

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 06-012841

Employee: Michael Ellington
Employer: Harrah's Casino (Settled)
Insurer: Old Republic Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, heard oral argument, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated February 23, 2011, as supplemented herein.

Oral argument for this case was originally heard on September 14, 2011, by former Chairman William Ringer and former Commissioner Alice Bartlett. At that time, the parties agreed to have the Commission hold review of this matter in abeyance pending the ruling by the Missouri Supreme Court (Court) in *Gervich v. Condaire*, 370 S.W.3d 617 (Mo. banc 2012).

After the Court issued its decision in *Gervich*, the parties filed supplemental briefs. Due to the fact that the current Commissioners, James Avery and Curtis Chick, did not hear counsel's oral argument, the Commission provided counsel with an opportunity to present their arguments to the present Commissioners. The second oral argument took place on November 7, 2012.

We affirm the ALJ's award of permanent total disability benefits against the Second Injury Fund; as we find that the overwhelming weight of the evidence supports the ALJ's finding that employee is permanently and totally disabled as a result of his primary injury combining with his preexisting disabilities. We provide this supplemental opinion solely to clarify the dependency issue involving employee's wife and only dependent, Sharon Ellington.

The ALJ listed as her second "Ruling of Law," on page 9 of the award, that Sharon Ellington is entitled to receive benefits under *Schoemehl v. Treasurer of State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), as long as employee predeceases her. The ALJ later stated, more generally, "I find *Schoemehl* applies in this case." We find, based upon the subsequent rulings in *Gervich* and *White v. University of Missouri, Kansas City*, 375 S.W.3d 908 (Mo.

¹ Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

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App. 2012), that the issue of Sharon Ellington's entitlement to said benefits requires further analysis.

Before discussing the holdings in *Gervich* and *White*, it is helpful to review the history of the *Schoemehl* holding. The Court in *Gervich* summarized *Schoemehl's* history, as follows:

In *Schoemehl*, [the] Court addressed whether the workers' compensation statutes in effect at that time required that an employee's dependents have the right to continuing permanent total disability benefits. [The] Court found that the language of the workers' compensation statutes, when reading the relevant statutory sections together, provided that the dependents of an injured employee who died from causes unrelated to the work-related injury had a right to continuing permanent total disability benefits.

...

In 2008, the legislature amended sections 287.010.1, 287.200, and 287.230, the statutes interpreted by *Schoemehl* to make clear that compensation for a permanent total disability is payable only during the lifetime of the injured employee and is not payable to dependents after the employee's death when the employee dies from causes unrelated to the work injury. The legislature expressly stated its intent to 'reject and abrogate the holding' in *Schoemehl*.

...

In *Bennett [v. Treasurer of State of Missouri]*, 271 S.W.3d 49 (Mo. App. 2009)], the court of appeals noted the 2008 amendments to the relevant statutes and stated that application of the holding in *Schoemehl* 'is limited to claims of permanent total disability 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 [the 2008 amendments].' This holding in *Bennett* was quoted by the court of appeals in *Tilley v. USF Holland Inc.*, 325 S.W.3d 487, 494 [(Mo. App. 2010)].... *Tilley* further stated that the amendment to section 287.230.3, expressly abrogating *Schoemehl*, 'is not retroactive and will only apply to claims initiated after the effective date of the amendment.'

Gervich, 370 S.W.3d at 620-21 (citations omitted).

In *Gervich*, the Commission denied Deborah Gervich, the wife of Gary Gervich (the injured worker), her workers' compensation benefits as a dependent of her deceased husband. *Id.* at 618.² The Commission found that Deborah's right to receive her husband's permanent

² Gary Gervich's claim for permanent total disability benefits was pending between January 9, 2007, and June 26, 2008.

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total disability benefits had not “vested” prior to the 2008 statutory amendments that eliminated dependents from the definition of “employee” in § 287.020.1 RSMo. *Id.* On appeal, the Court found that contrary to the Commission’s finding, the statutes in effect at the time of the worker’s injury governed whether his or her dependent was entitled to receive disability benefits, not the statutes on the date of death. Thus, the Court found that *Schoemehl* and that decision’s interpretation of three statutes, §§ 287.020, 287.200, and 287.230, controlled.

In *White*, the Missouri Court of Appeals for the Western District was faced with a set of facts distinguishable from *Schoemehl* and *Gervich* in that the injured employee was still alive when the court ruled on the issue of dependency.³ The *White* court pointed out that because the injured employees were already deceased in *Schoemehl* and *Gervich*, there was “at stake ... an immediate right to receive benefits; there were no remaining contingencies in the nature of conditions precedent.” *White*, 375 S.W.3d at 912-13. The court noted that in their case, because the injured employee is still alive, and his wife cannot be substituted as “employee” for him at that stage, she was *not* entitled to receive benefits under *Schoemehl* at that time. *Id.* at 913.

In accordance with *Gervich*, the *White* court held that the employee’s wife’s dependent status was established and determined as a matter of law at the time of the injury. However, the court held that the adjudication of her claim to entitlement of successor benefits was simply not ripe for review because the injured employee was still alive.

In this case, employee’s claim for permanent total disability benefits was pending during the *Schoemehl* window, January 9, 2007, to June 26, 2008. However, similar to *White*, the injured employee is still alive. Employee testified that as of the time of the injury and of the hearing, he was married to and living with Sharon Ellington. Dependent status is determined at the time of the injury, not at the time of the employee’s death. *Gervich*, 370 S.W.3d at 622. Consequently, we conclude that, as of the time of employee’s injury, Sharon Ellington satisfied the definition of dependent set forth in § 287.240.4 RSMo.

While we find that as a matter of law, Sharon Ellington is currently employee’s dependent, the adjudication of her claim to entitlement to successor benefits is simply not ripe for review because employee is still alive. Therefore, we only find that Sharon Ellington is entitled to receive employee’s permanent total disability benefits so long as at the time of employee’s death, all subsequent conditions applicable under the Missouri Workers’ Compensation Law and under *Schoemehl* and its progeny are satisfied.

The Commission affirms the award and decision of the ALJ, as supplemented herein.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued February 23, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

³ In *White*, the injured employee’s claim for permanent total disability benefits was pending between January 9, 2007, and June 26, 2008.

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The Commission further approves and affirms 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 14th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Michael Ellington

Injury No.: 06-012841

Dependents: Sharon Ellington

Before the
**Division of Workers'
Compensation**

Employer: Harrah's Casino (previously settled)

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

Additional Party: Second Injury Fund (only)

Insurer: Old Republic Insurance Company (previously settled)

Hearing Date: December 1, 2010

Checked by: KMH

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: February 20, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 twisted his knee while working on scaffolding.
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: left knee and lower extremity
14. Nature and extent of any permanent disability: 25% permanent partial disability of the left knee, previously paid by Employer, and permanent and total disability benefits from the SIF beginning October 26, 2007, due to a combination of the primary injury and the pre-existing injuries and disabilities.
15. Compensation paid to-date for temporary disability: none
16. Value necessary medical aid paid to date by employer/insurer? \$5,886.45

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$364.75/\$364.75
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

40 weeks of permanent partial disability from Employer (previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
No weekly differential and \$364.75 payable weekly by SIF beginning August 2, 2007, to continue as provided by law.

TOTAL: TO BE DETERMINED

23. Future requirements awarded:

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jagadeesh B. Mandava

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Ellington

Injury No.: 06-012841

Dependents: Sharon Ellington

Before the
**Division of Workers'
Compensation**

Employer: Harrah's (previously settled)

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

Additional Party: Second Injury Fund Only

Insurer: Old Republic Insurance Company
(previously settled)

Checked by: KMH

A hearing was held on the above captioned matter December 1, 2010. Michael Ellington (Claimant) was represented by attorney Jagadeesh Mandava. The SIF was represented by Assistant Attorney General Da-Niel Cunningham. Claimant settled his claim against Employer/Insurer prior to trial.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury by accident February 20, 2006, while in the course and scope of his employment for Employer.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Old Republic Insurance Company.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage yields a TTD/PTD and PPD rate of \$364.75.
6. Claimant received no TTD benefits and \$5,886.45 in medical benefits.
7. Claimant and Employer/Insurer reached a compromise settlement on October 15, 2007, representing 25% PPD of the left knee plus 2 weeks of disfigurement.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Second Injury Fund liability
2. Applicability of *Schoemehl v. Treasurer of State of Missouri*, 217 S.W.3d 900, (Mo. Banc 2007)

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 63 year old male who lives in St. Louis, MO. He is married to Sharon Ellington, and has no other dependents. He has not worked since October 26, 2006, and receives a disability pension of \$3,200.00 per month from the St. Louis Fire Department. He also receives Social Security Disability of \$441 per month.
2. Claimant is a high school graduate, and he later took some courses through Forest Park Community College related to his employment at the fire department. He also took some small engine repair classes at Briggs & Stratton. He is able to read and write.
3. From 1967-1969 Claimant served in the United States Navy in New Jersey. While in the Navy, Claimant injured his low back and received conservative treatment. He left the Navy early in part due to his back injury, and was honorably discharged.
4. After leaving the military, Claimant began working for the St. Louis Water Department. He worked at a pumping station for approximately one year. Claimant next worked at Lambert International Airport in maintenance for approximately two years.
5. Claimant then worked as a fire fighter for the St. Louis Fire Department for over eighteen years. He had a number of injuries while working for the fire department. He quit his work as a fire fighter due to disc problems in his neck resulting from a 1987 work injury.
6. Claimant testified he took a sabbatical from employment to heal, and returned to work because his pension eliminated healthcare benefits. After several years, Claimant began working for Ameristar Casino in security. He transferred to the maintenance department, working as a finish painter.
7. He next worked for Harrah's Casino as a finish painter fixing walls, plastering, and painting. He earned about \$550.00 a week. His work as a painter was physically demanding. He regularly lifted five gallon paint buckets that weighed approximately 80 pounds. He was required to climb, bend, squat, and kneel continuously, and was on his feet most of the day.

8. Claimant had problems with his left knee before his 2006 work injury. In 1970, he was involved in a motor vehicle accident and sustained a patellar fracture. He had a partial patellectomy. Following that treatment and leading up to his 2006 injury, he continued to have pain in his knee and was careful at work.
9. In early 1987, Claimant reinjured his knee while pulling hoses at work. He had injections and work hardening. Following that treatment and leading up to his 2006 injury, Claimant continued to have weakness in his knee. He tried not to lead with his left leg. He no longer was able to bowl or play with his grandchildren. He did not file a workers' compensation claim.
10. Claimant had a number of other injuries and disabilities before his 2006 work injury. In 1983, Claimant fell while climbing onto his fire truck. He injured his low back, neck and right upper extremity. He received conservative treatment and was diagnosed with contusions to his low back, chronic cervical sprain, and right radiculitis. He settled this case with Employer for 17 ½% of his neck and with the Second Injury Fund based on a prior 20% disability to his left knee.
11. Leading up to his 2006 injury and continuing, Claimant had pain in his neck which increased with excessive bending or overhead work. He had a pulling sensation in his neck when he turned to either side, and he had occasional episodes of tingling in his right thumb, index and middle finger.
12. In 1987, Claimant re-injured his neck when pulling a fire hose at work. He had pain in his neck and numbness into his arm. When work hardening and injections failed to relieve his complaints, Claimant underwent a C6-7 discectomy by Dr. Smith in April 1987. He had additional work hardening, and tried to return to work. He continued to have problems lifting, and had decreased strength. Claimant testified he had to leave the Fire Department because he did not meet their strength requirements. He retired after 18 years of service.
13. Leading up to his primary injury and continuing beyond, Claimant continued to have pain and limited mobility of his neck. Overhead work or weight bearing increased his pain, and he always had a nagging feeling in his neck. The injury changed how he did things, and he was generally guarded, even in his responsibilities at home.
14. Claimant settled this injury with Employer for 27.5% disability of the neck. He also settled with the Second Injury Fund for the combination of his neck and pre-existing knee injuries and carpal tunnel syndrome. The Second Injury Fund agreed Claimant's pre-existing disabilities were 20% of the left knee and 15% of each wrist.
15. Claimant also injured his right shoulder in 1987. An arthrogram showed a probable tear of the right rotator cuff. Claimant was treated with physical therapy, medications and injections, but had little relief. He continued to have decreased range of motion, he could not lift anything over 25 pounds overhead, and he had decreased strength. He often used his left arm instead of his right to reach overhead, and had difficulty when painting overhead or reaching to paint.

16. In May 1988, Dr. Sheridan opined it was permanently impossible for Claimant to work as a firefighter due to a combination of his injuries.
17. In 1993, Claimant had bilateral carpal tunnel releases. He had developed numbness and tingling in both hands while working for the fire department, but did not have surgery until after his retirement. Despite his treatment, he continued to have numbness and tingling in both hands. He had weakness in both hands, had difficulty with buttons, and often dropped things. While working for Employer, he dropped his paintbrushes and had difficulty handling small objects.
18. In January 2000, Claimant experienced shortness of breath and chest pain. He was diagnosed with coronary artery disease and underwent open heart surgery with a triple bypass. Two years later, he had similar complaints, and was diagnosed with two more blockages. He had an angioplasty and placement of two stents.
19. Leading up to and beyond his 2006 injury, Claimant continued to have shortness of breath, tightness in his chest, and difficulties with strenuous work or extreme temperatures. Claimant testified he was athletic before this, and he had to limit his activities. He was no longer able to participate in his sporting activities and hobbies. At work, he had to rest and take more frequent breaks. Although he had no medical restrictions, this condition slowed him down at work.
20. On February 20, 2006, Claimant injured his left knee while on a scaffold approximately four feet off the ground. A co-worker came through the door and struck the scaffold with the door. Claimant lost his balance and twisted his left knee.
21. Employer sent Claimant to Concentra February 22, 2006. He presented with a limp and was unable to squat. He had limited flexion and extension. After conservative treatment and medications failed to relieve his complaints, Claimant was sent for an MRI on March 7, 2006. The MRI revealed an anterior cruciate ligament tear that was suspected to be chronic, degenerative changes of both compartments, and a medial meniscus tear. Claimant's work restrictions continued, and he was referred to Dr. Kostman.
22. Dr. Kostman diagnosed degenerative arthritis and biceps femoris strain. He treated Claimant with injections and therapy. On April 24, 2006, Dr. Kostman released Claimant at MMI. He opined the meniscus tear was degenerative, and the tendonitis was not related to the work accident. He opined Claimant had no permanent partial disability from the work injury.
23. Claimant continued to have problems with his knee, and sought treatment on his own with Dr. Maylack. On July 21, 2006, Dr. Maylack performed a partial medial and lateral meniscectomy with chondroplasty and microfracture. Claimant testified he missed six to eight weeks of work, and was eventually released with no restrictions. Dr. Maylack issued a report in August 2007. He explained he found old and new meniscus tears during surgery. Although Claimant had degenerative conditions in his knee, he sustained a new injury in 2006 causing new medial and lateral meniscus tears.

24. Following his primary injury and surgery, Claimant returned to work for Employer from September 1, 2006, through mid October. During that time, he took over the counter pain medications, but still had difficulty completing many of his jobs. Employer gave him many of the easier jobs. When he got a harder job and had to be on his knee all the time, he had great discomfort and had to get help from his co-workers in order to be able to complete the job.
25. By mid October 2006, Claimant felt all his injuries together had taken a toll on him. He had great difficulty bending and squatting, even with knee pads. He had difficulty going up and down stairs. He could not balance well when he had to carry paint up stairs. He could not keep up with his work. He had pain when walking, and believed he could not work anymore because of all his injuries. He testified his 2006 knee injury was the "straw that broke the camel's back". His last day of work was October 26, 2006. He had not planned to retire, and would have liked to keep working.
26. Claimant settled this injury with Employer for 25% of the left knee plus TTD payments and a hold harmless agreement regarding the medical bills.
27. On a typical day, Claimant needs to sit in his recliner throughout the day. If he is more active, he has to rest more. He can't do any maintenance on his home, and hires someone to cut the grass. His wife does the housework. He can only sit about 45 minutes and then needs to walk around to move his knee. If he sits too long, his knee and back stiffen. He can stand for ten to fifteen minutes and walk for about one block. He can only drive 50-60 minutes and then has to stretch to loosen his knee and low back. He has back pain every morning.
28. Claimant's vocational expert, Gary Weimholt, opined due to Claimant's multiple injuries and medical conditions, he is limited to a less than full range of sedentary demand level jobs. He has no transferable job skills, and has no advantage over other workers in an open competitive labor market. He opined as a result of Claimant's primary injury and multiple preexisting injuries, he is totally vocationally disabled from employment, and there is no reasonable expectation an employer would hire him for any position.
29. Claimant's medical expert, Dr. Volarich, examined Claimant on two occasions and issued reports. He opined Claimant is permanently and totally disabled as a result of his primary injury in combination with his preexisting conditions.
30. Claimant lives with his wife, Sharon. They have been married since 1971, and she is financially dependent upon Claimant for support. Claimant's case was pending before the Division of Workers' Compensation between January 7, 2007, and June 26, 2008.
31. Claimant is credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant is permanently and totally disabled as a result of the combination of his primary injury and his pre-existing injuries and disabilities.

Claimant contends he is permanently and totally disabled as a result of the combination of his primary injury and pre-existing medical conditions. The SIF contends Claimant is not totally disabled and is entitled only to permanent partial disability benefits.

Section 287.220 provides in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

- the percentage of disability resulting from the last injury alone;
- that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
- that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant settled his claim with Employer for 25% of his left knee prior to this hearing. Based on the medical evidence and Claimant's testimony, I find this percentage accurately reflects his disability from the primary injury. I find his work injury was the prevailing factor in causing the condition in his knee and his need for medical treatment.

Claimant had a number of injuries prior to his 2006 work injury. The medical records and stipulations for compromise settlement regarding those injuries were admitted into evidence. Claimant credibly testified to his numerous complaints and limitations from those prior injuries. I find each of these injuries and disabilities were a hindrance or obstacle to Claimant's employment or to obtaining re-employment.

The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled.

Permanent and total disability is defined by Section 287.020.7 RSMo as the "inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." The Missouri Court of Appeals explained this definition in *Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo.App. S.D. 1995)(citations omitted)(overruled on other grounds):

The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to

be totally disabled. The pivotal question is whether any employer would reasonably be expected to employ the employee in the person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Claimant last worked October 26, 2006. He credibly testified he had more pain when walking and had difficulty completing his jobs. He applied for less physically demanding work, and was not able to find other employment. Although he had no restrictions from his treating doctors, he had numerous physical limitations as a result of his multiple injuries. Mr. Weimholt found Claimant did not have the vocational and educational background or the transferable skills to overcome his physical limitations and impairments.

Dr. Volarich credibly testified to Claimant's numerous disabilities and limitations. He recommended restrictions, and opined Claimant is permanently and totally disabled as a result of his work injury combined with his numerous preexisting medical conditions.

I find the testimony of Dr. Volarich and Mr. Weimholt credible and persuasive. No contrary evidence was offered by the SIF.

I find the overwhelming weight of the medical and vocational evidence establishes Claimant is permanently and totally disabled as a result of the combination of his February 20, 2006, accident and the pre-existing medical conditions. Claimant last worked October 26, 2006. He became permanently and totally disabled October 27, 2006. He received compensation from Employer for 40 weeks at \$364.75 per week. There is no differential payment due in this case. The SIF is hereby ordered to pay permanent total disability benefits of \$364.75 per week beginning August 2, 2007, which is 40 weeks after October 27, 2006. The weekly benefit shall continue as long as provided by law. The amount accrued to date shall be paid forthwith with interest as provided by law.

2. Sharon Ellington, Claimant's dependent, is entitled to receive benefits under *Schoemehl* if Claimant predeceases her.

Claimant alleges under the holdings of *Bennett v. Treasurer*, 271 S.W.3d 49 (Mo.App. W.D. 2008), Sharon Ellington is entitled to receive Claimant's permanent total disability benefits if he predeceases her since his claim for permanent total disability benefits was pending between January 9, 2007, and June 26, 2008. The applicability of *Schoemehl* was an issue at trial. The SIF did not address this issue in their proposed award.

There is no dispute Sharon Ellington is Claimant's wife and only dependent. Claimant's claim for permanent total disability benefits was pending between January 9, 2007 and June 26, 2008. Consistent with the holding of *Bennett*, I find *Schoemehl* applies in this case.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation