

Summary of SC91727, Gary Gervich, Deceased, and Deborah Gervich v. Condaire Inc. and Treasurer of Missouri as Custodian of the Second Injury Fund

Appeal from the labor and industrial relations commission

Argued and submitted Oct. 18, 2011; opinion issued July 31, 2012

Attorneys: Gervich was represented by Richard Grossman of St. Louis, (314) 261-7323; the state was represented by Carol L. Barnard of the attorney general's office, (573) 751-3321; and Condaire was represented by Kenneth Alexander of Holtcamp, Liese, Schulz & Hilliker in St. Louis, (314) 621-7773.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A woman appeals the labor and industrial relations commission's decision denying her claim to continuing payments of her deceased husband's permanent total disability benefits. In a 7-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the commission's decision and remands (sends back) the case. The woman is entitled to receive continuing permanent total disability benefits as her deceased husband's dependent under the statutes in effect when he was injured in April 2006. The amendments the legislature made two years later that eliminate such a right for dependents are substantive and constitutionally cannot be applied retrospectively to her claim.

Judge Cynthia L. Martin, a judge of the Missouri Court of Appeals, Western District, sat on this case by special designation in place of the then-vacancy on the Court.

Facts: Gary Gervich had a work-related injury in April 2006 while working as a pipefitter at Condaire Inc. He sought workers' compensation the next month, asserting he was permanently and totally disabled. In 2008, while Gervich's claim was pending, the legislature amended the workers' compensation statutes pertaining to the right of an injured worker's dependent to collect continuing compensation when the injured worker dies of causes unrelated to the work injury. Gervich died in April 2009 from causes unrelated to his work injury. Ten days later, his widow appeared at a hearing to determine the final award on Gervich's claim against Condaire, Condaire's insurer and the state's second injury fund. At the hearing, she filed paperwork about her husband's death and moved to be substituted as the party in his stead, asserting she was Gervich's sole surviving dependent. Her motion was sustained. She also amended his claim to assert that, under section 287.020.1, RSMo Supp. 2007, she became the "employee" for purposes of compensation when her husband died and, therefore, claimed a right to continued payment of Gervich's permanent total disability benefits. The administrative law judge found that Gervich was permanently and totally disabled as a result of his work injury, that his widow became the "employee" by operation of section 287.020.1 when Gervich died in April 2009, but that the widow nonetheless was not entitled to continued receipt of Gervich's permanent total disability benefits because she did not prove that she – as the employee – was permanently and totally disabled. On review, the labor and industrial relations commission affirmed the administrative law judge's finding that Gervich was permanently totally disabled but denied his widow's claim to the continued receipt of his permanent total disability benefits on a different ground – that her rights as a dependent did not vest until Gervich died in April 2009, which was after the 2008

amendments eliminated a dependent's right to continued benefits when the injured worker dies of causes unrelated to the work injury. Gervich's widow appeals.

REVERSED AND REMANDED.

Court en banc holds: The commission erred in denying Gervich's widow continuing payment of her husband's permanent total disability benefits as his dependent.

In *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900, 903 (Mo. banc 2007), this Court held that the language of the workers' compensation statutes provided that the dependents of an injured employee who died from causes unrelated to the work injury had a right to continuing permanent total disability benefits. The statutes considered in that case were 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;" section 287.200.1, RSMo 2000, which provided that permanent total disability benefits shall be paid for the "lifetime of the employee;" and section 287.020.1, RSMo Supp. 2007, which defined "employee" and stated that any reference to an injured employee shall include a deceased employee's dependents. In 2008, the legislature specifically abrogated the holding in *Schoemehl*, amending these three statutes to make clear that compensation for a permanent total disability is payable only during the lifetime of the injured employee and is not payable to the employee's dependents if the employee dies from causes unrelated to the work injury. In a case that was brought after the amendments became effective and that still was pending when the worker died, this Court held that the deceased worker's dependents were entitled to continuation of permanent total disability benefits after the worker's death. *Strait v. Treasurer of Missouri*, 257 S.W.3d 600, 602-03 (Mo. banc 2008) (noting that the law bars the retrospective application of the law to cases that had achieved final resolution and that *Schoemehl* is applied prospectively to all cases pending on and prospective to the date on which the opinion issued). The court of appeals consistently has ruled that injured workers and the dependents of deceased injured workers were barred from asserting claims to continuing permanent total disability benefits recognized in *Schoemehl* because final decisions had been rendered in those workers' compensation proceedings.

Here, Gervich's claim for continuing permanent total disability benefits accrued in April 2006 when he was injured, was filed in May 2006 and still was pending when *Schoemehl* was decided in January 2007 – all before the 2008 amendments to the workers' compensation statutes were passed and took effect. Unchanged by the amendments was section 287.240(4), RSMo, which provides that the status of an injured worker's dependents is determined at the time of the injury, not at the date of the worker's death. At the time of his injury, Gervich's sole dependent was his wife. It is settled law in Missouri that the legislature constitutionally cannot change the substantive law for a category of damages after a cause of action has accrued. *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 760 (Mo. banc 2010). This constitutional principle applies to Gervich's claim that accrued on the date of his injury, more than two years before the legislature reduced the benefits payable due to a claimant's permanent total disability. As such, Gervich's widow was entitled to continued payment of Gervich's permanent total disability benefits for the remainder of her life. Application of the 2008 amendments to her claim, therefore, would eliminate a right to a benefit that already has accrued.