

**IN THE
MISSOURI SUPREME COURT**

JOHN COX, deceased, and	}	
BETTYCOX,	}	
	}	
Appellants,	}	
	}	
v.	}	
	}	
	}	No. SC88992
	}	
TREASURER OF THE STATE OF	}	
MISSOURI, as Custodian of	}	
The Second Injury Fund,	}	
	}	
Respondent.	}	

**SUBSTITUTE BRIEF OF RESPONDENT, TREASURER OF THE
STATE OF MISSOURI, AS CUSTODIAN OF THE SECOND INJURY FUND**

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

Lee B. Schaefer, #32915
Assistant Attorney General
P.O. Box 861
St. Louis, Missouri 63188
(314) 340-7827
(314) 340-7850 (fax)
lee.schaefer@ago.mo.gov
ATTORNEYS FOR RESPONDENT
SECOND INJURY FUND

Table of Contents

Table of Authorities 2

Statement of Facts..... 4

Argument 6

Conclusion 14

Certificate of Service and Compliance 15

Appendix

Table of Authorities

CASES

Baxi v. United Techs. Auto Corp., 122 S.W.3d 92 (Mo.App. E.D. 2003)..... 10

Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue, 195 S.W.3d 420 (Mo. 2006)..... 11

Falk v. Barry, 158 S.W.3d 327, 329 (Mo.App. W.D. 2005)..... 6,10

Farmer v. Barlow Truck Lines, 979 S.W.2d 169, 170 (Mo. banc 1998)..... 6,7

Forkum v. Arvin Industries, Inc., 956 S.W.2d 359 (1997) 9

Greenlee v. Dukes Plastering Service, 75 S.W.3d 273 (Mo. 2002) 8

Lakeman v. Siedlik, 872 S.W.2d 503 (Mo.App. W.D. 1994) 12,13

Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. banc 2007)
..... 4,5,8

Smith v. Ozark Lead Co., 741 S.W.2d 802 (Mo.App. S.D. 1987)..... 7,9

Stonecipher v. Poplar Bluff R-1 School District, 205 S.W.3d 326 (Mo.App. S.D. 2006)
..... 11

CONSTITUTIONAL AND STATUTORY AUTHORITIES

§287.140 Rev. Stat. Mo. (2000) 7,9

§287.200 Rev. Stat. Mo. (2000) 7,9

§287.203 Rev. Stat. Mo. (2000) 9,11,13

§287.210 Rev. Stat. Mo. (2000) 12

§287.220 Rev. Stat. Mo. (2000) 12

§287.470 Rev. Stat. Mo. (2000)	7,9
§287.500 Rev. Stat. Mo. (2000)	9,10
§287.715 Rev. Stat. Mo. (2000)	12
§536.150 Rev. Stat. Mo. (2000)	10
8 CSR 20-3.010 (4).....	10

Statement of Facts

On July 11, 2003, Administrative Law Judge Leslie E. H. Brown issued an Award finding John Cox permanently and totally disabled. (ROA, p. 50). The employer was found liable for permanent partial disability and the Second Injury Fund liable for permanent total disability. (ROA, p. 50). The Administrative Law Judge's decision was not appealed.

On February 25, 2006, Mr. Cox passed away. The employer had paid its obligation under the Award, but payments from the Fund continued.

Mr. Cox's counsel contacted Linda Koelling, an employee of the Division of Workers' Compensation who handles the administrative tasks of the Second Injury Fund, to notify her that his client had died. Ms. Koelling then issued a letter to counsel, thanking him for informing her that his client had died and requesting reimbursement to the Fund of the amounts paid for periods after Mr. Cox had died. (Supplemental ROA, p. 1). Counsel then issued checks to the Fund for the amounts requested, but informed Ms. Koelling in the letter accompanying the checks that "we are in disagreement with the contention that the Second Injury Fund is no longer liable for disability payments." (ROA, p. 2-4). No other contact was made between counsel for Mr. Cox's estate and the Division of Workers' Compensation during 2006.

On January 9, 2007, in *Schoemehl v. Treasurer of the State of Missouri*, the Missouri Supreme Court held that a claimant's surviving spouse was entitled to her deceased husband's permanent total disability benefits. 217 S.W.3d 900 (Mo. banc

2007).

On January 11, 2007, counsel for Mr. and Mrs. Cox sent a letter to Ms. Koelling requesting that benefits be paid to Mr. Cox's spouse, citing *Schoemehl*. (ROA, p. 66). Counsel did not include a request for a hearing.

The January 11, 2007 letter was given to the Labor and Industrial Relations Commission, which treated the letter as a request to reinstate benefits. On April 9, 2007, the Commission issued a letter stating that it had received the January 11, 2007 correspondence requesting reinstatement of benefits and giving the Second Injury Fund ten days to respond. (Supplemental ROA, p. 14-15). That response was filed on April 17, 2007. On May 2, 2007, the Commission dismissed the request for continuation of benefits to Mrs. Cox due to a lack of jurisdiction. (ROA, p. 70).

On May 22, 2007, Mrs. Cox filed two documents: a Motion for Determination of Surviving Dependents by the Commission, and a Notice of Appeal to the Court of Appeals of the May 2 order. (Supplemental ROA, p. 5-13; ROA, p. 71-77). The May 22 motion was never ruled on by the Commission.

The Court of Appeals heard oral arguments in this matter, and, on December 4, 2007, affirmed the Commission's decision finding a lack of jurisdiction. However, because of the general interest and importance of this issue, the Court of Appeals transferred this matter to this Court.

Argument

The Commission is a creature of statute and has only the authority granted to it by specific statutory authority. *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo. banc 1998). The Court of Appeals, Western District, has held that post-award proceedings, such as ones to interpret or enforce an award, are not within the Commission's jurisdiction, but within the jurisdiction of the circuit court. *Falk v. Barry, Inc.*, 158 S.W.3d 327, 329 (Mo.App. W.D. 2005). That is true in every case – except one in which there is specific statutory authority for the Commission to revisit a past award. Despite appellant's many arguments, she can cite to absolutely no authority within the workers' compensation statute that allows for a decision that is final to be re-opened, and additional evidence to be adduced. Without such authority, appellant cannot prevail.

Mrs. Cox, the surviving appellant, argues that the Commission has jurisdiction over this matter based on the "primary jurisdiction" doctrine. (Appellant's Brief at 22). Mrs. Cox argues that the "primary jurisdiction" doctrine, which assigns questions about disability and other factual issues to the Commission and its "special expertise," requires that the Commission accept jurisdiction in this matter. What she neglects to identify is any authority for the proposition that the Commission has a particular expertise in determining the identity of dependents. Further, by arguing the "primary jurisdiction" doctrine, Mrs. Cox totally ignores the fact that the Commission is a statutory creature, and as such only has jurisdiction as specifically provided by the statute. *Farmer*, 979 S.W.2d at 170.

Mrs. Cox next points to “Factual Questions Which Arise Upon Death of Permanently and Totally Disabled Worker” as proof that there are factual issues to be decided in this case that fall within the Commission’s “primary jurisdiction.” (Appellant’s Brief at 23). Once again, appellant disregards the fact that not one workers’ compensation statute allows for the re-opening and re-litigating of a case once the time for appeal has passed. In *Smith v. Ozark Lead Co.*, the Court spoke (in dicta) of post-final modification by the Commission and indicated that it can only occur pursuant to specific statutory authority, giving as examples §§ 287.140, 200(2), and .470. 741 S.W.2d 802, 810 (Mo.App. S.D. 1987). None of these examples opens the door for the Commission to consider whether the injured worker’s death was related to his work injury and whether there are surviving dependents – are not issues of such complexity that they could not be handled by the Circuit Court. Therefore, as there is not a statute granting the Commission jurisdiction to re-open this case and litigate these issues, the proper venue to attempt to do so is Circuit Court.

Further, Mrs. Cox argues (Appellant’s Brief at 27) that it is significant that the Commission did not enter a formal “Show Cause” order terminating benefits. First, appellant can cite to no regulation, statute or case that requires the issuance of a “Show Cause” Order to terminate the payment of PTD benefits. So, it is unclear why the absence of such an Order is significant. Further, Mrs. Cox cannot cite to any language in the original Award that would have allowed benefits to continue upon the death of Mr. Cox. Mrs. Cox argues that, because the Commission routinely issues “Show Cause”

orders to terminate the payment of permanent total disability Awards, those Awards cannot be final. However, the obligation to pay permanent total disability benefits under this Award terminated upon the death of Mr. Cox - with or without a “Show Cause” Order from the Commission. The obligation to pay benefits terminated immediately upon the death of Mr. Cox because nothing in the Award identifies dependents or otherwise requires payment to them – it is specific to Mr. Cox. While the Commission had jurisdiction over this matter, neither Mr. or Mrs. Cox raised the issue of dependency or requested that payments continue to any surviving dependents upon the death of the injured worker.

Appellant’s reliance on *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 274 (Mo. 2002) is also misplaced. In *Greenlee*, the claimant died *while the appeal was pending*, therefore, the Award was not final and the Commission retained jurisdiction to address the factual dependency questions. *Greenlee*, 75 S.W.3d at 275. In that regard, *Greenlee* is similar to *Schoemehl*, in which the dependency issue arose before the Award became final, i.e., while the Commission could still address it. *Schoemehl*, 217 S.W. 3d at 900. Neither of these cases are dispositive, or even helpful, because in neither one did someone seek to re-open a final Award and introduce new evidence.

Appellant then argues that if the Commission does not accept jurisdiction, other courts cannot simply accept jurisdiction and issue a ruling. (Appellant’s Brief at 32). While that may be true, it is not relevant to this case. The sole issue before this Court is whether the Commission has jurisdiction to re-open this case and make the factual

determination of dependency. Further, there is another court with jurisdiction in this matter - the circuit court has jurisdiction pursuant to § 287.500. What relief can be granted by the circuit court is another issue for another day. But that uncertainty does not change the longstanding rule that without specific authority to accept jurisdiction, the Commission, as a statutory creature, cannot act.

Mrs. Cox next cites *Forkum* and *Smith* for the proposition that permanent total awards are not closed or final awards because they are subject to recall or revision. *Forkum v. Arvin Industries, Inc.*, 956 S.W.2d 359, 362 (1997), *Smith*, 999 S.W.3d at 13. (Appellant's Brief at 37). However, neither of these cases are helpful to Cox. In *Forkum*, the Commission did not take jurisdiction over an appeal because the ALJ issued a Temporary Award, which was not deemed to be final. *Forkum*, 956 S.W.2d at 362. In *Smith*, as discussed above, the Court spoke of post-final modification by the Commission only when there is specific statutory authority – such as that found in §§ 287.140, 200(2), and .470 – that allows such modification. *Smith*, 741 S.W.2d 810. Appellants cite to §287.200.2 (1994) and §287.203 as statutes that would allow modification, but those sections refer only to cases in which the *employer* is paying compensation, and make no mention of the Second Injury Fund. Therefore, appellants cannot cite any statutory authority that would allow review in this matter.

Next, Mrs. Cox attempts to draw an analogy between this case and a death case (Appellant's Brief at 41). However, that analogy fails upon review of the regulation cited by appellant. The Commission has jurisdiction to modify a death award when there has

been a “change of condition or status of the parties receiving the benefits.” 8 CSR § 20-3.010(4). Under the regulation, the Commission’s review is for parties who have already been awarded benefits – not to introduce new evidence about who might be a dependent or to make a new argument about the right of a dependent to receive benefits.

Mrs. Cox next claims that the Commissions’s refusal to consider this matter has deprived her of a property interest without due process (Appellant’s Brief at 43). But those claims ring hollow in light of *Falk*. Cox can proceed to circuit court – either in an effort to enforce the award (which she apparently deems covered her, and not just her husband) pursuant to § 287.500 R.S.Mo 2000, *see Falk v. Barry*, 158 S.W.3d 327, 328 (Mo.App. W.D. 2005), citing to *Baxi v. United Techs. Auto Corp.*, 122 S.W.3d 92, 96 (Mo.App. E.D. 2003), or perhaps by objecting to the Fund’s or the Commission’s decision to deny her benefits under the award, pursuant to § 536.150. In the Treasurer’s view, those methods will ultimately be futile because the awardee, Mr. Cox, did not take the steps necessary at the time of the award to create a record and obtain an award that would cover his wife in the event of his death. In other words, she never acquired a property interest. But if she did, she can make her claim in circuit court.

The *Conseco* and *Stonecipher* cases cited by Mrs. Cox do not lead to her ability to relitigate her case at the Commission. *Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue* requires an opportunity for a hearing. 195 S.W.3d 410, 420 (Mo. 2006). But here there has already been one – at which John Cox, the only person with any right to obtain an award, could have presented evidence of dependency and asked for an award

that included a finding of dependency, but did not. And, again, Mrs. Cox can assert her claim and be heard by a circuit court.

Stonecipher v. Poplar Bluff R-1 School District, 205 S.W.3d 326 (Mo. App. S.D. 2006), provides no more support for Mrs. Cox's position than does *Conseco*. The court in *Stonecipher* did insist on notice and an opportunity to be heard. *Id.* at 332-333. But again, John Cox had that opportunity, including the opportunity to be heard as to dependency, and Mrs. Cox can be heard in Circuit Court.

Mrs. Cox closes with an equal protection argument, based solely on the fact that § 287.203 provides for notice and hearing when an employer ceases to pay benefits, but the statute does not cover the Second Injury Fund (Appellant's Brief at 45). She asserts – correctly, of course – that § 287.203 draws a line between those who are paid benefits from employers and those who are paid benefits from the Second Injury Fund. And she concedes, as she must, that the decision to create a hearing process for employer-paid benefits and not for Second Injury Fund is subject merely to “rational basis” review. Where she errs is in suggesting that she can take a single point in the statutory scheme where the State treats dissimilar parties differently and demand an explanation for that distinction.

The State has, indeed, drawn a line between employers and the Second Injury Fund. But the line is not restricted to the question of whether there is an administrative process for seeking reinstatement of suspended payments. The differences between the two groups begin at the outset, distinguishing between those with prior disabling

conditions and those without. *See* § 287.220.1. The statutes distinguish between payments that an employer must make to its own employees and payments made from the Second Injury Fund, into which all employers pay, regardless of whether their employees ever draw from it. *See* § 287.715. The statutes also distinguish between employers and the Second Injury Fund with regard to medical examinations. An employer in a workers' compensation case may require an employee to submit to a medical examination under § 287.210. The Fund has no such discovery right. *See Lakeman v. Siedlik*, 872 S.W.2d 503, 507 (Mo. App. W.D. 1994).

The fact is that the Second Injury Fund and employers are treated differently within the workers' compensation statute because they are completely different entities. While workers' compensation law generally is a creature of statute, it was originally created as a tacit agreement between employees and employers to litigate in the simpler forum of workers' compensation, rather than civil litigation. *Lakeman*, 872 S.W.2d at 505. The Second Injury Fund, however, is entirely a creature of statute, and as such, both those defending the Fund and those seeking benefits from the Fund have only statutorily given rights and benefits. *Id* at 506, 507. In other words, without workers' compensation law, employers and employees would still have a forum in which to resolve their disputes over work injuries, namely civil litigation. Without the workers' compensation statutes, neither the Second Injury Fund, nor the benefits given by the Second Injury Fund would exist. Because the Second Injury Fund and employers are completely different entities

with completely different functions, rights, and responsibilities, there is certainly a rational basis for treating the entities differently.

Moreover, if there were a constitutional problem with § 287.203, it would lead not to giving some additional right to Mrs. Cox, but to sending employees to circuit court to seek reinstatement of benefits being paid by employers.

And if Mrs. Cox were really arguing that § 287.203 unconstitutionally distinguishes between two groups, her claim would involve the validity of that statute, and would have required her to appeal directly to the Missouri Supreme Court. She did not initiate her appeal in this Court for a simple reason: the question here is not the validity of § 287.203, but whether the Commission can reopen and modify long-final awards. And the answer to that question is, “No.”

Conclusion

Because the Commission lacked jurisdiction to entertain Appellant's request, the Commission's decision should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

Lee B. Schaefer, #32915
Assistant Attorney General
P.O. Box 861
St. Louis, Missouri 63188
(314) 340-7827
(314) 340-7850 (fax)
lee.schaefer@ago.mo.gov
ATTORNEYS FOR RESPONDENT
SECOND INJURY FUND

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06 (b)(c) 360 of this Court and contains 2,836 words, excluding the cover, this certification and the appendix, as determined by Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That two (2) true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 22nd day of January, 2008, to:

Mr. Dean L. Christianson
Attorney at Law
1221 Locust Street
Suite 250
St. Louis, MO 63103

4. That an original and nine (9) true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were hand-delivered, this 22nd day of January, to:

Clerk of the Supreme Court
State of Missouri
Post Office Box 150
Jefferson City, Missouri 65102

Lee B. Schaefer
Missouri Bar No. 32915
Assistant Attorney General
P.O. Box 861
St. Louis, Missouri 63188
(314) 340-7827
(314) 340-7850 (Fax)
lee.schaefer@ago.mo.gov
ATTORNEYS FOR RESPONDENT
SECOND INJURY FUND

Appendix

§287.203 Rev. Stat. Mo. (2000)	A-1
§287.500 Rev. Stat. Mo. (2000)	A-2
§536.150 Rev. Stat. Mo. (2000)	A-3
8 CSR 20-3.010(4).....	A-4

Termination of compensation by employer, employee right to hearing--assessment of costs.

287.203. Whenever the employer has provided compensation under section 287.170, 287.180 or 287.200, and terminates such compensation, the employer shall notify the employee of such termination and shall advise the employee of the reason for such termination. If the employee disputes the termination of such benefits, the employee may request a hearing before the division and the division shall set the matter for hearing within sixty days of such request and the division shall hear the matter on the date of hearing and no continuances or delays may be granted except upon a showing of good cause or by consent of the parties. The division shall render a decision within thirty days of the date of hearing. If the division or the commission determines that any proceedings have been brought, prosecuted, or defended without reasonable grounds, the division may assess the whole cost of the proceedings upon the party who brought, prosecuted, or defended them.

(L. 1993 S.B. 251, A.L. 2005 S.B. 1 & 130)

Circuit court may act upon memorandum--procedure.

287.500. Any party in interest may file in the circuit court of the county in which the accident occurred, a certified copy of a memorandum of agreement approved by the division or by the commission or of an order or decision of the division or the commission, or of an award of the division or of the commission from which an application for review or from which an appeal has not been taken, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment were a final judgment which had been rendered in a suit duly heard and determined by said court. Any such judgment of said circuit court unappealed from or affirmed on appeal or modified in obedience to the mandate of the appellate court, whenever modified on account of a changed condition under section 287.470, shall be modified to conform to any decision of the commission, ending, diminishing or increasing any weekly payment under the provisions of section 287.470 upon the presentation to it of a certified copy of such decision.

(RSMo 1939 § 3733, A.L. 1963 p. 410)

Prior revision: 1929 § 3343

Review by injunction or original writ, when--scope.

536.150. 1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.

2. Nothing in this section shall apply to contested cases reviewable pursuant to sections 536.100 to 536.140.

3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section.

(L. 1953 p. 678 §§ 1, 2, 3)

(1972) Where county ordinance provided no appeal from ruling of Board of Building Appeals, relator was entitled to writ of certiorari to compel the board to certify a sufficiently complete record of proceedings of basis leading to board's decision including name and identity of witnesses and at least a summary of their testimony. State ex rel. Walmar Investment Co. v. Armstrong (A.), 477 S.W.2d 730.

(1975) School district has no right to appeal decision of county board of equalization. State ex rel. St. Francois County School Dist. R-III v. Lalumondier (Mo.), 518 S.W.2d 638.

(1979) Mandamus was remedy when city council denied a liquor license under a municipal code when all conditions were met and was not a "contested" case. State ex rel. Keeven v. City of Hazelwood, et al. (A.), 585 S.W.2d 557.

8 CSR 20-3.010(4) Modifying Death Benefit Awards.

The commission shall have sole authority to modify final awards allowing death benefits to dependents. The commission may modify death benefit awards from time-to-time upon its own motion or upon motion by an interested party. All motions for modification of final awards shall be made to the commission and the movant shall submit proof of the change or condition or status of the parties receiving the benefits. Proof of the remarriage of the dependent surviving spouse shall be made by filing a copy of the marriage license of the remarried dependent surviving spouse or affidavit of the surviving spouse admitting remarriage. Proof of the death of any dependent shall be made by filing a copy of the death certificate of the dependent. Evidence of the remarriage of the dependent surviving spouse or the death of dependents may be made by deposition or other evidence as the commission may specify.