

IN THE SUPREME COURT OF MISSOURI

SC 89078

MICHAEL STRAIT, Natural Father and Legal Guardian of
JOSHUA NEAL STRAIT and MICK TYLER STRAIT,
Appellant,

v.

TREASURER OF MISSOURI AS CUSTODIAN OF SECOND INJURY FUND,
Respondent

Appeal from Labor and Industrial Relations Commission
Injury Number 02-109322

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from the Decision of the Labor and Industrial Relations Commission dismissing Appellant's Motion to Amend Final Award for lack of jurisdiction. The issues here involved do not fall within the exclusive appellate jurisdiction of the Supreme Court as designated in Article V, Section III, of the Missouri Constitution and this case is within the general appellate jurisdiction of the Court of Appeals.

The claim which is the subject of this appeal arose from work injuries alleged to have occurred in Franklin County, Missouri. The matter falls within the territorial jurisdiction of the Eastern District Court of Appeals, pursuant to Section 477.050 R.S.Mo. 1978, as well as Section 287.495(1) of the Missouri Workers' Compensation Act. This Court granted transfer prior to Opinion of the Court of Appeals pursuant to Article V, Section X of the Missouri Constitution, and Supreme Court Rule 83.01.

STATEMENT OF FACTS

Appellant is the divorced Natural Father and Legal Guardian of surviving dependent minor children of deceased employee, Rosalyn Strait, a single mother, who was awarded permanent total disability benefits by virtue of a "Final Award" issued by the Labor and Industrial Relations Commission on January 12, 2007, arising out of injury occurring in August, 2002. Subsequent to the entry of that Award, Rosalyn Strait died of injuries not related to her Claim for Workers' Compensation Benefits on January 27, 2007. Notice of Claimant's Death pending Proceedings, pursuant to Section 287.580 R.S.Mo. was provided to the Commission and all parties on February 1, 2007. (app.p. 1). Said Notice further advised the Commission and all parties that decedent had dependents at the time of her death who had survived her and who, pursuant to other provisions of the Workers' Compensation Act succeeded to the rights of deceased employee, and would proceed accordingly. Respondent then filed her Notice of Appeal on February 2, 2007.

The Missouri Court of Appeals Eastern District granted Appellant's Motion to Substitute Party in the underlying appeal on March 19, 2007, substituting Michael Strait, Natural Father and Legal Guardian of Joshua Neal Strait and Mick Tyler Strait for the deceased Employee, Rosalyn Strait (app.p. 3). The Eastern District noted that none of the other parties, including Respondent herein, filed any objections to the Motion for Substitution of Party. In that order, the Court of Appeals declared that Decedent's two minor children (Appellant's children herein) were ". . . conclusively presumed to be dependent for

support on the decedent." Said Order from the Court of Appeals further held that decedent's minor children were her dependents ". . . as that term is used in Chapter 287."

In October, 2007, the Eastern District affirmed the Decision of the Commission to Award permanent total disability benefits for the remainder of Employee's lifetime. *Strait v Integram St. Louis Seating*, 236 S.W.3d 121 (Mo.App.E.D. 2007). The Court of Appeals issued its Amended Mandate on December 4, 2007 correcting the case name to reflect the substituted party, Michael Strait, Appellant herein. Thereafter, Appellant filed Employee's Motion to Amend Final Award with the Commission seeking to direct the Second Injury Fund to pay permanent total disability benefits to the substituted party claimants. In its Order of January 8, 2008, the Commission dismissed the Motion for lack of jurisdiction. (R.O.A. 10-11). In setting forth its reasoning, the Commission erroneously stated that Rosalyn Strait died while the cause was pending before the Court of Appeals. This appeal follows.

POINT RELIED ON

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN DISMISSING APPELLANT'S MOTION TO AMEND AWARD FOR LACK OF JURISDICTION BECAUSE THE COMMISSION RETAINED JURISDICTION AT THE TIME BOTH THE COMMISSION AND RESPONDENT HEREIN RECEIVED NOTICE OF EMPLOYEE'S DEATH PENDING PROCEEDINGS PURSUANT TO SECTION 287.580 R.S.MO. IN THAT SAID NOTICE WAS RECEIVED PRIOR TO THE EXPIRATION OF TIME FOR APPEALING THE AWARD TO THE MISSOURI COURT OF APPEALS.

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

Falk v Barry, Inc., 158 S.W.3d 327 (Mo.App.W.D. 2005)

Greenlee v Duke's Plastering Service, 75 S.W.3d 273 (Mo.banc 2002)

Scannel v. Fulton Iron Works Company, 289 S.W.2d 122 (Mo.Sup.Ct. 1956)

ARGUMENT

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN DISMISSING APPELLANT'S MOTION TO AMEND AWARD FOR LACK OF JURISDICTION BECAUSE THE COMMISSION RETAINED JURISDICTION AT THE TIME BOTH THE COMMISSION AND RESPONDENT HEREIN RECEIVED NOTICE OF EMPLOYEE'S DEATH PENDING PROCEEDINGS PURSUANT TO SECTION 287.580 R.S.MO. IN THAT SAID NOTICE WAS RECEIVED PRIOR TO THE EXPIRATION OF TIME FOR APPEALING THE AWARD TO THE MISSOURI COURT OF APPEALS.

I. Standard of Review

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 (Mo.banc 2007) citing *Pierson v Treasurer of the State of Missouri*, 126 S.W.3d 386, 387 (Mo.banc 2004). "This Court's interpretation of the Worker's Compensation Act is informed by the purpose of the Act, which is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment." *Schoemehl*, 217 S.W.3d at 901, citing *Wolfgeher v Wagner Cartage Serv., Inc.*, 646 S.W.2d 781, 783 (Mo.banc 1983). Accordingly, the law "shall be liberally construed to the public welfare." Section 287.800 R.S.Mo., *Schoemehl* at 901. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *Schoemehl* at 901 citing *Wolfgeher* 646

S.W.2d at 783. Employee's injury herein occurred prior to statutory amendments enacted in 2005.

II. Legal Analysis

Given the accelerated briefing schedule in this case and its docketing for argument in conjunction with *Winberry v Treasurer of the State of Missouri*, SC 88979 and *Cox v Treasurer of the State of Missouri*, SC 88992, it is important to understand the timing of the important events in this case which distinguish it from *Winberry* and *Cox*.

In this case, Rosalyn Strait was awarded permanent partial disability benefits by the administrative law judge after hearing in his Award dated March 24, 2006. Employee then filed a timely Application for Review with the Labor and Industrial Relations Commission (hereinafter "Commission"), which then issued its "Final Award Allowing Compensation" on January 12, 2007. In that Award, the Commission reversed the decision of the ALJ by awarding permanent total disability benefits in favor of Employee against the Second Injury Fund. On January 27, 2007, Employee Rosalyn Strait was killed in an automobile accident. On February 1, 2007 counsel for deceased employee filed a "Notice of Employee's Death Pending Proceedings Pursuant to Section 287.580 R.S.Mo." and provided copies of such notice to the Commission and the attorney for Respondent. Subsequently, on February 2, 2007, Respondent filed her Notice of Appeal to the Missouri Court of Appeals, Eastern District challenging the Commission's finding of permanent total disability.

Appellant herein filed his "Motion to Substitute Party" with the Eastern District Court of Appeals on March 5, 2007, which was unopposed by Respondent herein. On March 19,

2007, the Eastern District entered its Order granting the Motion to Substitute Party. Therefore, it is undisputed that, contrary to the situation concerning the deceased employees in both *Winberry* and *Cox*, the employee herein not only died **before** the appeal from the Commission to the Court of Appeals was filed, but so too were all parties and the Commission were given notice of such death pending proceedings pursuant to Section 287.580 R.S.Mo. Clearly, if the appellants in *Winberry* and *Cox* prevail in their appeals before this Court, the same reasoning would apply in favor of Appellant herein. For this reason, Appellant will not reargue the positions set forth in the briefs of Appellants in *Winberry* and *Cox*. However, the important distinction between the instant case and both *Winberry* and *Cox* demands further analysis based upon the timing of the death of the employees involved.

In issuing its ruling denying Appellant's Motion to Amend Final Award, the Commission relied heavily on the holding of the Western District Court of Appeals in *Falk v Barry, Inc.*, 158 S.W.3d 327 (Mo.App.W.D. 2005), by citing the portion of the decision which found that ". . . the Commission is without authority to further delineate the Award or expand on its meaning." (ROA p. 10). However, closer examination of the opinion in *Falk* discloses that the quoted language comes after the important holding in *Falk* as follows: ". . . the Commission properly concluded that it was without authority to amend the Award **because the time for appeal of the award had expired.**" *Falk* at 329 (emphasis added). It is not clear why the Commission overlooked this important qualifier, but perhaps it is due to the Commission's misconception of the sequence of events in this matter as indicated by

its finding that "While the cause was pending before the Court of Appeals, Ms. Strait died." (ROA p.10). Aside from the question of whether the Commission retains jurisdiction over permanent total disability cases generally as argued in both *Winberry* and *Cox*, this case raises the separate question of when the "Award" becomes final in the first place. This is a very important question, as identified by the Eastern District Court of Appeals in *Cox* discussing the issue of the Commission's jurisdiction. In that opinion, the Court held as follows: "We find the situation here different from that in *Schoemehl*. There, the injured employee's case was still pending when he died." *Cox v. Treasurer of the State of Missouri* (Mo.App.E.D. 89751, 12-04-2007 at p. 3).

Appellant anticipates that Respondent may attempt to distinguish this case from *Schoemehl* by pointing out that the employee in *Schoemehl* died prior to the Decision of the ALJ whereas Appellant's decedent herein died after the decision of the Commission upon review. The infirmity of that position is illustrated by considering the possibilities of what might have happened in the underlying appeal herein. Unless Respondent's appeal in the underlying claim was totally frivolous and without merit, there certainly remained the possibility that the Court of Appeals could have reversed the Commission and found Appellant's decedent to only be permanently partially disabled. That finding, together with her death and notice given under Section 287.580 R.S.Mo. would have resulted in the payment of unpaid "*accrued*" compensation, for which the Commission would have had to have subsequently determined to whom the compensation would be paid.

Furthermore, Section 287.580 specifically states that when an employee dies pending any proceedings, upon notice to the parties, such proceedings *may be revived and proceed in favor of the successor to the rights* [of the deceased employee]. Clearly, the Commission has jurisdiction pursuant to this Section to determine the identity and entitlement of any claimed "successor". The ability to do so would apply not only to claims against an employer, but also the Second Injury Fund. *Bone v Daniel Hamm Drayage Co.*, 449 S.W.2d 169 (Mo.Sup.Ct. 1970).

So, does the conclusion of proceedings at the Commission level equal loss of jurisdiction? No! Appellant notes that the Commission's ruling on Appellant's Motion to Amend Award in this case contains language which actually supports Appellant's position on the point. In that ruling, the Commission stated: "*When the Court of Appeals issued its Mandate in the instant matter the Award became final.*" (ROA p.11) (emphasis added). In fact, Respondent argues this very point in its Substitute Brief in *Cox*. "In *Greenlee*, the claimant died *while the appeal was pending*, therefore, the Award was not final and the Commission retained jurisdiction to address the factual dependency questions." (Substitute Brief of Respondent, *Cox v Treasurer*, SC88992 at p. 8).

In that argument, Respondent distinguishes the holdings in *Schoemehl* and *Greenlee* from the situation in *Cox* based upon the timing of the death of the employee. In *Greenlee v Duke's Plastering Service*, 75 S.W.3d 273 (Mo.banc 2002), this Court reviewed a Commission decision denying a post-permanent total disability award Motion to Modify the Commission's final award to include death benefits. The employee in that case died while

the matter was pending review before the Commission. Subsequently, the Commission issued its Final Award. *Greenlee*, 75 S.W.3d at 275. Approximately four years later, the Commission ruled that because employee's claim for disability benefits was still pending at the time of his death, any award of death benefits must be made through a modification of the Commission's prior Award and not through a separate claim. *Id.* at 275. In so doing, the Commission clearly exercised jurisdiction over the matter. While not specifically so holding, this Court tacitly approved the jurisdiction of the Commission in hearing and ruling on the Claimant's Motion to Modify the Award because, while affirming the Commission's decision to deny death benefits, this Court did not state that the Commission was without jurisdiction to entertain the Motion.

In *Cox*, Respondent argues that *Greenlee* is similar to *Schoehmehl* because the dependency issue arose before the Award became final, i.e., while the Commission could still address it (Substitute Brief of Respondent, *Cox v. Treasurer*, SC88992 at p.8). There is no plausible reason why the Commission exercised jurisdiction after a Final Award in *Greenlee*, but refuses to exercise jurisdiction to "revive" the instant case when Notice of Employee's Death was provided to all parties pursuant to Section 537.580 R.S.Mo. prior to appeal.

In addition, Respondent's argument is inconsistent with the procedure followed in *Scannel v. Fulton Iron Works Company*, 289 S.W.2d 122 (Mo.Sup.Ct. 1956). In that case, the employee who was awarded permanent total disability benefits later died from a cause not connected with the occupational disease giving rise to his claim. The surviving dependent widow then filed a suggestion of death and an application for substitution of party while the

case was on appeal. As a result, the case was remanded to the Commission to determine the right of surviving spouse to be substituted. *Scannel, supra* at 123. Similar to *Greenlee*, while not specifically so holding, this Court tacitly approved the jurisdiction of the Commission to decide dependency and substitution issues which arose on appeal, after the Commission award became "final".

Appellant herein does not seek to reopen the record or introduce new evidence before the Commission concerning the issue of dependency. Rather, that issue was decided by the Eastern District Court of Appeals in *Strait v. Integram St. Louis Seating*, 236 S.W.3d 121 (Mo.App.E.D. 2007) when it granted Appellant's Motion for Substitution of Party. (app.p. 3). In so doing, the Eastern District decided the issue of dependency at the time of employee's death. The law of the case doctrine ". . . provides that a previous holding in a case constitutes the law of the case and precludes re-litigation of the issue on remand in subsequent appeal." *Kuykendall v Gates Corp.*, 237 S.W. 3d 249, 251 (Mo.App.S.D. 2007) citing *State v. Graham*, 13 S.W.3d 290, 293 (Mo.banc 2000). Furthermore, Appellant has not sought to "modify" the Award to add death benefits as in *Greenlee*, so there is no basis to conclude that Decedent's death was caused by her work injury. In fact, the Motion to Substitute Party filed with the Eastern District in the underlying appeal specifically stated that Ms. Strait died in an automobile accident on January 27, 2007, and that Motion was unopposed by Respondent. Accordingly, the Eastern District's Order granting the Motion to Substitute obviated the need for any further record to be made or evidence to be adduced concerning the issues of dependency and cause of death.

CONCLUSION

Because Appellant's decedent died and Notice of her Death Pending Proceedings Pursuant to Section 287.580 R.S.Mo. was given to all parties and the Commission while the Commission still had the file before Respondent's Appeal to the Court of Appeals, the Commission maintains jurisdiction post-appeal to amend the Award to provide for payment of disability benefits to the substituted parties. Accordingly, this case should be remanded to the Commission with instructions to amend its Final Award to provide for lifetime payments of disability benefits to the substituted parties herein.

Respectfully,

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CERTIFICATE OF SERVICE

The undersigned hereby states that on this ____ day of February, 2008, two copies of the foregoing were hand delivered to: M. Jennifer Sommers, Assistant Attorney General, 815 Olive Street, Suite 200, St. Louis, MO 63101, Attorney for Respondent.

James G. Krispin

CERTIFICATE OF COMPLIANCE

This Brief complies with the provisions of Rule 84.06(b) and contains 3072 words, not including the Appendix. To the best of my knowledge and belief the enclosed disc has been scanned and is virus free.

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Mo. Const. Art. V, § III

Jurisdiction of the supreme court

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Mo. Const. Art. V, § X

Transfer of cases from court of appeals to supreme court - scope of review

Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as an original appeal.

Mo. Rev. Stat. §477.050

Territorial jurisdiction of the eastern district court of appeals

The jurisdiction of the eastern district of the court of appeals shall be coextensive with the counties of Monroe, Shelby, Knox, Scotland, Clark, Lewis, Marion, Ralls, Pike, Lincoln, Montgomery, Warren, St. Charles, St. Louis, Jefferson, Ste. Genevieve, Perry, Cape Girardeau, Madison, St. Francois, Washington, Franklin, Audrain, Gasconade, Osage and the city of St. Louis.

for setting aside - disputes governed by this section, claims arising on or after August 13, 1980.

1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, 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.

2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

Mo. Rev. Stat. § 287.580

Death, pending proceedings - action shall not abate

If any party, shall die pending any proceedings under this chapter, the same shall not abate, but on notice to the parties may be revived and proceed in favor of the successor to the rights or actions of the personal representative of the party liable, in like manner as in civil actions.

Mo. Rev. Stat. §287.800

Law to be liberally construed

All of the provisions of this chapter shall be liberally construed with a view to the public welfare, and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the division and the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.