

IN THE MISSOURI SUPREME COURT

NO: SC87750

**FRED SCHOEMEHL (deceased)
ANNETTE SCHOEMEHL,
Appellant,**

v.

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

**AMICUS CURIAE BRIEF OF MISSOURI MERCHANTS AND
MANUFACTURERS' ASSOCIATION AND MISSOURI UNITED SCHOOL
INSURANCE COUNCIL IN SUPPORT OF THE SUBSTITUTE RESPONDENT'S
BRIEF FILED BY THE SECOND INJURY FUND**

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The relevant, undisputed facts, stipulated to by the parties¹ at hearing are as follows:

On May 11, 2001, while employed by Cruiser Country Incorporated, Fred Schoemehl sustained a work related injury to his left knee. (Tr.19-22). Fred Schoemehl filed a Claim For Compensation against employer Cruiser Country and the Second Injury Fund (hereinafter “Fund”), seeking benefits for injuries occurring to him as a result of the May 11, 2001 accident. (Tr.19-22).

Fred Schoemehl died on January 2, 2004, from causes unrelated to the May 11, 2001 work injury. At the time he died, Fred Schoemehl was married to Annette Schoemehl (hereinafter “Appellant” or “claimant”). (Tr.19-22). On February 19, 2004, Annette Schoemehl filed an Amended Claim for Compensation, naming herself as the claimant and successor to Fred Schoemehl’s Claim for Compensation. On December 8, 2004, Annette Schoemehl settled her Claim with employer Cruiser Country and its workers’ compensation

¹Amicus Curiae Missouri Merchants and Manufacturers’ Association is an association of Missouri businesses, approximately 500 in number, which also acts as an insurance pool for several of its members. Missouri United Insurance Council is an insurance pool for select Missouri school districts.

insurer. Under the settlement between Annette Schoemehl and the employer/insurer, Annette Schoemehl received a lump sum payment in the amount of \$11,844.37, which represented a disability of 25% of the left knee, and \$1,433.97 in underpaid temporary total disability benefits. At the time of Annette Schoemehl's settlement with the employer/insurer, the Claim against the Fund was left opened for subsequent adjudication. (Tr.19-22).

ALJ's Award

ALJ Robert Dierkes held a hearing on February 24, 2005. During that hearing, evidence submitted on the issue of disability demonstrated that Fred Schoemehl was permanently and totally disabled, due to the combination of the disability arising from the May 11, 2001 work injury, and the disability arising from his pre-existing injuries and impairments. The only issue for the ALJ's resolution at hearing was the liability of the Second Injury Fund. (A7-A10).²

In his April 4, 2005 Award, ALJ Dierkes held that the Fund was liable for permanent total disability benefits for the period from December 3, 2003 through January 2, 2004, the date of Fred Schoemehl's death. (A7-A10). As ALJ Dierkes observed, Annette Schoemehl settled her Claim with the employer/insurer for 25% permanent partial disability of the left knee, representing 40 weeks of benefits. Under that settlement, claimant Annette Schoemehl was compensated with full weekly benefits from the employer/insurer through December 2,

²Matters referred to herein that are contained the Appendix to Appellants' Substitute Brief shall be designated as (A.____).

2003. The Fund was liable for an additional 4 and 3/7 weeks of benefits, through January 2, 2004. ALJ Dierkes rejected Annette Schoemehl's argument that she was entitled to additional weekly benefits after January 2, 2004 for *her* lifetime. He reasoned that claimant was not the injured employee, her husband was, and that under Section 287.200.1, compensation for permanent total disability "shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation" in effect on the date of the injury for which compensation was made. Fred Schoemehl was the employee who was injured. His lifetime (hence the payment of permanent total disability compensation), ended on January 2, 2004. Annette Schoemehl was not entitled to any disability benefits past that date. (A7-A10).

Industrial Commission Award

On December 9, 2005, the Industrial Commission issued its Final Award Allowing Compensation. Therein, the Industrial Commission affirmed the 4/4/05 Award issued by ALJ Dierkes, finding that the Award was supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. (A3-A6).

Opinion Of The Court Of Appeals, Southern District

On May 9, 2006, the Missouri Court of Appeals, Southern District, issued its Opinion. Therein, the Court of Appeals affirmed the Industrial Commission's Award. (Opinion,1).

The issue before the Southern District-whether the right to compensation for the permanent total disability of an injured employee, who has died from causes unrelated to the work injury, survives to the dependents of that injured employee-was one of first impression.

Answering this question in the negative, the Southern District held that Fred Schoemehl was not entitled to compensation for permanent total disability following his death and, therefore, Annette Schoemehl, as his dependent, was likewise not entitled to compensation for Fred Schoemehl's permanent total disability after the date of his death. (Opinion,6-12).

In so ruling, the Southern District found that the statutory definition of "**employee**", contained in Section 287.020.1, did not include the dependents of the employee for all purposes. Referencing the definition of "**employee**" contained in Section 287.020.1, the Southern District observed that a dependent of an injured employee was only considered to be an "employee" under that statutory provision when the injured employee was dead. During the lifetime of the injured employee, dependents were not considered to be employees for purposes of the Workers' Compensation Law. (Opinion,6).

Thus, the question was whether, under Section 287.200.1, the word "**employee**" included dependents. (Opinion,6). As the Southern District observed, Section 287. 200.1 spoke in terms of the "lifetime of the employee". Under that provision, compensation for permanent total disability was to be paid for the lifetime of the employee and, once the lifetime of the employee had terminated, compensation for permanent total disability also terminated. Under claimant's construction of the Act, any dependents claimant might have at the time of her death would then be considered "employees" as well, because claimant considered herself to be an injured "employee" under Section 287.020.1. If Annette Schoemehl's dependents were considered to be "employees", then the dependents' dependents, two generations removed from claimant, would also have to be considered

“employees” at the time of Annette Schoemehl’s dependents’ deaths. This would create a seemingly endless cycle of dependents turning into employees and the employer’s obligation to compensate for the permanent total disability of the first employee, Fred Schoemehl, would never end. This was not a logical interpretation of Section 287.200.1. (Opinion,6-7).

Moreover, the Southern District found that under claimant’s interpretation, the clause, “during the continuance of such disability”, contained in Section 287.200, would have no meaning. Claimant’s interpretation of Section 287.200 was premised on the assumption that Fred Schoemehl’s permanent total disability would continue indefinitely, and not be subject to further review. Appellant was not asserting that she had to have a continuing disability, only Fred Schoemehl, as the initial employee, was required to have such a disability. This construction of Section 287.200.1, the Southern District rejected as illogical. (Opinion,7).

Further, the Southern District found that *Nations v. Barr*, 43 S.W.2d 858 (Mo.App.St.L.D.1931); *Henderson v. National Bearing Div. of American Brake Shoe Co.*, 267 S.W.2d 349 (Mo.App.St.L.D.1954); and *Bone v. Daniel Hamm Drayage Co.*, 449 S.W.2d 169 (Mo.banc.1970), relied upon by claimant, involved permanent partial disability benefits, and not permanent total disability benefits, as did the case before it. This distinction was significant, since Section 287.200.1 only applied to cases of permanent total disability, not permanent partial disability, and since compensation for permanent partial disability involved a pre-determined, finite amount to be paid. The fairest way to read *Nations*, *Henderson*, and *Bone*, the Southern District concluded, was to find that those cases stood for the proposition that under Section 287.230, the right to compensation for permanent *partial*

disability of an injured employee, who dies from causes unrelated to their work injury, survives to the dependents of that injured employee. (Opinion,7-9).

The Southern District rejected claimant's argument that since there were no cases limiting Section 287.230 to compensation for permanent partial disability, and since Section 287.230 spoke in terms of "compensation" generally, that section should be interpreted to include compensation for permanent total disability as well. In making this argument, claimant ignored a significant difference between compensation for permanent total disability and all other forms of compensation for work related injuries. As the Southern District observed, the difference was that at the time of an award of compensation for permanent total disability, there was no pre-determined ending date to the payment of benefits. This was unlike cases of permanent partial disability, temporary total disability, and temporary partial disability. In those cases, an employer was only required to continue to make payments to the injured employee for the finite time period mandated by the respective provisions of the Act. Under Section 287.230, as interpreted by *Nations* and *Henderson*, the right to this finite amount of money survived to dependents of the injured employee when the employee died of causes unrelated to their work injury. (Opinion,9-10).

Permanent total disability, on the other hand, had no pre-determined ending date because the injured employee was totally disabled when he was unable to return to any employment. Pursuant to Section 287.200.1, an employer was obligated to make payment for an injured employee's permanent total disability for the "lifetime of the employee". Compensation for permanent total disability continued so long as the employee was alive or

no longer disabled. Once the injured employee died, he was no longer entitled to compensation for permanent total disability, thus leaving nothing for his dependents to claim. (Opinion,10).

This interpretation of Section 287.200.1 was in harmony with Section 287.230.2. Section 287.230.2 only applied to dependents of a deceased injured employee where an employee was *entitled* to compensation and death ensued for any cause not resulting from the injury for which he was *entitled* to compensation. The key word, the Southern District noted, was *entitled*. If the injured employee was no longer *entitled* to compensation, his dependents were entitled to nothing. In *Nations*, *Henderson*, and *Bone*, which all involved compensation for permanent partial disability, the injured employees were entitled to compensation for a fixed amount of time. Although the employees in each of these cases died before this fixed amount of time had expired, they were all still *entitled* to that compensation, and as Section 287.230.2 required, their respective dependents became entitled to the right to that compensation. (Opinion,10-11).

On the other hand, permanent total disability awards, by their very nature, were not fixed amounts and such payments lasted for an indefinite period of time. The injured employee was only *entitled* to compensation for permanent total disability “during the continuance of the disability for the lifetime of the employee”. Thus, once either (1) the disability no longer continued; or (2) the lifetime of the employee was terminated, the employee was no longer *entitled* to compensation for permanent total disability. (Opinion,11).

As the Southern District reasoned, if the employee is not *entitled* to compensation, Section 287.230.2 was not triggered, and the result was that there was nothing for the dependents of the injured employee to be compensated for. In the instant case, Fred Schoemehl was entitled to compensation for permanent total disability, starting on 12/2/03 to either: 1) a time when his disability no longer continued to exist; or 2) the time when his life terminated. Fred Schoemehl's permanent total disability never ceased to exist during his lifetime. However, Fred Schoemehl's life ended on January 2, 2004. Under Section 287.200.1, Fred Schoemehl was no longer entitled to compensation for permanent total disability after that date. Accordingly, under Section 287.230.2, claimant, as Fred Schoemehl's dependent, was likewise not entitled to compensation for Fred Schoemehl's permanent total disability following January 2, 2004. Thus, the Industrial Commission's decision did not create legislative disharmony. (Opinion,11-12).

Finally, the Southern District held that the Industrial Commission's decision did not violate the Equal Protection clauses of the United States and Missouri Constitutions. (Opinion,12). The focus of the statutes at issue was on the compensation to which an injured employee was *entitled*. Section 287.230.2 essentially provided a right to the dependents of an employee, who died of causes unrelated to the work injury for which he was entitled to compensation, to collect the compensation to which the deceased employee was entitled. Section 287.200.1 granted an employee the right to be compensated for permanent total disability only for his lifetime. A permanently and totally disabled person was not entitled to benefits after their death. The Industrial Commission's decision interpreted Section 287.230

in a way that was rationally related to a legitimate state interest. That interest was in the different compensation of totally disabled persons and partially disabled persons. (Opinion,12-13).

As the Southern District found, Fred Schoemehl had a permanent total disability and, pursuant to Section 287.200.1, was entitled to compensation during his lifetime. Upon his death, his dependents were not entitled to receive any of that compensation. Conversely, if Fred Schoemehl had sustained a permanent partial disability, his compensation would have been determined according to Section 287.190, and that amount would have been fixed and finite, and Fred Schoemehl would have been entitled to that full compensation. Thus, under Section 287.230.2, Fred Schoemehl's dependents, on his death, would have been entitled to the balance of the compensation that Fred Schoemehl was already entitled to. Consequently, there was a rational basis for the Industrial Commission's construction of Sections 287.200 and 287.230, in that its construction only permitted dependents of a deceased employee to collect that compensation which the employee was *entitled* to receive. There being a rational basis for the Industrial Commission's construction of the law, the Southern District held that its decision did not violate either the Equal Protection Clause of the United States or the Missouri Constitution. (Opinion,13-14).

STANDARD OF REVIEW

The Supreme Court reviews the Award of the Industrial Commission pursuant to Section 287.495. R.S.Mo. §287.495. Under Section 287.495, the Court may modify,

reverse, remand for hearing, or set aside the Award only on the ground(s) specified by statute, namely: 1) that the Industrial Commission acted without or in excess of its power; 2) that the Award was procured by fraud; 3) that the facts found by the Industrial Commission do not support the Award; or 4) that there was not sufficient, competent evidence in the record to warrant the making of the Award. R.S.Mo. §287.495.1; *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222 (Mo.banc.2003).

The Court examines the whole record to determine if it contains sufficient, competent and substantial evidence to support the Industrial Commission's Award. *Hampton*, 121 S.W.3d at 222-223. It will set aside the Industrial Commission's factual findings and resulting award, if the award is contrary to the overwhelming weight of the evidence. *Id.*

On appeal, issues involving matters of law are reviewed independently. *Blades v. Commercial Transport Inc.*, 30 S.W.3d 827, 828-829 (Mo.banc.2000). Interpretation of a statute is a question of law, warranting de novo review. *Smith v. Shaw*, 159 S.W.3d 830, 831 (Mo.banc.2005).

POINTS RELIED ON

I

THE INDUSTRIAL COMMISSION DID NOT ERR IN RULING THAT ANNETTE SCHOEMEHL, AS FRED SCHOEMEHL'S SURVIVING DEPENDENT, WAS NOT

ENTITLED TO COMPENSATION FOR FRED SCHOEMEHL'S PERMANENT TOTAL DISABILITY AFTER HIS DEATH FROM CAUSES UNRELATED TO HIS WORK INJURY, FOR THE REASONS THAT:

A.

PURSUANT TO SECTION 287.200.1, FRED SCHOEMEHL WAS ONLY ENTITLED TO RECEIVE PERMANENT TOTAL DISABILITY BENEFITS DURING THE "CONTINUANCE OF SUCH DISABILITY" FOR HIS LIFETIME; ONCE FRED SCHOEMEHL DIED, HIS ENTITLEMENT TO RECEIVE PERMANENT TOTAL DISABILITY CEASED; AND THEREFORE, ANNETTE SCHOEMEHL, AS THE EMPLOYEE'S SURVIVING DEPENDENT, WAS NOT ENTITLED TO RECEIVE PERMANENT TOTAL DISABILITY BENEFITS PURSUANT TO SECTION 287.230.2.

B.

THE INDUSTRIAL COMMISSION AWARD DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, FOR THE REASONS THAT THE INDUSTRIAL COMMISSION'S DECISION HARMONIZES SECTION 287.200.1 AND SECTION 287.230.2, WHILE ACCORDING THE TERMS THEREIN THEIR PLAIN AND ORDINARY MEANING; AND THE CLASSIFICATION ESTABLISHED BY THE INDUSTRIAL COMMISSION'S DECISION IS BOTH CONSISTENT WITH THE DISTINCTION BETWEEN PERMANENT PARTIAL DISABILITY AND

PERMANENT TOTAL DISABILITY BENEFITS UNDER THE WORKERS' COMPENSATION ACT, AND IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF PROVIDING THE SURVIVING DEPENDENTS OF INJURED EMPLOYEES WITH THE SAME WORKERS' COMPENSATION BENEFITS AS THOSE EMPLOYEES WOULD HAVE BEEN ENTITLED HAD THEY LIVED.

Kristanik v. Chevrolet Motors Co., 41 S.W.2d 911 (Mo.App.E.D.1931)

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

In the matter of Care & Treatment of Schottle v. State, 159 S.W.3d 836 (Mo.banc.2005)

United C.O.D. v. State of Missouri, 150 S.W.3d 311 (Mo.banc.2004)

ARGUMENT

I.

THE INDUSTRIAL COMMISSION DID NOT ERR IN RULING THAT ANNETTE SCHOEMEHL, AS FRED SCHOEMEHL'S SURVIVING DEPENDENT, WAS NOT ENTITLED TO COMPENSATION FOR FRED SCHOEMEHL'S PERMANENT TOTAL DISABILITY AFTER HIS DEATH FROM CAUSES UNRELATED TO HIS

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Introduction

The issue before the Court is one of first impression: does the right to compensation of a permanently and totally disabled employee, who dies from causes unrelated to his work injury, survive to the dependents of the injured employee? When Section 287.200.1 is construed in pari materia and harmonized with 287.230.2, it becomes readily apparent that the answer to this question is “no”.

Nature Of Workers’ Compensation Proceedings

A proper resolution of the question before the Court requires an understanding of the nature of workers’ compensation proceedings. The Workers’ Compensation Act is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy, which is wholly substitutional in character and supplants all other rights and

remedies, where an employer and employee have elected to accept the Act or are subject thereto by operation of law. *Sheets v. Hill Brothers Distributors Inc.*, 379 S.W.2d 514, 516 (Mo.1964); *State ex rel McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152, 153 (Mo.banc.1988). All remedies, claims or rights accruing to an employee against an employer for compensation for an injury arising out of and in the course of his employment are those provided for in the Workers' Compensation Act, to the exclusion of any common law or contractual rights. *Sheets*, 379 S.W.2d at 516. The rights of the parties under the Workers' Compensation Act, and the manner of procedure thereunder, must be determined by the provisions of the Act. *Kristanik v. Chevrolet Motors Co.*, 41 S.W.2d 911, 912 (Mo.App.E.D.1931). Proceedings under the Act are purely statutory. *Id.*

Workers' compensation law is entirely a creature of statute, and the Court is guided by general rules of statutory construction in interpreting the Workers' Compensation Act. *Richard v. Missouri Dept. of Corrections*, 162 S.W.3d 35, 39 (Mo.App.W.D.2005); *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 276 (Mo.banc.2002). Thus, the Court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms, and give effect to that intent, if possible. *Greenlee*, 75 S.W.3d at 276; *Elrod v. Treasurer of Missouri*, 138 S.W.3d 714, 716 (Mo.banc.2004); *Smith*, 159 S.W.3d at 834. In determining legislative intent, statutory words and phrases are taken in their usual and ordinary sense. *Smith*, 159 S.W.3d at 834. When a statute does not define a term, that term is to be given its plain meaning, as derived from the dictionary. *Missouri Department of Social Services v. Brookside Nursing Center*, 50 S.W.3d 273, 276 (Mo.banc.2001); *State ex*

rel Nixon v. Quiktrip Corp., 133 S.W.3d 33, 37 (Mo.banc.2004). A term in a statute must be considered in context. *Missouri Dept. of Social Services*, 50 S.W.3d at 277.

The provisions of a legislative act are not read in isolation. Rather, they are construed together and read in harmony with the entire act. *Missouri Department of Social Services*, 50 S.W.3d at 276; *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo.banc.2005) (in determining legislative intent, a statute is read as a whole and in pari materia with related sections). In interpreting statutes, it is appropriate to take into consideration statutes involving similar or related subject matter, when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters or were enacted at different times. *Lane*, 158 S.W.3d at 226; *State ex rel BP Products North America v. Ross*, 163 S.W.3d 922, 927 (Mo.banc.2005) (related statutes are also relevant to further clarify the meaning of a statute).

If possible, each word or phrase in a statute must be given meaning. *BP Products North America*, 163 S.W.3d at 927; *State v. Blocker*, 133 S.W.3d 502, 504 (Mo.banc.2004).

When examining statutes, the Supreme Court presumes that the legislature did not intend to enact an absurd law and favors a construction that avoids unjust or unreasonable results. *In the matter of Care & Treatment of Schottle v. State*, 159 S.W.3d 836, 842 (Mo.banc.2005).

Where the words of a statute are capable of more than one meaning, the Court will give the words a reasonable reading, rather than an absurd or strained reading. *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo.banc.2000).

To ascertain legislative intent, the Court should examine the words used in the statute,

the *context* in which the words are used, and the problem the legislature sought to remedy by the statute's enactment. *Care & Treatment of Schottle*, 159 S.W.3d at 841-842. In interpreting a statute, the Court should strive both to implement the policy of the legislature and to harmonize all provisions of the statute. *Id.*

A court cannot add words to a statute under the auspice of statutory construction. *Southwestern Bell Yellow Pages v. Dir. of Revenue*, 984 S.W.3d 388, 390 (Mo.banc.2002). Nor may a court read into a statute a legislative intent contrary to the intent made evident by the statute's plain language. *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo.banc.2002). A court is not permitted to engraft upon a statute provisions which do not appear in the explicit words, or by implication from the words contained in the statute. *Div. of Medical Services v. Brundage*, 85 S.W.3d 43, 49 (Mo.App.W.D.2002). Provisions not plainly written in a statute, or necessarily implied from what is written, will not be imparted or interpolated in order that the existence of a right may be made to appear when otherwise, on the face of the statute, it does not appear. *Sayles v. Kansas City Structural Steel*, 128 S.W.2d 1046, 1051 (Mo.banc.1939).

The purpose of the Workers' Compensation Act is to compensate employees for work-related injuries. *Elrod*, 138 S.W.3d at 716. The Workers' Compensation Act is to be liberally construed in favor of an injured employee, and with a view to the public welfare. However, the Act may not be liberally construed to the extent that the intent of the legislature is negated. *Id.*; *Nunn v. C.C. Midwest*, 151 S.W.3d 388, 396. While the Workers' Compensation Act is to be construed so as to best effectuate its beneficent purpose, the

Supreme Court is not at liberty to write into the Act, under the guise of construction, provisions that the legislature did not see fit to insert. *Sayles*, 128 S.W.2d at 1054. Nor does liberal application of the Workers' Compensation Act extend to the authorization of a compensation claim, which lacks an essential element required by law. *Ossery v. Burger-Baird Engine Engraving Co.*, 256 S.W.2d 805, 809 (Mo.1953).

Nature Of Disability Benefits Under The Workers' Compensation Act

The Missouri Workers' Compensation Act provides for four types of disability benefits: temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability. R.S.Mo. §287.170.1; R.S.Mo. §287.180.1; R.S.Mo. §287.190; R.S.Mo. §287.200.1. Workers' compensation benefits for temporary total disability are intended to cover an employee's healing period from a work related injury. *Phelps v. Jeff Wolk Constr.*, 803 S.W.2d 641, 645-646 (Mo.App.E.D.1991). The Act contemplates that temporary total disability is to be paid prior to the time when an injured employee can return to work, his condition stabilizes, or his condition has reached the point of maximum medical progress. *Id.* Pursuant to Section 287.170.1, for temporary total disability, "the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made." R.S.Mo. §287.170.1.

Pursuant to Section 287.180.1, temporary partial disability compensation "shall be paid during such disability but not for more than one hundred weeks, and shall be sixty-six

and two-thirds percent of the difference between the average earnings prior to the accident and the amount which the employee, in the exercise of reasonable diligence, will be able to earn during the disability, to be determined in view of the nature and extent of the injury and the ability of the employee to compete in an open labor market.” R.S.Mo. §287.180.1.

Section 287.190 governs permanent partial disability. R.S.Mo. §287.190. Therein, “**permanent partial disability**” is defined as a disability that is permanent in nature and partial in degree. R.S.Mo. §287.190.6. Pursuant to Section 287.190.1,

“For permanent partial disability, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with sections 287.170 and 287.180, respectively, the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made, which compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses”. R.S.Mo. §287.190.1.

For permanent injuries other than those specified in the schedule of losses set forth in Section 287.190.1,

“the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the

injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power. For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of the arm, hand, thumb, finger, leg, foot, toe or phalange, as provided in the schedule of losses.”

R.S.Mo. §287.190.3.

Clearly then, as provided for in Sections 287.170.1, 287.180.1, and 287.190 of the Workers' Compensation Act, temporary total disability, temporary partial disability, and permanent partial disability compensation are benefits, of a finite, fixed amount, to be paid to an injured employee, for a set period of time, measured in weeks. Permanent total disability benefits, however, are not of this nature. Section 287.200.1 provides that:

“Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made.” R.S.Mo. §287.200.1.

By its express language, Section 287.200.1 measures permanent total disability in terms of the “lifetime” of the injured employee, and not in terms of a finite amount or a specific number of weeks, as do Sections 287.170.1, 287.180.1, and 287.190. R.S.Mo. §§287.170.1;

287.180.1; 287.190.1; 287.190.3; 287.200.1.

Pursuant to the explicit terms of Section 287.170.1, 287.180.1, 287.190.1, and 287.190.3, benefits for temporary total disability, temporary partial disability, and permanent partial disability are finite amounts, to be paid for a fixed period, not to exceed a stated number of weeks. R.S.Mo. §§287.170.1; 287.180.1; 287.190.1; and 287.190.3. However, permanent total disability benefits, as contemplated by Section 287.200.1, are not finite amounts, restricted to a certain number of weeks. Rather, permanent total disability benefits are to be paid “during the continuance of such disability for the lifetime of the employee”. R.S.Mo. §287.200.1. As the Southern District properly found, the entitlement to continued payment of permanent total disability is dependent upon two contingencies: 1) the continuance of permanent total disability; and 2) the continuance of the employee’s life. (Opinion,10). If either of these contingencies is not satisfied, an employee is no longer entitled to permanent total disability and his permanent total disability benefits will terminate. For example, if an injured employee is no longer permanently and totally disabled, the responsible employer can file a motion for change in condition and, if that motion is granted, permanent total disability benefits will cease. R.S.Mo. §287.470; ***Bunker v. Rural Elec. Coop.***, 46 S.W.3d 641, 646-647 (Mo.App.W.D.2001).

Unlike Section 287.190, no provision of Section 287.200 limits permanent total disability benefits to a finite amount, or restricts the payment of such benefits to a certain number of weeks. R.S.Mo. §§ 287.190; 287.200.1. Section 287.190.6, pertaining to permanent partial disability, provides that when payment has been made in accordance with a

settlement for permanent partial disability benefits, such percentage of disability shall be conclusively presumed to continue undiminished, whenever a subsequent injury to the same part of the body also results in permanent partial disability, for which compensation under the Act may be due. R.S.Mo. §287.190.6. No provision of Section 287.200 states that permanent total disability benefits shall continue, undiminished, for an indefinite period of time. R.S.Mo. §287.200.

Recovery Of Benefits By Surviving Dependents Of An Injured Employee

Section 287.230 addresses the payment of compensation at the death of an injured employee. That statutory provision states, in relevant part:

“Where 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 therefor shall terminate unless there are surviving dependents at the time of death.”

R.S.Mo. §287.230.2.

No reported Missouri decision has applied Section 287.230.2 to permanent total disability benefits, as claimant seeks to do in the instant case. *Nations v. Barr*, 43 S.W.2d 858; *Henderson v. National Bearing Div. of American Brake Shoe Co.*, 267 S.W.2d 349;

and *Bone v. Daniel Hamm Drayage Co.*, 449 S.W.2d 169, each applied Section 287.230 in the context of permanent partial disability benefits.

At issue in *Nations* was whether a dependent widow was precluded from recovering compensation for a deceased employee's disability by the employee's failure to file a compensation claim during his lifetime. *Nations*, 43 S.W.2d at 861. Almore Nations was injured while in the employ of Barr. Subsequently, Nations died, but not as a result of his work related injury. His dependent widow filed two claims for compensation. One claim was for the death of her husband. The second claim was for permanent partial disability. Both claims were alleged to have resulted from the employee's work injury—a fracture of the right femur. After the two claims were consolidated for hearing, a Commissioner disallowed the claim for death benefits, and awarded compensation on the claim for permanent partial disability. Upon review before the whole Commission, a final award was made for permanent partial disability in accordance with the award of the Commissioner. The Circuit Court reversed the award of the full Commission, and plaintiff appealed to the Court of Appeals. *Nations*, 43 S.W.2d at 859.

During appeal, the employer contended that under Section 3318 of the Act,³ plaintiff was not entitled to an award for disability for the deceased employee, for the reason that no claim for compensation was filed by the employee, and no award of compensation was made by the Industrial Commission, prior to his death. *Nations*, 43 S.W.2d at 861. Interpreting

³Section 3318 of the 1929 Workers' Compensation Act was the statutory predecessor of what is currently Section 287.230.

Section 3318, the Court construed the first clause as relating only to cases where an employee's death resulted from the work injury. In such cases, only accrued compensation was payable, and death was the end of the disability. Under such circumstances, the beneficiaries could not collect both for the death and the disability, but they were entitled to receive compensation only for the death, plus whatever compensation for disability that had accrued and become payable upon the death of the employee. *Nations*, 43 S.W.2d at 861. The second clause of Section 3318, the Court found to relate only to cases where death resulted from a cause other than the work injury. This clause provided that payments for the unaccrued balance for such injury shall cease, and all liability therefor shall terminate, upon the death of the employee, unless there be surviving dependents at the time of such death. Clearly, under this clause, the right of the employee to compensation for disability, accrued and unaccrued, survived to his dependents. There was no provision or suggestion in Section 3318 that the right to compensation must be evidenced by a claim filed, or an award made, prior to the death of the employee, to entitle the dependents to compensation. It was the right to compensation, not the evidence of it, that survived to the dependents. *Nations*, 43 S.W.2d at 861.

Henderson, 267 S.W.2d at 352-353, held that an employee's right to recover compensation for the loss of earning power, which right would have died with the employee if he had no dependents, survived to the employee's dependent son to whom it was reserved, by statute, that which the employee could have recovered had he lived. Hibbler sought compensation for disability arising out of an occupational disease contracted while he was in

National Bearing Division's employ. Before the claim was heard, Hibbler died, from a cause not connected with his occupational disease, and his minor son, by guardian, was substituted as claimant. *Henderson*, 267 S.W.2d at 349-350. The Industrial Commission found that Hibbler contracted an occupational disease resulting in 65% permanent partial disability of the body as a whole, and that Hibbler subsequently died from causes unrelated to his occupational disease. Further, the Industrial Commission found that the employer's liability for the permanent partial disability awarded had accrued and become payable at the time of Hibbler's death, and that Hibbler's son was entitled to the unpaid accrued balance and the unpaid unaccrued balance of compensation for that permanent partial disability. *Henderson*, 267 S.W.2d at 350-351.

Employer contended that the employee's death terminated all liability for payments beyond the time of his death. In rejecting the employer's contention, the Court relied on Section 287.230, as construed in *Nations*, 267 S.W.2d at 350-351. The Court reasoned that if *Nations* properly construed Section 287.230, then the award must be affirmed. *Henderson*, 267 S.W.2d at 352. Employer argued that an allowance of compensation beyond the date of the employee's death would be in the nature of damages rather than compensation for loss of wages, and that the purpose of the Act was to compensate for the loss of earning power and disability to work. As the Court observed, however, awards of permanent partial disability did not represent damages for loss of wages, but rather, for the loss of earning power. Section 287.530, stating that it was the intention of the Act that compensation payments were in lieu of wages and were to be received by the injured employee in the same

manner in which wages were ordinarily paid, related to the manner of the payment of an award, and not to the nature of it. Therefore, the construction given to Section 287.230 in *Nations* did not conflict with Section 287.530. *Id.*

Additionally, employer argued that the language in Section 287.230, providing that payments of the unpaid unaccrued balance for such injury shall cease and all liability therefor shall terminate unless there be surviving dependents at the time of death, could not refer to any sums that might have been due the employee beyond the date of death, because of the word “unaccrued”. Rejecting this argument, the Court held that this statutory language could only mean the unawarded and unpaid amounts due to the employee by virtue of his injury. *Henderson*, 267 S.W.2d at 352-353. What survived to the dependent when the employee died was the right to compensation, as stated in *Nations*. The purpose of the Act was to compensate for the loss of earning power. Hibbler suffered such a loss and had a right to recovery. This right would have died with him, if he had no dependents. But the statute reserved, to his dependent son, that which Hibbler could have recovered had he lived. *Henderson*, 267 S.W.2d at 353.

Bone, 449 S.W.2d at 169, applied Section 287.230 so as to permit an employee’s dependents to recover permanent partial disability benefits from the Fund. Therein, the Supreme Court held that where an employee sustained a compensable injury, and at the time of the injury had a pre-existing permanent partial disability, and the combination of that pre-existing disability and his work injury resulted in additional permanent partial disability to the employee, the employee’s dependent widow could succeed to the deceased worker’s

rights to permanent partial disability compensation from the Fund. *Bone*, 449 S.W.2d at 174. Bone claimed compensation from his employer for traumatic amputation of his right foot, and from the Fund, on account of that injury, and a pre-existing permanent partial disability. The employee entered into a compromise settlement with the employer, whereunder he received 170 weeks of permanent partial disability benefits. The claim against the Fund was left pending. Subsequently, the injured employee died and his widow amended and proceeded with the claim against the Fund. *Bone*, 449 S.W.2d at 170. After hearing, a referee entered an award in favor of the widow, and against the Fund. The Industrial Commission affirmed. On appeal to the Circuit Court, the Fund obtained a reversal of the award. The Supreme Court reversed. *Bone*, 449 S.W.2d at 170-171.

At issue before the Supreme Court was whether the injured employee's widow was entitled to recover the compensation which would have been due to the injured employee from the Fund, had the employee lived. *Bone*, 449 S.W.2d at 171. The Fund asserted that the employee's claim against it died with him. Specifically, the Fund contended that Section 287.230 provided only that the liability of an employer was not affected by the death of an employee, and that Section 287.230 was not intended to apply to continue the Fund's liability after an injured employee's death. This was a question of first impression in Missouri. *Bone*, 449 S.W.2d at 173.

As the Supreme Court noted, the general rule was that dependents of an injured employee were not entitled to compensation during the employee's life, and they succeeded to the employee's right to disability compensation on his death, only to the extent provided

for by statute. **Bone**, 449 S.W.2d at 174. Section 287.020 provided that any reference to an employee who has been injured shall, when the employee is dead, also include his dependents, and other persons to whom compensation may be payable, and that the term “employee” was used without any qualification in Section 287.220, in providing for the recovery against the Fund. The accrual of Bone’s right to compensation was not questioned. Thus, the Supreme Court held that the Industrial Commission’s finding that his dependent widow succeeded to that right was intended and authorized under the Act. **Bone**, 449 S.W.2d at 174.

Giving **Nations**, **Henderson**, and **Bone** their most liberal reading, those decisions stand for nothing more than the proposition that where an injured employee who is entitled to permanent *partial* disability benefits as the result of a work related injury, whether such benefits are the obligation of an employer or the Fund, and the employee dies due to causes unrelated to his work injury, his surviving dependents may recover those permanent *partial* disability benefits. **Nations**, 43 S.W.2d at 861; **Henderson**, 267 S.W.2d at 352-353; **Bone**, 449 S.W.2d at 174. None of these decisions hold that, when an injured employee dies from causes unrelated to his work injury, his dependents may recovery permanent *total* disability benefits against either an employer or the Fund. **Id.** To the extent that Appellant relies upon **Nations**, **Henderson**, and **Bone** to support her claim for permanent total disability benefits against the Fund, her reliance upon those decisions is misplaced. **Nations**, **Henderson**, and **Bone** do not authorize the recovery of the permanent total disability benefits that Appellant seeks as the dependent of Fred Schoemehl. **Id.**

Nor does *Scannell v. Fulton Iron Works Co.*, 289 S.W.2d 122 (Mo.1956), permit claimant to recover permanent total disability benefits, as she suggests in her Substitute Appellant's Brief. (Appellant's Substitute Brief,32-33). *Scannell* ruled that where a judgment was entered in a workers' compensation case after the death of an injured employee for permanent total disability payments of \$25.00 per week for 300 weeks and for medical aid, but was expressly made subject to modification and review by the Industrial Commission, the amount involved was not more than \$7,500.00, independent of all contingencies, and therefore, the case fell within the jurisdiction of the Court of Appeals, pursuant to Section 287.500. *Scannell*, 289 S.W.2d at 125-126.

Significantly, the version of Section 287.200 at issue therein stated that an injured employee could receive permanent total disability benefits during 300 weeks and thereafter for life, but not less than \$8.00, nor more than \$18.00 per week. *Scannell*, 289 S.W.2d at 123-124. At that time, Section 287.200 did not provide for a single permanent total disability benefit, but rather, provided for 300 weekly payments of a specified amount, and additional payments for life. *Scannell*, 289 S.W.2d at 125. The difference in the statutory language in Section 287.200, as that provision existed at the time the *Scannell* decision was issued, and Section 287.200, as it presently exists, renders that decision irrelevant to the issue before the Court. It must also be noted that *Scannell* involved an action for enforcement of a workers' compensation award under Section 287.500, and did not address the merits of the underlying award. *Scannell*, 289 S.W.2d at 125-126. Therefore, like *Nations*, *Henderson*, and *Bone*, *Scannell* does not stand as authority to support Appellant's claim for permanent total

disability benefits under Section 287.230.2.

To determine whether claimant may recover permanent total disability benefits from the Fund, Section 287.230.2 must be read in pari materia with Section 287.200.1, and the two statutes must be harmonized. *Care & Treatment of Schottle*, 159 S.W.3d at 841-842. In interpreting these statutory provisions, the distinction between the nature of permanent partial disability benefits and permanent total disability benefits must be taken into account. According to the express language contained in Section 287.200.1 its plain and ordinary meaning, and placing the language in its proper statutory context, it becomes apparent that permanent total disability benefits are only to be paid during such time as an employee continues to be permanently and totally disabled, and continues to live. R.S.Mo. §287.200.1. Once an employee is no longer permanently and totally disabled, or the injured employee dies, his entitlement to permanent total disability benefits, and the obligation of an employer or the Fund to pay such benefits, is extinguished. *Id.* Any other construction of Section 287.200.1 would fail to give meaning to the words “during the continuance of such disability for the lifetime of the employee” contained therein. *BP Products North America*, 163 S.W.3d at 927.

There is no dispute that Fred Schoemehl died from causes unrelated to the left knee injury he sustained in the May 11, 2001 accident. (Tr.19-22). Thus, Section 287.230.2 applies to determine whether Annette Schoemehl, as Fred Schoemehl’s dependent, may recover workers’ compensation benefits upon his death. R.S.Mo. §287.230.2. As the Southern District properly found, the key to the application of Section 287.230.2 is the word

“**entitled**”, contained therein. Section 287.230 does not define the word “**entitled**”, as used within that statutory section. Nor does any other provision of the Workers’ Compensation Act. In the absence of a statutory definition, the term must be given its plain meaning, as found in the dictionary. *Mo. Dept. of Social Services*, 50 S.W.3d at 276. **Merriam Webster’s Collegiate Dictionary**, 10th Edition, defines “**entitle**” as follows:

“1: to give a title to: DESIGNATE; 2: to furnish with proper grounds for seeking or claiming something <this ticket ~s the bearer to free admission>.”

The Missouri Supreme Court has given “**entitle**” a similar meaning. See *In re Graves*, 30 S.W.2d 145, 151 (Mo.banc.1930), holding that the word “**entitle**” meant to give a right or title to; to qualify for, with a direct object of the person, and a remote object of the thing; or to furnish with grounds for seeking or claiming with success.

According to the word “**entitled**” its plain meaning, and construing Section 287.230.2 in a manner consistent with the *Nations*, *Henderson* and *Bone* decisions, when an employee is entitled to compensation for permanent partial disability benefits-benefits owed for a finite amount, and representing a certain number of weeks- and death ensues for an unrelated cause, and the employee has surviving dependents at the time of his death, payment of unpaid accrued and unaccrued permanent *partial* disability compensation will be paid over to the employee’s dependents. R.S.Mo. §287.230.2; *Nations*, 43 S.W.2d at 861.

For example, assume that Fred Schoemehl only named the employer in his Claim, and did not seek recovery against the Fund. Assume further that Fred Schoemehl died of causes

unrelated to his work injury, and that an ALJ concluded that Fred Schoemehl sustained a 25% permanent partial disability of the right knee, due to the May 11, 2001 accident. The amount owed to Fred Schoemehl was fixed, (the 25% permanent partial disability awarded represented 40 weeks of benefits), and thus, was a sum certain. Under these circumstances, the right to receive payment for that 25% permanent partial disability survived to Annette Schoemehl, as Fred Schoemehl's dependent. Section 287.230.2; *Nations*, 43 S.W.2d at 861; *Henderson*, 267 S.W.2d at 350-351; *Bone*, 449 S.W.2d at 174.

Put in the language of Section 287.230.2, Fred Schoemehl would be "*entitled*" to \$11,844.37 in permanent partial disability benefits, and, in the event he died from causes unrelated to his work injury, claimant, as his surviving dependent, would be "*entitled*" to that amount. Unlike permanent total disability benefits, the continued payment of permanent partial disability benefits is not contingent upon either the continuance of permanent partial disability, or upon the continuance of the injured employee's life. R.S.Mo. §287.190.1; 287.200.1. Consequently, Fred Schoemehl, and claimant as his surviving dependent, would be "*entitled*" to permanent partial disability benefits of 25% of the right knee, representing 40 weeks of permanent partial disability, regardless of whether the employee's permanent partial disability continued, or whether he died during that 40 week period. R.S.Mo. §287.230.2; *Nations*, 43 S.W.2d at 861; *Henderson*, 267 S.W.2d at 350-351.

A different result obtains under Section 287.230.2, if the disability sustained by Fred Schoemehl is permanent *total* disability, rather than permanent partial disability. Under Section 287.200.1, Fred Schoemehl would be *entitled* to compensation for permanent total

disability, so long as he remained permanently and totally disabled, and so long as he continued to live. R.S.Mo. §287.200.1. However, once Fred Schoemehl died, one of the two requirements for entitlement to permanent total disability benefits under Section 287.200.1 was no longer satisfied. As a result, Fred Schoemehl was no longer “*entitled*” to permanent total disability compensation. R.S.Mo. §287.200.1. As his surviving dependent, Annette Schoemehl succeeded to the same rights as Fred Schoemehl had under the Act, and to no greater rights. Upon Fred Schoemehl’s death, any entitlement he had to permanent total disability benefits ceased. Therefore, Annette Schoemehl, as his surviving dependent, could not recover permanent total disability benefits. R.S.Mo. §§287.200.1; 287.230.2.

While the death of an injured employee does not extinguish their entitlement, and thus the entitlement of their surviving dependents, to permanent *partial* disability benefits, the death of an injured employee extinguishes their entitlement, and thus the entitlement of their dependents, to permanent *total* disability benefits. R.S.Mo. §§287.190; 287.200.1; 287.230.2; *Nations*, 43 S.W.2d at 861. It necessarily follows that Annette Schoemehl may not recover permanent total disability benefits under Section 287.230.2. The Industrial Commission’s Award must be affirmed.

Appellant’s construction of Section 287.230.2 fails to take into consideration the difference between permanent partial disability benefits and permanent total disability benefits in determining whether an employee is “*entitled*” to compensation for such benefits, within the meaning of Section 287.230.2. Moreover, Appellant’s interpretation of Section 287.230.2 fails to recognize that an employee is only “*entitled*” to compensation for

permanent total disability benefits, so long as that permanent total disability continues to exist *and* the injured employee continues to live. Claimant's construction of Section 287.200.1 fails to give effect to the phrase "during the continuance of such disability for the lifetime of the employee", contained therein. However, each word or phrase in a statute must be given meaning. *BP Products North America*, 163 S.W.3d at 927.

The construction given to Section 287.230.2 by Appellant produces a result that is both unjust and unreasonable. *Care & Treatment of Schottle*, 159 S.W.3d at 841-842. Under Appellant's reading of Sections 287.200.1 and 287.230.2, it is *presumed* that the permanent total disability of an injured employee will continue indefinitely, that such permanent total disability does not cease upon the death of the injured employee, and when that injured employee dies, his surviving dependents, if any, are presumed to be entitled to permanent total disability benefits for their lifetime, as are their surviving dependents. Thus, liability for permanent total disability benefits, whether the payor is an employer or the Fund, will be expanded exponentially. As long as the injured employee's surviving dependents leave surviving dependents upon their death, the liability of an employer or the Fund for permanent total disability benefits will continue, ad infinitum. Thus, the liability of an employer or the Fund for permanent total disability benefits will have no relation to the injured employee's continued total disability or continued life, but rather, will be based upon the lifetime of the injured employee's surviving dependents and the fortuity of whether the injured employee's surviving dependents have surviving dependents upon their death. This is an absurd result, one not contemplated by either Section 287.200.1 or Section 287.230.2. *Care & Treatment*

of *Schottle*, 159 S.W.3d at 841-842. In enacting the Workers' Compensation Act, the legislature's intent was to provide compensation for work related injuries resulting in disability to an employee. Under Appellant's construction of the Act, workers' compensation benefits would be transmogrified into life insurance. Workers' compensation was never designed to operate in such a manner. *Leslie v. School Services & Leasing Inc.*, 947 S.W.2d 97, 99 (Mo.App.W.D.1997).

As did the claimant in *Bone*, 449 S.W.2d at 174, Appellant relies upon the workers' compensation statutes of other states to support her construction of Section 287.230.2. As a creature of statute, however, Missouri workers' compensation law is governed by Chapter 287, R.S.Mo. *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo.banc.1998); *Kristanik*, 41 S.W.2d at 912. Moreover, there are significant differences between the Missouri Workers' Compensation Act and the Kentucky and Ohio statutes relied upon by claimant. Unlike Sections 287.200 and 287.230, the Kentucky and Ohio statutes cited by claimant expressly provide that the right to receive permanent total disability benefits (i.e., the entitlement to such benefits) survives the injured employee's death. Both the Kentucky and Oklahoma statutes that claimant relies on allow for the continuation of permanent total disability benefit payments, in limited amounts, to specified individuals, when an employee who is permanently and totally disabled dies from causes unrelated to the work injury that resulted in permanent total disability. See KRS §342.730(3)(a); 85 Okl. St. §48.2. Moreover, both the Kentucky and Oklahoma statutes provide a date for the cessation of permanent disability benefit payments-i.e., when the surviving spouse dies, remarries, or is

eligible for social security benefits. *Id.* The distinctions between Sections 287.230 and 287.200 and the Oklahoma and Kentucky statutes relied upon by claimant require the rejection of the Oklahoma and Kentucky statutes as authority to support Appellant's claim for permanent total disability benefits under Section 287.230.2. *Bone*, 449 S.W.2d at 174.

B.

THE INDUSTRIAL COMMISSION AWARD DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, FOR THE REASONS THAT THE INDUSTRIAL COMMISSION'S DECISION HARMONIZES SECTION 287.200.1 AND SECTION 287.230.2, WHILE ACCORDING THE TERMS THEREIN THEIR PLAIN AND ORDINARY MEANING; AND THE CLASSIFICATION ESTABLISHED BY THE INDUSTRIAL COMMISSION'S DECISION IS BOTH CONSISTENT WITH THE DISTINCTION BETWEEN PERMANENT PARTIAL DISABILITY AND PERMANENT TOTAL DISABILITY BENEFITS UNDER THE WORKERS' COMPENSATION ACT, AND IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF PROVIDING THE SURVIVING DEPENDENTS OF INJURED EMPLOYEES WITH THE SAME WORKERS' COMPENSATION BENEFITS AS THOSE EMPLOYEES WOULD HAVE BEEN ENTITLED HAD THEY LIVED.

In her Substitute Appellant's Brief, Annette Schoemehl asserts that the decision of the Industrial Commission violates equal protection. (Appellant's Substitute Brief,46-51).

However, Appellant failed to properly preserve this constitutional issue for the Court's review.

An issue that was never presented to or decided by the trial court is not preserved for appellate review. *Smith*, 159 S.W.3d at 835. The Supreme Court will not convict a lower court or agency of error on an issue that was not put before it to decide. *Id.* This rule applies in workers' compensation cases. Thus, questions regarding a workers' compensation claim that might have been presented to the Industrial Commission, to establish a case or defense, cannot be litigated on appeal from the Industrial Commission's award, where a party neglects to first present and litigate that issue before the Industrial Commission. *Buskuehl v. The Doe Run Company*, 68 S.W.3d 535, 541 (Mo.App.E.D.2001); *Long v. City of Hannibal*, 670 S.W.2d 567, 570 (Mo.App.E.D.1984). Issues that could have been, but were not raised before the Industrial Commission, cannot be litigated on appeal. Such issues are not preserved for appellate review. *Donavan v. Temporary Help*, 54 S.W.3d 718, 719 (Mo.App.E.D.2001); *Vinson v. Curators of the University of Missouri*, 822 S.W.2d 504, 508 (Mo.App.E.D.1991).

The general rule is that constitutional questions are deemed waived if they are not raised at the first opportunity, consistent with the pleadings and orderly procedure. *City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 378 (Mo.banc.1991); *Massage Therapy Training Institute v. Missouri State Board of Therapeutic Massage*, 65 S.W.3d 601, 608 (Mo.App.S.D.2002) (a constitutional issue has to be raised in the trial court at the earliest possible moment that the pleadings and orderly procedure will admit under the circumstances

of the given case; otherwise it will be waived). To properly raise a constitutional question, a party must: 1) raise the constitutional question at the first available opportunity; 2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section, or by quotation of the provision itself; 3) state the facts showing the violation; and 4) preserve the constitutional question throughout for appellate review. *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo.banc.1989); *United C.O.D. v. State of Missouri*, 150 S.W.3d 311, 313 (Mo.banc.2004).

Appellant has failed to properly reserve her constitutional question for review. At hearing in this matter, Appellant failed to raise any equal protection challenge concerning Section 287.230, and its application in cases of permanent total disability. After ALJ Dierkes issued his Award, holding that under Section 287.230.2 Appellant, as Fred Schoemehl's dependent, was not entitled to compensation for Fred Schoemehl's permanent total disability following his death, Appellant failed to raise an equal protection challenge before the Industrial Commission. Consequently, the Industrial Commission did not address or rule on that constitutional question. Since Appellant failed to raise her equal protection issue before the Industrial Commission, she has failed to preserve that issue for appellate review. *Buskuehl*, 68 S.W.3d at 541; *Donovan*, 54 S.W.3d at 719; *Vinson*, 822 S.W.2d at 508.

To properly preserve her constitutional question, Appellant was required to raise that question at the first opportunity. In the instant case, that opportunity would have been before the Industrial Commission. Appellant having failed to raise her equal protection challenge before the Industrial Commission, she has waived that constitutional issue, and it is not

properly preserved for this Court's review. *City of Chesterfield*, 811 S.W.2d at 378; *Callier*, 780 S.W.2d at 641.

Assuming, *arguendo*, that Appellant has preserved her equal protection challenge for review, that challenge necessarily fails.

The first step in considering an equal protection claim is to determine whether the challenged classification operates to the disadvantage of some suspect class, or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *In re Marriage of Korhing*, 999 S.W.2d 228, 231-232 (Mo.banc.1999); *Pike*, 162 S.W.3d at 470; *United C.O.D.*, 150 S.W.3d at 313. If so, the classification is subject to strict judicial scrutiny, to determine whether it is necessary to accomplish a compelling state interest. *Marriage of Korhing*, 999 S.W.2d at 232; *United C.O.D.*, 150 S.W.3d at 313. A suspect class receiving heightened scrutiny in equal protection analysis includes race, alienage, national origin, gender, and illitigimacy. Fundamental rights requiring strict scrutiny include the right to interstate travel, to vote, and free speech. *United C.O.D.*, 150 S.W.3d at 313. If a classification does not touch upon a suspect class or impinge upon a fundamental right, review is limited to a determination of whether the classification is rationally related to a legitimate state interest. *Id*; *Marriage of Korhing*, 999 S.W. 2d at 232; *Pike*, 162 S.W.3d at 470.

The rational basis test requires only that the challenged classification bear some rational relationship to a legitimate state interest. *Pike*, 162 S.W.3d at 471. Under the rational basis test, there only need be a conceivably rational basis to uphold the regulatory

scheme or classification in question. *United C.O.D.*, 150 S.W.3d at 313. To prevail under the rational basis test, a party must show that the classification has no reasonable basis and that it is purely arbitrary. *Pike*, 162 S.W.3d at 471. When applying the rational basis test, the court will not substitute its judgement for that of the legislature as to the wisdom, social desirability or economic policy underlying the statute or classification in question. *Pike*, 162 S.W.3d at 471; *Marriage of Korhing*, 999 S.W.2d at 233; *Greenlee*, 75 S.W.3d at 277-278.

The classification challenged by Appellant, surviving dependents of permanently and totally disabled individuals who sustain a work related injury, but die of causes unrelated to that work injury, is not a suspect class. Nor does that classification impinge upon a fundamental right, such as the right of interstate travel or the right of free speech. *United C.O.D.*, 150 S.W.3d at 313. Since the classification at issue does not touch upon a suspect class, or impinge upon a fundamental right, review is limited to determining whether the classification established by the Industrial Commission's decision is rationally related to a legitimate state interest. *Id*; *Marriage of Kohring*, 999 S.W.2d at 232; *Pike*, 162 S.W.3d at 471.

The Industrial Commission's decision serves to harmonize Section 287.200.1 and Section 287.230.2, while according the terms "during the continuance of such disability for the lifetime of the employee", as contained in Section 287.200, and the term "entitled", in Section 287.230.2 their plain and ordinary meaning. R.S.Mo. §§287.200.1; 287.230.2. The distinction challenged by claimant is that between "dependents of employees with partial disability and dependents of employees with total disability". (Appellant's Substitute

Brief,49). What Appellant ignores, however, is the fact that this classification is entirely consistent with the difference in the nature of permanent partial disability benefits-benefits in a fixed, finite amount representing a period not to exceed a certain number of weeks-and permanent total disability benefits-benefits in an indefinite amount, the entitlement to which is dependent upon the employee's continued permanent and total disability and his continued existence-as codified in and established by Sections 287.190 and 287.200.1. In creating a system of workers' compensation benefits, the state obviously had a legitimate interest in distinguishing between permanent total disability of an injured employee and permanent partial disability of an injured employee, and in establishing the criteria to be met by an injured employee, and their surviving dependents, before they were entitled to receive such benefits.

Moreover, the Industrial Commission's decision, and its construction of Section 287.230.2, was rationally related to the legitimate state interest of providing the surviving dependents of injured employees with the same benefits that the injured employee would have been entitled to, had they survived. It necessarily follows that the Industrial Commission's decision, and its interpretation of Section 287.230.2, is not violative of the equal protection guarantee contained in either the Missouri or United States Constitution. *United C.O.D.*, 150 S.W.3d at 313; *Marriage of Kohring*, 999 S.W.2d at 232.

To the extent that claimant's equal protection challenge extends to Section 287.230.2, that challenge must also be rejected. All statutes are presumed to be constitutional. *United C.O.D.*, 150 S.W.3d at 313; *State v. Pike*, 162 S.W.3d 464, 470 (Mo.banc.2005); *State ex*

rel Hilburn v. Staden, 91 S.W.3d 607, 609 (Mo.banc.2002) (Supreme Court proceeds under the assumption that a statute bears no constitutional flaw). This presumption of constitutionality compels the Court to adopt any reasonable reading of a statute that will allow its validity and to resolve all doubts in favor of the statute's constitutionality. *Hilburn*, 91 S.W.3d at 608; *United C.O.D.*, 150 S.W.3d at 313. A statute will be enforced, unless it plainly and palpably affronts fundamental law embodied in the Constitution. *Pike*, 162 S.W.3d at 470; *United C.O.D.*, 150 S.W.3d at 313; *State ex rel Hilburn*, 91 S.W.3d at 609. The construction afforded to Section 287.230.2 by the Industrial Commission does not violate any fundamental law embodied in either the Missouri or the United States' Constitution. *Id.* That statute should be enforced, since it is constitutionally valid. *Id.*

One final reason warrants the rejection of claimant's constitutional argument. Under claimant's construction of Sections 287.200.1 and 287.230.2, the surviving dependents of employees who sustain permanent total disability as a result of a work injury, but die of causes unrelated to that work injury, will have greater rights of recovery under the Workers' Compensation Act than surviving dependents of employees who die as a result of a work related injury or occupational disease. If any "classification" lacks a rational basis, it is the classification established by claimant's construction of Sections 287.200.1 and 287.230.2. When an employee dies of causes unrelated to his work injury, the economic loss suffered by his family as a result of his death has no connection to the injured worker's employment. Under these circumstances, it is neither reasonable nor logical to make industry, employers, or insurers responsible for the economic loss suffered by the injured worker's surviving

dependents. Yet this is precisely what claimant is asking this Court to do. Therefore, claimant's constitutional challenge must be rejected, as must her construction of the Worker's Compensation Act.

Conclusion

Construing Section 287.200.1 in pari materia with Section 287.230.2, harmonizing both statutes, and giving the words contained therein their plain meaning, when a permanently and totally disabled employee dies of causes unrelated to their work injury, the employee is no longer entitled to permanent total disability benefits and, accordingly, his surviving dependents are not entitled to receive permanent total disability. This construction of the Act, adopted by the Industrial Commission below, is rationally related to the legitimate state interest of ensuring that surviving dependents of an injured employee receive the same workers' compensation benefits that the injured employee would be entitled to receive, had they lived. Where, as here, an injured employee dies of causes unrelated to his work injury, the economic loss resulting to the employee's surviving dependents from his death has no connection to the worker's employment and thus, that economic loss should not be the responsibility of industry. To make it the responsibility of industry would exponentially expand the liability of employers and insurers under the Workers' Compensation Act and transform workers' compensation benefits into life insurance.

The construction of the Workers' Compensation Act adhered to by Appellant will give greater rights of recovery under the Workers' Compensation Act to surviving dependents of permanently and totally disabled employees who die of causes unrelated to their work injury, than to the surviving dependents of employees who die as a result of a work related injury, accident, or occupational disease. This is an absurd, unjust result, one not contemplated by Sections 287.200.1 and 287.230.2. The Industrial Commission properly rejected claimant's construction of the Workers' Compensation Act, and its Award must be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed this 5th day of October, 2006 to: Dean L.

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CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 84.06(b) and contains 10,695 words. To the best of my
knowledge and belief the enclosed disc has been scanned and is virus-free.

Mary Anne Lindsey