*, 915 S.W.2d 325 (Mo. 1995). And it is well-settled that this principle applies to Missouri workers' compensation matters. *Stonecipher v. Poplar Bluff R1 Sch. Dist.*, 205 S.W.3d 326, 333 (Mo.App. 2006) (citing *Willard v. Red Lobster*, 926 S.W.2d 550, 553-54 (Mo.App. 1996)).

At the same time, neither the availability of post-deprivation judicial review of the agency action, nor the opportunity to obtain damages after the fact of deprivation, satisfies due process requirements. *Conseco*, 195 S.W.3d at 420 (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972)). Rather, due process requires "an opportunity for a hearing *before* [the individual] is deprived of any significant property interest." *Id.* (emphasis original). This requirement is consistent with the fact that "due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner." *Stonecipher*, 205 S.W.3d at 333.

See also *Conseco*, 195 S.W.3d at 420 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

In *Stonecipher*, an administrative law judge of the Division of Workers' Compensation determined that the employer was liable to Mr. Stonecipher for permanent partial disability benefits, whereas the Second Injury Fund was liable for permanent total disability benefits. *Stonecipher*, 205 S.W.3d at 327. The employer appealed, but the Fund did not. *Id.* Nevertheless, the Commission vacated the award of permanent total disability benefits against the Fund. *Id.* The Court of Appeals reversed the Commission's decision, concluding that since the Fund had not appealed it had effectively conceded its liability for permanent total disability benefits. It explained that the Commission had exceeded its power by vacating the award against the Fund:

due process requires that a person facing deprivation of property receive notice and an opportunity for hearing appropriate to the nature of the case. Moreover, due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner. *Willard v. Red Lobster*, 926 S.W.2d 550, 553-54 (Mo.App. 1996). This is true in workers' compensation cases in Missouri and elsewhere. *See, e.g., Willard, supra; Brown v. Beckwith Evans Co.*, 192 Mich. App. 158, 480 N.W.2d 311, 320 n.3 (Mich.App. 1991).

Stonecipher, 205 S.W.3d at 333. In short, the court ruled that the Commission had deprived the employee of a property right without affording him notice and an opportunity to be heard. *Id.*, at 332. It ordered that the matter be remanded to the Commission for further

proceedings. *Id.*

Here, as in *Stonecipher*, the Commission has deprived Mrs. Cox of her permanent total disability benefits without affording notice and an opportunity to be heard. She was deprived of the opportunity to submit evidence as to the relationship, or lack thereof, of Mr. Cox's death with his work injury, and she was deprived of the opportunity to prove that she was a surviving dependent. Mrs. Cox has been left without legal means to address the situation as civil courts will refuse to invade a matter in which the Commission has primary jurisdiction. As such, Mrs. Cox is unable to "exhaust her administrative remedies," and as such, Appellants respectfully request that this Court remand this matter to the Commission with instructions to afford Appellants notice and an opportunity to be heard on the issue of the termination of permanent total disability payments.

VIII. Equal Protection

If the interpretation and application of law propounded by the Commission is followed, then such would violate the Equal Protection clauses of both the United States and Missouri Constitutions, U.S. Const. Amend. XIV; Mo. Const. Art. I, § 2, because Courts are to avoid construing a statute so as to create a constitutional infirmity. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-839 (Mo. 1991). There is a two-step analysis to be applied in determining whether a statute violates equal protection guarantees. *Etling v. Westport Heating and Cooling Services*, 92 S.W.3d 771 (Mo. 2003).

The first step is to determine whether the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right

explicitly or implicitly protected by the Constitution.” If so, the classification is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest. If not, review is limited to determining whether the classification is rationally related to a legitimate state interest. Suspect classes are classes such as race, national origin or illegitimacy that “command extraordinary protection from the majoritarian political process” for historical reasons. Fundamental rights include the rights to free speech, to vote, to freedom of interstate travel, and other basic liberties.

Id. at 774 (*footnotes omitted*). See also *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 841-42 (Mo.App. 2000).

In its construction of the Missouri Workers’ Compensation Act, the Commission’s refusal to accept jurisdiction operates to the disadvantage of a class of persons in that: 1) it treats “permanent total” dependents worse than it treats “death benefit” dependents; and 2) it treats “permanent total” dependents differently depending on whether their benefits are paid by the Second Injury Fund versus those paid by employers.

With regard to the difference between dependents in permanent total disability versus death benefit situations, it has been shown that dependents in death benefit situations receive notice and an opportunity to present evidence and be heard concerning modification of benefits. MO. CODE REGS. ANN. 8, §20-3.010(4) (1993). But dependents of permanently totally disabled workers are not given the same accord, despite the fact that their entitlement to weekly benefits is without question. *Schoemehl v. Treasurer of the State of Missouri*, 217

S.W.3d 900 (Mo. 2007). It cannot be reasonably argued that there is a rational basis for allowing one class of dependents an opportunity to be heard, but not allowing another.

With regard to the difference in permanent total cases between dependents who are receiving benefits from the employer, versus those who are receiving benefits from the Second Injury Fund, a disparity exists if the latter are not given an opportunity to be heard. This is because persons who are paid permanent total disability benefits by their employer are entitled to notice and a hearing upon termination of benefits as per §287.203 and §287.220.2, whereas persons receiving the same benefits from the Fund are not so entitled. MO. REV. STAT. §§287.203 & 287.220.2 (1994). Again, a rational basis for the difference is lacking.

Since these are not suspect classes, no fundamental rights are implicated by the distinctions, See *State ex rel. Nixon*, 27 S.W.3d at 841-842 (individuals with severe health conditions do not constitute a suspect class), citing *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991), and therefore the Court must apply rational basis scrutiny. But although rational basis review is deferential, it has its limits. For instance, the U.S. Supreme Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), struck down a zoning ordinance which required group homes for mentally retarded individuals to obtain special use permits but did not require other multiple use and care facilities to obtain special use permits. The City of Cleburne failed to articulate any rational basis for treating group homes for the mentally retarded differently than similar classes of facilities. Applying such thinking to the case at hand, there can be no conceivable rational basis for allowing a

dependent in a death benefit case to receive a hearing before termination, but not in permanent total disability cases. Similarly, there can be no rational basis for allowing a hearing upon termination of permanent total disability benefits from the employer, but not upon termination by the Fund.

This Court in *Martin v. Schmalz*, 713 S.W.2d 22, 25 (Mo.App. 1986), construed statutes in a way that would avoid an equal protection violation. The statutes at issue in that case were §610.100-610.120, RSMo. (1981), which provided for closing and sealing certain arrest records. The question was whether the statutes applied retrospectively to arrests prior to 1981. The plaintiff in the case appealed the denial of his application to the St. Louis County Police Department for a private watchman's license. The denial was based on the plaintiff's failure to divulge pre-1981 arrests on his application. There was no question that if the arrests had occurred after 1981, they would have been closed under §§610.100 - 610.120, and the plaintiff could not have been penalized for failure to reveal them. The Court held, "To distinguish between pre-enactment and post-enactment arrests would make the statutes unconstitutional as a denial of equal protection without a rational relation to some legitimate state interest." *Martin*, 713 S.W.2d at 25. The Court concluded:

[r]esponding to our responsibility to seek a statutory construction "which avoids unjust or unreasonable results and gives effect to the legislative intent," . . . and recognizing the basic maxim of statutory construction [which] requires that a court faced with a constitutional challenge to a statute must, if possible, construe it in favor of constitutionality, . . . we are constrained to hold that

secs. 610.100–610.120, RSMo.Cum.Supp. 1984, by unavoidable implication, must be given retrospective as well as prospective operation.

Id. (internal citations omitted).

This Court should apply exactly this sort of analysis to the Commission’s interpretation of its jurisdiction in this matter. The Commission’s construction of the Workers’ Compensation Act creates distinctions without any rational relation to legitimate state interests. The Court should avoid construing the statute in a way that creates an equal protection violation, and instead construe the statute “in favor of constitutionality,” *Martin*, 713 S.W.2d at 25. Appellants respectfully request that this matter be remanded to the Labor and Industrial Relations Commission for the taking of additional evidence concerning Mrs. Cox’s entitlement to ongoing permanent total disability benefits.

CONCLUSION

The Labor and Industrial Relations Commission is a Missouri administrative agency subject to the Missouri Administrative Procedure Act. As such, it has primary and exclusive jurisdiction over workers' compensation matters, especially questions of fact. This jurisdiction extends to questions which arise in any award which includes ongoing benefits, as such awards are not said to lapse.

The Missouri Supreme Court determined in *Schoemehl* that dependents of permanently and totally disabled workers are entitled to continue receiving the injured worker's permanent total disability benefits so long as the injured worker died from causes unrelated to his accident, and the injured worker was survived by dependents. Both of these issues involve questions of fact that fall within the jurisdiction of the Commission to determine. The refusal of the Commission to accept jurisdiction has left Mrs. Cox without recourse to answer the critical questions which would allow her to continue receiving benefits, despite the fact that statutory and case law establish that her claim remains pending before the Commission.

The Commission's refusal to accept jurisdiction also has the effect of depriving Mrs. Cox of property rights without being afforded notice and an opportunity to be heard. As such, it violates the due process clauses of the U.S. and Missouri Constitutions. At the same time, the Commission's refusal effectively discriminates among classes of persons without a rational basis. It creates a distinction between persons who are entitled to a hearing based

upon a termination of benefits, depending on whether the person was being paid by an employer versus the Second Injury Fund, and as such, it violates the equal protection clauses of the U.S. and Missouri Constitutions.

The Court should remand this matter to the Labor and Industrial Relations Commission with instructions to develop the record and take additional evidence, such that the Commission may determine whether Mrs. Cox, or other dependents, are entitled to a continuation of Mr. Cox's permanent total disability benefits as per this Court's pronouncement in *Schoemehl*.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby states that on this 26th day of December, 2007, two copies of the foregoing were hand delivered to Ms. Laura C. Wagener, Assistant Attorney General, 815 Olive Street, Suite 200, St. Louis, MO 63101.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the provisions of Rule 84.06(b) and contains 11,416 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus free.

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