

CORRECTING ORDER

Correcting Final Award Allowing Compensation
dated September 26, 2016

(Correction In Bold and Underlined)

Injury No.: 05-074457

Employee: Richard Courtois, deceased
Claimant: Carolyn Courtois, surviving spouse
Employer: Employee Screening Services, Inc.
Insurer: Commerce & Industry Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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, heard the parties' arguments, 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.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) whether the accident caused the injuries and disabilities for which benefits are claimed; (2) whether employer is obligated to pay for past medical expenses; (3) whether employee has sustained injuries that will require future medical care in order to cure and relieve employee of the effects of the injuries; (4) whether temporary total disability benefits are owed to employee; (5) the nature and extent of any permanent disabilities; (6) liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability benefits; and (7) whether *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007) applies to the facts of this case.

The administrative law judge determined as follows: (1) the accident of June 15, 2005, was a substantial factor in causing the need for treatment for employee from the date of the accident up to the date of his death on November 28, 2014; (2) employer is ordered to provide employee all medically reasonable treatment required to cure and relieve the effects of his injury from and after the date of maximum medical improvement up to the date of his death; (3) employer is ordered to reimburse claimant in the amount of \$75,933.17 as and for medical expenses incurred by employee which should have been paid by employer; (4) employer is ordered to pay employee the sum of \$115,091.05 for amounts of unpaid temporary total disability benefits due up to the date of maximum medical improvement; (5) employee was rendered permanently and totally disabled as a result of the effects of the accident of June 15, 2005, considered alone; (6) the

Employee: Richard Courtois, deceased

- 2 -

Second Injury Fund has no liability in this claim; and (7) the rulings set out in *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007) apply to the facts of this claim.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in finding that the June 15, 2005, accident was a substantial factor in causing employee's ongoing complaints and need for additional treatment; (2) in awarding past medical expenses; (3) in awarding future medical expenses; (4) in awarding temporary total disability benefits through January 4, 2012; (5) in finding employee was permanently and totally disabled; and (6) in finding employee was permanently and totally disabled as a result of the June 15, 2005, motor vehicle accident alone.

Employee filed a timely application for review requesting that the Commission consider whether the Second Injury Fund is liable for permanent total disability benefits, in the event the Commission finds that employee was not rendered permanently and totally disabled as a result of the primary injury considered alone.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) the nature and extent of permanent disability; and (2) the liability of the Second Injury Fund. We also supplement the administrative law judge's award with respect to the issue of medical causation.

Discussion

Medical causation

The parties asked the administrative law judge to determine whether the accident caused "the injuries and disabilities for which benefits are claimed." *Transcript*, page 4. In other words, the parties disputed the issue of medical causation. Section 287.020.2 RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

The administrative law judge determined the accident of June 15, 2005, was a substantial factor "in causing the need for treatment for [employee] from the date of accident up to the date of his death on November 28, 2014." *Award*, page 19. The administrative law judge, however, did not identify the particular medical condition(s) he believed to have resulted from the accident. This is a medically complex case involving extensive preexisting cervical, thoracic, and lumbar spine disability; consequently, identification of the "resulting medical condition" per § 287.020.2 is, in our view, a threshold inquiry before we proceed to the question of the benefits to which employee may be entitled under the Missouri Workers' Compensation Law. As a result, we discern a need to supplement the award to provide the requisite statutory analysis.

Employee: Richard Courtois, deceased

- 3 -

The parties presented competing expert medical testimony with respect to the issue of medical causation. Employee advances the expert medical opinion of Dr. Robert Poetz, who believes the accident was a substantial factor causing employee to suffer 1) a cervical strain, (2) a herniated disk at C5-6, and (3) exacerbation of preexisting cervical spondylitic myelopathy with severe spinal cord stenosis. Dr. Poetz rated employee's cervical spine injuries resulting from the accident at 40% permanent partial disability of the body as a whole. Dr. Poetz also believes the accident was a substantial factor causing employee to suffer a thoracic strain with exacerbation of degenerative disc disease, which he rated at 10% permanent partial disability of the body as a whole, and a lumbar strain with exacerbation of lumbar degenerative disc disease, which he rated at 15% permanent partial disability of the body as a whole.

Employer, on the other hand, advances the expert medical opinion of Dr. Russell Cantrell, who believes that the accident is not a substantial factor in causing employee's "current and ongoing complaints" as of the date of Dr. Cantrell's evaluation on March 11, 2013. *Transcript*, page 3032. Notably, Dr. Cantrell *did* assign permanent disability to the effects of the June 2005 accident: specifically, he rated 3% and 2% permanent partial disabilities of the body as a whole referable to cervical and lumbar strains, respectively. We find these ratings inconsistent with Dr. Cantrell's opinion that the work injury was not "a substantial factor" in employee's overall disability.

Additionally, employer procured the testimony of the treating physician, Dr. Thomas Corsolini, who believes the accident caused employee to suffer a strain to the cervical spine and to the spine in general, as well as possible aggravation of his preexisting degenerative spine conditions, for which Dr. Corsolini would assign a 5% permanent partial disability of the body as a whole.

Thus, the uncontested expert medical opinion evidence on this record compels a finding that, at the very least, employee suffered some permanent aggravation and/or change in pathology with regard to his preexisting degenerative spine conditions as a result of the June 2005 accident, which causes him to suffer permanent disability. We have thoroughly reviewed the deposition testimony from the experts. We note that Dr. Poetz provided a rather vigorous defense, on cross-examination, of his opinion that the accident caused employee to suffer a herniated disc at C5-6. After careful consideration, we find Dr. Poetz's medical causation opinion to be the most persuasive in this case. We find, therefore, that employee's work for employer was a substantial factor causing employee to suffer (1) a cervical strain, (2) a herniated disk at C5-6, (3) exacerbation of preexisting cervical spondylitic myelopathy with severe spinal cord stenosis, (4) a thoracic strain with exacerbation of degenerative disc disease, and (5) a lumbar strain with exacerbation of lumbar degenerative disc disease. Dr. Poetz offered some testimony suggesting he believes that the effects of the work injury would render employee permanently and totally disabled in isolation. We are not persuaded. Instead, we find that the effects of the work injury resulted in an overall 30% permanent partial disability of the body as a whole referable to the resulting medical conditions we have identified affecting employee's spine.

Employee: Richard Courtois, deceased

- 4 -

We deem reasonable and hereby adopt the administrative law judge's finding that employee reached maximum medical improvement from the effects of the work injury as of January 4, 2012, when the treating surgeon, Dr. Chad Morgan, released employee following the July 2011 surgery he performed (in part) to address employee's C5-6 herniation resulting from the work injury.¹

Nature and extent of disability

The administrative law judge determined that employee is permanently and totally disabled as a result of the effects of the work injury considered alone. As noted above, we disagree, and we have found instead that the last injury resulted in a 30% permanent partial disability of the body as a whole referable to the spine. We turn now to the question whether employee is permanently and totally disabled as a result of the primary injury in combination with his preexisting conditions of ill-being.

The administrative law judge, in his award, thoroughly summarized the evidence with regard to employee's preexisting disabling conditions, which included extensive cardiovascular disease resulting in heart attacks and multiple surgeries; an intestinal blockage surgery in 1991 with subsequent development of two incisional hernias; cervical spine complaints requiring a January 1996 bi-level fusion surgery; thoracic spine complaints requiring decompression and microdiscectomy surgeries in May 1996; and lumbar spine complaints. Dr. Poetz believes employee suffered considerable preexisting permanent partial disability referable to these conditions, and provided extensive ratings for each. Dr. Cantrell concurred that employee suffered from considerable preexisting permanent partial disability, and suggested that if employee is unable to compete for work in the open labor market, it would be owing to a combination of the work injury and these preexisting conditions, including employee's chronic spinal pain complaints and oxygen dependence referable to preexisting COPD.

We acknowledge the deposition testimony from employee, as well as the testimony from employee's wife and the claimant herein, Carolyn Courtois, asserting that employee was very active and wholly able-bodied prior to the primary injury. We find, however, more persuasive the unanimous expert opinions from Drs. Poetz and Cantrell that employee suffered considerable preexisting permanent partial disability. Specifically, we find that, at the time of the primary injury on June 15, 2005, employee suffered considerable preexisting permanent partial disability referable to the lumbar, thoracic, and cervical spine, the cardiovascular system, and the abdomen.

Following employee's release in January 2012 by Dr. Morgan, employee continued to suffer ongoing pain and discomfort referable to the effects of the work injury, as well as

¹ We acknowledge employer's argument that Dr. Morgan believed his July 2011 surgery was necessary to cure and relieve the effects of an unrelated November 2008 motor vehicle accident. First, we are not persuaded from a review of his notes that Dr. Morgan accurately understood employee's history of two different motor vehicle accidents, e.g., Dr. Morgan variously references a "rear-end" MVA (which would correspond to the 2008 incident) versus an MVA in 2005 (which would correspond to the work injury). See *Transcript*, page 1477-79. Second, Dr. Morgan specifically declined to address causation. See *Transcript*, page 1552. Third, we have ultimately credited Dr. Poetz's opinion that the C5-6 herniation resulted from the work injury.

Employee: Richard Courtois, deceased

- 5 -

his preexisting degenerative spinal conditions. At that time, employee was 64 years of age, had been out of work for over six years owing to his medical problems stemming from the primary injury and his preexisting conditions of ill-being, and had a work history limited to managing his father's convenience store, working in a limited sales capacity at his son's furniture store, and sales/route driving. Employee was taking narcotic pain medications on a daily basis, and suffered severe functional limitations including an inability to withstand prolonged walking or standing. Employee also suffered sleep deficits owing to his chronic pain. We are persuaded that given all of these circumstances, a hypothetical employer would not have been likely to hire employee, and that employee was thereby unable to compete for work in the open labor market owing to the combination of the work injury and his preexisting conditions of ill-being.

We acknowledge the argument advanced by employer and the Second Injury Fund that, if employee is unable to compete in the open labor market, such inability must necessarily stem (in part) from permanent disability resulting from the unrelated motor vehicle accident of July 4, 2008.² While this intervening event undeniably complicates the analysis in this case, we are not persuaded by this argument. We note that, as early as July 6, 2007, employee's primary care physician, Dr. Felipe Eljaiek, believed employee was unable to work owing to the effects of the work injury in combination with his preexisting conditions of ill-being. Likewise, employee's vocational expert, Timothy Lalk, believed employee was permanently and totally disabled as of the date of his evaluation of employee on September 11, 2006. And, directly contrary to employer's erroneous assertions throughout both its application for review and brief in this matter, Dr. Poetz *specifically* and *thoroughly* discussed the 2008 motor vehicle accident, and opined that it resulted in, at worst, a temporary aggravation of employee's ongoing, chronic pain referable to the work injury and preexisting conditions.³ We credit Dr. Poetz on this point. We find that the 2008 motor vehicle accident did not result in additional permanent disability.

As we have noted, this is an exceedingly complex case from a medical standpoint, and the issue of the nature and extent of employee's permanent disability referable to his various injuries and conditions of ill-being was by no means easy for us to resolve. However, after a careful review of the whole record, and much deliberation, we are persuaded that, as of January 4, 2012, employee was unable to compete for work in the open labor market owing to the combination of the effects of the primary injury and his preexisting disabling conditions. We so find.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been

² Incidentally, we note the absence, in the administrative law judge's award, of any discussion (or even any mention) of the July 2008 motor vehicle accident. As a result, we are unable to defer to any findings by the administrative law judge (whatever they may have been) with regard to this critical and much litigated factual issue.

³ Whether the result of mere inadvertence or otherwise, employer's repeated error in this regard caused us to question the extent to which we could rely upon any of the statements contained in employer's brief.

Employee: Richard Courtois, deceased

- 6 -

previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

As we have noted, at the time of the primary injury, employee suffered extensive preexisting permanent partial disability of the body as a whole referable to the cervical, thoracic, and lumbar spine, the cardiovascular system, and the abdomen. After careful consideration, we are convinced that employee's preexisting disability was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced that each of employee's preexisting disabling conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of this preexisting condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.*

We have found that the last injury did not render employee permanently and totally disabled in isolation, but instead resulted in a 30% permanent partial disability of the body as a whole referable to the spine. We have found that employee's inability to compete for work in the open labor market is a result of the primary injury in

Employee: Richard Courtois, deceased

- 7 -

combination with his preexisting disability. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of (1) the nature and extent of permanent disability; and (2) the liability of the Second Injury Fund.

Employer is not liable for permanent total disability benefits. Instead, employer is liable for a total of \$42,486.00 in permanent partial disability benefits.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning on the date of maximum medical improvement, January 4, 2012, at the differential rate of \$16.91 for 120 weeks, and thereafter at the weekly permanent total disability rate of \$370.96. **The weekly payments shall continue for the lifetime of Carolyn Courtois, the surviving dependent and claimant herein, or until modified by law.**

The award and decision of Administrative Law Judge David L. Zerrer, issued December 2, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

We approve and affirm the administrative law judge's allowance of attorney's fee 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 4th day of October 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute claimant Injury No. 05-074457
Dependents: Carolyn Courtois
Employer: Employee Screening Services, Inc. Before the
Additional Party: Second Injury Fund **DIVISION OF WORKERS'**
Insurer: Commerce & Industry Insurance Co. **COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Hearing Date: August 12, 2015/September 4, 2015 Checked by: DLZ

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: June 15, 2005
5. State location where accident occurred or occupational disease was contracted: Audrain County, Missouri
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:
Claimant injured in motor vehicle collision
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: Back; body as a whole
14. Nature and extent of any permanent disability: permanent total disability
15. Compensation paid to-date for temporary disability: \$11,777.27
16. Value necessary medical aid paid to date by employer/insurer? \$23,819.08

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

- 17. Value necessary medical aid not furnished by employer/insurer? \$75,933.17
- 18. Employee's average weekly wages: \$556.44
- 19. Weekly compensation rate: \$370.96/\$354.05
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$75,933.17

342 weeks of temporary total disability, less credit for amounts paid-\$115,091.05

Permanent total disability benefits from Employer beginning January 5, 2012 , for Claimant's lifetime, according to law-

- 22. Second Injury Fund liability: Yes No Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential () payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: \$75,933.77 PLUS \$115,091.05 PLUS \$69,528.51 PLUS \$370.96 PER WEEK FROM DATE OF HEARING FOR LIFE OF CAROLYN COURTOIS ACCORDING TO LAW

- 23. Future requirements awarded: As provided for in this award

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ronald Edelman

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard Courtois, deceased, Carolyn Courtois,
substitute Claimant

Injury No: 05-074457

Dependents: Carolyn Courtois

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Employee Screening Services, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Commerce & Industry Insurance Co.

Checked by: DLZ

On the 12th day of August, 2015, the parties appeared before the undersigned Administrative Law Judge for final hearing. The substituted claimant, Carolyn Courtois, appeared in person and by her attorneys, Ronald Edelman and Marshall Edelman. The Employer appeared by its attorney, Jay Lowry. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General Erin Smith. The record was ordered left open until 5:00 p.m. September 4, 2015, and later extended to 5:00 p.m. September 11, 2015. On the 24th day of August, 2015, a conference call was held with attorneys on the record. Claimant offered, and there was admitted without objection, Exhibit 34, which is a document executed by the attorneys for the substitute claimant and the Employer and Insurer, setting out a stipulation that Employer paid medical expenses for treatment administered to Richard Courtois in the sum of \$23,819.08. The exhibit further states that Claimant claims unpaid medical expenses of \$75,933.17, as set out on page two of Exhibit 34.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 15th day of June, 2005, Employee Screening Services, Inc., was an employer operating subject to the Missouri Workers' Compensation Law; the Employer's liability was fully insured by Commerce & Industry Insurance Co.; on the alleged

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

injury date of June 15, 2005, Richard Courtois was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about June 15, 2005, Claimant sustained an accident, which arose out of the course of and scope of employment; the employment occurred in Audrain County, Missouri, and the parties agree that Audrain County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$556.44, sufficient to allow the following compensation rates: \$370.96 for temporary total disability and permanent total disability, and \$354.05 for permanent partial disability; temporary disability benefits have been paid in the amount of \$11,777.27, prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award; the parties agree that the amount paid for temporary total disability represents 18-5/7 weeks, which amounts to an overpayment of \$4,836.61 based on the agreed rate of temporary total disability benefits; Carolyn Courtois is the surviving spouse of Richard Courtois and is the substituted claimant pursuant to order of the Division dated January 7, 2015; Richard Courtois died of unrelated causes on November 28, 2014.

ISSUES

Whether the accident caused the injuries and disabilities for which benefits are now being claimed?

Whether the Employer is obligated to pay for past medical expenses?

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries?

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Whether temporary total benefits are owed to the Claimant?

The nature and extent of any permanent disabilities?

The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability?

Whether the case of Schoemehl v. Treasurer applies to the facts of this claim?

DISCUSSION

The Claimant offered Exhibits 1 through 31 and 33 through 34 into evidence. Any of the Claimant's exhibits which were offered into evidence, and to which an objection was made to any part of an exhibit, the objection is overruled and the exhibit is admitted. All objections not previously sustained are overruled.

EXHIBITS

1. Division of Workers' Compensation file for Richard Courtois: Injury numbers 05-074457 and 95- 157318
2. Attorney Request for Statements under §287.215 to Employer dated July 29, 2005, with Proof of Service
3. Deposition of Richard Courtois taken June 19, 2006
4. Deposition of Dr. Robert Poetz taken January 28, 2010, with exhibits attached
5. Deposition of Dr. Robert Poetz taken December 16, 2014, with exhibits attached
6. Deposition of Timothy Lalk, taken March 16, 2015, with exhibits attached
7. Suggestion of Death of Employee & Substitution of Surviving Wife as Claimant dated 1/2/15, Certificate of Death, filed with the Division January 5, 2014
8. Order of Substitution of Parties, entered by the Division January 7, 2015

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

9. Marriage License and Certificate of Marriage dated June 7, 1969
10. Missouri Uniform Accident Highway Patrol Report, dated June 15, 2005
11. Medical records of Audrain Medical Center with statement of charges, dated June 15, 2005
12. Medical records of Dr. Felipe Eljaiek with statement of charges from June 21, 2005, through July 6, 2007
13. Medical records of Dr. Thomas Corsolini, St. John's Clinic, Springfield, Missouri, from August 21, 2005, through October 24, 2005
14. Medical records of Open MRI of St. Louis with statement of charges from July 29, 2005, through September 20, 2005
15. Medical records of St. John's Health Center from July 14, 2005, through October 26, 2005
16. Medical records of Phelps County Regional Medical Center with statement of charges from July 21, 2005, through September 8, 2005
17. Medical records of Dr. Sunghoon Lee, Neurosurgeon, St. John's Health Center, with statement of charges from October 4, 2005, through October 5, 2005
18. Medical records of Dr. Pecos Coble, Bond Clinic-Rolla with statement of charges from November 4, 2008, through May 28, 2013
19. Medical records of Central Missouri Pain Management with statement of charges from July 10, 2012, through November 19, 2013
20. Medical records of Cox Medical Center with statement of charges from July 15, 2011, through July 25, 2011
21. Medical records of Springfield Neurological & Spine Institute LLC with statement of charges from May 23, 2011, through January 4, 2012

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

22. Medical records of Southwest Spine & Sports Medicine with statement of charges for January 23, 2011
23. Medical records of Phelps County Regional Medical Center with statement of charges from August 22, 2005, through May 18, 2011
24. Medical records of Missouri Baptist Medical Center, from November 12, 1993, through May 5, 1996
25. Medical records of Dr. Jerome Dwyer, from December 22, 2000, through May 24, 2001
26. Medical records of Dr. James Spadaro, from December 29, 2001, through May 12, 2001
27. Medical records of St. Joseph's Hospital from December 29, 2000, through May 12, 2001
28. Medical records of Phelps County Regional Medical Center, from September 29, 2002, through October 21, 2002
29. Bill Summary- (*Demonstrative Exhibit*)
30. Records of Wal-Mart Pharmacy- Rolla, from June 16, 2005, through November 23, 2014, and records of Wal-Mart Pharmacy-Sullivan, from July 29, 2005 through June 19, 2008
31. Claimant's Demands for Treatment
32. (Exhibit was withdrawn prior to being offered into evidence)
33. Collection Letters
34. Medical expense summary submitted prior to the close of the record after conclusion of presentation of evidence on August 24, 2015

The Employer offered, and there was admitted the following exhibits:

- A. Deposition of Dr. Thomas Corsolini, November 6, 2008
- B. Deposition of Dr. Russell Cantrell, June 26, 2014
- C. Deposition of Michael McKee, January 29, 2014

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

D. Deposition of Nancy Beisswenger, July 18, 2014

E. Police report from St. James Police Department, November 4, 2008

F. Medical records from Phelps County Regional Medical Center (Financial Responsibility) with affidavit

G. Certified medical records from Cox Medical (Financial Responsibility) with affidavit dated 8/10/2015

H. Requests for deposition of Claimant

I. Deposition of Carolyn Courtois taken July 1, 2015

Any of the Employer's exhibits which were offered into evidence, and to which an objection was made to any part of an exhibit, the objection is overruled and the exhibit is admitted. All objections not previously sustained are overruled.

The Second Injury Fund did not offer any exhibits.

Carolyn Courtois, substitute Claimant and surviving spouse of Richard Courtois, testified in her own behalf. Mrs. Courtois testified that she was married to Richard Courtois on June 7, 1969, and that they lived together as husband and wife until the date of his death on November 28, 2014. She testified that three children were born of the marriage, each child an adult and fully emancipated, not dependent on Richard Courtois.

Mrs. Courtois testified concerning Richard Courtois' pre-existing medical conditions including a cervical fusion in 1996, from which Richard Courtois had no restrictions from activities. She indicated that he did not take any medication on an ongoing basis for his neck and back; that he worked full time; his sleep patterns were normal; he did chores around the house that needed to be done; and that he played softball until he was diagnosed with a heart condition which required him to avoid extreme heat.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Mrs. Courtois testified that prior to June 2005 Richard Courtois would help with dishes, laundry, and vacuuming. He did activities with his children, he was active in his church, he was active in the Knights of Columbus, he was a lector at church, and he went fishing and camping, and in general, enjoyed life as a normal person.

Mrs. Courtois testified that Richard Courtois' job duties consisted of traveling to different businesses for the purpose of performing random drug testing of employees. She stated that he had no problem doing his job and that he did not complain about any of his job duties when he was home. She stated that Richard Courtois worked for Employer for about one and one-half years prior to the accident of June 15, 2005.

Mrs. Courtois testified concerning the extensive medical treatment Richard Courtois received after the accident of June 15, 2005. She testified that she attended almost every treatment visit with her husband and participated in discussions with treating physicians about Richard Courtois' treatment plans and his conditions. She further testified that she signed her husband's name to medical documents from time to time with his permission and at his request. Mrs. Courtois' testimony concerning the long and extensive treatment of Richard Courtois is supported by the medical record exhibits which were admitted into evidence.

Mrs. Courtois testified that after the accident of June 15, 2005, Richard Courtois stopped doing most of his previous activities. She stated that he still attended church, although he could not kneel at church and could not stand very long. He no longer took an active part in services and his condition and activity level did not change or improve up to the time of his death. She further stated that if he did perform more active movements, he would pay for it by being in pain for days following the activity.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Mrs. Courtois testified concerning Richard Courtois' pre-existing conditions. She indicated that he had a neck fusion in January 1996 and thoracic surgery in May 1996. She stated that her husband returned to work and performed his normal work duties after both of the surgeries. She also indicated that from 1996 until 2005 Richard Courtois limited his outside activities due to the heat. He limited raking leaves and he quit bowling. He had no restrictions on his work duties from 1996 until 2005.

Mrs. Courtois testified that her husband treated for a heart condition between 1993 and 1995. She also stated that her husband continued to take heart medication after he became Medicare eligible.

Mrs. Courtois testified that after her husband was released from treatment in October 2005 he continued to have severe pain and began treating on his own. She stated that Claimant had neck fusion surgery in July 2011 and was released from that surgery in January 2012. She stated that her husband had the same pain complaints after the 2011 surgery as he had prior to the procedure. She testified that by 2012 her husband could stand for 15 to 20 minutes without having to sit down; he could walk about 50 feet; he could sit for 15 to 20 minutes before he would have to stand up. She further stated that her husband could not carry a gallon of milk without experiencing pain in his neck and back. She indicated that her husband could still drive a car, but he had to make stops to rest periodically. Mrs. Courtois testified that after June 2005 her husband's sleep habits changed substantially. He complained of pain when he laid down or when he tried to roll over on his side. She stated that after one to two hours of sleep he would get up and go to his recliner in the middle of the night, and after a period of time he may return to bed or sometimes he would not return to bed for the remainder of the night.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Mrs. Courtois testified that prior to June 2005 she had normal marital relations with Richard Courtois, but after the accident of June 15, 2005, those relations stopped permanently. She also indicated that Richard Courtois could dress himself in sweat suit type clothing, but she usually had to tie his shoes if he wore shoes with shoe laces.

Mrs. Courtois testified about her husband's daily activities. She indicated that when he arose, he would sit in his recliner, have breakfast in that chair and begin to watch television from the recliner. She stated that her husband spent most of his day in his recliner. She also testified that when she reached her 62nd birthday she retired from her job so that she could take of her husband.

Mrs. Courtois testified that she and her husband made requests for treatment on multiple occasions and that each request was denied. She testified that her husband incurred \$81,246.56 in medical treatment expense which was not paid by the Employer.

On cross-examination by Employer Mrs. Courtois admitted that she had read her husband's deposition and that generally she agreed with the contents of the deposition. She further admitted that she went to almost every treatment visit with her husband and that she went into the treatment room with her husband. She admitted that the 1996 neck surgery did not resolve all of the pain issues her husband was experiencing and that he still had some radicular pain after the 1996 surgery. She also admitted that her husband had some right leg radicular pain prior to June 2005. She further admitted that her husband had several pre-existing medical conditions including obesity, high blood pressure, high cholesterol, sleep apnea, and chronic obstructive pulmonary disorder.

On cross-examination by the Second Injury Fund, Mrs. Courtois admitted that her husband went on social security disability after the June 2005 accident and eventually qualified

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

for Medicare coverage. She further admitted that Richard Courtois' symptoms were much worse after his June 2005 accident than prior to that date.

Richard Courtois testified by deposition taken on June 19, 2006. Mr. Courtois testified concerning his medical treatment up to that date. He testified that on June 15, 2005, he was a field representative for Employer and had been employed by the Employer for about fourteen months. He states that his job duties involved traveling to customer locations in order to collect urine samples for drug screenings, as well as administering breathalyzer examinations to determine blood alcohol content levels of various employees. Employer provided a motor vehicle for transportation between stops. Mr. Courtois stated that he drove about 125 miles per day in his job.

Mr. Courtois testified that on June 15, 2005, he was on his way to New Florence, Missouri, traveling on Missouri Highway 19 near the intersection of Highway 54. He testified that when he approached the intersection, a vehicle traveling on Highway 54 making a turn onto Highway 19/54 pulled out in front of the path of his vehicle and his vehicle struck the other vehicle. Mr. Courtois stated that his air bag inflated and he struck his head on the windshield during impact. He also stated that he was wearing his seatbelt at the time of the collision. Mr. Courtois was transported from the scene of the collision by ambulance to the Audrain Medical Center in Mexico, Missouri, where he received initial treatment for his injuries.

Mr. Courtois testified that he continued to have low back pain, neck pain, pain in his ring and small fingers and his left arm. He indicated that the pain in his back and neck is intermittent and not constant. He also stated that he has pain down his left leg periodically. He further testified that he has trouble sleeping at night and that he sleeps a lot during the day in his recliner,

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

where he spends most of his time. Mr. Courtois testified that the symptoms he experienced prior to June 15, 2005, with pain in his neck and back were worse since the accident of June 2005.

Dr. Robert Poetz testified on behalf of Claimant on two occasions, January 28, 2010, and December 16, 2014. He testified that he conducted an independent medical evaluation of the Claimant on April 25, 2006, and authored a written report dated July 31, 2006, based on a history taken from Mr. Courtois, medical records reviewed as identified in the report, and a physical examination of Mr. Courtois. Dr. Poetz's report diagnosed Mr. Courtois with cervical, thoracic, and lumbar degenerative disc disease which was pre-existing the accident of June 2005. He also diagnosed a pre-existing cervical fusion at C3-5 and thoracic back surgery as pre-existing. In addition he diagnosed pre-existing conditions of uncontrolled hypertension; coronary artery disease with myocardial infarction; and intestinal blockage surgery in 1991. As a result of the accident of June 15, 2005, he diagnosed cervical strain with herniated disc at C5-6 and an exacerbation of the pre-existing cervical degenerative disc disease; thoracic lumbar strain with exacerbation of the thoracic and lumbar degenerative disc disease; laceration of the forehead (resolved); left wrist contusion (resolved) .

Dr. Poetz rated Mr. Courtois' pre-existing conditions as follows: 40% disability to the body as a whole at the cervical spine; 25% disability to the body as a whole at the thoracic spine; 5% disability to the body as a whole at the lumbar spine; 40% of the body as a whole at the cardiovascular system; and 25% disability to the body as a whole at the abdomen. He rated the results of the June 15, 2005, accident as follows: 30% disability to the body as a whole at the cervical spine and 20% disability to the body as a whole at the thoracic/lumbar spine.

Dr. Poetz's initial report opined that Mr. Courtois was permanently totally disabled as a result of the combination of the June 15, 2005, injuries and the various pre-existing conditions

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

identified in his diagnosis. He issued a supplemental report dated June 13, 2007, stating that in his opinion, “absent the prior injuries and medical condition he would be permanently and total disabled from the June 15, 2005, injury alone.”

During Dr. Poetz’s second deposition on December 16, 2014, he testified that he conducted a second independent medical evaluation of the Mr. Courtois. The re-evaluation occurred on May 12, 2012, and a written report of the evaluation was authored by Dr. Poetz dated October 1, 2012. The report of Dr. Poetz reviewed the activities and conditions of Mr. Courtois since the initial evaluation, also certain additional medical records identified in the report were reviewed.

As a result of the second evaluation, Dr. Poetz opined that Claimant suffered the following disabilities as a result of the accident of June 15, 2005: 40% disability to the body as a whole at the cervical spine; 10% disability to the body as a whole at the thoracic spine; and 15% disability to the body as a whole at the lumbar spine.

Dr. Poetz opined that Mr. Courtois was permanently totally disabled as a result of the accident of June 15, 2005, in combination with Mr. Courtois’ pre-existing conditions. During his second deposition, Dr. Poetz testified that his opinion contained in the supplemental report of June 13, 2007, with regard to Mr. Courtois’ ability to obtain employment in the open labor market had not changed. Dr. Poetz also opined that Mr. Courtois had achieved maximum medical improvement as of January 4, 2012.

Mr. Timothy Lalk testified on behalf of the Claimant by deposition. Mr. Lalk testified that he is a certified vocation rehabilitation counselor and that he performed a vocational evaluation of Mr. Courtois on September 11, 2006. Mr. Lalk indicated that he authored a written

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

report of his findings and conclusions with regard to the evaluation of Mr. Courtois dated November 20, 2006.

Mr. Lalk testified that, based on Dr. Corsolini's restrictions, Mr. Courtois could return to work at his previous position or a variety of retail settings. He further testified that based on Dr. Poetz's restrictions, he believed Mr. Courtois could return to some sales positions or unskilled entry-level positions. Mr. Lalk further stated that Mr. Courtois described symptoms that did not allow him to return to work within either Dr. Poetz's or Dr. Corsolini's restrictions.

Mr. Courtois reported that the only way he could control his symptoms was to sit in a recliner all day. He also displayed difficulty walking and changing positions during the evaluation. Mr. Lalk opined that Employee was not able to secure and maintain employment in the open labor market. He stated that no employer would be able to accommodate Employee's need to recline all day and that Employee's signs of pain behavior would make an employer reluctant to hire him.

Mr. Lalk provided two more reports in response to Employer's vocational expert, Michael McKee. Mr. Lalk opined that Mr. McKee misidentified Mr. Courtois' actual jobs; he did not directly assess Mr. Courtois' actual capabilities; and did not meet with Mr. Courtois in person.

Mr. Lalk also provided supplemental reports in response to additional medical records submitted to him by Claimant's attorney. He testified that the additional records did not change his initial opinion that Mr. Courtois could not secure and maintain employment in the open labor market. Mr. Lalk testified that he believed Mr. Courtois was permanently and totally disabled based on the last accident alone.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Claimant offered and there was admitted several exhibits setting out treatment records which chronicle the extensive treatment administered to Claimant after the accident of June 15, 2005. With the exception of a functional capacity evaluation, which contained some observations which were subjective conclusions on the part of the test examiner, the medical records support the testimony of Richard Courtois and his spouse, who took a very active role in monitoring and assisting her husband in the treatment he sought after the Employer denied Claimant's requests to provide any further treatment to Mr. Courtois.

On the date of August 24, 2015, the parties went back on the record for the sole purpose of offering Exhibit 34. The exhibit was admitted into evidence with no objection from any party. Exhibit 34 is a two-page document which states that the Employer has paid the sum of \$23,819.08 as and for medical treatment administered to Mr. Courtois prior to his death of unrelated causes. Page two of the exhibit sets out certain providers and charges levied by providers for medical treatment administered to Mr. Courtois, but which have not been paid by the Employer. The total amount of medical expense set out in Exhibit 34 is \$75,933.17.

Dr. Thomas Corsolini testified on behalf of the Employer by deposition.

Dr. Corsolini testified that he treated Mr. Courtois from August 22, 2005, through October 24, 2005. He stated that he diagnosed Mr. Courtois with a strain to the cervical spine and "to the spine in general." Dr. Corsolini recommended long-term limitations of not lifting and carrying more than 20 pounds on an occasional basis. However, he also stated that the permanent restrictions were not related solely to the accident of June 15, 2005. He further opined that Mr. Courtois' accident of June 15, 2005, had aggravated pre-existing degenerative changes. Dr. Corsolini rated Mr. Courtois' disability at 5% of the body as a whole.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Dr. Russell Cantrell testified on behalf of Employer by deposition. He testified that he performed an independent medical evaluation of the Claimant on March 11, 2013, from which he authored a written report of his findings and conclusions of the same date. He testified that he took a history from Mr. Courtois, reviewed certain medical records identified in his report, and performed a physical examination of Mr. Courtois.

Dr. Cantrell testified that Mr. Courtois was at maximum medical improvement at the time of the evaluation. He opined that he did not believe that Mr. Courtois' June 15, 2005, car accident was the substantial factor causing the need for his 2011 cervical surgery or his current complaints. Dr. Cantrell diagnosed Mr. Courtois with cervical and lumbar strains as a result of the June 15, 2005, accident. Dr. Cantrell assigned 3% permanent partial disability to the cervical spine and 2% permanent partial disability to the lumbar spine as a result of the June 15, 2005, accident. He assigned 17% permanent partial disability to the cervical spine as a result the fusions before and after June 15, 2005, and 6% permanent partial disability to the lumbar spine as a result of degenerative disc disease.

Dr. Cantrell's opinion was that Mr. Courtois was not permanently totally disabled as a result of the June 15, 2005, accident. He stated that, if Mr. Courtois was found to be permanently and totally disabled, it would be as a result of his chronic spinal pain complaints, his oxygen dependence, knee problems, and diabetes.

Mr. Michael McKee testified on behalf of Employer by deposition. Mr. McKee performed a vocational evaluation review and issued a written report of his findings and conclusions dated by hand as July 6, 2011. He testified that he interviewed Mr. Courtois over the phone on one occasion, but never met Mr. Courtois personally. He reviewed certain medical records and the reports from Dr. Poetz, Dr. Corsolini, Dr. Cantrell, and Mr. Lalk.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

Mr. McKee testified that he believed that the restrictions placed by Dr. Poetz were subjective. He testified that Dr. Cantrell did not find a need for permanent restrictions and further that Mr. Courtois was employable within several job descriptions, relying on Dr. Corsolini's restrictions rather than those of Dr. Poetz.

Mr. McKee issued an undated addendum to Mr. Courtois' evaluation after reviewing additional medical records. He opined that Mr. Courtois continued to be employable. He also stated that, if Mr. Courtois was permanently and totally disabled, it was because of several factors, including his pre-existing conditions, the June 15, 2005, accident, his medical conditions following the June 15, 2005, work accident, his age, and his 8-year absence from the workforce.

FINDINGS OF FACT AND RULINGS OF LAW

Whether the accident caused the injuries and disabilities for which benefits are now being claimed?

The parties agree that a compensable accident occurred on June 15, 2005. The parties do not agree that all the treatment which Mr. Courtois received after the date of accident and up to the date of his death in November 2014, was caused by the accident of June 15, 2005.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has met her burden to proof that the accident was a substantial factor in causing the need for the treatment administered to Mr. Courtois, such treatment being well documented in several of the exhibits which were admitted into evidence. I further find that, in this claim, the opinions and medical findings of Dr. Poetz are more persuasive than those of Dr. Corsolini or Dr. Cantrell with regard to the accident being a substantial factor in causing the need for Claimant's treatment.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

There is no dispute that Claimant had pre-existing conditions prior to June 15, 2005. However, Mr. Courtois testified as to how his symptoms were exacerbated after the accident. Mrs. Courtois testified credibly concerning the substantial changes in her husband's activities and abilities to carry on the activities of daily living. She testified that she retired from her occupation in order to stay home and take care of Mr. Courtois. She also identified many activities that Mr. Courtois participated in prior to June 15, 2005, which he stopped after the accident.

I find that the accident of June 15, 2005, was a substantial factor in causing the need for treatment for Mr. Courtois from the date of accident up to the date of his death on November 28, 2014.

I find this issue in favor of Claimant.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries?

Based on the findings and rulings set out above, I find that there is substantial and competent evidence that Claimant sustained injuries in the accident of June 15, 2005, which will require medical care to continue after the date of maximum improvement.

Mr. Courtois was released from his last surgery on January 4, 2012. Dr. Poetz opined that the date of maximum improvement was January 4, 2012. After that date Mr. Courtois continued to take prescription medications and received medical treatment for pain relief, as a result of the injuries of June 15, 2005.

Employer is ordered to provide to Mr. Courtois all medically reasonable treatment required to cure and relieve the effects of his injury from and after the date of maximum medical improvement up to the date of his death.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

I find this issue in favor of Claimant.

Whether the Employer is obligated to pay for past medical expenses?

Exhibit 34 sets out a summary of charges for medical treatment administered to Mr. Courtois for this injury until the date of his death, including but not limited to physicians' treatment, as well as medications. The exhibit sets out amounts which total \$75,933.17. The amount set out on the exhibit covers dates as late as November 23, 2014, which would include expenses attributable to treatment after the date of maximum medical improvement, as ordered above in this award.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Employer was obligated to provide the medical services summarized in Exhibit 34. I further find that the services and charges levied therefore were both reasonable and necessary in order to cure and relieve Mr. Courtois of the effects of his injury of June 15, 2005.

Employer is hereby ordered to reimburse Claimant in the amount of \$75,933.17 as and for medical expenses incurred by Claimant which should have been paid by Employer.

I find this issue in favor of Claimant.

Whether temporary total disability benefits are owed to the Claimant?

The parties stipulated and agreed that Employer paid temporary total disability benefits from a period of 18-5/7 weeks. They further stipulated that Employer overpaid temporary total benefits in the sum of \$4,836.61, due to a miscalculation of the appropriate rate, for which Employer is entitled to a credit of \$4,836.61. Dr. Poetz placed Mr. Courtois at maximum medical improvement as of January 4, 2012.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, and based on the findings and rulings set out in this award, I find that Mr. Courtois was entitled to receive temporary total disability benefits from June 15, 2005, until January 4, 2012, the date of maximum medical improvement.

Employer is hereby ordered to pay to Claimant the sum of \$370.96 per week for a period of 342 weeks from June 15, 2005 through January 4, 2012. Employer is given a credit in the total amount of \$11,777.27 for temporary total disability benefits paid to Mr. Courtois.

Employer is ordered to pay to Claimant the sum of \$126,868.32 as and for temporary total disability benefits, less a credit of \$11,777.27 for sums previously paid. Employer is ordered to pay to Claimant the sum of \$115,091.05 for amounts of unpaid temporary total disability benefits due up to the date of maximum medical improvement.

The nature and extent of any permanent disabilities?

Mr. Courtois attempted to return to work shortly after the date of his injury. He could not drive the required number of miles to perform his job duties and was terminated. Mr. Courtois did not work again up to the date of his death.

Mr. Lalk testified that no employer could be expected to employ a person who spent most of the day in a recliner. He further testified that the restrictions placed on Mr. Courtois from a weight bearing perspective would not completely eliminate him from the open labor market. Mr. Courtois self-limited his activities in order to reduce the amount of pain he had to endure from day to day. Mrs. Courtois testified that if her husband did very much activity, he would “pay” for it afterwards in suffering an increase in spinal pain.

Dr. Poetz issued two reports which opined that Claimant was permanently totally disabled. He issued an addendum which opined that Mr. Courtois would be permanently totally

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

disabled if his pre-existing conditions were not considered in forming the opinion. Dr. Poetz testified twice to his opinion that Mr. Courtois was permanently totally disabled without considering his pre-existing conditions.

If an injured employee is permanently totally disabled from the last injury alone, there is no inquiry necessary as to whether the injured employee was permanently totally disabled as a combination of his last injury alone and the pre-existing condition.

After a review of all the evidence adduced at the hearing, both oral and written, I find there is sufficient competent and substantial evidence that Claimant has met her burden of proof that Mr. Courtois was permanently totally disabled as result of the accident of June 15, 2005.

Employer is hereby ordered to pay to Claimant the sum of \$370.96 per week from and after the date of maximum medical improvement for the lifetime of Carolyn Courtois as and for permanent total disability benefits due as a result of the accident and injury of Richard Courtois on June 15, 2005, said payments to begin as of January 5, 2012.

Employer is hereby ordered to pay to Claimant the sum of \$69,528.51 (187.4286 weeks x \$370.96 = \$69,528.51) as and for permanent total disability benefits due up to the date of this hearing. Thereafter, Employer is ordered to pay to Carolyn Courtois the sum of \$370.96 per week for the remainder of her natural life according to law.

I find this issue in favor Claimant.

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability?

Based on the findings and rulings set out above in this award, finding that Mr. Courtois was permanently and totally disabled as a result of the last injury alone, I find no liability against the Second Injury Fund in this Claim.

I find this issue in favor of the Second Injury Fund.

Whether Schoemehl v. Treasurer applies to the facts of this claim?

Richard Courtois was married to Carolyn Courtois in 1969 and remained married to her continuously through the date of his injury June 15, 2005, and until his death from unrelated causes on November 28, 2014. The claim was filed August 4, 2005, and remained on file until the date of this hearing. The facts of this claim are applicable to the decision in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo banc 2007) announced January 9, 2007. The amendments enacted by the legislature effective June 26, 2008, intended to end the prospective awarding of permanent total disability benefits to dependents of a permanently disabled employee after the employee's death from causes unrelated to the work injuries. The Court of Appeals held that the amendments were not retroactive and applied only to claims initiated after the effective date of the amendment. *Tilley v. USF Holland Inc.*, 325 S.W.3d 487 (Mo. App. E.D. 2010). The Supreme Court has held that the rights of the employee and the rights of a dependent spouse of the employee are fixed on the date of the injury and are governed by the law in effect on the date of injury. *Gervich v. Condaire, Inc.*, 370 S.W.3d 617 (Mo banc 2012) .

Employee: Richard Courtois, deceased, Carolyn Courtois, substitute Claimant Injury No. 05-074457

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that the rulings set out in *Schoemehl v. Treasurer* apply to the facts of this claim.

I find that Carolyn Courtois, surviving spouse and dependent of Richard Courtois, is entitled to received the permanent total disability benefit of Richard Courtois from the date of death of Richard Courtois for the remained of the life of Carolyn Courtois according to law.

Employer is hereby ordered to pay to Carolyn Courtois, dependent of Richard Courtois, the sum of \$370.96 per week from and after the date of November 28, 2014, for the remainder of her natural life, according to law.

Claimant's attorney has requested approval of an attorney fee of 25% of the amount of this award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is awarded an attorney fee of 25% of the amount of this award. Claimant's attorney is granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Made by: _____
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation