



In the Missouri Court of Appeals
Eastern District

DIVISION THREE

GARY GERVICH, Deceased and)	No. ED94726
DEBORAH GERVICH,)	
)	Appeal from the Labor and
Appellant,)	Industrial Relations Commission
)	
vs.)	
)	
CONDAIRE, INC.,)	
)	
and)	
)	
TREASURER OF MISSOURI AS)	
CUSTODIAN OF THE SECOND)	
INJURY FUND,)	
)	
Respondents.)	Filed: March 8, 2011

The claimant, Deborah Gervich, appeals the decision of the Labor and Industrial Relations Commission denying her permanent total disability (PTD) benefits as the sole surviving dependent of the injured worker, the claimant's deceased husband Gary Gervich. The Commission determined that Mrs. Gervich was not entitled to continuing benefits pursuant to *Schoemehl v. Treasurer of Missouri*.¹ The Commission reasoned that Mr. Gervich's right to unaccrued PTD benefits terminated at the time of his death, and did not survive to his wife because her right to such benefits had not "vested" prior to the 2008 statutory amendments abrogating *Schoemehl*. We reverse and remand.

¹ 217 S.W.3d 900 (Mo. banc 2007).

Factual Background

Mr. Gervich worked for Condaire, Inc. as a pipefitter. On April 6, 2006, Mr. Gervich sustained an accidental injury arising out of, and in the course of, his employment. He timely filed a claim for workers' compensation benefits on May 15, 2006. Mr. Gervich died on April 5, 2009 from causes unrelated to his work injury. On April 15, 2009, Mrs. Gervich appeared for a hearing for a final award on her husband's claim against his employer, its insurer, and the Second Injury Fund. Mrs. Gervich filed a suggestion of death and motion for substitution of party, which the Administrative Law Judge (ALJ) granted. Mrs. Gervich also filed an amended claim for compensation, noting that Mr. Gervich had died and that she was his sole surviving dependent.

The ALJ found that Mr. Gervich was permanently and totally disabled prior to his death as the result of the combination of his primary and pre-existing disabilities. The ALJ determined that the employer was liable for 120 weeks of compensation, and that the Second Injury Fund was liable for Mr. Gervich's permanent total disability.

The ALJ then considered *Schoemehl's* applicability to the case. Mr. and Mrs. Gervich were married in 1978 and continued to be married until Mr. Gervich's death on April 5, 2009. The ALJ found that Mrs. Gervich was her husband's sole surviving dependent at the time of his death. The ALJ determined that while Mrs. Gervich became the "employee" by operation of section 287.020.1 RSMo. (Supp. 2005) on the date her husband died, Mrs. Gervich, as the "employee," did not continue to be permanently and totally disabled after that date. Thus, Mrs. Gervich was not entitled to continuing PTD benefits.

The Commission affirmed the ALJ's award, but substituted a different analysis to deny continuing PTD benefits to Mrs. Gervich. The Commission opined that, when statutory changes abrogating *Schoemehl* became effective in 2008, Mrs. Gervich's rights as a dependent were subject to divestment because she might have remarried or predeceased Mr. Gervich. The Commission determined that Mrs. Gervich's rights as a dependent to continuing PTD benefits did not vest until her husband died on April 5, 2009. Thus, the Commission held that Mr. Gervich's right to unaccrued PTD benefits terminated upon his death, and did not survive to his dependent wife.

On appeal, Mrs. Gervich contends that the Commission erred as a matter of law when it denied her the right to collect, for her lifetime, continuing PTD benefits for her late husband's work-related injury. She argues that her right to receive PTD benefits accrued prior to both the injured worker's death and the 2008 statutory amendments enacted to abrogate *Schoemehl*, and that the statutory amendments cannot be applied retrospectively to deny her benefits.

The Treasurer, as Custodian of Missouri's Second Injury Fund, does not try to defend the theory advanced by the Commission in his brief. The Treasurer merely notes, without discussion or citation to any authority, that Mrs. Gervich had no vested right in continuing benefits until her husband's death, which occurred after the 2008 statutory amendments became effective. Instead, the Treasurer responds with yet a third theory for denying Mrs. Gervich benefits. Relying on *Strait v. Treasurer of Missouri*,² the Treasurer argues that *Schoemehl* does not apply to the Gervich claim because it was neither pending in the Commission nor pending on appeal at the time of the *Schoemehl* decision, but rather was pending in the Division of Workers' Compensation.

² 257 S.W.3d 600, 602-03 (Mo. banc 2008).

Standard of Review

Article 5, section 18 of the Missouri Constitution provides for judicial review of the Commission's award to determine whether the decision is authorized by law. We are not bound by the Commission's interpretation and application of the law, and we give no deference to the Commission's interpretation of the law. *Schoemehl*, 217 S.W.3d at 901; *Cox v. Treasurer of Missouri*, 258 S.W.3d 835, 837 (Mo. App. E.D. 2008).

Discussion

On January 9, 2007, the Missouri Supreme Court held in *Schoemehl v. Treasurer of Missouri* that the injured worker's right to compensation for both accrued and unaccrued PTD benefits survives to his or her dependents. 217 S.W.3d at 902. In other words, "when a claimant has been awarded PTD benefits and subsequently dies of a cause unrelated to the work injury, the claimant's dependents are entitled to receive the awarded benefits for their lifetime." *Buescher v. Mo. Highway and Transp. Comm'n*, 254 S.W.3d 105, 106 (Mo. App. W.D. 2008). The Court based its ruling in *Schoemehl* on three statutes: 1) section 287.230.2 RSMo. (2000), which provided that an injured worker's benefits shall cease when the worker dies from causes unrelated to the work injury "unless there are surviving dependents at the time of death"; 2) section 287.200.1 RSMo. (2000), which stated that PTD benefits shall be paid for the "lifetime of the employee"; and 3) section 287.020.1 RSMo. (2000), which defined "employee," and stated that any reference to an injured employee shall include his dependents when the employee is deceased. 217 S.W.3d at 901-02. Reading these provisions together, the Court concluded that the right to compensation for the PTD of an injured employee who

has died from causes unrelated to the work-related injury survives to the dependents of that injured employee. *Id.* at 901-02.

The Missouri General Assembly responded to *Schoemehl* with several statutory amendments, which took effect June 26, 2008. *Taylor v. Ballard R-II School Dist.*, 274 S.W.3d 629, 632 (Mo. App. W.D. 2009). The amended statutes redefined the term “employee” to exclude a deceased employee’s dependents, section 287.200.1 RSMo. (Supp. 2009); clarified that unaccrued PTD benefits do not survive to the injured worker’s dependents, section 287.200.2 RSMo. (Supp. 2009); and provided that surviving dependents shall receive no other compensation when an injured worker dies of causes unrelated to the work injury, section 287.230.2 RSMo. (Supp. 2009). Particularly, the General Assembly expressly rejected and abrogated *Schoemehl* and all cases citing, interpreting, applying, or following it. Section 287.230.3 RSMo. (Supp. 2009); *Taylor*, 274 S.W.3d at 632-33. The statutory amendments, however, are not retroactive, and apply only to claims initiated after the effective date of the amendments. *Tilley v. USF Holland, Inc.*, 325 S.W.3d 487, 494 (Mo. App. E.D. 2010); *Taylor*, 274 S.W.3d at 633.

Since the Supreme Court issued *Schoemehl*, Missouri courts have denied survivorship benefits to dependents only on procedural grounds. *Id.* Specifically, if a claim for survivorship benefits was not brought prior to the time the Commission’s final award became conclusive and binding, the courts ruled dependents’ claims untimely as a procedural matter because the claims were no longer “pending.” *Id.* In this case, however, the Commission held that under the laws relevant to Mrs. Gervich as of April 5, 2009, Mr. Gervich’s right to unaccrued PTD benefits terminated at the time of his death, and did not survive to his dependent wife. Neither the Commission nor the Treasurer

cites any case standing for the proposition that *Schoemehl* applies only to those dependents whose rights “vested” as a result of the injured worker’s death prior to the 2008 statutory amendments. Nor do we find any case discussing a dependent’s “vested” rights in the context of the *Schoemehl* decision.

We reject the Commission’s reasoning. First, the 2008 statutory amendments do not apply retroactively, but apply only to claims initiated after the effective date of the amendments. *Tilley*, 325 S.W.3d at 494; *Taylor*, 274 S.W.3d at 633. *See also Bennett v. Treasurer of Missouri*, 271 S.W.3d 49, 53 (Mo. App. W.D. 2008)(observing that statutory amendments became effective June 26, 2008).

Second, *Schoemehl*’s fundamental logic is that when an injured worker dies from causes unrelated to the work injury, the worker’s dependents assume his or her place to become the “employee” for purposes of receiving PTD benefits. *See Schoemehl*, 217 S.W.3d at 901-02. “[D]isability benefits shall be paid to the employee’s dependents for their lifetime because the surviving dependents are deemed to have the same rights as the employee under the Workers’ Compensation Law.” *Buescher*, 254 S.W.3d at 108. An injured worker acquires a legal right or interest in a workers’ compensation award when he or she suffers the work-related injury. *Petties v. Petties*, 129 S.W.3d 901, 908 (Mo. App. W.D. 2004). In other words, the worker’s right to benefits vests at the time of injury.

Likewise, the status of a deceased worker’s dependents are determined at the time of the injury. We find support in section 287.240 RSMo. (2000), which defines “dependent” as used throughout Chapter 287, and provides:

If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

(4) *The word “dependent” as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:*

- (a) A wife upon a husband with whom she lives or who is legally liable for her support . . . provided that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefits under this chapter. . . .

(Emphases added.) Our Supreme Court has held that the Commission erred in an award of death benefits when it considered only the fact of a widow’s remarriage instead of determining the fact and extent of her dependency at the time of her late husband’s injury. *Reneau v. Bales Elec. Co.*, 303 S.W.2d 75, 80-81 (Mo. 1957). Furthermore, in *Tilley*, this Court affirmed both the Commission’s award of PTD benefits to the injured worker (who was still living), and the Commission’s ruling that the worker’s wife was entitled to continuing PTD benefits under *Schoemehl*. 325 S.W.3d at 493-94.³ The Commission’s determination in *Tilley*, which this Court affirmed, directly contradicts its current theory that Mrs. Gervich’s right to continuing PTD benefits vested only upon her husband’s death.

It is clear that a dependent’s right to benefits under *Schoemehl* vests at the same time the worker’s rights vest, which is when the worker suffers the work-related injury. A theory that the status and rights of a dependent vest at some later time than those of the injured worker vest is not supported by logic, caselaw, or statute, and fails to follow the

³ We declined to address whether *Schoemehl* applies only in cases where the worker has died because the employer failed to properly raise or brief the issue on appeal. *Tilley*, 325 S.W.3d at 494 n.2.

logic of section 287.240(4) RSMo. (2000), which defines the term “dependent” as used throughout the workers’ compensation law.

Third, we find support for the proposition that the injured worker and his or her spouse share a vested property right in pending workers’ compensation benefits in our caselaw concerning dissolution of marriage. A workers’ compensation award is marital property to the extent that it compensates for earnings lost during the marriage. *Seyler v. Seyler*, 201 S.W.3d 57, 62 (Mo. App. E.D. 2006). Thus, both spouses have a property right in such compensation. *See, e.g., id.* at 62-63 (reversing and remanding for trial court to determine what portion of husband’s pending workers’ compensation claims constituted marital property subject to equitable distribution); *Petties*, 129 S.W.3d at 908 (workers’ compensation settlement is presumptively marital when injury occurred during marriage); *Heslop v. Heslop*, 967 S.W.2d 249, 254 (Mo. App. W.D. 1998)(noting statutory presumption that all property acquired during marriage is marital property, and holding husband failed to prove any portion of award under Federal Employer’s Liability Act was nonmarital); *Pauley v. Pauley*, 771 S.W.2d 105, 110 (Mo. App. E.D. 1989)(reversing and remanding to trial court to determine what portion of husband’s workers’ compensation awards constituted marital property subject to equitable distribution).

In determining whether property is marital, it is important to consider when the property was “acquired.” *Petties*, 129 S.W.3d at 907-08. With respect to most property, determining the acquisition date is relatively straightforward because it is the date that the property is purchased or received. *Id.* at 908. In other circumstances, however, the acquisition date is considered to be the date that a recipient acquires a legal right or

interest in the property. *Id.* Workers' compensation awards fall into the latter category. For purposes of workers' compensation, the important date in terms of the acquisition date is when the worker suffered the injury, not when he or she received an award from the ALJ or Commission. *Id.* Thus, in this case, because Mr. and Mrs. Gervich were married on the date that Mr. Gervich suffered his work-related injury, Mrs. Gervich acquired a legal right—a marital-property interest—in her husband's workers' compensation award on the date of his injury.

We conclude that Mrs. Gervich's rights as a dependent vested on the date that Mr. Gervich suffered his work-related injury. Mrs. Gervich cannot be denied continuing PTD benefits under *Schoemehl* based on the Commission's current theory that her rights "vested" only upon her husband's death, which occurred after the 2008 statutory amendments became effective.

We now consider the Treasurer's argument on appeal, which is entirely different from the Commission's basis for denying benefits. The Treasurer argues that Mrs. Gervich is not entitled to continuing PTD benefits because the claim was neither pending in the Commission nor pending on appeal at the time of the *Schoemehl* decision, but rather was pending in the Workers' Compensation Division. The Treasurer maintains that in *Strait v. Treasurer of Missouri*, the Missouri Supreme Court limited *Schoemehl's* application to cases in which the injured worker's claim was "pending in the [C]ommission or pending on appeal at the time of the *Schoemehl* decision." 257 S.W.3d at 602-03. The Treasurer asserts that this does not include claims, such as the one here, that were pending in the Workers' Compensation Division awaiting original hearing or settlement.

This Court's Western District clarified *Strait*'s holding in *Bennett v. Treasurer of Missouri*. There, the Western District held that recovery under *Schoemehl* is limited to claims for PTD benefits that were pending between January 9, 2007, when the Supreme Court decided *Schoemehl*, and June 26, 2008, when the statutes were amended to abrogate *Schoemehl*. *Bennett*, 271 S.W.3d at 53. Like our colleagues in the Western District, this Court does not read *Strait* in the limited fashion urged by the Treasurer. *Tilley*, 325 S.W.3d at 494. It is a misinterpretation of *Strait* to say that *Schoemehl* applies only to cases that were pending before the Commission or on appeal during the relevant timeframe. *Id.*

In *Strait*, the question before the Supreme Court was whether the claim was final or whether it was still pending at the time of the injured worker's death. 257 S.W.3d at 602. As the Court stated, "[c]ourts respect the finality of judgments," and this was the context in which the Court concluded that *Schoemehl* applies to pending cases rather than those where the award has already become conclusive and binding. *Id.* at 602-03.

Because *Strait*'s case was still pending on the date the *Schoemehl* decision issued, *Schoemehl* applies to *Strait*'s case, and the [C]ommission must follow it. In so holding, this Court acts in conformity with the common-law principle allowing prospective application of a decision to "all actions pending on and prospective to the date on which" that opinion was issued.

Id. at 602. Similarly in *Tilley*, the employer asserted that benefits must have been awarded in the allotted period for *Schoemehl* to apply. 325 S.W.3d at 494 n.2. We rejected this argument because it is unsupported by caselaw. *Id.* Notably, the injured worker in *Schoemehl*, like the injured worker in the case now before us, died before the ALJ awarded PTD benefits. *Schoemehl*, 217 S.W.3d at 901; *Tilley*, 325 S.W.3d at 494 n.2.

Here, it is undisputed that the Gervich claim was pending on January 9, 2007 when the Supreme Court issued its *Schoemehl* decision. We reject the Treasurer’s contention that the term “pending” used in *Strait* excludes those claims pending in the Workers’ Compensation Division between the date the *Schoemehl* opinion issued and the later statutory amendments abrogating *Schoemehl*.

Conclusion

The Commission’s decision is not authorized by law. Mrs. Gervich’s rights as a dependent vested on the date that her husband suffered his work-related injury. Mr. Gervich’s workers’ compensation claim was pending when our Supreme Court decided *Schoemehl*. Thus, the 2008 statutory amendments abrogating *Schoemehl* do not apply to Mrs. Gervich, and we hold that she is entitled to assume her late husband’s place as the “employee” for purposes of receiving continuing permanent total disability benefits pursuant to *Schoemehl*. The Commission’s decision is reversed and remanded for an appropriate award made in accordance with *Schoemehl* and with this opinion.

LAWRENCE E. MOONEY, JUDGE

SHERRI B. SULLIVAN, P.J., and
CLIFFORD H. AHRENS, J., concur.