

IN THE SUPREME COURT OF MISSOURI

DEBORAH GERVICH, as surviving spouse)
of GARY GERVICH (Decedent),)
)
 Appellant,)
)
vs.) **Appeal No. SC91727**
)
CONDAIRE, INC.)
)
and)
)
TREASURER OF MISSOURI,)
Custodian of the Second Injury Fund,)
)
 Respondents.)

Appeal from the Labor and Industrial Relations Commission of Missouri
Injury No. 06-030063
Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED94726

APPELLANT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an Award of the Missouri Labor and Industrial Relations Commission (Commission), reviewing a Workers' Compensation Award entered by an administrative law judge (ALJ) of the Missouri Division of Workers' Compensation (Division). The Division, and then the Commission, awarded the Employee, Gary Gervich, both permanent partial disability benefits from the Employer, Condaire, Inc., and permanent total disability benefits from the Missouri Second Injury Fund (SIF), for an injury which occurred on April 6, 2006. However, both the ALJ and the Commission failed to award Appellant Deborah Gervich her continuing permanent total disability benefits for the remainder of her life, as the wife and sole surviving dependent of the now deceased Employee (who died of unrelated causes on April 5, 2009). Appellant appeals from this denial of her claim to continuing permanent and total disability benefits.

The Court of Appeals for the Eastern District had jurisdiction of the appeal under Article V, Section 18 of the Constitution of Missouri and §§ 287.495 and 477.050, R.S.Mo. (2000), as the injury in question occurred in St. Louis County, Missouri. On March 8, 2011, the Court of Appeals issued its opinion reversing the Commission's decision as not authorized by law, and remanding the matter with instructions to enter an award in accordance with the opinion. After the Court of Appeals denied the Respondent SIF's Motion for Rehearing and Application for Transfer to this Court on April 21, 2011, Respondent filed a further Application for Transfer on May 6, 2011, pursuant to Missouri Supreme Court Rule 83.04, which was granted on June 28, 2011.

STATEMENT OF FACTS

On April 6, 2006, the Employee, Gary Gervich, was injured after falling from a basket being lowered by a crane. The Employer, Respondent Condaire, Inc., properly acknowledged its liability under Chapter 287, R.S.Mo., and authorized medical treatment for his injuries. On May 15, 2006, the Employee filed a Claim for Compensation alleging he was permanently and partially disabled due to his injuries sustained on April 6, 2006. Legal File (hereinafter cited as L.F.) 2-3. On February 15, 2007, the Employee amended his claim, alleging that he was permanently and totally disabled as a result of his injuries. L.F. 7-8. By May 23, 2006, the Employer's authorized treating neurosurgeon had diagnosed the Employee with a broad-based disc herniation at C6-7 as well as cervical spondylosis at C6-7, and effacement of the cervical spinal fluid causing spinal cord compression. Transcript (hereinafter cited as T.) 232-235. Both surgical and conservative treatment options were discussed with the Employee, but it was ultimately determined that he was not a good surgical candidate. T. 235-237. The Employee died on April 5, 2009, of causes unrelated to his work injury of April 6, 2006. L.F. 567-568.

A hearing on the Employee's claim was held April 15, 2009, in St. Louis, Missouri, before the Honorable John K. Ottenad, Administrative Law Judge (ALJ). T. 1-45. Before the hearing, the Employee's attorney filed a Suggestion of Death and a Motion for Substitution of Party, both of which were admitted into evidence. An Amended Claim for Compensation was also filed, which detailed the death of the Employee and named his wife, Appellant Deborah Gervich, as his sole surviving dependent. T. 587-592. At the hearing,

both the Employee and the Employer submitted expert medical testimony that the Employee was permanently and totally disabled. T. 221-290, 767-825.

The ALJ issued his Award on August 12, 2009, finding that the Employee was permanently and totally disabled due to the combination of his primary injury of April 6, 2006, and his prior disabilities. The Award also determined that the Employee was entitled to permanent and total disability (PTD) benefits from the Employer and the Missouri Second Injury Fund (SIF) up through the date of his death. The ALJ further found that Employee's wife, Deborah Gervich, the Appellant herein, was the Employee's sole surviving dependent and thereby became the Employee for purposes of PTD benefits, but that she did not submit evidence to show she was herself permanently and totally disabled. The ALJ stated that since Appellant herself was not permanently and totally disabled, she was not entitled to such benefits as the legal equivalent of the Employee. L.F. 34-37.

On August 31, 2009, Appellant requested a review by the Commission on the issue of Appellant's continuing right to receive the Employee's PTD benefits, pursuant to the Supreme Court of Missouri's interpretation of death benefits under Chapter 287, R.S.Mo., as detailed in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007). L.F. 38-40. At the same time, the SIF filed a separate Application for Review, seeking to shift the issue of the ALJ's finding on liability for the Employee's permanent and total disability to the Employer/Insurer. L.F. 41.

A divided Labor and Industrial Relations Commission of Missouri (Commission) affirmed the Award and decision of the ALJ by vote of 2-1 on April 7, 2010, modifying only

the portion of the ALJ's decision regarding Appellant's right to PTD benefits, but without changing the outcome of the case. L.F. 42-71.

Appellant timely filed her Notice of Appeal (L.F. 72-105) on April 26, 2010. The parties briefed and argued the case in the Court of Appeals for the Eastern District, with Appellant raising the sole issue which is set out, in identical form, in her Point Relied On herein.

On March 8, 2011, the Court of Appeals issued its opinion reversing the Commission's decision as not authorized by law, and remanding the matter with instructions to enter an award in accordance with the Court of Appeals's opinion. The panel stated unanimously that just as a worker's rights are "determined at the time of injury," so too "the status of a deceased worker's dependents are determined at the time of the injury." Slip Opinion at 6. Accordingly, the Appellant's rights as a dependent of a PTD employee were determined – or, in alternative language, "vested" – the date that the Employee suffered his work-related injury. *Id.*

On March 23, 2011, Respondent filed a Motion for Rehearing or in the Alternative Application for Transfer in the Missouri Court of Appeals, Eastern District, which denied Respondent's motion on April 21, 2011. On May 6, 2011, Respondent filed an Application for Transfer to this Court. At this Court's request, Appellant filed her Suggestions in Opposition on May 26, 2011. On June 28, 2011, Respondent's Application for Transfer was sustained and the appeal was ordered transferred to this Court.

POINT RELIED ON

I

The Labor And Industrial Relations Commission Erred, As A Matter Of Law, When It Denied The Claimant Employee's Surviving Widow And Dependent, Appellant Deborah Gervich, The Right To Collect Continuing Permanent And Total Disability Benefits For His 2006 Work-Related Injury During Her Lifetime, Because She Is Legally Entitled To Collect Those Benefits Pursuant To Former § 287.230, R.S.Mo. (2006), *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), And Article 1, Section 13 Of The Constitution Of Missouri, In That The Employee's Dependent's Rights To Receive Such Benefits Accrued Prior To Both The Employee's Death And The 2008 Amendments To § 287.200 And § 287.230, R.S.Mo., Which Cannot Be Applied Retrospectively To Bar The Collection Of Those Benefits.

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

Taylor v. Ballard R-II School District, 274 S.W.3d 629 (Mo.App.W.D. 2009)

Tilley v. USF Holland, 325 S.W.3d 487 (Mo.App.E.D. 2010)

Strait v. Treasurer of Missouri, 257 S.W.3d 600 (Mo. banc 2008)

Constitution of the State of Missouri, Article 1, Section 13

§ 287.240, R.S.Mo (2000)

ARGUMENT

I

The Labor And Industrial Relations Commission Erred, As A Matter Of Law, When It Denied The Claimant Employee’s Surviving Widow And Dependent, Appellant Deborah Gervich, The Right To Collect Continuing Permanent And Total Disability Benefits For His 2006 Work-Related Injury During Her Lifetime, Because She Is Legally Entitled To Collect Those Benefits Pursuant To Former § 287.230, R.S.Mo. (2006), *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), And Article 1, Section 13 Of The Constitution Of Missouri, In That The Employee's Dependent’s Rights To Receive Such Benefits Accrued Prior To Both The Employee's Death And The 2008 Amendments To § 287.200 And § 287.230, R.S.Mo., Which Cannot Be Applied Retrospectively To Bar The Collection Of Those Benefits.

The Standard of Review

In a workers’ compensation appeal, under § 287.495.1 R.S.Mo. (2000), the appellate court “shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
- (2) That the award was procured by fraud;
- (3) That the facts found by the commission do not support the award;
- (4) That there was not sufficient competent evidence in the record to warrant the making of the award.”

Where the issues involve matters of law, the appellate court will review *de novo*. *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo. banc 2002). Appellate courts are not bound by the Commission's interpretation and application of the law, and no deference is afforded to the Commission's interpretation of the law. *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, 901 (Mo. banc 2007), *citing Pierson v. Treasurer of the State of Missouri*, 126 S.W.3d 386, 387 (Mo. banc 2004).

The legal issue presented by the Appellant is whether the Commission erred in denying Appellant, as the surviving spouse of Gary Gervich, her claim to continued receipt of PTD benefits for the remainder of her life. Appellant contends that the Commission failed to follow recognized Missouri case law precedent standing for the proposition that in cases where an injured employee dies of causes unrelated to the work injury, a surviving spouse has the right to collect PTD benefits for the remainder of her life – as long as the case was pending between January 9, 2007 and June 26, 2008. In this case, Gary Gervich's injury occurred on April 6, 2006, and his case was pending as of January 9, 2007. Therefore Appellant is entitled to receive the PTD benefits at issue.

In addressing this legal issue, the Court must understand that there is no dispute in this case as to the facts. Therefore, there is no issue as to whether there was substantial and competent evidence on any point. The only issue is whether the Commission properly applied Missouri case law to the undisputed facts of the case.

The Errors of Law Requiring Reversal

Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. banc 2007), was the first case to address whether an employee's dependents have the right to permanent and total disability (PTD) benefits if the injured employee dies from causes unrelated to the work-related injury. *Id.* at 901. This Court held that surviving spouses were protected and did have the right to receive such continued benefits. *Id.* at 903.

In *Schoemehl*, the employee sustained a work-related injury on May 11, 2001. A claim was timely filed against the employer and the Second Injury Fund. Prior to the hearing Schoemehl died from causes unrelated to his work-related injury. The Administrative Law Judge (ALJ) conducted a hearing and found that Schoemehl was PTD, and awarded benefits up to the date of Schoemehl's death. The Commission affirmed the ALJ, but Schoemehl's wife/dependent appealed, arguing that as Schoemehl's dependent she was entitled to PTD benefits for the remainder of her life. The Supreme Court of Missouri reversed the Commission's decision denying her PTD benefits. It analyzed the issue by looking primarily at three sections of the Workers' Compensation Code: §§ 287.020, 287.200 and 287.230, R.S.Mo. (2006). Relying on an integrated reading of those statutes, the Supreme Court held that dependents of deceased employees who died from causes unrelated to their underlying workers' compensation claims – in that case, Schoemehl's wife – were entitled to continued permanent and total disability benefits. *Id.* at 902.

Missouri courts continued to follow *Schoemehl* for workers' compensation cases where – as is the case here with the late Employee Gary Gervich and his surviving widow,

Appellant Deborah Gervich – the employees’ claims were already pending on the date *Schoemehl* was decided by the Supreme Court of Missouri. *Taylor v. Ballard R-II School District*, 274 S.W.3d 629 (Mo.App.W.D.2009); *Bennett v. Treasurer of the State of Missouri*, 271 S.W.3d 49 (Mo.App.W.D.2008); *Strait v. Treasurer of Missouri*, 257 S.W.3d 600 (Mo. banc 2008); *Tilley v. USF Holland*, 325 S.W.3d 487 (Mo.App.E.D. 2010).

Deborah Gervich’s appeal is only the latest in a series of cases where the appellate courts have been asked to fairly apply the above precedent. *Taylor, supra*; *Strait, supra*; *Tilley, supra*.¹ The *Schoemehl* decision remained the law until 2008 when the Legislature amended §§ 287.020.1, 287.200.1 and 287.230, R.S.Mo. to specifically deny PTD benefits to dependents of permanently and totally disabled employees in workers’ compensation cases arising out of injuries that would occur after the enactment of the amendments. In addition to amending § 287.230.2 to include the language “no other compensation for the injury shall

¹The Commission’s treatment of the issue, however, has not been so consistent. Attached to this brief, in the Appendix at A-51 – A-96, are copies of its decisions in *Dolores Woolery*, Injury No. 11-145150 (2/09/10), *Daniel Gruendler (Deceased)*, Injury No. 99-125167 (8/12/10), and *Michael Webb*, Injury No. 97-406714 (2/4/10), where dependents were in fact awarded continuing PTD benefits after employee’s deaths. See *Woolery* at A80 – A-81, *Gruendler* at A-62, and *Webb* at A-77. Such inconsistency by the Commission is a further reason for this Court not to give the Award in the present case any deference.

be paid to the surviving dependents at the time of death”, the Legislature added a completely new §287.230.3 to state:

“In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate the holding in Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007), and all cases citing, interpreting, applying, or following this case.”

However, and this is the critical fact in this appeal, *Schoemehl* remained the law as to all cases which were pending on the day the *Schoemehl* opinion was rendered. Case law carved out a well-defined window of time within which a dependent of a permanently and totally disabled employee would remain entitled to receive continuing benefits throughout her lifetime if the employee dies from causes unrelated to the work injury. Specifically, where PTD employees die from causes unrelated to their work injuries, the validity of their dependents’ rights to continuing benefits is limited to instances of claims for permanent total disability benefits that, as here, were already pending between January 9, 2007 – the date the Missouri Supreme Court issued its decision in *Schoemehl* – and June 26, 2008, the effective date of the new amendments. *Taylor v. Ballard R-II School District, supra; Bennett v. Treasurer of the State of Missouri, supra; Tilley v. USF Holland, supra; see also Strait v. Treasurer of Missouri, supra.* Since the present case was pending when *Schoemehl* was decided, Appellant’s claim falls directly within the mandate of these cases. Therefore, if *stare decisis* has any meaning, the Commission erred here and the denial of continuing PTD benefits must be reversed. The cases of *Strait, Taylor, Tilley* and *Bennett* remain good law.

They have never been overruled. How can the Commission ignore them absent their reversal?

The relevant facts of this case are strikingly similar to those of *Schoemehl* and come well within the window for claims in which dependents may continue to receive PTD benefits, as established by *Schoemehl* and the subsequent case law. The Employee, Gary Gervich, sustained a work-related injury on April 6, 2006. A claim was timely filed on May 15, 2006, against both the Employer and the Second Injury Fund. After the 2007 *Schoemehl* decision, but prior to the hearing in this case, the Employee died from causes unrelated to his work-related injury. A Suggestion of Death, a Motion for Substitution of Party, and an Amended Claim were all filed, accepted and received into evidence, adding the Employee's wife, Appellant herein, as his dependent. T. 587-593A. As in *Schoemehl*, a hearing was conducted and the ALJ found that the Employee was PTD, and awarded benefits up through the date of his death. But instead of applying the statutory analysis as laid out in *Schoemehl*, and the cases which followed therefrom, the ALJ and the Commission majority devised a succession of strained, erroneous arguments to assert that *Schoemehl* does not apply, and thereby denied PTD benefits to his dependent, Deborah Gervich. L.F. 68-71, 42-44.

The analysis of the Commission majority, in contrast to that of the ALJ, hinged on whether or not the dependent's benefits "vested" prior to the amendment of § 287.230, RSMo. The Commission claimed this result was *mandated* by "strict statutory construction," but it was not. First, there was no case law before this case which ever discussed, much less imposed, a requirement that the dependent's benefits be decided or "vested" prior to the

amendment of § 287.230 R.S.Mo. Second, even if there was a “vesting” requirement, Appellant’s rights indeed “vested” on the day her husband was injured, not the day her husband died. Appellant’s rights to the benefits are required by *Schoemehl*, even though neither *Schoemehl* nor the cases which followed it have expressed such a requirement of “vested” benefits, by “strict statutory construction” or otherwise.²

In fact, the appropriate statutory construction has already occurred – in *Schoemehl* and the cases such as *Taylor, Bennett, Tilley* and *Strait, supra*, which followed it in the Missouri appellate courts – so no further exercises in the purported construction of the statutes were either necessary or appropriate on the part of the Commission.

The Commission majority appears to have resorted to its notion of a “vested” benefit that supposedly occurred only after the Employee’s death, as a red herring in order to invent a false issue and misinterpret the real issue under Article 1, Section 13 of the Constitution of Missouri. That constitutional provision prevents the enactment of a law “retrospective in its operation.” A statute operates retrospectively in violation of Article 1, Section 13 “if it takes away or impairs a vested or substantial right or imposes a new duty in respect to a past

²However, the concept that rights are “vested” on the date of injury, and cannot be taken away by retrospective legislation, is not foreign to the field of workers’ compensation. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 407-408 (Mo.App.W.D. 1996), referring to a claimant’s “vested right of recovery when he was injured that cannot be taken away by the retrospective application” of statutory amendments.

transaction. ... [A] vested right ... is a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand" *Beatty v. State Tax Commission*, 912 S.W.2d 492, 496 (Mo. banc 1995).

Neither *Schoemehl* nor the *Taylor, Bennett, Tilley* and *Strait* decisions, *supra*, which followed and applied it, used the term "vested" to describe the nature of a dependent's right to continuing PTD benefits after an employee's death. They turned, instead, on the dependents' own status within the meaning of the statutory term "employee", as used to describe the persons entitled to such benefits, which *Schoemehl* said were "both accrued and unaccrued" in nature. *Schoemehl, supra*, at 902. Moreover, as stated in *Taylor, supra*, at 630, the dependent surviving spouse is the "successor" to the deceased Employee within the meaning of § 287.580, R.S.Mo. But if it is necessary further to characterize Appellant Deborah Gervich's right to continuing PTD benefits during her lifetime – as the Employee's dependent, survivor, and legal equivalent – it should be clear that her right was *already vested* in every meaningful sense under the former § 287.230, R.S.Mo. (2006), once her husband Gary Gervich suffered the injury of April 6, 2006. His claim premised on that injury was filed on May 15, 2006 (L.F. 2-3), and was still pending on the date when *Schoemehl* was decided. His injury and claim were the "past transaction" which resulted in the vesting of Appellant's rights in this case.

As the dissenting opinion in the Commission recognized, only if the statutory amendments of 2008 had *terminated* Appellant's already existing (and, in effect, vested) benefits would she have lost the right to receive them. (L.F. 45.) But if those amendments

were interpreted to terminate her benefits, retrospectively, the amendments would themselves have violated Article 1, Section 13. In reality, the amendments clearly did not terminate Appellant's PTD benefits, and she is entitled to an award confirming her right to receive them. It was the Commission majority whose Award improperly attempted to *divest* her of the right she legally possessed to those continuing benefits. This Court should reject that unwarranted action, on both statutory, decisional and constitutional grounds.

Moreover Respondent's and the Commission majority's "vesting" arguments for denying Appellant survivor benefits under *Schoemehl* fail because they inherently conflict with §287.240(4) R.S.Mo. Respondent attempted, in its Brief to the Court of Appeals, to defend the Commission's position that as of June 26, 2008 – the date the amending statutes became effective – Appellant's rights as a dependent "were subject to divestment." Respondent's Court of Appeals Brief at 6. However, that argument is incoherent, both as a matter of fact and logic, and under §287.240(4). First, the very word "divestment" implies – contrary to the Commission majority's theory – that Appellant's rights *were* vested: you can't divest yourself of a benefit unless you were already vested with that benefit. Second, the statement is fundamentally flawed in this case because Deborah Gervich didn't remarry and she didn't pre-decease her husband, the Employee. She did not take any action to divest herself of her rights. The ALJ correctly found, and the Commission affirmed, that Appellant was indeed the Employee's spouse and sole surviving dependent. A.29. But, in addition, thirdly, the Workers Compensation statute itself defines, in § 287.240(4), R.S.Mo.: (1) why dependency *on the date of injury* controls; (2) who is a dependent; and (3) how a dependent

spouse might theoretically divest herself of benefits after the death of the employee – solely by death or remarriage, which never occurred in this case. The statute requires that a dependent must be dependent for support upon the employee “*at the time of the injury.*” § 287.240(4), R.S.Mo. The plain language of the statute thus tells us that “the date of injury” defines and locks in a dependent’s rights. *Id.*

There is not now, nor has there ever been, any dispute that Appellant is the deceased Employee’s spouse and sole surviving dependent. A.29. There isn’t any additional vesting requirement of the sort incorrectly demanded by the Commission majority, because – at the risk of sounding redundant – the dependent’s rights are determined “*at the time of the injury.*” § 287.240(4) R.S.Mo. There isn’t a separate statute to distinguish dependents of employees who die from work-related injuries, as opposed to dependents of employees who die from causes unrelated to their work injuries; and when the legislature amended § 287.230 R.S.Mo., it didn’t also amend § 287.240(4) R.S.Mo. to create a separate class of dependents whose rights are only to be determined on a date sometime in the future. But the Commission majority’s analysis of § 287.230 R.S.Mo., as amended, requires this court to ignore the plain language of § 287.240(4) R.S.Mo.

It is impossible to read § 287.230 R.S.Mo. , as glossed by the Commission, without rendering part of § 287.240(4) R.S.Mo. as idle verbiage. Courts have long held that *all* the words in a statute are presumed to have meaning, and an interpretation which renders the statutory language superfluous is not favored. *Schoemehl, supra* at 902, *citing Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. Banc 1988). *See, e.g., Dubinsky v. St.*

Louis Blues Hockey Club, 229 S.W.3d 126, 130 (Mo.App.E.D.2007) (stating that courts will “presume that the legislature did not insert superfluous language or idle verbiage in the statute.”)

It is true that § 287.240(4)(a) R.S.Mo. provides a mechanism by which a dependent spouse could divest herself of such benefits, to wit:

“on the death or remarriage of a widow ..., the death benefit shall cease unless there be other total dependents entitled to any death benefits under this chapter.”

So it is possible that Deborah Gervich could, as the Commission majority and Respondent suggested, remarry. That is, she could take an affirmative act to divest herself of benefits. We know that has not been the case here. Or she could have, as the Commission majority and Respondent suggested, pre-deceased the Employee. But in this case, again, we know that did not occur. Those are the *only* statutorily prescribed mechanisms by which a surviving spouse may divest herself of benefits upon the death of the employee, and they are completely immaterial to this case.

The Commission majority’s newly concocted “vesting upon death” requirement is not merely:

- (1) contrary to §287.240(4) as discussed above;
- (2) contrary to the primary theory of the Second Injury Fund’s Brief in the Court of Appeals, i.e, the theory that Appellant’s claim was not “pending in the Commission” or “pending on appeal” during the post-*Schoemehl* window because it was instead

“pending in the division” – a theory decisively rejected by the Court of Appeals in *Tilley, supra*, and in this case;

(3) contrary to the theory of the ALJ in this case; and

(4) contrary to the precedent of *Schoemehl, Strait, Taylor, Bennett* and *Tilley*; but it is also

(5) contrary to other well-established legal authorities.

For example, for more than twenty years, Missouri courts have recognized that Workers’ Compensation benefits are marital assets and the spouse of the injured worker has a right to those assets if they are accrued during the marriage. *See Pauley v. Pauley*, 771 S.W.2d 105, 109-110 (Mo.App.E.D. 1989). More recently, the Court of Appeals ruled that the spouse of the injured worker acquires the legal right to workers’ compensation benefits at the time the injury occurs. *Petties v. Petties*, 129 S.W.3d 901, 908 (Mo.App. 2004). Those rights only divest through the dissolution of the marriage. *See Seyler v. Seyler*, 201 S.W.3d 57, 62 (Mo.App.E.D. 2006).

In other words, even under a “vesting” analysis, Appellant Deborah Gervich’s interests and rights in her husband’s workers’ compensation benefits “vested” on April 6, 2006, when he injured his back – and they never “divested.” Those rights continued past the date the General Assembly abrogated *Schoemehl* and through the date of Gary Gervich’s death. They continue through this day, since the Gervichs never divorced. Under the *Schoemehl* decision and the Workers’ Compensation Law in effect at the time of the injury,

Mrs. Gervich gained a “vested” right to her husband’s weekly benefits, and the only way those rights can be “divested” is by dying or remarrying.³

Schoemehl requires this result. None of *Schoemehl*’s progeny changed it. None of them deny Mrs. Gervich her “employee” status on the day her husband injured his back at work. None of them “divest” widows and widowers of injured workers of their benefits, by “strict statutory construction” or otherwise, as long as the permanently and totally disabled worker’s case was pending anywhere in the legal system when the changes in § 287.230, R.S.Mo. took effect.

Finally, Respondent’s May 6, 2011, Application for Transfer to this Court fails to allege any actual error in the holding of the Court of Appeals, let alone any suggestion that this case (premised as it is on since-amended statutes which were changed to overrule *Schoemehl* for the future) is either of general interest and importance or requires the re-examination of existing law. While it appears that Respondent sought transfer to this Court because the Eastern District supposedly applied the law of domestic relations, rather than workers’ compensation, to the facts of this case, that was *not* the actual holding set out by the Eastern District’s opinion.

³Furthermore, even if she remarries, the Law still grants her a lump-sum payment equal to two years of permanent and total disability benefits above and beyond the weekly benefits she received prior to the day of her remarriage. *See* §287.240(4)(a) R.S.Mo.

The Eastern District first determined that “the 2008 statutory amendments do not apply retroactively, but apply only to claims initiated after the effective date of the amendments.” Slip Opinion at 6, *citing Tilley, supra*, at 494, *Taylor, supra*, at 633, and *Bennett, supra*, at 53. The Court of Appeals then held that, just as a worker’s rights are determined – or vested – at the time of the injury, so too are the worker’s dependents’ rights determined at the time of the injury. *See* Slip Opinion at 6, *citing* §287.240 RSMo. (2000). The Court of Appeals astutely pointed out that any other holding “is not supported by logic, caselaw or statute, and fails to follow the logic of section 287.240(4) RSMo. (2000), which defines the term ‘dependent’ as used throughout the workers’ compensation law.” Slip Opinion at 7-8.

Only after that analysis did the Court of Appeals point out that its holding is *consistent with* holdings in other areas of the law, such as domestic relations law. The analogy, although helpful to understand the holding, is not a holding on its own. It is mere dictum. The remainder of the Court of Appeals’s Gervich opinion stands on its own, with or without any reference to domestic relations law.

Thus, it appears that Respondent has proposed yet another new theory, not offered prior to its application to this Court, with which to deny the Appellant the benefits she is entitled to under *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), and the statutes as they existed at the time the Employee was injured. Apparently, under this new theory, the Court of Appeals erred in its analysis of domestic relations law in relation to the status of workers’ compensation claimants’ marital rights, and thus this

Court must overturn the decision to correct that perceived wrong. There are several problems with this new theory, but most striking are: (a) the Court of Appeals was correct in its analysis of the law, and so there is no need to re-address the issue; and (b) as discussed above, this was a dictum which doesn't even appear until the eighth page of the opinion. Its inclusion in the opinion occurred, no doubt, in an attempt to explain how the result here is consistent not just in the law of workers' compensation, but elsewhere as well. The Respondent would have this court re-write the law of vested rights across the entire legal spectrum just to avoid its legal obligation to pay the benefits to which Appellant is entitled under *Schoemehl* and the statutes related thereto.

CONCLUSION

Appellant requests this Court to reverse the Commission's Award as a matter of law and thereby find in favor of Appellant on her claim for an award of continuing permanent and total disability benefits against the Second Injury Fund during Appellant's lifetime.

Respectfully submitted,

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Certificate of Rule 84.06(c) Compliance

The undersigned counsel for Appellant hereby certifies that this brief consists of 5607 words (excluding the cover, Certificate of Service, signature block, and this Certificate of Compliance) and was prepared using Corel WordPerfect X3 for Windows, utilizing Times New Roman Font, 13-point type, in full compliance with the limitations and guidelines established under Rules 55.03, Rule 84.06(c), and Local Rule 360.

The undersigned further certifies that the computer diskettes provided herewith to the Court and to opposing counsel have been scanned for viruses utilizing Symantec Endpoint Protection for Windows, Program Version 11.0.5002.333, and have been found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of the above and foregoing together with a copy of a floppy disk containing the same were mailed, postage prepaid, this _____ day of July, 2011, to:

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