IN THE
SUPREME COURT OF MISSOURI

No. SC87750

ANNETTE SCHOEMEHL,
Appellant,

v.

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

Appeal from the Labor and Industrial
Relations Commission
#01-046332

SUBSTITUTE BRIEF OF APPELLANT ANNETTE SCHOEMEHL

Dean L. Christianson #30362
1221 Locust Street
Suite 250
St. Louis, Missouri 63103

Attorney for Appellant
Annette Schoemehl

TABLE OF CONTENTS

TABLE OF CASES

I. CASE LAW

II. CONSTITUTIONAL AND STATUTORY AUTHORITY

JURISDICTIONAL STATEMENT

This is a workers= compensation case wherein Fred Schoemehl, deceased, sought recovery from his employer, Cruiser Country, Incorporated, and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund. Mr. Schoemehl sustained injury by way of accident on or about May 11, 2001. He thereafter died on January 2, 2004, and his surviving widow, Annette Schoemehl, proceeded with the claim, alleging that Mr. Schoemehl was permanently and totally disabled, and requesting benefits through the remainder of her lifetime. She then settled the claim against Cruiser Country, and proceeded to trial against only the Second Injury Fund on May 11, 2001. On April 4, 2005, the Honorable Robert J. Dierkes, Administrative Law Judge of the Division of Workers' Compensation, issued a Final Award which found the Second Injury Fund liable to Mrs. Schoemehl for permanent total disability benefits, but not beyond the date of Mr. Schoemehl=s death. Appellant sought review with the Labor and Industrial Relations Commission, which affirmed the Award by a two-to-one vote on December 9, 2005. An appeal was then taken to the Missouri Court of Appeals, Southern District, pursuant to the general appellate jurisdiction of the Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri, as amended 1970. The Southern District affirmed the Commission=s Award on May 9, 2006. Mrs. Schoemehl thereafter filed a Motion for Rehearing and Application to Transfer to the Supreme Court of Missouri on May 23, 2006, though the Motion was denied on May 30, 2006. She then filed

an Application for Transfer with this Court on June 12, 2006, which was sustained on June 30, 2006.

STATEMENT OF FACTS

The facts in this matter are basically undisputed, and in fact the parties entered into a fairly comprehensive stipulation of facts at the beginning of the hearing. They include the following:

1. On May 11, 2001 Fred Schoemehl was an employee of Cruiser Country, Inc. (hereinafter AEmployer@), and both parties were operating and subject to the provisions of the Missouri Workers= Compensation Law. (Tr. 19-22).

2. Employer=s liability at the time was insured by Missouri Employer=s Mutual Insurance Company (hereinafter AInsurer@). (Tr. 19-22).

3. On May 11, 2001 Mr. Schoemehl sustained injury to his left knee by way of an accident which arose out of and in the course of his employment with Employer. (Tr. 19-22).

4. Mr. Schoemehl gave proper notice of his injury to Employer, and filed a Claim for Compensation against Employer and Second Injury Fund (hereinafter ARespondent@) within the time prescribed by law. (Tr. 19-22).

5. Mr. Schoemehl=s average weekly wage on May 11, 2001 was $391.88, and his compensation rates were $261.26 for temporary total disability benefits and $261.26 for permanent disability benefits. (Tr. 19-22).

6. Employer and Insurer paid $20,661.65 in temporary total disability benefits and $9,477.08 in medical benefits. (Tr. 19-22).

7. On January 2, 2004 Mr. Schoemehl died, and said death was from causes unrelated to his injury of May 11, 2001. (Tr. 19-22).

8. Prior to his death, additional surgery was recommended to Mr. Schoemehl but such surgery could not be performed because of his other unrelated medical conditions. (Tr. 19-22).

9. At the time of his death, Mr. Schoemehl was married to Annette Schoemehl (hereinafter AAppellant@). (Tr. 19-22).

10. Mr. Schoemehl and Appellant lived together as husband and wife from the date of their marriage, January 18, 1986, until the date of Mr. Schoemehl=s death. (Tr. 19-22).

11. Neither Mr. Schoemehl nor Appellant had filed for separation or divorce prior to the date of Mr. Schoemehl=s death. (Tr. 19-22).

12. Appellant has not remarried, nor does she have plans to remarry. (Tr. 19-22).

13. Both Mr. Schoemehl and Appellant had previously been married, which marriages had legally ended in divorce. (Tr. 19-22).

14. Mr. Schoemehl and Appellant had no children born of their marriage. (Tr. 19-22).

15. Mr. Schoemehl had children born of a previous marriage, though all such children are beyond the age of twenty-two, and none of them were dependent upon him at the time of his death. (Tr. 19-22).

16. None of Mr. Schoemehl=s children from his previous marriage were mentally or physically incapable of self support at the time of his death. (Tr. 19-22).

17. Mr. Schoemehl had no dependents other than Appellant. (Tr. 19-22).

18. Appellant filed an amended Claim for Compensation on February 19, 2004, listing herself as the claimant and successor to Mr. Schoemehl=s Claim for Compensation. (Tr. 19-22).

19. On December 8, 2004 Appellant settled her claim with Employer and Insurer for payment of a lump sum amount of $11,844.37, which was based upon disability of 25% of Mr. Schoemehl=s left knee and $1,433.97 in underpaid temporary total disability benefits. (Tr. 19-22).

20. At the time of the settlement with Employer and Insurer, the claim with the Second Injury Fund was left Aopen@ for later adjudication. (Tr. 19-22).

Appellant submitted into evidence a number of medical records from Mr. Schoemehl=s past medical care. She also submitted the deposition testimony of Dr. David Volarich, who was the only medical expert to testify. (Tr. 25-62). He established that Mr. Schoemehl suffered from disabilities to his left knee, heart, left shoulder and low back. (Tr. 43-46). He said that these disabilities would combine and concur with each other to create a greater overall disability. (Tr. 47). Appellant testified that Mr. Schoemehl was severely limited by these disabilities. (Tr. 10-15).

The only vocational expert to testify, Mr. Timothy Lalk, established that the combination of these disabilities rendered Mr. Schoemehl unemployable in the open labor market. (Tr. 79-80). Mr. Lalk testified that while the left knee injury of May 11, 2001 -- in and of itself -- would not have rendered Mr. Schoemehl permanently and totally disabled, the

combination of that injury with his pre-existing disabilities would render him unemployable. (Tr. 79-80).

POINT RELIED ON

The Labor and Industrial Relations Commission erred in finding that the Second Injury Fund=s liability in a permanent total disability case ends with the injured worker=s death, because '287.230.2 of the Missouri Workers= Compensation Law states that liability for compensation continues beyond the worker=s date of death if the worker dies of causes unrelated to the work injury and leaves behind dependents, in that the Commission=s finding imposes restrictions on '287.230.2 which the General Assembly never intended, in that the Commission=s finding creates legislative disharmony between ''287.230.2, 287.220.1, 287.200.1, 287.020.1 and 287.240(4), and in that the Commission=s finding creates a constitutional infirmity, such that the Commission=s decision should be reversed and replaced with an order finding Respondent liable to Appellant for compensation from the date of Mr. Schoemehl=s death until the end of Appellant=s life.

Nations v. Barr, 43 S.W.2d 858 (Mo.App. 1931).

Henderson v. National Bearing Division, 267 S.W.2d 349 (Mo.App. 1954).

Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), *overruled on other grounds in Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo.banc 2003).

Scannell v. Fulton Iron Works Company, Inc., 289 S.W.2d 122 (Mo. 1956).

MO. REV. STAT. ' 287.020.1 (1993).

MO. REV. STAT. ' 287.200.1 (2004).

MO. REV. STAT. ' 287.220.1 (2004).

MO. REV. STAT. ' 287.230 (1994).

MO. REV. STAT. ' 287.240(4) (1993).

Mo. Const. Art. I, ' 2.

U.S. Const. Amend. XIV.

ARGUMENT

The Labor and Industrial Relations Commission erred in finding that the Second Injury Fund=s liability in a permanent total disability case ends with the injured worker=s death, because '287.230.2 of the Missouri Workers= Compensation Law states that liability for compensation continues beyond the worker=s date of death if the worker dies of causes unrelated to the work injury and leaves behind dependents, in that the Commission=s finding imposes restrictions on '287.230.2 which the General Assembly never intended, in that the Commission=s finding creates legislative disharmony between ''287.230.2, 287.220.1, 287.200.1, 287.020.1 and 287.240(4), and in that the Commission=s finding creates a constitutional infirmity, such that the Commission=s decision should be reversed and replaced with an order finding Respondent liable to Appellant for compensation from the date of Mr. Schoemehl=s death until the end of Appellant=s life.

I. Standard of Review

Appellant asserts that the Labor and Industrial Relations Commission (hereinafter ACommission@) erred in interpreting and applying the Missouri Workers= Compensation Law to the factual situation of her claim under the Law. One of this Court=s roles is to review decisions of the Commission which are clearly interpretations or applications of law,

without giving deference to the Commission=s judgment. *Pierson v. Treasurer of the State of Missouri, as custodian of the Second Injury Fund*, 126 S.W.3d 386, 387 (Mo. 2004). Another is to liberally construe the Workers= Compensation Law with a view to the public welfare,[1] though substantial compliance with the statutes will be sufficient to give effect to the Commission=s awards. MO. REV. STAT. ' 287.800 (1993); *Pierson*, 126 S.W.2d at 387-388. And in reviewing such awards, the Court is to resolve all doubts in favor of the employee. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 923 (Mo.App. 1982).

II. Basic Statutory Construction Guidelines

The primary rule of statutory construction is to ascertain the intent of the General Assembly from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Sheldon v. Board of Trustees*, 779 S.W.2d 553, 554 (Mo. 1989); *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988). The courts are to look to the object to be accomplished and the problems to be remedied by the statute, *State ex rel. Kemp*

[1/] This is the language of ' 287.800 at the time of Mr. Schoemehl=s injury and death. The section was later amended on August 28, 2005 to require a Astrict construction@ of the law. MO. REV. STAT. ' 287.800 (2005).

v. Hodge, 629 S.W.2d 353, 358 (Mo.banc 1982), and utilize rules of statutory construction Athat subserve rather than subvert legislative intent.@ *Oberreiter v. Fullbright Trucking Co.*, 117 S.W.3d 710 (Mo.App. 2003). In *Crest Communications v. Kuehle,* 754 S.W.2d 563, 566 (Mo. 1988), the Missouri Supreme Court stated that:

> [p]rovisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized.

See also *Kincade v. Treasurer of the State of Missouri*, 92 S.W.3d 310, 311 (Mo.App. 2002). And while they are being harmonized, the courts are to broadly and liberally interpret the law with a view to the public interest and with the understanding that the law is intended to benefit the largest possible class. *Id*. at 311-12.

III. Permanent Total Disability

Permanent total disability is defined by the Missouri Workers= Compensation Law as being the Ainability to return to any employment.@ MO. REV. STAT. '287.020.7 (1993).[2] The test for such disability, then, is the worker=s ability to Acompete on the open labor market.@ *Laturno v. Carnahan*, 640 S.W.2d 470, 472-473 (Mo.App. 1982). And just as the Law allows an employer to be found liable for

[2/] Section 287.020 was amended on August 28, 2005. Such amendment neither changed nor affected the language relied upon by Appellant in her brief.

permanent total disability benefits, MO. REV. STAT. ' 287.200.1 (2004), it also allows such a finding against the Second Injury Fund. MO. REV. STAT. ' 287.220.1 (2004).

Mr. Fred Schoemehl was seventy-six years old at the time of his May 11th, 2001injury. He was injured at work in an accident which arose out of and in the course of his employment, (ALJ Award, p. 3; Tr. 19), and then received temporary total disability benefits for a period of time. (ALJ Award, p. 3). He died on January 2, 2004 from causes unrelated to his knee injury. (Tr. 20). Appellant, his surviving spouse, then filed an amended claim for compensation, substituting herself as claimant, and pursued the claim. She settled the claim against Employer for permanent partial disability of twenty-five percent of Mr. Schoemehl=s left knee. (Tr. 21). She then pursued this claim against Respondent, alleging that Mr. Schoemehl was permanently and totally disabled at the time of his death.

Mr. Schoemehl had a high school education, (Tr. 75), and was diabetic. (Tr. 296). The only medical expert to testify, Dr. David Volarich, established that Mr. Schoemehl suffered from disabilities to his left knee, left shoulder, heart and low back. (Tr. 43-46). He concluded that these disabilities combined and concurred with each other to create a greater overall disability. (Tr. 47). Appellant similarly testified that Mr. Schoemehl was severely limited by his disabilities. (Tr. 10-15). And Mr. Timothy Lalk, a vocational rehabilitation expert, testified that Mr. Schoemehl=s knee injury of May 11, 2001 combined with his pre-existing disabilities to render him unemployable in the open labor market. (Tr. 79-80).

The Commission accordingly and appropriately found the Second Injury Fund to be liable to Mr. Schoemehl for permanent total disability benefits beginning December 3, 2003 -- a finding which is supported by undisputed facts sufficient to establish the Fund=s liability. (ALJ Award, p.3). *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990). Neither party has challenged this finding.

IV. Liability to an Injured Worker=s Dependents

Appellant disagrees with the Commission=s finding that Respondent=s liability for compensation did not shift to Mr. Schoemehl=s dependents upon Mr. Schoemehl=s death. Appellant asserts that the Commission should have found that Respondent=s liability continued beyond Mr. Schoemehl=s death, payable to any dependents which Mr. Schoemehl may have had on the date of his injury.

A. Mr. Schoemehl=s Cause of Death

The Labor and Industrial Relations Commission properly found that Mr. Schoemehl=s death was Atotally unrelated to his work-related left knee injury@ -- a finding which has not been challenged. (ALJ Award, p.3). In fact, the parties stipulated prior to trial that Asaid death was from causes unrelated to his injury of May 11, 2001,@ (Tr. 20), and the stipulation was supported by the record: the Certificate of Death listed Mr. Schoemehl=s cause of death as being ischemic cardiomyopathy, multivessel coronary artery disease, renal failure, atrial fibrillation and ventricular tachycardia, (Tr. 23); the Certificate of Death indicated that the cause of death was not an injury at work, (Tr. 23); and the testimony of Dr. Volarich

established that the cause of death was a cardiac condition. (Tr. 34). In short, it is well established that Mr. Schoemehl=s death was from causes unrelated to the May 11, 2001 injury to his left knee.

B. Effect of Death on Workers= Compensation Benefits

When an employee is injured at work, and subsequently dies, that death affects both the payment of compensation and the persons entitled to it, depending on whether the death was from the work injury, or not.

(1) Death Resulting From Work Injury

The starting point for analyzing the effect of death on workers= compensation benefits is an understanding of the general purpose of the Workers= Compensation Law, for all injuries, not just death claims. It has been said:

> [t]he essence of the law is to place on industry the burden of bearing the loss resulting from injuries sustained by workers which arise out of their employment instead of the workers *and their dependents* bearing such loss alone. (*Emphasis added*).

Burgess v. NaCom Cable Company, 923 S.W.2d 450, 454 (Mo.App. 1996). And so, when a worker is killed by an injury at work, several provisions of the Law provide for the payment of Adeath benefits@ to surviving dependents because of the financial harm done to them by the loss of the worker=s income. See MO. REV. STAT.

'' 287.020, 287.240, 287.241 (1993); *Yardley v. Montgomery*, 580 S.W.2d 263, (Mo. 1979). The dependents are entitled to receive support beyond the employee=s death, through payment of weekly benefits. For instance, a spouse may receive benefits for life, and a child to age twenty-three. MO. REV. STAT. ' 287.240(4)(a) & (b) (1993).

(2) Death Resulting From Causes Other Than Work Injury

Then there are situations where the work-related injury is not the cause of death, as in this matter. Mr. Schoemehl=s work injury caused a twenty-five percent (25%) disability to his left knee, and combined with his preexisting medical conditions to cause an inability to compete for work in the open labor market. (ALJ Award, p. 3). This combination rendered him permanently and totally disabled, but it did not cause his death. (ALJ Award, p. 3; Tr. 20, 23, 34).

The question, then, is this: what happens when the permanently totally disabled worker dies of a medical condition which is unrelated to his or her work injury? Does liability under the Law terminate, or does it continue to the worker=s dependents? Appellant asserts that the Missouri legislature created a mechanism for the Second Injury Fund to have continued liability when a permanently totally disabled worker dies of causes unrelated to the work injury.

(a) Legislative History of ' 287.230

The key to properly analyzing this matter is to come to a proper understanding of ' 287.230. MO. REV. STAT. ' 287.230 (2004). This is a provision which has existed in

some form since Missouri=s Workers= Compensation Law was first enacted in 1919, though it was initially somewhat different than it is today. When first written, it was referenced as '13611, and it read as follows:

> **Death of injured not to affect liability of employer.**
>
> The death of the injured employe (sic) shall not affect the liability of the employer to furnish compensation as in this chapter provided, so far as such liability has accrued and become payable at the time of the death, and any accrued and unpaid compensation due the employe (sic) shall be paid to his dependents without administration, or if there be no dependents, to his personal representative or other person entitled thereto, but such death shall be deemed to be the termination of the disability.

MO. REV. STAT. '13611 (1919). Comparing this section with today=s '287.230, it can be seen that the 1919 version contained only what today is subsection one of '287.230. So the wording in today=s subsection two did not exist in the 1919 Law.

Then, in 1925, portions of the Workers= Compensation Law were amended, including '13611. In addition to changing its numerical reference from '13611 to '3318, its wording was changed to read as such:

> **Death -- injuries resulting in -- liability of employer -- exceptions.**
>
> The death of the injured employe (sic) shall not affect the liability of the employer to furnish compensation as in this chapter provided, so far as such liability has accrued and become payable at the time of the death,

and any accrued and unpaid compensation due the employe (sic) shall be paid to his dependents without administration, or if there be no dependents, to his personal representative or other person entitled thereto, but such death shall be deemed to be the termination of the disability. Where an employe (sic) 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 unaccrued balance for such injury shall cease and all liability therefore shall terminate unless there be surviving dependents at the time of such death. (Underlining shows language added by 1925 amendment).

MO. REV. STAT. ' 3318 (1925). Comparing this section with today=s ' 287.230, it can be seen that the 1925 amendments added what today is subsection two.

Since 1925, the numerical reference to this section of the law has changed, eventually leading to today=s ' 287.230, but the wording has remained constant. Today=s ' 287.230 reads:

1. The death of the injured employee shall not affect the liability of the employer to furnish compensation as in this chapter provided, so far as the liability has accrued and become payable at the time of the death, and any accrued and unpaid compensation due the employee shall be paid to his dependents without administration, or if there are no

dependents, to his personal representative or other persons entitled thereto, but the death shall be deemed to be the termination of the disability.

2. 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 therefore shall terminate unless there are surviving dependents at the time of death.

MO. REV. STAT. ' 287.230 (1994). Appellant asserts that the lesson to be learned from these changes is that the 1925 Missouri General Assembly intended to extend liability beyond an employee=s death, in situations where the injured worker dies of causes unrelated to his or her injury.

(b) Historical Application of ' 287.230

Analyzing the legislative intent behind ' 287.230 begins with an analysis of subsection one. It has been said that this provision only applies to situations where: 1) benefits have accrued[3] before death, and 2) the employee dies of causes related to his work injury. *Nations*

[3/] The courts have accepted a definition of the word Aaccrue@ as being: A[t]o come into existence as an enforceable claim.@ *Henderson v. National Bearing Division*,

v. Barr, 43 S.W.2d 858, 860 (Mo.App. 1931). Since the issue in the current matter involves a claim for unaccrued[4] benefits, and since Mr. Schoemehl did not die of causes related to his work injury, subsection one is not presently relevant.

This leaves us with subsection two. It is undisputed that subsection two creates liability for compensation beyond an injured worker=s date of death. This is seen in *Nations* where the employee fractured his leg while performing his job on June 17, 1928. *Id*., at 859, 861. He was paid temporary total disability benefits until October 21, 1928, and he subsequently died on January 5, 1929 due to causes unrelated to his accident. *Id*., at 860. His dependent widow then filed a workers= compensation claim alleging entitlement to both accrued and unaccrued permanent partial disability benefits. *Id*. It was determined that the employee had sustained permanent partial disability of 103.5 weeks, and that even though the period of time between the termination of temporary total disability benefits (October 21, 1928) and the date of death (January 5, 1929) was only eleven weeks, the widow was

---

267 S.W.2d 349, 352 (Mo.App. 1954). Therefore, Aaccrued benefits@ are those benefits which have become due and owing *prior* to the Employee=s death. *Nations*, 43 S.W.2d at 861.

[4]/The courts have defined the term Aunaccrued benefits@ as being Athe unawarded and unpaid amounts due to the employee by virtue of his injury.@ *Henderson*, 267 S.W.2d at 353. Unaccrued benefits are therefore those benefits which become due and owing *after* the Employee=s death.

awarded the entire 103.5 weeks of permanent disability. *Id*. In other words, the court ordered that the widow be paid for 92.5 weeks *beyond the employee=s date of death. Id*. In so doing, it was said:

> [t]he second clause of [' 287.230] refers only to cases where, as here, death results from causes other than the injury received. This clause provides 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, survives to his dependents.* There is no provision or suggestion in the statute 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 the compensation. *It is the right to the compensation, not the evidence of it, that survives to the dependents.* (*Emphasis added*).

Id., at 861. And so, the dependent widow was entitled to receive permanent disability benefits beyond her husband=s date of death, as these benefits survived to her. *Id*.

In *Henderson v. National Bearing Division*, 267 S.W.2d 349 (Mo.App. 1954) the court again addressed the second clause of ' 287.230. On March 19, 1951 the employee contracted lead poisoning -- an occupational disease which arose out of and in the course of his employment. *Id*., at 350. He then died on May 18, 1952

from unrelated causes. *Id*. After his dependent son filed a claim for benefits, it was found that the employee had sustained permanent disability of 260 weeks. It was also found that even though the period of time between the onset of the occupational disease (March 19, 1951) and his death (May 18, 1952) was only 61 1/7 weeks, the son was entitled to the entire 260 weeks of permanent disability. *Id*. In other words, the court ordered that the son be paid for 197 6/7 weeks *beyond the employee=s date of death. Id*.

The employer in *Henderson* argued that the son could not receive benefits beyond the date of the employee=s death because, if they were to do so, then the benefits would be Ain the nature of damages rather than compensation for loss of wages, as wages obviously stop at death.@ *Id*., at 352. They argued that such payments would be contrary to the purpose of the workers= compensation law, which is to Acompensate for the loss of earning power and the disability to work.@ *Id*. The court agreed that the general purpose of the law is compensation for the Aloss of earning power,@ but said that this purpose cannot be fulfilled simply by compensating for the loss of wages, because injured workers frequently receive disability awards where there are no lost wages. *Id*. The court said that Alost wages@ are not the sole ground upon which a loss of earning power is determined, explaining:

> [w]hat survives to the dependent when the employee dies is the right to compensation as stated in *Nations v. Barr*. As we have said, the

> purpose of the act is to compensate for the loss of earning power. [The employee] suffered such a loss and had a right to recover. This right would have died with him if he had no dependents, *but the statute reserved, to his dependent son, that which [the employee] could have recovered had he lived.* (*Emphasis added*).

Id., at 353. And so, the dependent son was entitled to receive permanent disability benefits beyond the employee=s date of death because the Aloss of earning power@-- resulting in an entitlement to permanent disability benefits -- survived to him. *Id*.

This finding of continued liability is not just a pronouncement of the lower courts, as the Supreme Court of Missouri has held the same, whether the claim be against an employer, *Hogue v. Wurdack*, 292 S.W.2d 576, 577 (Mo. 1956); *Scannell v. Fulton Iron Works Company, Inc.*, 289 S.W.2d 122, 125 (Mo. 1956), or the Second Injury Fund. *Bone v. Daniel Hamm Drayage Company*, 449 S.W.2d 169, 174 (Mo. 1970), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003). So in short, there is no dispute that ' 287.230.2 of the Missouri Statutes creates a continued liability on the behalf of both employers and the Second Injury Fund for permanent disability benefits, at least when that disability is partial in nature.

(c) Application of ' 287.230 to this matter

Since the dependents of permanently partially disabled workers are entitled to receive benefits extending beyond the worker=s date of death, the question

becomes whether the dependents of permanently *totally* disabled workers are similarly entitled to receive such benefits. Appellant submits that they are.

It was previously stated that the general purpose of the Law was to create a mechanism for reimbursement of economic losses incurred by either an injured worker or a dependent, on account of an injury at work. *Burgess v. NaCom Cable Company*, 923 S.W.2d 450, 454 (Mo.App. 1996). And just as a dependent in a death benefits case may suffer an economic loss, so may a dependent of a permanently totally disabled worker who subsequently dies of unrelated causes. In the current matter, Appellant was very much financially dependent upon Mr. Schoemehl both at the time of his injury and thereafter. There was a general stipulation at trial that Appellant was dependent upon Mr. Schoemehl. (Tr. 21, 3-4). And the specific factual evidence showed some of the specifics of that dependency. For instance, Mr. Schoemehl used his paychecks to purchase the groceries that both he and Appellant survived upon, as well as for other items such as car repairs, or going out to eat. (Tr. 9). And when Mr. Schoemehl became totally disabled, Appellant=s reliance upon his financial contributions did not end, as his total disability checks continued to be used for her economic benefit. (Tr. 10).

Since Mr. Schoemehl=s death, Appellant no longer has help with the expense of groceries and other daily living expenses that Mr. Schoemehl=s compensation previously covered, which means, in other words, that she has sustained an economic loss. *Id*. And since she has sustained an economic loss, this leaves us

with the question of whether the Workers= Compensation Law is meant to compensate for it. That is: was the Workers= Compensation Law written to compensate for a dependent=s losses in permanent partial disability cases, but not in permanent total disability cases?

When the Missouri General Assembly enacted ' 287.230.2 it didn=t use the term Adisability,@ and it certainly didn=t use the term A*partial* disability.@ Instead, it simply referred to the continuation of Acompensation@ in general, stating:

> [w]here 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 therefore shall terminate unless there are surviving dependents at the time of death. (*Emphasis added*).

MO. REV. STAT. ' 287.230.2 (2004). And the General Assembly used the same term -- compensation -- not only in ' 287.230.2, but also in its enactment of the Second Injury Fund=s liability for permanent total disability benefits. It said:

> [i]f the *compensation* for which the employer at the time of the last injury is liable is less than the *compensation* provided in this chapter for permanent total disability, then in addition to the *compensation* for which the employer is liable and after the completion of payment of the

> *compensation* by the employee, the employee shall be paid the remainder of the *compensation* that would be due for permanent total disability under section 287.200 out of a special fund known as the >Second Injury Fund=. . . (*Emphasis added*).

MO. REV. STAT. ' 287.220.1 (2004). A plain and simple reading of the Legislature=s language seems to show a clear intent to cover compensation for both permanent partial and permanent total disability.

It should be noted that no Missouri court has ever suggested that the partial/total distinction affects liability, with the case of *Scannell v. Fulton Iron Works Company, Inc.*, 289 S.W.2d 122 (Mo. 1956), actually suggesting that the distinction is irrelevant. *Scannell* involved a man who developed an occupational disease which rendered him permanently and *totally* disabled, therefore entitling him to weekly compensation benefits from his employer. *Id*. While his case was on appeal, Mr. Scannell died of causes not connected with his occupational disease. *Id*. The matter was therefore pursued by his widow. *Id*. Both the facts and the issues in *Scannell* were different than those in the matter at hand, as *Scannell* involved a dispute over jurisdiction rather than payment of weekly benefits. But the Supreme Court=s analysis in *Scannell* is nevertheless important because it recognized that its jurisdiction in a permanent total disability case is affected by ' 287.230.2. So while

the issues were different, *Scannell* nevertheless stands for the proposition that section 287.230.2 applies to cases of permanent total disability.[5]

[5/] See also *Crow v. Missouri Implement Tractor Company*, 292 S.W.2d 573 (Mo. 1956), for a similar case in which the Supreme Court envisioned a payment of benefits to dependents for life.

Nevertheless, it has been argued that there are inherent differences between permanent partial and permanent total disability cases, such that the Commission was justified in denying compensation to Appellant.[6] The basic argument is that ' 287.230.2 applies only to cases of permanent partial disability because such cases are typically paid in a lump sum, whereas permanent partial disability cases are paid out over time. This is partially correct and partially relevant. It is true that partial disability cases are typically paid in lump sums but this is not because of some inherent difference in these benefits. The primary reason that that insurers opt for lump sum payments is simply for convenience sake, because it is cheaper to pay the benefits all at once than to pay a claims adjustor to maintain an open file and issue checks on a weekly basis. And second, when an administrative law judge makes an award for permanent partial disability, the time between the employee=s date of Amaximum medical improvement@ and the date of the judge=s award usually exceeds the Aweeks@ of the award, so payment in a lump sum is inevitable.[7]

---

[6]/The Court of Appeals stated that the difference is in the fact that there is no pre-determined ending date for payment of permanent total disability, (Opinion of Court of Appeals, Southern District, p. 10), which, of course, is incorrect, as the payments are to extend for the finite period of a Alife in being,@ that being the life of the dependent.

[7]/Assume an employee injures her wrist and reaches maximum medical

improvement on January 1, 2005. On October 1, 2005 she then receives an award for fifteen percent disability. The calculation of this fifteen percent disability equates to 26.25 weeks of disability (175 total weeks for the hand, multiplied by the 15% disability). Since the number of weeks between January 1st and October 1st is thirty-nine weeks, the entire payment of 26.25 weeks would be payable in a lump sum following the award.

And even though partial disability compensation may be paid in a lump sum, it still represents a *period of time*, not a liquidation of damages. This can be seen both in the fact that partial disability benefits are laid out in Aweeks@ of disability, MO. REV. STAT. '287.190.1 (1994), and in the fact that the General Assembly refers to partial disability as a Aperiod@ of time. MO. REV. STAT. '287.190.3 (1994). It can also be seen in the fact that once the lump sum check is issued and cashed, the insurer=s liability under the Law does not end -- it continues during the length of time covered by the number of weeks of disability. *Tiller v. 166 Auto* Auction, 65 S.W.3d 1 (Mo.App. 2001), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

So permanent partial disability cases are not just Alump sum payment@ cases, but are Apayments over a period of time.@ And this is important because cases such as *Nations* and *Henderson* found that liability for those Apayments over time@ extended *beyond the employee=s date of death*. In other words, they found that it was of no consequence that the injured worker died during that period of time he had been awarded benefits. The death simply shifted entitlement to compensation from the injured worker to the dependents.

The Commission=s analysis heavily relied upon '287.200.1, of the Workers= Compensation Law, which says:

> [c]ompensation for permanent total disability benefits 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 section on the date of the injury for which compensation is being made.

MO. REV. STAT. ' 287.200.1 (2004). The Commission majority focused primarily on the phrase Alifetime of the employee,@ and, Appellant asserts, thereby committed error by placing reliance on one section of the Law to the exclusion of others.[8] It is true that with a simple analysis, reading ' 287.200.1 in isolation, it seems reasonable to limit the payment of compensation to only the injured worker. But when ' 287.200.1 is read together with other provisions of the Law, there again is disharmony. This can be seen when coupling ' 287.200.1 with the General

[8]/The Commission=s concluded that ' 287.230.2 does not apply to permanent total disability cases because benefits are specifically restricted to the Aemployee@ by ' 287.200.1. (ALJ Award, p. 3). If this is so, then ' 287.230.2 also does not apply to permanent *partial* disability cases because permanent partial disability benefits are also specifically restricted to the Aemployee,@ by ' 287.190. MO. REV. STAT. ' 287.190.1 (2004). So, using the Commission=s reasoning, ' 287.230.2 applies to no compensation, and the General Assembly simply enacted a meaningless provision. AIt is a well established presumption that the General Assembly did not intend for any part of a statute to be without meaning or effect.@ *Sheldon v. Board of Trustees*, 779 S.W.2d 553, 556 (Mo. 1989).

Assembly=s definition of the term Aemployee@ in '287.020.1, which includes this statement:

> [a]ny reference to any employee who has been injured shall, when the employee is dead, also include his dependents, and other persons to whom compensation may be payable.

MO. REV. STAT. '287.020.1 (2004). This means that since Mr. Schoemehl is deceased, the Commission should have read the word Aemployee@ -- contained within the permanent total disability provisions of '287.220.1 -- as Adependent.@ If it had done so, it would have arrived at the conclusion that Appellant Astepped into the shoes@[9] of Mr. Schoemehl when he died, thereafter being entitled to the compensation he was receiving for their combined economic loss, for the remainder of her life.

The Missouri Court of Appeals, Southern District, stated in its Decision that the harmonization of ''287.020.1, 287.200.1 and 287.230.2, as propounded by Appellant, is illogical because it would result in a Aseemingly endless cycle of dependents.@ The lower Court rationalized that since one dependent may step into the shoes of the injured worker, then the Adependent=s dependents@ would also be entitled to do so, creating a never ending stream of Aemployees.@ Unfortunately, the lower Court failed to recognize the Workers= Compensation Law prevents such

[9/] The Court in *Bone* used the phrase: Astand in the same shoes.@ *Id*., at 171.

a cycle by restricting the definition of the word Adependent@ to *only those persons who are actually dependent on the injured worker at the time the injury occurs*. MO. REV. STAT. '287.240(4) (2004). Section 287.240(4) reads:

> [t]he word Adependent@ as used in this chapter[10] shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury.

MO. REV. STAT. '287.240(4) (2004). The Missouri General Assembly foresaw the potential of an endless cycle of dependents and therefore limited the potential Aline of succession.@ Under the Law, if a claimed dependent is not alive and actually dependent upon the injured worker on the day the injury occurs, he or she is not a dependent at all. And the case law is consistent with this, saying that dependency is

---

[10/] Note that while the General Assembly chose to include the definition of the word Adependent@ within section 287.240 -- the Adeath benefit@ section -- they specifically stated that this definition is to apply throughout the entire *chapter* of the law, i.e., the entire Workers= Compensation Act.

determined as of the date of the injured worker=s injury -- including both the dependency of widows, *Mays v. Williams*, 494 S.W.2d 289, 294 (Mo. 1973), and the dependency of children. *Gennari v. Norwood Hills Corp.*, 322 S.W.2d 718, 721 (Mo. 1959). The statute therefore prevents the problem of the Aseemingly endless cycle of dependents@ by limiting Adependents@ to those persons who were reliant upon the injured workers= wages at the time the injury occurred. Anyone not born and not reliant -- at the time of the injury -- could never be a dependent.

The Missouri Court of Appeals, Southern District, in fact found the very theoretical underpinnings of Appellant=s argument to be illogical. (Court of Appeals Opinion, p. 7). The Court concluded that in a workers= compensation setting it is irrational to argue that dependents may have an entitlement to permanent total disability benefits upon the injured workers= date of death, because to do so would be to create an indefinite payment to someone who the law could never have presumed to be entitled to such benefits. (Court of Appeals Opinion, p. 10). The Court rejected Appellant=s arguments, stating that the Legislature had specifically limited liability for permanent total disability Aduring the continuance of disability,@ which could only logically mean the lifetime of the employee. (Court of Appeals Opinion, p. 7). The Court essentially concluded that the phrase Aduring the continuance of disability@ cannot peacefully coexist with the idea of payment of permanent total disability benefits to dependents after death.

It is interesting to analyze the Southern District=s reasoning through the eyes of the States which surround Missouri. For instance, the State of Oklahoma=s workers= compensation law contains a limitation on permanent total disability benefits just like that relied upon by the Southern District. Using phraseology very similar to Missouri=s '287.200.1, Oklahoma=s law says:

> [i]n case of total disability adjudged to be permanent, seventy percent (70%) of the employee's average weekly wages shall be paid to the employee during the continuance of such total disability.

OKLA. STAT. 85, '22.1 (1994). And so, using the Southern District=s reasoning, a dependent in Oklahoma could never receive permanent total disability benefits beyond the injured worker=s date of death, as it would be illogical to do otherwise. And yet, the Oklahoma workers= compensation statute goes on to state:

> [i]f claimant has been adjudged a permanent totally disabled person prior to death, and such death has resulted from causes other than the person=s accidental personal injury or occupational disease causing such total permanent disability, the award may be revived and made payable to the following persons . . .

OKLA. STAT. 85, '48(2) (1994), see also *Comerford v. Pryor Foundry*, 987 P.2d 434, 436 (Okla.Civ.App. 1999). It then goes on to list the persons entitled to receive continued permanent total disability benefits -- including the spouse -- and provides that unless she remarries, they are to continue *for life*. OKLA. STAT. 85, '48(2)(e) (1994).

So what could be the theoretical underpinnings behind the Oklahoma legislature in providing that permanent total disability benefits are to continue to dependents? Are the two not Aoil and water?@ Appellant asserts that it is the same theory which acts as the foundation of Missouri=s Workers= Compensation Law, that liability for economic loss caused by injury at work is to fall upon industry, not on injured workers, nor their widows, widowers or children. *Burgess v. NaCom Cable Company*, 923 S.W.2d 450, 454 (Mo.App. 1996).

No doubt the argument will follow that the Oklahoma statute is different than Missouri=s, and is much more specific in detailing what is to happen upon the death of a permanently totally disabled worker. It is true that Oklahoma=s statute is more specific than Missouri=s. But it is untrue to say that they are inherently different. Just like Oklahoma, Missouri enacted ' 287.230.2 to establish that unpaid, unaccrued compensation benefits do not end if there are dependents. And while Oklahoma may be more specific in addressing how the situation is to be handled, that is simply a matter of *procedure*. Appellant accepts the argument that Missouri=s law could be procedurally more specific, but Appellant rejects the argument that a lack of procedural specifics should extinguish a dependent=s *substantive* right to benefits.

And Oklahoma is not a quirk. Like Missouri and Oklahoma, the State of Kentucky has a provision which defines permanent total disability as Athe condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work,@ KY. REV. STAT. ANN. ' 342.0011(11)(c) (Michie 2006),

with benefits limited to only Aduring that disability.@ KY. REV. STAT. ANN. ' 342.730(1)(a) (Michie 2006). And yet Kentucky also has a provision for the continuation of liability to widows, widowers, and children. KY. REV. STAT. ANN. ' 342.730(3) (Michie 2006). That provision states:

> [s]ubject to the limitations contained in subsection (4) of this section, when an employee, who has sustained disability compensable under this chapter, and who has filed, or could have timely filed, a valid claim in his lifetime, dies from causes other than the injury before the expiration of the compensable period specified, portions of the income benefits specified and unpaid at the individual=s death, whether or not accrued or due at his death, shall be paid, under an award made before or after the death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this section and in the order named[11] . . .

[11/] Unlike Oklahoma, Kentucky continues benefits to widow or widower only until she or he qualifies for Social Security retirement benefits, KY. REV. STAT. ANN. ' 342.730(4) (2006),

KY. REV. STAT. ANN. ' 342.730(3) (Michie 2006); see also *Palmore v. Jones*, 774 S.W.2d 434, 434-435 (Ky. 1989).

To be sure, there are States surrounding Missouri that do not seem to allow the continuation of liability beyond an injured worker=s death, though their statutes are different from those of Missouri, Oklahoma and Kentucky, because they simply do not contain language which specifically permits payment of unaccrued benefits to a dependent. Of the States who have no provision for the continuation of unaccrued benefits, the only statute with any similarity to Missouri=s seems to be that of Iowa. Iowa=s workers= compensation statute was first enacted in 1913 and said:

> [w]here an employee is entitled to compensation under this act for an injury received, and death ensues from any cause not resulting from the injury for which the employee was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

---

with the obvious intent being to continue support to persons who were dependent on the injured workers= wages and compensation benefits.

IOWA CODE Ch. 147, Sec. 11 (1913).[12] Six years later, in 1919, Missouri enacted a provision[13] in its workers compensation law which used essentially the same language as Iowa, which means that it can be reasonably inferred that Missouri=s General Assembly Aborrowed@ language from Iowa=s law. And if Missouri borrowed from an Iowa statute which does not allow payment of unaccrued benefits to dependents, then it can be safely said that when Missouri amended its statute in 1925[14] to *allow* such payments, the General Assembly was attempting to distinguish itself from states like Iowa.

AClearly, under this clause, the right of the employee to compensation for disability, accrued and unaccrued, survives to his dependents.@ *Nations v. Barr*, 43 S.W.2d 858, 861 (Mo.App. 1931). And in *Henderson*:

> [w]hat survives to the dependent when the employee dies is the right to compensation as stated in *Nations v. Barr*. As we have said, the purpose of the act is to compensate for the loss of earning power. [The employee] suffered such a loss and had a right to recover. This right

[12/] Today=s version of the Iowa statute is essentially identical. IOWA CODE '85.31(4) (2005).

[13/] MO. REV. STAT. '13611 (1919).

[14/] MO. REV. STAT. '3318 (1925).

would have died with him if he had no dependents, *but the statute reserved, to his dependent son, that which [the employee] could have recovered had he lived.* (*Emphasis added*).

Id. The court stated that dependents are entitled to recover that which the employee would have received, had he *lived*. The rationale of the Commission and the Court of Appeals, Southern District, is based upon a presumption that dependents are entitled to recover that which the employee would have received, had he *died*.

The primary rule of statutory construction is to ascertain the intent of the General Assembly from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. As such, the Court=s holding conflicts with the cases which have interpreted ' 287.230.2, such as *Bone v. Daniel Hamm Drayage Company*, 449 S.W.2d 169 (Mo. 1970), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003); *Henderson v. National Bearing Division*, 267 S.W.2d 349 (Mo.App. 1954); and *Nations v. Barr*, 43 S.W.2d 858 (Mo.App. 1931), none of which said that application was limited to partial disability cases.

V. Equal Protection

If the interpretation and application of law propounded by the Commission majority were to be followed, then such would violate the Equal Protection clauses of both the United

States and Missouri Constitutions, U.S. Const. Amend. XIV; Mo. Const. Art. I, ' 2, because Courts are to avoid construing a statute so as to create a constitutional infirmity. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-839 (Mo. 1991).

There is a two-step analysis to be applied in determining whether a statute violates equal protection guarantees. *Etling v. Westport Heating and Cooling Services*, 92 S.W.3d 771 (Mo. 2003).

> The first step is to determine whether the classification Aoperates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.@ If so, the classification is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest. If not, review is limited to determining whether the classification is rationally related to a legitimate state interest. Suspect classes are classes such as race, national origin or illegitimacy that Acommand extraordinary protection from the majoritarian political process@ for historical reasons. Fundamental rights include the rights to free speech, to vote, to freedom of interstate travel, and other basic liberties.

Id. at 774 (footnotes omitted). *See also State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 841-42 (Mo.App. 2000).

In its construction of ' 287.230.2, the Commission majority=s Award operates to the disadvantage of a distinct class of persons in that it treats dependents of permanently totally disabled individuals worse than it treats dependents of permanently partially disabled

individuals. Since neither of these classes is a suspect class, no fundamental rights are implicated by the distinctions, *State ex rel. Nixon*, 27 S.W.3d at 841-842 (individuals with severe health conditions do not constitute a suspect class), *citing Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991), and therefore the Court must apply a Arational basis@ scrutiny. Although rational basis review is deferential, it has its limits. The U.S. Supreme Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), struck down a zoning ordinance which required group homes for retarded individuals to obtain special use permits but did not require other multiple use and care facilities to obtain special use permits. The City of Cleburne failed to articulate any rational basis for treating group homes for the retarded differently than similar classes of facilities. Similarly, there can be no conceivable rational basis for allowing dependents of an individual with a permanent *partial* disability to receive his or her benefits, but withholding benefits from dependents of an individual with a permanent *total* disability.

In *Martin v. Schmalz*, 713 S.W.2d 22, 25 (Mo.App. 1986), the Eastern District construed statutes in a way that would avoid an equal protection violation. The statutes at issue in that case were MO. REV. STAT. '610.100-610.120 (1981), which provided for closing and sealing certain arrest records. The question was whether the statutes applied retrospectively to arrests prior to 1981. The plaintiff in the case appealed the denial of his application to the St. Louis County Police Department for a private watchman=s license. The denial was based on the plaintiff=s failure to divulge pre-1981 arrests on his application. There was no question that if the arrests had occurred after 1981, they would have been

closed under ''610.100 - 610.120, and the plaintiff could not have been penalized for failure to reveal them. The Court held, A[t]o distinguish between pre-enactment and post-enactment arrests would make the statutes unconstitutional as a denial of equal protection without a rational relation to some legitimate state interest.@ *Martin*, 713 S.W.2d at 25. They concluded:

> [r]esponding to our responsibility to seek a statutory construction Awhich avoids unjust or unreasonable results and gives effect to the legislative intent,@ . . . and recognizing the basic maxim of statutory construction [which] requires that a court faced with a constitutional challenge to a statute must, if possible, construe it in favor of constitutionality,@. . . we are constrained to hold that secs. 610.100 B 610.120, RSMo.Cum.Supp. 1984, by unavoidable implication, must be given retrospective as well as prospective operation.

Id. (internal citations omitted).

This Court should apply exactly this sort of analysis to the Commission=s construction of '287.230.2. The Commission=s construction creates a distinction between dependents of employees with partial disability and dependents of employees with total disability, without any rational relation to a legitimate state interest. The Court should avoid construing the statute in a way that creates an equal protection violation, and instead construe it Ain favor of constitutionality.@ *Martin*, 713 S.W.2d at 25.

VI. Conclusion

The Commission majority erred in failing to properly apply the guidelines of statutory construction to this Claim. Prior to his death, Mr. Schoemehl was unemployable on the open labor market due to the combination of his disabilities. He was therefore entitled to permanent total disability benefits from Respondent. Since he had been paid temporary total disability benefits through February 26, 2003, and since the claim with Employer was resolved for forty weeks of disability, Respondent=s obligation to pay permanent total disability benefits began on December 3, 2003. On Mr. Schoemehl=s date of death, Respondent became liable to Appellant for unaccrued benefits of $261.26 per week, payable for the remainder of her life. Appellant is entitled to Astep into the shoes@ of Mr. Schoemehl and receive the same benefits that he would have received, had he survived. *Bone*, 449 S.W.2d at 174.

The Commission=s Award violates the guidelines of statutory construction by failing to give effect to the General Assembly=s intent in allowing the payment of unaccrued benefits upon death. The Commission=s reasoning fails to look to the object which the Legislature was trying to accomplish, that being the protection of widows, widowers and children from economic loss upon injury to an employee in the course of employment. The Commission=s reasoning shifts the burden of such loss from industry to the dependents, and leaves behind a disharmony among several provisions of the Law and Constitution which clearly cannot be said to be a

liberal interpretation designed with a view to the public interest, intended to benefit the largest possible class.

The Missouri Supreme Court states that in claims against the Second Injury Fund it is the intention of the legislature that the dependent widow succeed to the injured worker=s right to receive benefits, when that worker has died of unrelated causes. *Bone*, 449 S.W.2d at 174. The decision of the Commission should be reversed, and it should be found that the Second Injury Fund is liable to Appellant for permanent total disability benefits for the remainder of her life.

Respectfully submitted,
SCHUCHAT, COOK & WERNER

_____

Dean L. Christianson #30362
1221 Locust Street, Suite 250
St. Louis, MO 63103-2364
(314) 621-2626
FAX: 314-621-2378

CERTIFICATE OF SERVICE

The undersigned hereby states that on this 17th day of July, 2006, a copy of the foregoing was mailed via first-class mail, postage prepaid to Ms. Cara Lee Harris, Assistant Attorney General, 149 Park Central Square, Suite 1017, Springfield, MO 65806.

_____
Dean L. Christianson

CERTIFICATE OF COMPLIANCE

This Brief complies with the provisions of Rule 84.06(b) and contains 10,114 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus free.

_____
Dean L. Christianson
Missouri Bar #30362
1221 Locust Street, Suite 250
St. Louis, MO 63103
(314) 621-2626

293332.WPD