
IN THE MISSOURI SUPREME COURT

NUMBER SC87750

FRED SCHOEMEHL (deceased)

ANNETTE SCHOEMEHL

Employee-Appellant

vs.

**Treasurer of the State of Missouri as
Custodian of the SECOND INJURY FUND**

Additional Party-Respondent

**SUBSTITUTE BRIEF OF ADDITIONAL PARTY/RESPONDENT
SECOND INJURY FUND**

**JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL**

**Cara Lee Harris
Assistant Attorney General
Mo. Bar No. 40691
149 Park Central Square, Suite 1017
Springfield, Missouri 65806
Ph. (417) 895-6567
Fax (417) 895-6382**

Attorneys for the Second Injury Fund

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STATEMENT OF FACTS

The stipulation of facts set forth by Spouse accurately represent the agreements of the parties at hearing. In addition, the parties agree that the only evidence submitted at the time of hearing indicates that Mr. Schoemehl was permanently and totally disabled as a result of a combination of his work injury and prior disabilities. The Fund did not appeal that finding. The only issue remaining is whether Mr. Schoemehl's surviving spouse is entitled for the remainder of her life, to the weekly permanent and total disability benefits of her husband who died of causes unrelated to the work accident. The Administrative Law Judge (ALJ) issued an Award dated April 4, 2005, holding that she was not entitled to such benefits. Spouse appealed that Award to the Labor and Industrial Relations Commission (Commission), which affirmed the Award of the ALJ. Spouse appealed that Award to the Missouri Court of Appeals, Southern District which affirmed the Award of the Commission. Spouse sought transfer to this Court, which was accepted.

ARGUMENT

Standard of Review

This Court's review is governed by Section 287.495, RSMo. (2000).¹ The decision of the Commission should be affirmed unless it acted in excess of its powers, the award was procured by fraud, the facts do not support the award, or there was not sufficient evidence in the record to warrant the making of the award. Section 287.495.1, RSMo.

The Commission's interpretations of law, however are reviewed for correctness without deference to the Commission's judgment. *Pierson v. Treasurer of the State of Missouri*, 126 S.W.3d 386, 387 (Mo.banc 2004). Further, while the Worker's Compensation Laws are to be "liberally construed with a view to the public welfare," this rule does not authorize the allowance of a claim where an essential element is lacking. *Hillyard v. Hutter Oil, Co.*, 978 S.W.2d 75 (Mo.App. 1998).

The Commission did not err in denying Spouse payment of her husband's permanent total disability benefits after his death because his benefits did not transfer to her, in that under §287.200.1 RSMo., benefits for permanent total disability "shall be paid during the continuance of such disability for the lifetime of the employee" and therefore his benefits ceased upon his death.

¹All statutory references are to RSMo. 2000 unless otherwise noted.

A. Mr. Schoemehl was permanently totally disabled.

The Fund agrees with Spouse that the Commission correctly determined Mr. Schoemehl to be permanently and totally disabled as a result of a combination of the injuries from his work-related injury of May 11, 2001 and his pre-existing disabilities. The Commission therefore correctly awarded Mr. Schoemehl permanent total disability benefits from the Second Injury Fund. The Commission was likewise correct in finding that such benefits began as of December 2, 2003, the date at which time the payment for Mr. Schoemehl's permanent partial disability (paid for by his Employer) ceased.

Further, all parties agree that Mr. Schoemehl's death was not caused by, or related to his work-related injury of May 11, 2001; therefore Spouse is not entitled to "death benefits" as defined by §287.240 RSMo. (Tr. 20, 23, 24; Appellant's Substitute Brief p. 20).

B. Effect of Death on Workers' Compensation Benefits

Spouse cites various cases and statutes regarding what effect the death of an injured worker has on workers' compensation benefits. She cites this court to *Burgess v. NaCom Cable Company*, 923 S.W.2d 450, 454 (Mo.App. 1996) as a general proposition as to purpose of the Workers' Compensation Act.

[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, 923 S.W.2d at 454. Spouse emphasizes a different portion of this citation and glosses over that portion emphasized by the Second Injury Fund. (Appellant’s Substitute Brief p. 21). There is no disagreement that the purpose of the Workers’ Compensation Act is to place the burden of loss resulting from work-related injuries on industry, not employees and their families. However, Spouse is attempting impose on industry not only the burden of loss from “injuries sustained by workers which arise out of their employment” but also the burden of loss resulting from the natural death of employees, resulting from causes in no way related to their employment.

Spouse points out that just as dependents of an employee killed in a work-related accident suffer an economic loss, “so may the dependents of a permanently totally disabled worker who subsequently dies of unrelated causes.” (Substitute Brief of Appellant p. 30). Respondent does not disagree with this assertion, or a even a more broad assertion that the dependents of anyone who dies, from any cause, typically suffer an economic loss. This reality does not, however, in any way justify a shift of the burden for all of this economic loss to industry as Spouse argues. The fact is, Spouse would have the same economic loss she has now whether or not Mr. Schoemehl had suffered a work-related injury on May 11, 2001, in that he died irrespective of that injury. Spouse’s argument attempts to turn the workers’ compensation system into a life insurance system, having to provide lifelong coverage for dependents of workers even when workers die of causes totally unrelated to any work-related injury. In *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo.App. 1992) the

courts specifically found that the Second Injury Fund is not a form of insurance as Spouse would have it be.

C. Benefits from the Second Injury Fund ceased as of the date of Mr. Schoemehl's death on January 2, 2004.

Section 287.200.1 provides authority for payment of permanent total disability benefits. That authority is limited to the continuation of the disability during the lifetime of the employee:

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

§287.200.1 RSMo.(emphasis added).

Spouse does not contest that this authority is so limited- she nevertheless contends that the benefits should continue to her, even after Mr. Schoemehl's death. In her view, the Commission erred in relying on this statute alone to determine that the permanent total disability benefits due to Mr. Schoemehl ended when he died.

Spouse insists that §287.200.1 be read in conjunction with the definition of "Employee" as set forth in §287.020.1. She claims that under that definition, she, as a dependant of Mr. Schoemehl at the time of his death, becomes the "employee" for purposes of determining when permanent total disability benefits stop, after her husband's death. Spouse correctly observes that under rules of statutory construction

“provisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized.” *Hagley v. Board of Education of Webster Groves School District*, 841 S.W.2d 663, 667 (Mo.1992). And, while Spouse attempts to use this rule to her favor in “harmonizing” Sections 287.020.1, 287.200.1, and 287.230.2, she fails to extend this rule to harmonize the provisions of the entire Workers’ Compensation Act.

To extend Spouse’s argument (that she “‘stepped into the shoes’ of Mr. Schoemehl when he died”(Substitute Brief of Appellant p. 36)) to its illogical conclusion would not only mean that she is entitled to any permanent total disability benefits he was due, but also that she is entitled to potentially receive future medical care for her lifetime, which may have been awarded to an “employee” (whom she claims as a “dependent” to step into the shoes of). §287.140.1 RSMo. Under her logic, an employer could also be required under §287.140.8 RSMo. to provider *her* with an artificial leg, arm, or hand, since she would now be the “employee,” even though she never even worked for the employer. Spouse’s position also fails to harmonize with the provisions set forth in the Workers’ Compensation Act relative to benefits awarded to dependents of an employee who is actually killed in a work-related accident, as opposed to her husband who died from causes unrelated to his work-related injury. Applying Spouse’s theory, dependents of an employee killed as a result of a work-related injury are actually entitled to less than she would be even though her husband’s death was completely unrelated to his work-related injury.

Under §287.240 a dependent spouse of an employee killed as a result of a work-related injury is entitled to “death benefits”² during her lifetime or until she remarries. §287.240(4)(a)RSMo. Upon remarriage, the dependent spouse is entitled to a two year lump sum payment of benefits and nothing more. *Id.* The benefits due to dependent children of an employee killed in a work-related injury likewise cease at age 18, 22, 23 or earlier depending on specific circumstances. §287.240(4)(b) RSMo. Under Spouse’s theory, she is entitled to benefits for the remainder of her lifetime, no matter her age or if she remarries. Certainly an interpretation of the statute allowing for a dependent of an employee actually killed in a work-related injury being entitled to LESS benefits than a dependent of an employee who dies of causes *unrelated* to his work injury fails to harmonize the entire statute and fails to ascertain the intent of the legislature in establishing such benefits. *Sheldon v. Board of Trustees*, 779 S.W.2d 553, 554 (Mo. 1989).

D. Spouse fails to recognize the first requirement for continued permanent total disability benefits.

In asserting her argument, Spouse fails to recognize that there are two requirements that must be met for permanent total disability benefits to continue under §287.200.1 RSMo. Spouse jumps to the second, pointing out that benefits are due “for the lifetime of the employee.” She jumps past the statement that such benefits continue only “during the continuance of such disability, for the lifetime of the employee.”

² Paid at the same rate as permanent total disability benefits.

§287.200.2 RSMo., establishes that there are circumstances which may cease permanent total disability benefits from being due and owing, even prior to the death of the employee. If indeed the disability is found to have discontinued, then so do the previously awarded permanent total disability benefits. §287.200.2 RSMo.

Spouse ignores this prong of §287.200.1 RSMo. and fails to recognize that indeed upon her husband's death, his disability ceased and therefore even accepting Spouse's argument that she "stepped into his shoes" upon his death, his benefits under §287.200.1 were correctly ended, as his disability ended.

E. Spouse misconstrues §287.230 RSMo.

Spouse argues that the language of §287.230.2 RSMo., which has been held to require payment of unpaid, unaccrued permanent *partial* benefits to surviving dependents, should be extended to include payment of unpaid, unaccrued permanent *total* disability benefits as well. Spouse argues that the term used in §287.230.2 RSMo, is not "partial disability" and in fact is not even "disability," but instead is "compensation." (Substitute Brief of Appellant p. 31). The statute is as follows:

Where an employee is entitled to compensation under this chapter for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to compensation, payment 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.

§287.230.2 RSMo.

Spouse asserts that “[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.” (Substitute Brief of Appellant p. 32). Spouse’s “plain and simple reading” however fails to consider the whole statute, and specifically that portion which states when the statute is applicable- “[w]here an employee is *entitled* to compensation under this chapter...”. §287.230.2 RSMo. Spouse focuses solely on the last portion of the statute, when the key word is actually “entitled.” If an employee is no longer “entitled” to compensation, then the statute is inapplicable and the dependents are entitled to no benefits.

Using this as the premise for the construction of this statute, it is clear why courts have held that dependents are entitled to receive that money the deceased employee would have received in permanent partial disability cases, but not in cases of permanent total disability. The main focus needs to be when is someone “entitled” to receive benefits, or “compensation.”

The point in time in which an employee becomes “entitled” to compensation differs between permanent partial and permanent total disability benefits. Spouse asserts that it has been argued that the only inherent difference between permanent partial disability and permanent total disability is how they are paid- lump sum verses weekly benefits. Such is a vast understatement of the differences between permanent partial and permanent total disability benefits. The main difference is how they are

determined and when a person becomes “entitled” to receive them. Permanent partial benefits are for a finite amount, while permanent total benefits are an unknown amount based entirely on the continuation of the disability and the continuation of the life of employee. §287.200.1 RSMo.

The method of determining the amount of benefit due in a permanent total disability case and a permanent partial disability case is entirely different. In a case of permanent partial disability, disability is in no way tied to the life of the injured employee, but instead is based upon a specific finding of a percentage of permanent disability at a specified level of the body as defined by, and set forth by the legislature in §287.190 RSMo. In order to be due and payable, permanent partial disability must be “shown to a reasonable certainty, and that such proof may not rest on surmise and speculation.” *Sanders v. St. Clair*, 943 S.W.2d 12, 16 (Mo.App, 1997). Such proof is required even in a case where an injured employee dies as a result of unrelated causes. *Id. at 17*. Furthermore, while permanent partial disability is paid at a certain number of weeks,³ such payment is not simply for lost wages. *Henderson v. National Bearing Division*, 267 S.W.2d 349, 352 (Mo.App. 1954). Permanent partial disability benefits, by definition are a sum certain - regardless of whether they are paid in a lump sum, and despite being awarded as a number of weeks. Finally, while permanent partial disabilities are presumed to continue, payment for a permanent partial disability is not tied to the continuation of an employee’s disability. §287.190.6 RSMo. A person

³Percentage of disability multiplied by the entire number of weeks assigned to the particular body part affected. §287.190 RSMo.

becomes “entitled” to receive compensation of a permanent partial nature when they have an injury that results in permanent disability. The courts in many cases cited by Spouse have held that the entitlement to permanent partial disability benefits exists even when, and after, the injured employee has died. *Henderson v. National Bearing Division*, 267 S.W.2d 349 (Mo.App. 1954); *Nations v. Barr*, 43 S.W.2d 858 (Mo.App. 1931); *Bone v. Daniel Hamm Drayage Co.*, 449 S.W.2d 169 (Mo. 1970).

In contrast, permanent total disability benefits are not based upon a percentage of disability and are not proven in the same manner. Permanent total disability benefits are awarded upon a showing that an injured employee is “totally disabled” or unable to return to any employment, not just the employment in which he was engaged at the time of the injury. §287.020.7 RSMo. Unlike permanent partial disability benefits, permanent total disability benefits are not a certain number of weeks, but instead are tied directly to the “continuance of such disability” and are only “for the lifetime of the employee,” are not a sum certain and are therefore paid on a weekly basis, so long as these two conditions are met. §287.200.1 RSMo. Even Spouse admits there is no reported Missouri case holding that an injured employee is “entitled” to continue to receive permanent total disability benefits after their death.

If an employee is no longer “entitled” to compensation, then §287.230.2 is not triggered and therefore the dependents of that employee are not entitled to further compensation either. Mr. Schoemehl was entitled under §287.200.1 to permanent total disability as long as 1) his disability continued and 2) he continued to live. When Mr.

Schoemehl died on January 2, 2004, he was no longer entitled to compensation under §287.200.1 and therefore neither are his dependants, under §287.230.2.

F. Spouse looks to other states' statutes for support of her argument

Spouse cites surrounding states' statutes which she argues are similar to Missouri. She contends that those states allow dependents in her position to continue to receive the permanent total disability benefits of their deceased spouse. She asserts that Oklahoma and Kentucky both have similar permanent total disability definitions, but both allow for payments after death, unrelated to the work injury, to be made to dependants. Spouse's argument that Missouri's Workers' Compensation Act is so similar to Oklahoma's or Kentucky's that we should rely on the obvious written intentions of their legislature to interpret §287.230.2 of Missouri's Act is misplaced. A more complete review of the laws of Oklahoma and Kentucky show that they differ greatly from Missouri's. And, there are vast differences between what those states allow spouses of deceased employees, and what Spouse seeks here.

In Kentucky, permanent total disability benefits are due "during the disability." KRS §342.730(1)(a). While Spouse argues that this is similar to the permanent total disability in Missouri under §287.200.1 which continues payments during the continuation of the disability for the life of the employee, Kentucky statute §342.730(4) tells the rest of the story in Kentucky. In Kentucky, permanent total disability benefits "terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under United States Social Security Act, 42 U.S.C. secs.

301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever occurs last." This same statute goes on to state that any benefits owed to dependents "shall terminate when such spouse and dependents qualify for benefits under the United States Social Security Act by reason of the fact that the worker upon whose earnings entitlement is based would have qualified for normal old-age Social Security retirement benefits." *Id.* Furthermore, the Kentucky statute does not provide the spouse of an employee who is on permanent total disability benefits at the time he dies from unrelated causes, is entitled to receive the employee's full benefit, as Spouse seeks here. A widow or widower gets only 50% of the benefit awarded, and again as set forth above, it ceases when Social Security is available. KRS §342.730(3)(a). Finally, and most importantly, Kentucky has a very specific statute, that allows for the continuation of benefit to certain dependents, in certain amounts, after a permanently and totally disabled employee dies of causes unrelated to the work injury. KRS §342.730(3)(a). Missouri does not.

Similarly, Oklahoma's statute differs from Missouri's. Like Kentucky, Oklahoma has a specific statute setting forth the right of a dependent spouse to continue to receive benefits after an employee dies of causes unrelated to the work injury. 85 Okl. St. §48.2. Also like Kentucky, Oklahoma's statute specifically limits the amount the spouse receives to 50% of the award of employee. 85 Okl. St. §48.2(a). Oklahoma law also provides a termination date for such payments, ceasing it when the spouse dies or remarries. 85 Okl. St. §48.2(e). Again, Missouri, has no such statute and Spouse's

assertion that she is entitled to Mr. Schoemehl's entire permanent total disability benefit for the rest of her life, no matter should she remarry, is in sharp contrast to that which is allowed in both Oklahoma and Kentucky.

Spouse's reliance on the laws of Oklahoma and Kentucky is misplaced.

Workers' compensation law differ widely from state to state for various reasons.

Despite what other states may provide, the laws of Missouri provide that dependents of employees who die of causes unrelated to a work-related injury are only entitled to receive what the employee was "entitled" to receive. §287.230.2 RSMo. Since under §287.200.1, employees found permanently totally disabled are only entitled to receive those benefits during their lifetime during the continuation of the disability, at death, those benefits are no longer an entitlement and thus the dependent's get nothing further.

G. Spouse attempts to argue the correct application of §287.230.2 is unconstitutional

Spouse asserts that her constitutional rights will be violated if the decision of the Commission is affirmed. She argues that under the Commission's ruling, her "class"—dependents of permanently totally disabled individuals- are treated worse than another "class"—dependents of permanently partially disabled people. (Substitute Brief of Appellant p. 44). In the same respect, however, following Spouse's rationale would lead to the Workers' Compensation Act treating another "class"- dependents of employees *actually killed in work-related injuries*- being treated worse than her "class," whose employee's die of causes totally unrelated to any work-related injury.

Furthermore, none of the “classes” as defined by Spouse fall within protected “classes” under either the Federal or State Constitutions.

Furthermore, Spouse’s argument that there is no “rational basis” for the distinction between permanent partial disability benefits continuing to be payable to dependents after the employee’s death due to unrelated causes and permanent total disability benefits ceasing upon the death of the employee due to unrelated causes is without merit. As pointed out throughout this brief, there are many distinctions between the two types of payments and a rational basis certainly exists for the distinction as to the continuation of such payments on the death of the employee.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Labor and Industrial Relations Commission.

Respectfully submitted,
JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

CARA LEE HARRIS
Missouri Bar Number 40691
Assistant Attorney General
149 Park Central Square, Suite 1017
Springfield, Missouri 65806

ATTORNEY FOR THE TREASURER
OF THE STATE OF MISSOURI AS
CUSTODIAN OF THE
SECOND INJURY FUND

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies that Respondent's Brief contains the information required by Rule 55.03, and that the Brief complies with the limitations contained in Rule 84.06(b), containing 4344 words, as counted by the word count of the word processing system used to prepare the brief.

JEREMIAH W. (JAY) NIXON
Attorney General

Cara Lee Harris
Missouri Bar Number 40691
Assistant Attorney General
149 Park Central Square, Suite 1017
Springfield, Missouri 65806
Ph. (417) 895-6567
Fax (417) 895-6382

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned hereby certifies that the floppy disk containing Respondent's
Brief filed herewith has been scanned for viruses and is virus free.

JEREMIAH W. (JAY) NIXON
Attorney General

Cara Lee Harris
Missouri Bar Number 40691
Assistant Attorney General
149 Park Central Square, Suite 1017
Springfield, Missouri 65806
Ph. (417) 895-6567
Fax (417) 895-6382

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing document were mailed to each of the below listed parties, postage prepaid, on this ____ day of _____, 2006.

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

Cara Lee Harris

APPENDIX

§287.140 RSMo	A1
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