

IN THE SUPREME COURT OF MISSOURI

SC 89078

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

v.

TREASURER OF MISSOURI AS CUSTODIAN OF SECOND INJURY FUND,
Respondent

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	3
ARGUMENT	4
CONCLUSION	6
CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06(B)	7

TABLE OF AUTHORITIES

CASE LAW

Cox v. Treasurer of the State of Missouri, (SC 88992) 4

Greenlee v Duke's Plastering Service, 75 S.W.3d 273 (Mo.banc 2002) 4, 5

Smith v. Ozark Lead Co., 741 S.W.2d 802, 810 (Mo.App.S.D. 1987) 4

Winberry v Treasurer of the State of Missouri, (SC 88979) 4

STATUTORY AUTHORITY

Mo. Rev. Stat. §287.580 4, 5, 6

Mo. Rev. Stat. §287.470 5

ARGUMENT

Respondent's Brief overlooks the key element of Appellant's position by completely ignoring the importance of Section 537.580 R.S.Mo. Respondent argues that Appellant can cite to no authority within the workers' compensation statutes that allows for a decision which is "final" to be reopened. (Respondent's Brief, p2). Yet, Respondent cites no authority for the premise that such situations are limited to the three examples mentioned in dicta in *Smith v. Ozark Lead Co.*, 741 S.W.2d 802, 810 (Mo.App.S.D. 1987). The court in *Smith*, certainly did not indicate that the three sections cited were an exhaustive list of the only situations which allow for "re-opening" of a "final" award. Interestingly, Respondent's Brief is completely devoid of any reference to Section 287.580 R.S.Mo. Such silence speaks volumes in this case because Respondent offers no other explanation for the language contained in Section 287.580 "... but on notice . . . may be revived . . ." as possibly meaning anything other than a "re-opening" of the case.

This failure to acknowledge the impact of Section 287.580 R.S.Mo. by Respondent is further illustrated by her suggestion that Appellant indicates that the only important distinction between the instant case and *Winberry* and *Cox*, is that Rosalyn Strait died while the Commission still had jurisdiction. (Respondent's Brief at p.3). However, Appellant is clear in his Appellant's Brief in page 11, and states again here, that just as important (perhaps even more so), is the fact that notice pursuant to Section 287.580 R.S.Mo. was given to the Commission and all parties **before** the appeal to the Court of Appeals. Respondent's deficiency in this regard is further illustrated by her analysis of the Decision in *Greenlee v.*

Duke's Plastering Service, 75 S.W.3d 273 (Mo.banc 2002). That analysis offered by Respondent overlooks the true reason why the Commission still had jurisdiction by jumping to the conclusion that it must have been a procedure under Section 287.470 R.S.Mo. "due to a change in circumstances". (Respondent's Brief at p.6). However, the *Greenlee* court does not cite to Section 287.470 R.S.Mo., and while admittedly also does not cite to Section 287.580 R.S.Mo., a closer reading to the Decision illustrates that the Commission was relying on subsection 580 as evidenced by the Court's recitation of the Commission's ruling ". . . that because employee's claim for disability benefits was still pending at the time of his death . . ." the Commission still had jurisdiction to modify the Award. *Greenlee* 75 S.W.3d at 275. This language speaks nothing of a change in condition ala Section 287.470, but it embraces the key language of Section 287.580 R.S.Mo. Respondent's analysis of *Greenlee* also completely overlooks the fact that the claimant in *Greenlee* was not arguing a change in condition, but rather a change in the whole nature of the claim from one for disability benefits (vesting in the injured employee and his successors pursuant to Section 287.580 R.S.Mo.) to one for death benefits (vesting in a totally different class of claimants pursuant to Section 287.240).

CONCLUSION

By all accounts, the Commission was given notice of employee's death pending proceedings pursuant to Section 287.580 R.S.Mo. while it had jurisdiction of the claim, and has to this date failed to address the procedures allowed for in that Section. Regardless of the timing of the "finality" of the Award, the Commission needs to rule on the issues presented pursuant to such notice. As a result, the Commission has jurisdiction to address the issue whether it "gets back" such jurisdiction pursuant to the provisions of Section 287.580 R.S.Mo. providing for the claim to be "revived" or simply through its original jurisdiction to determine all issues needing to be addressed which were presented during the pendency of the proceedings.

Respectfully,

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CERTIFICATE OF SERVICE

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

James G. Krispin

CERTIFICATE OF COMPLIANCE

This Brief complies with the provisions of Rule 84.06(b) and contains 892 words, not including the Appendix. To the best of my knowledge and belief the enclosed disc has been scanned and is virus free.

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