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 REPLY BRIEF

OF APPELLANT ANNETTE SCHOEMEHL

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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.

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

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

MO. REV. STAT. §287.230.2 (1994).

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.

Respondent argues that giving a plain reading to §287.230.2 will result in turning the Workers' Compensation Law into an unintended "life insurance system" for dependents. (Respondent's Substitute Brief, p. 7). First of all, Missouri's Workers' Compensation Law was created not only to assist injured workers, but also, in certain circumstances, their dependents. This is clearly evident in those cases where the worker is killed by his employment, as the dependents are entitled to receive compensation for their economic loss.

And the reason is simple: the dependents have suffered an economic loss when their loved one's compensation is no longer a part of the family financial picture. Yes, the matter at hand is different than a death benefits case, because here the death was not caused by the work injury. But the fact remains that dependents in situations such as ours still suffer economic loss because they are no longer receiving the compensation which the injured worker was contributing to the family finances. Whether or not such a loss should be compensated is a matter for the legislative body to decide, but without a doubt, among the states surrounding Missouri, more than one has decided that industry should continue to bear the burden of these losses after the injured worker has died.

Respondent misunderstands Appellant's point in referencing the laws of States such as Oklahoma and Kentucky. (Respondent's Substitute Brief, p. 15-16). Appellant is not suggesting that Missouri's §287.230.2 is exactly like those States, because it is not -- at least from a procedural standpoint. The laws of Oklahoma and Kentucky are very specific in explaining the procedure for payment of permanent total disability benefits to dependents. OKLA. STAT. 85, §48 (1994); KY. REV. STAT. ANN. §342.730 (Michie 2006). Missouri's law, on the other hand, does not contain procedural specifics within the confines of §287.230.2. MO. REV. STAT. §287.230.2 (2004). But the laws of all three States are similar in their *substantive* sense: that is, they each allow the continuance of compensation to dependents in the case of a worker who dies of causes other than the work injury. And it is this substantive right to a continuation of benefits which has already been recognized in Missouri partial

disability cases, and which Appellant now alleges should also be recognized in total disability cases.

Both Respondent and the Court of Appeals, Southern District, have placed heavy reliance on the statutory use of the term: "entitlement." (Respondent's Substitute Brief, p. 12-15). Respondent's argument is based on the theory that permanent total disability benefits are "owned" by the injured worker, and only by the injured worker. The argument is that permanent total disability benefits *by their very nature*[1] are personal to the injured worker, and therefore, to suggest in a workers' compensation setting that someone else may ever be entitled to such benefits is illogical.

The reason that Appellant references to the laws of Oklahoma and Kentucky is not to simply show a similarity between states, but to illustrate that permanent total disability benefits are not by their very nature personal to the injured worker. They are a statutory creation, and as such, they may be extended to dependents if the legislature so desires. So it makes no sense to simply argue that permanent total disability benefits are tied into the lifetime of the injured worker, and therefore these benefits can never extend to dependents, because Oklahoma and Kentucky also tie payment into the lifetime of the injured worker, OKLA. STAT. 85, §22(1) (1994); KY. REV. STAT. ANN. §342.0011(11)(c) & §342.730(1)(a) (Michie 2006), and yet they extend benefits to dependents. Using Respondent's reasoning,

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[1/] The "personal nature" of these benefits, it is argued, lies in the fact that they are tied into the lifetime of the injured worker.

the Oklahoma and Kentucky provisions which extend benefits to dependents is illogical, because permanent total disability benefits in those states is tied into the lifetime of the injured worker.

Like Missouri, the States of Oklahoma and Kentucky recognize that in circumstances such as those before us, the dependents suffer economic harm upon the death of the injured worker. The legislatures in all three States have therefore passed legislation intended to shift the burden of this harm away from the dependents, and back onto industry. These laws stand for the fact that permanent total disability benefits are not by their very nature something to which only the injured worker is "entitled." Permanent total disability benefits can be, if the State legislature so decides, a benefit to which dependents may be entitled.

Missouri's §287.230.2 defines "entitlement" to permanent total disability benefits as being a benefit which may extend to dependents, and the Statute does not limit itself to matters of "partial" disability. MO. REV. STAT. §287.230.2 (2004). It simply uses the term "compensation." *Id*. This language creates the entitlement -- the substantive right -- to continued benefits. The issue of the *duration* of those payments -- which is really what Respondent complains about -- is a procedural matter, which obviously is to be evaluated somewhat independently of substantive issues. Respondent's complaint is less with the dependent's substantive entitlement, and more with the fact that that the Missouri General Assembly did not include the same procedural specifics that the General Assemblies of Oklahoma and Kentucky employed. This, it is argued, leads to illogical situations which

obviously indicate that Missouri could not have intended that dependents have a substantive right to benefits.

Respondent asserts that one such illogical situation involves the issue of medical care. It is argued that if §287.230.2 covers permanent total disability cases, then the dependents are "entitled to potentially receive future medical care for [their] lifetime." (Respondent's Substitute Brief, p. 9). Appellant agrees that this would be a problem, if it were possible. But it isn't possible, because a dependent's injury could never be said to "arise out of and in the course of" the employment with the employer. MO. REV. STAT. §287.020.3 (1994); see also MO. REV. STAT. §287.140.1 (1994).

And Respondent asserts that extending permanent total disability benefits to dependents is illogical because it would be possible for a dependent to receive a longer period of benefits than a dependent in a death benefits case. There are always perceived "injustices" that can be envisioned in the Workers' Compensation Law. For instance, if an employee sustains a spinal cord injury, rendering him a paraplegic, and over the next five and one-half years his body deteriorates to the point he dies, his burial is paid for and his family receives death benefits. But if that same employee does not die for another two or three months, then his family receives nothing because he did not die within a period of 300 weeks from the date of the accident. MO. REV. STAT. §287.020.4 (1994). Yes, there can be many arguments as to the reasoning behind a 300 week limitation on death following an injury, but the fact remains that there will be situations where seemingly inequitable situations will result.

And even if Respondent's criticism were to be accepted as true, that inequitable situations may result in the comparison of a dependent's rights to death benefits and a dependent's rights to permanent total disability benefits, what is to be the relief? Appellant suggests that if a dependent has a substantive right to benefits, it would be improper to deny her those benefits simply because the Law as written does not include certain procedural specifics. The proper recourse would be to acknowledge the dependent's fundamental right to benefits, and then leave it up to the General Assembly to deal with -- or not deal with -- as it sees fit.

A plain and simple reading of §287.230.2 indicates an intent to shift the burden of economic loss away from widows, widowers, and their dependent children, and onto industry, in permanent total disability cases. *Henderson v. National Bearing Division*, 267 S.W.2d 349 (Mo.App. 1954). And such a finding recognizes that the Supreme Court has in the past acknowledged the applicability of §287.230.2 to permanent total disability claims. *Scannell v. Fulton Iron Works Company, Inc.*, 289 S.W.2d 122 (Mo. 1956). The decision of the Labor and Industrial Relations Commission improperly shifts liability for loss caused by injury at work away from industry, and squarely on the shoulders of those persons who relied on the benefits for support. As such, the decision should be reversed and substituted with a finding that Respondent remains liable to Appellant for permanent total disability benefits.

CONCLUSION

Appellant has suffered economic harm as a result of the loss of income coming from Mr. Schoemehl's permanent total disability benefits. The Missouri Workers' Compensation Law is similar to the laws of Oklahoma and Kentucky in that all three States grant dependents the substantive right to continue receiving permanent total disability benefits upon the death of the injured worker. Within these states, the legislatures have defined "entitlement" to these benefits as extending beyond the worker's date of death. Given the fact that Appellant has a substantive right to permanent total disability benefits under a plain and simple reading of the Law, the Commission's Award should be reversed in favor of an award which finds Respondent liable for continued payment of permanent total disability compensation to Appellant.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby states that on this 16th day of August, 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.

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Dean L. Christianson

CERTIFICATE OF COMPLIANCE

This Brief complies with the provisions of Rule 84.06(b) and contains 2,155 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus free.

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