

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 06-110636

Employee: Donald Busick  
Employer: Wilson Plumbing Company  
Insurer: Missouri Employers Mutual Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Discussion**

*The Schoemehl window*

This living employee sought a finding from the administrative law judge that *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007) will apply to entitle his wife to his permanent total disability benefits if he predeceases her of a cause unrelated to the work injury. Employer argues that *Schoemehl* doesn't apply because employee did not file his claim for compensation before the legislative abrogation of *Schoemehl* took effect on June 26, 2008. The administrative law judge rejected employer's argument and made a finding that *Schoemehl* applies with the effect that employee's wife is entitled to his permanent total disability benefits in the event employee dies of causes unrelated to the work injury.

Employer appeals, citing *Bennett v. Treasurer of Missouri-Custodian of the Second Injury Fund*, 271 S.W.3d 49, 53 (Mo. App. 2008), which held: "recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in *Schoemehl*, and June 26, 2008, the effective date of HB 1883." Employer argues that, because employee did not file his claim for compensation until January 19, 2009, employee did not have a claim for permanent total disability benefits that was pending during the "*Schoemehl* window." Employee responds that, because employee's date of injury was November 18, 2006, the legislative abrogation can't be applied retroactively to preclude an award under *Schoemehl*. Employee cites *Gervich v. Condaire, Inc.*, 370 S.W.3d 617 (Mo. 2012), which ordered an award of *Schoemehl* benefits to the husband of an employee who died after the *Schoemehl* window closed, because his "right to compensation and the substantive law applicable to his claim are governed by the statutes in effect at the time of the injury." *Id.* at 624.

The issue before us appears to be one of first impression. On the one hand, the courts have found that an amended claim for compensation filed after abrogation (which, for the first time, alleged an employee was entitled to permanent total disability benefits) related back to the date the employee filed her initial claim for compensation, which was before

Employee: Donald Busick

- 2 -

abrogation, such that the employee had a “claim for permanent total disability benefits” pending during the *Schoemehl* window. *Goad v. Treasurer of Mo.*, 372 S.W.3d 1, 11 (Mo. App. 2011). At first glance, the *Goad* decision would seem to suggest that the court considered the filing of a claim for compensation within the *Schoemehl* window to be a prerequisite to recovery, which would bolster employer’s argument.

On the other hand, the *Goad* court provided the “relation back” analysis to reject an argument from the Second Injury Fund without actually reaching the question whether an employee’s claim would fall outside the *Schoemehl* window where it was filed after abrogation, and in fact the court specifically noted its reservations with that proposition when it suggested that “the relevant time for determining H.B. 1883’s applicability would appear to be the date of the worker’s injury, not the date on which a claim was first asserted.” 372 S.W.3d at 11 n.8. The *Goad* decision also predates *Gervich*, wherein the Missouri Supreme Court made clear that the date of injury, rather than some other event such as the employee’s death, is the pivotal date for purposes of determining *Schoemehl* applicability.

We note also the case of *Grubbs v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009), which, although addressing a different provision of Chapter 287 altogether, noted that a “claim” is defined in Black’s Law Dictionary as “[t]he aggregate of operative facts giving rise to a right enforceable by a court.” *Id.* at 911. Under this definition, employee had a “claim” as soon as he suffered the compensable injury, or in other words, on November 18, 2006, before the closing of the *Schoemehl* window. And in *Gillespie v. American Bus Lines*, 246 S.W.2d 797, 800 (Mo. 1952), the court noted that “[n]o ‘pleadings’ are required under [Chapter 287]. Workmen’s compensation proceedings are initiated by the filing of a notice of accident. A ‘Claim’ need be filed only in case of a dispute; and the commission must assist the claimant in filing his ‘Claim’; it need not be signed by an attorney nor state facts sufficient to state a claim for relief or the definite amount of money claimed.”

Ultimately, we are persuaded that the *Gervich* court’s focus on the date of injury means that an employee’s dependents may recover under *Schoemehl* where the injury giving rise to the claim for permanent total disability benefits occurs before closing of the *Schoemehl* window, regardless whether the claim for compensation is filed after June 26, 2008. For this reason, we agree with the administrative law judge’s decision to reject employer’s request for a finding that *Schoemehl* does not apply because employee’s claim for compensation was not filed until after abrogation of the *Schoemehl* decision.

#### Living employee

In *White v. Univ. of Mo.*, 375 S.W.3d 908 (Mo. App. 2012), a decision issued after the administrative law judge issued her award herein, the court held that the Commission exceeded its powers in declaring that a dependent’s claim for permanent total disability benefits “qualifies for application of the *Schoemehl* case,” because the employee was still living at the time the Commission issued its award. *Id.* at 910, 913. The *White* decision makes clear that the Commission is limited to making a finding of dependency where the employee is still living.

Employee: Donald Busick

- 3 -

Pursuant to *White*, we must modify the award of the administrative law judge as to the issue whether employee's wife will be entitled to receive his permanent total disability benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007). Accordingly, we vacate the finding that "*Schoemehl* applies." See *Award*, page 7. Instead, we find that on November 18, 2006, employee was married to Dorothy Mae Busick. We conclude that Dorothy Mae Busick was employee's "dependent," as that term is defined in § 287.240(4)(a) RSMo, at the relevant time for purposes of *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007). But because employee is still living, Dorothy Mae Busick's right to receive benefits pursuant to *Schoemehl* "remains contingent, and cannot be adjudicated at this time." *White*, 375 S.W.3d at 912.

**Award**

We modify the award of the administrative law judge as to the issue whether employee's wife will be entitled to receive permanent total disability benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007).

The award and decision of Administrative Law Judge Emily S. Fowler, issued April 9, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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**DISSENTING OPINION FILED**  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Donald Busick

### **DISSENTING OPINION**

Based on my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that employee's claim does not qualify for application of *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007), because he did not file his claim for compensation until after the legislative abrogation of the *Schoemehl* decision.

In *Tilley v. USF Holland Inc.*, 325 S.W.3d 487 (Mo. App. 2010), the court expressly stated that the legislative abrogation of *Schoemehl* will apply to claims "initiated after the effective date of the amendment," or June 26, 2008. *Id.* at 494. In *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 621 (Mo. 2012), the Missouri Supreme Court approvingly quoted the *Tilley* court on this point.

Here, employee's injury occurred on November 18, 2006, before the *Schoemehl* window opened, and his original claim for compensation was not filed until January 19, 2009, almost seven months after the *Schoemehl* window closed. Employee never had a Missouri claim for compensation pending prior to the effective date of the legislative amendments abrogating the *Schoemehl* decision. On the date that employee filed his claim for compensation, the applicable statutes specifically excluded "the injured worker's dependents" from the definition of "employee" for purposes of permanent total disability awards. § 287.200.1 RSMo. Section 287.230.3 RSMo further provided that:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate the holding in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), and all cases citing, interpreting, applying, or following this case.

I disagree with the majority's reasoning that the filing of employee's claim for compensation was no more than an administrative formality. To the contrary, the filing of a claim for compensation is nothing less than a jurisdictional prerequisite for an award of permanent total disability benefits: "no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death ..." § 287.430 RSMo.

I am convinced that under the relevant case law and statutory provisions, there is no need to adjudicate the dependency of employee's wife, because employee did not have a claim for permanent total disability benefits pending during any time period that the *Schoemehl* decision represented the law of this state. I would enter an award concluding that employee's wife is precluded from receiving his permanent total disability benefits in the event he predeceases her of a cause unrelated to the work injury. Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

## FINAL AWARD

Employee: Donald Busick Injury No. 06-110636  
Dependents: N/A  
Employer: Wilson Plumbing Company  
Insurer: Missouri Employers Mutual Insurance Company  
Additional Party: N/A  
Hearing Date: March 7, 2012 Checked by: ESF/pd

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 18, 2006
5. State location where accident occurred or occupational disease was contracted: Shawnee County, Kansas
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While working in the course and scope of his employment, Employee was tightening a chain on a piece of equipment he had loaded onto the back of a trailer when the chain slipped and he was hit, knocking him to the floor.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Neck and back
14. Nature and extent of any permanent disability: permanent total disability to the body as a whole
15. Compensation paid to date for temporary disability: \$66,944.00
16. Value necessary medical aid paid to date by employer/insurer? \$98,818.81
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,004.16
19. Weekly compensation rate: \$669.48/376.55
20. Method wages computation: By stipulation

#### COMPENSATION PAYABLE

21. Amount of compensation payable: Employer is to pay Employee permanent total disability benefits from November 18, 2006 to present and ongoing as of March 7, 2012, compensation is payable for 99.99 weeks of temporary total disability compensation at \$669.48 per week for a total of \$66,944.00, followed by 176 weeks of permanent total disability compensation at \$669.48 per week for a total sum of \$184,772.48, less compensation previously paid of \$125,000, for a net amount due and owing of \$59,772.48. Thereafter, permanent total disability compensation shall be paid at the weekly rate of \$669.48.
22. Second Injury Liability: N/A
23. Future requirements awarded: N/A

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Zachary Kolich, Employee's attorney, for necessary legal services rendered.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donald Busick Injury No. 06-110636  
Dependents: N/A  
Employer: Wilson Plumbing Company  
Insurer: Missouri Employers Mutual Insurance Company  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: March 7, 2012 Checked by: ESF/pd

On March 7, 2012, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Donald Busick, appeared in person and with counsel, Mr. Zackary Kolich and Mr. Mike R. Wallace. The Employer appeared by and through Ms. Jodi Fox.

### STIPULATIONS

The parties stipulated to the following:

- 1) that on or about November 18, 2006 Wilson Plumbing Company was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law with its liability being insured by Missouri Employers Mutual Company;
- 2) that Donald Busick was its employee and working subject to the law in Kansas City,
- 3) Jackson County, Missouri;
- 4) that on November 18, 2006 in Shawnee County, Kansas Employee sustained a
- 5) personal injury by accident arising out of and in the course and scope of his
- 6) employment with the Employer;
- 7) that Missouri has jurisdiction to entertain this case;
- 8) that Employee provided Employer with timely notice of the accidental injury;
- 9) that a claim for compensation was timely filed;
- 10) that at the time of the accident Employee's average weekly wage was \$1,004.16, making his compensation rate \$669.48 for temporary total disability and \$376.55 for permanent partial disability compensation;
- 11) that the Employer and its Insurer have paid temporary total disability compensation for 99.99 weeks at the weekly rate of \$669.48 for a total of \$66,944.00;
- 12) Employer and Insurer have paid medical expenses associated with Employee's injury in the sum of \$98,818.81,
- 13) that as a result of the November 18, 2006 injury, Employee is permanently and totally disabled. Therefore, Employer and Insurer are liable for the payment of permanent total disability compensation at the weekly rate of \$669.48;

- 14) that the Second Injury Fund has no responsibility herein and is not responsible for any payments of benefits;
- 15) that as of March 7, 2012, compensation is payable for 99.99 weeks of temporary total disability compensation at \$669.48 per week for a total sum of \$66,944.00, followed by 176 weeks of permanent total disability compensation at \$669.48 for a total sum of \$184,772.48, less compensation previously paid of \$125,000, for a net amount due and owing of \$59,772.48. Thereafter, permanent total disability compensation shall be paid at the weekly rate of \$669.48 and such payments are to be continued as provided by law;
- 16) that on November 18, 2006 Employee was legally married to Dorothy Mae Busick;
- 17) that the injury date was November 18, 2006; that the report of injury was filed on November 22, 2006; that a formal claim was filed on January 19, 2009; and an amended claim was filed on October 27, 2010.

### ISSUES

The issue to be resolved by this hearing is as follows:

- 1) whether or not the Claimant's wife, Dorothy Mae Busick, shall be entitled to permanent total disability benefits upon Employee's death if such death is unrelated to the work injury pursuant to *Schoemehl v. Treasurer of the State of Missouri*, 217 SW 3d 900 (Mo. Banc 2007).

### FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Donald Busick, testified in person and offered the following exhibits jointly with the Employer/Insurer, all of which were admitted into evidence without objection:

***Joint Exhibit A*** – Two marriage certificates

***Joint Exhibit B*** – Stipulation for Compromise Settlement in Injury No. 06-110636

***Joint Exhibit C*** – Medical Records of Dr. John Pazell

***Joint Exhibit D*** – Medical Report of Dr. Adrian Jackson dated 2/13/08

***Joint Exhibit E*** – Medical Report of Dr. Paul Nassab dated 12/31/08

***Joint Exhibit F*** – Medical Report of Dr. Larry Frevert dated 6/25/08

The Employer/Insurer offered no witness testimony but joined in the offering of the exhibits as previously stated above.

Based on the above exhibits and the testimony of the Employee, the Court makes the following findings:

On November 18, 2006, Donald Busick (hereinafter referred to as Employee) was an employee of Wilson Plumbing Company when he was injured. He was attempting to secure a forklift on a trailer which required the tightening of a chain using a steel bar. Apparently, the steel bar came loose, hitting Employee and knocking him off the trailer backwards and he landed

on the ground on his back. He injured his neck and his shoulder. He contacted his Employer while the hauling the load on the way back on the same day as the accident, November 18, 2006. Thereafter, he was treated with physical therapy for approximately four to five months. He ultimately had surgery on his neck and two surgeries on his right shoulder and was given additional therapy both before and after his surgeries. He was seen by Drs. Frevert, Nassab and Jackson.

At trial Employee testified that he heard the stipulations as agreed to by the parties read into the record, and he did not believe there were any changes that needed to be made to the stipulations. He testified that he was married to Dorothy Mae Busick at the time he was injured on November 18, 2006, and he still married to her to this date. He did testify that he was originally married to her in 1980. However, that marriage was dissolved, but the then the parties remarried in 1991 and this marriage continues through today.

The only issue to be determined herein is whether or not the Claimant's wife, Dorothy Mae Busick, would be entitled to permanent total disability upon Employee's death if such death is unrelated to the work injury pursuant to the question which arises in the case of Schoemehl v. Treasurer of the State of Missouri, 217 SW 3d 900 (Mo. Banc 2007). In that case, it was determined that an employee's rights to permanent total disability benefits accrue to their dependents upon their death from causes unrelated to the work injury. It has been stipulated that claimant suffered a compensable injury on November 18, 2006 that has left him permanently and totally disabled. The only disputed issue is whether claimant's wife/dependent shall be entitled to the continued receipt of permanent total disability compensation should claimant die from causes unrelated to his work injury.

In Schoemehl v. Treasurer of the State of Missouri, 217 SW3d 900 (Mo. banc 2007), the Missouri Supreme Court held the surviving spouse/dependent of an injured worker adjudicated to be permanently and totally disabled shall continue to receive compensation for such disability in the event the worker dies from causes unrelated to the work injury. This holding was abrogated by legislative amendments that became effective on June 26, 2008. Since then the Supreme Court and Court of Appeals have considered the applicability of Schoemehl to claims arising before the statutory amendments.

First was Strait v. Treasurer of Missouri, 257 SW3d 600 (Mo. banc 2008) which held Schoemehl cannot be applied to any claim that reached a conclusion before Schoemehl was decided. A few months later, the Western District in Bennett v. Treasurer of the State of Missouri, 271 SW3d 50 (Mo. App. W.D. 2008) refused an attempt to join the employee's spouse as a party to her workers compensation claim because an award had previously been entered and all appeals had been exhausted prior to the Schoemehl decision. The Court held:

Courts respect the finality of judgments. The law bars the retrospective application of the laws to cases that have achieved final resolution. If [an injured worker's] claim [is] no longer pending, and her case [has] been closed, then Schoemehl cannot be applied to allow the substitution of [the injured worker's] dependents as beneficiaries of her permanent total disability benefits. 271 SW3d at 52.

The Court also introduced the notion of the “Schoemehl window.” In particular, it stated:

Therefore, under HB 1883 and the Missouri Supreme Court’s later decision in *Strait*, recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in *Schoemehl*, and June 26, 2008, the effective date of HB 1883. 271 SW3d at 53.

The so-called *Schoemehl* window should not be confused with a requirement that a formal claim must have been filed before the 2008 amendments or else *Schoemehl* cannot be applied. Rather, the Court was explaining that *Schoemehl* is not relevant to those claims that had reached a conclusion and therefore, the claim was no longer pending as of the date *Schoemehl* became law. The term “pending” was simply used to describe claims that had not “achieved final resolution.”

Currently, the Missouri Supreme Court is considering *Gervich v. Condaire*, No. SC 91727 which most likely will be dispositive of the issue raised herein. The Court granted transfer following the Eastern District’s holding that the 2008 amendments cannot be retroactively applied. Of particular importance was the Court’s acknowledgement “that a dependent’s right to benefits under *Schoemehl* vests at the same time the worker’s rights vests, which is when the worker suffers the work related injury.”

Most recently, the Western District reached the identical conclusion in *Goad v. Treasurer of the State of Missouri*, \_\_\_ SW3d \_\_\_ (Mo. App. W.D. 2011). In that case, the Fund argued *Schoemehl* did not apply even though the worker’s August 13, 2007 accident predated its statutory abrogation. The Court rejected the Fund’s contention that the dependent’s right to compensation did not “vest” until the worker’s death which was after the amendments. The Court held, “Therefore, as of the date of Cheryl Goad’s workplace injury, Goad’s status as her ‘dependent’ was established, as was his right to continuing payment of permanent total disability benefits, in the event of her death from causes unrelated to the injury. Goad’s right to continuing payment of Cheryl Goad’s permanent total disability benefits was a substantive right.” The Court added, “Cheryl Goad acquired property rights in her workers’ compensation award as of the date of her injury,” and “[i]f substantive post-injury amendments to the Workers’ Compensation Law could not be applied to Cheryl Goad, they are not applicable to the surviving dependent who has stepped into her shoes.”

Perhaps the most informative statement can be found in footnote no. 8 appearing at the very end of the Court’s decision. It reads, “We note that, under the analysis in Section I, above, the relevant time for determining H.B. 1883’s applicability would appear to be the date of the worker’s injury, not the date on which a claim was first asserted.”

In summary, appellate decisions issued after *Schoemehl* establish the following:

1. *Schoemehl* cannot be applied to any claim that reached a conclusion before its release date.
2. The 2008 amendments abrogating *Schoemehl* affect substantive legal rights and therefore, cannot be retroactively applied.
3. The right to compensation for both the injured worker and his or her dependents arise on the date of accident.
4. The 2008 amendments cannot be applied to any accident that occurred before such were enacted regardless of when the formal claim was filed.

In this case, claimant was injured on November 18, 2006. Although his injury predated the decision in Schoemehl, the claim for such injury had not been concluded before the decision was entered and technically was still "pending." Since claimant's injury occurred before the 2008 amendments, Schoemehl applies regardless of the date the formal claim was filed. Accordingly, claimant's surviving spouse/dependent is entitled to continue to collect the compensation payable for claimant's permanent and total disability in the event he dies from causes unrelated to his injury.

Wherefore this Court awards to Employee Employer is to pay Employee permanent total disability benefits from November 18, 2006 to present. Ongoing as of March 7, 2012, compensation bills payable for 99.99 weeks of temporary total disability compensation at \$669.48 per week for a total of \$66,944.00, followed by 176 weeks of permanent total disability compensation at \$669.48 per week for a total sum of \$184,772.48, less compensation previously paid of \$125,000, for a net amount due and owing of \$59,772.48. Thereafter, permanent total disability compensation shall be paid at the weekly rate of \$669.48. Claimant's surviving spouse/dependent is entitled to continue to collect the compensation payable for claimant's permanent and total disability in the event he dies from causes unrelated to his injury.

Finally, this Court awards to Employee's attorneys, Mr. Zackary Kolich and Mr. Mike R. Wallace a fee of 25 percent of all benefits awarded herein.

Made by: \_\_\_\_\_  
Emily S. Fowler  
*Administrative Law Judge*  
*Division of Workers' Compensation*