

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 06-030063

Employee: Gary Gervich (Deceased)
Claimant/Dependent: Deborah Gervich (Widow)
Employer: Condaire, Inc.
Insurer: Federated Mutual Insurance Co.
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. We have heard the oral arguments of the parties, reviewed their briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by this separate opinion.

While we agree with the award of the administrative law judge, we do not agree with his analysis for denying Deborah Gervich, (claimant), continuing permanent total disability benefits that would have accrued after employee's death. By this opinion, we substitute our analysis to reach the same conclusion.

Our conclusion turns on the application to this case of the Supreme Court's decision in *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), as well as the statutes enacted after that decision "to undo the effect of the *Schoemehl* decision." *Roller v. Treasurer of Missouri*, 297 S.W.3d 128, 132 (Mo. App. W.D. 2009).

Employee's injury occurred April 6, 2006. He filed his claim for compensation under the Missouri Workers' Compensation Law on May 15, 2006. The *Schoemehl* decision was issued January 9, 2007. In *Schoemehl*, the court for the first time interpreted the relevant statutes to confer on dependents of an injured employee, who thereafter dies from causes unrelated to the work-related injury, the right to compensation for the employee's permanent total disability benefits.

On June 26, 2008, the Missouri legislature amended the statutes upon which the *Schoemehl* decision relied and attempted to limit its effects. Section 287.200.1 RSMo was changed to read, in pertinent part, as follows:

The word "**employee**" as used in this section shall not include the injured worker's dependents

Section 287.200.2 was changed to read, in pertinent part, as follows:

The right to unaccrued compensation for permanent total disability of an injured employee terminates on the date of the injured employee death in

Employee: Gary Gervich (Deceased)

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accordance with section 287.230, and does not survive to the injured employee's dependents

Section 287.230.3 RSMo was added, which reads as follows:

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

Employee died on April 5, 2009, from causes unrelated to the work-related injury.

The question then arises as to whether or not the statutes that were amended in June 2008 were applicable or effective to claimant. If so, then clearly she has no right to employee's permanent total disability benefits that accrued after his death.

Article I, Section 13 of the Missouri Constitution states, "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." Consequently, the general rule is that "[p]rospective application of a statute is presumed unless the legislature evidences a clear intent to apply the amended statute retroactively, or where the statute is procedural in nature." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. E.D. 2007).

"Those rights which are substantive and which therefore cannot be applied retroactively are regularly defined as those which 'take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed.'" *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974) (emphasis added).

"A 'vested right' has been defined as 'a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of [a] demand.' In this context, the word 'vested' means 'fixed, accrued, settled or absolute.' A vested right must be something more than a mere expectation based upon an anticipated continuance of an existing law." *St. Board of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260, 265 (Mo. App. W.D. 2002) (internal citations omitted). A right subject to divesting contingencies is not vested. See *Robbins v. Robbins*, 463 S.W.2d 876, 879-881 (Mo. 1971); *Mays v. Williams*, 494 S.W.2d 289, 294 (Mo. banc 1973).

"Rights are vested . . . when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." *Pearson v. Great Northern Railway Co.*, 161 U.S. 646, 673 (1896).

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In the case at hand and as of June 26, 2008 (when the amending statutes were effective), claimant's rights as a dependent were subject to divestment. She might have remarried or pre-deceased employee. Claimant's rights as a dependent, thus, did not vest until April 5, 2009, when employee died.

Accordingly, it follows that the amendments in June 2008 to the laws relevant to this issue did not take away or impair any vested rights of claimant. Therefore, we hold that under the laws relevant to claimant as of April 5, 2009, employee's right to unaccrued permanent total disability benefits terminated at the time of his death and did not survive to his dependent: claimant.

The award and decision of Administrative Law Judge John K. Ottenad issued August 12, 2009, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, and decision set forth herein.

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

Given at Jefferson City, State of Missouri, this 7th day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Gary Gervich (Deceased)

SEPARATE OPINION

(Concurring in Part and Dissenting in Part)

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I concur with the administrative law judge's decision as well as the Commission majority's affirmation, except so far as they address Deborah Gervich's right to receive employee's unaccrued permanent total disability benefits. I would reverse that part of these decisions.

As indicated in the majority's opinion, the Supreme Court's ruling in *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), gave Deborah Gervich the right, as dependent, to continue to receive employee's permanent total disability benefits unless the legislative changes in 2008 are read to retrospectively apply to this case.

Employee filed his claim with the Division of Workers' Compensation (Division) in 2006. As of the time employee filed his claim with the Division, his claim became "pending" and remained pending until such time as a final award was issued.

In 2008, the Missouri Court of Appeals had the opportunity to analyze the affect of the 2008 legislative changes (designed to limit the affect of *Schoemehl*) on cases already pending before the legislation became effective. The court held that "recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, and June 26, 2008." *Bennett v. Treasurer of Missouri*, 271 S.W.3d 49, 53 (Mo. App. W.D. 2008).

Because the case before us was pending during this clearly delineated window, claimant was subject to and entitled to the benefit of the *Schoemehl* ruling. Therefore, employee's rights to permanent total disability benefits did not terminate at the time of his non-work-related death, and claimant stepped into the position of employee for purposes of the receipt of these benefits.

Consequently, since under *Bennett* claimant is entitled to the unaccrued permanent total disability benefits previously due to employee, both the administrative law judge and the Commission majority (for alternative reasons) wrongly terminated her right to such benefits. Therefore, with respect to this dependent issue, I must respectfully dissent.

John J. Hickey, Member

AWARD

Employee: Gary Gervich (Dec) Injury No.: 06-030063
Dependents: Deborah Gervich (Spouse)
Employer: Condaire, Inc. Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Additional Party: Treasurer as Custodian of the
Second Injury Fund
Insurer: Federated Mutual Insurance Co.
Hearing Dates: April 15, 2009 Checked by: JKO

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: April 6, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 was employed as a pipefitter for Employer, when he tripped and fell on a worksite striking his head on an exposed piece of conduit pipe.
12. Did accident or occupational disease cause death? No Date of death? April 5, 2009
13. Part(s) of body injured by accident or occupational disease: Head, Neck and Body as a Whole
14. Nature and extent of any permanent disability: 20% of the Body as a Whole referable to the Cervical Spine and 10% of the Body as a Whole referable to the Head.
15. Compensation paid to-date for temporary disability: \$5,177.50
16. Value necessary medical aid paid to date by employer/insurer? \$6,102.17

Employee: Gary Gervich (Dec)

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to result in the maximum rates of compensation
- 19. Weekly compensation rate: \$696.97 for TTD/ \$365.08 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable from Employer:

120 weeks of permanent partial disability benefits	\$43,809.60
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22. Second Injury Fund liability:

\$331.89 per week for 120 weeks from 06/21/06 until 10/08/08	\$39,826.80
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\$696.97 per week for 25 4/7 weeks from 10/08/08 through 04/05/09	\$17,822.51
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TOTAL: **\$101,458.91**

23. Future requirements awarded: None

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: Richard T. Grossman.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Gary Gervich (Dec)	Injury No.: 06-030063
Dependents:	Deborah Gervich (Spouse)	Before the
Employer:	Condaire, Inc.	Division of Workers'
Additional Party:	Treasurer as Custodian of the Second Injury Fund	Compensation
Insurer:	Federated Mutual Insurance Co.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
		Checked by: JKO

On April 15, 2009, the employee’s spouse, Deborah Gervich, appeared in person and by her attorney, Mr. Richard T. Grossman, for a hearing for a final award on her husband’s claim against his employer, Condaire, Inc., its insurer, Federated Mutual Insurance Co., and the Second Injury Fund. The employer, Condaire, Inc., and its insurer, Federated Mutual Insurance Co., were represented at the hearing by their attorney, Mr. Kenneth D. Alexander. The Second Injury Fund was represented at the time of the hearing by Assistant Attorney General Carol L. Barnard.

At the outset of the hearing, Employee's attorney filed a **Suggestion of Death** (Exhibit P) and a **Motion for Substitution of Party** (Exhibit Q), which were both received into evidence by the Court. The Suggestion of Death formally notified the Court of Employee’s death. The Motion for Substitution of Party, which included a copy of the Marriage License and Employee’s Death Certificate, declared Deborah Gervich as Employee’s surviving spouse and sole dependent at the time of his death on April 5, 2009. The Motion for Substitution of Party was granted and ordered by the Administrative Law Judge on the date of the hearing, April 15, 2009.

Employee’s attorney also filed an **Amended Claim for Compensation** (Exhibit R) for Injury Number 06-030063 at the time of the hearing. The Amended Claim was filed to note the death of Employee and the fact that his wife was his sole surviving dependent. The Amended Claim was received in evidence, since it primarily was entered so that the Claim would conform to the evidence in this case, regarding the recent death of Employee and his wife’s position as Employee’s sole, surviving dependent.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about April 6, 2006, Gary Gervich (Employee) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Employee.
- 2) Gary Gervich was an employee of Condaire, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Employee earned an average weekly wage sufficient to result in applicable rates of compensation of \$696.97 for total disability benefits and \$365.08 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$5,177.50, representing a period of time from May 3, 2006 to June 20, 2006, or 7 3/7 weeks.
- 8) Employer paid medical benefits totaling \$6,102.17.
- 9) Employee's death on April 5, 2009 was not related to the injury of April 6, 2006.

ISSUES:

- 1) Were Employee's neck (cervical) complaints, as well as any resultant disability, medically causally connected to his injury at work on April 6, 2006?
- 2) What is the nature and extent of Employee's permanent partial and/or permanent total disability attributable to this accident?
- 3) What is the liability of the Second Injury Fund?
- 4) Does the *Schoemehl* case apply to the facts of this case and, if so, what effect does the *Schoemehl* case have on the payment of benefits in this matter?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Gary S. Gervich (Employee) on July 13, 2007
- B. Deposition of Gary S. Gervich (Employee) on March 20, 2009
- C. Deposition of Dr. Thomas F. Musich, with attachments, dated January 27, 2009
- D. Deposition of Dr. Daniel Kitchens, with attachments, dated February 11, 2009
- E. Deposition of James M. England, Jr., with attachments, dated March 10, 2009
- F. Certified medical records of St. Anthony's Medical Center
- G. Certified medical records of Unity Corporate Health
- H. Certified medical records of PRORehab
- I. Certified medical records of Concentra Medical Center
- J. Certified medical records of Metro Imaging
- K. Certified medical records of Cardinal Neurosurgery & Spine, Inc.
(Dr. Daniel Kitchens)
- L. Certified medical records of Pain Management Services
- M. Certified medical records of Plumbers' & Pipefitters' Local 562 Health Center
- N. Certified medical records of DePaul Health Center
- O. Certified medical records of Hoffman Chiropractic Clinic
- P. Suggestion of Death of Employee
- Q. Motion for Substitution of Party
- R. Amended Claim for Compensation

Employer/Insurer Exhibits:

- 1. Deposition of Dr. Russell Cantrell, with attachments, dated January 20, 2009
- 2. Deposition of Bob Hammond, with attachments, dated February 16, 2009
- 3. Deposition of Dr. Robert Poetz, with attachments, dated April 7, 2009

Second Injury Fund Exhibits:

Nothing submitted at the time of hearing.

Notes: 1) *Some of the Exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.*

2) *Any stray markings or writing on the Exhibits in evidence in this case were present on those Exhibits when they were admitted into evidence on April 15, 2009. No additional markings have been made since their admission on that date.*

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Employee's deposition testimony, the expert medical opinions and depositions, the medical records, the vocational opinions and depositions, and the testimony of the other witnesses at hearing, as well as my personal observations of the witnesses at hearing, I find:

- 1) **Deborah Gervich**, Employee's widow, testified she and Employee were married on February 25, 1978. They continued to be married up until the time of Employee's death on April 5, 2009, as a result of metastatic pancreatic cancer. She testified that she was dependent on Employee for support. She had been the victim of an assault approximately 10 years ago. After that assault and before his April 6, 2006 injury, Employee basically did everything around the house for her, including cooking, cleaning and shopping. After Employee's injury on April 6, 2006, her children did all of those things since her husband was not able to do them anymore.
- 2) **Employee** (Exhibit A), at the time of his death, was a 55-year-old career pipefitter, who spent almost 30 years total in that profession. During his time in the union, Pipefitters' Local #562, he was employed by a number of different companies in that capacity up until April 29, 2006, which was the last time he worked. He officially retired in October 2006.
- 3) In terms of his education, Employee graduated from McCluer High School in 1972. After high school he took a few general classes at a community college, but he never received any type of degree. He also took classes in welding and pipefitting through the union. According to vocational tests he was given by Mr. England, Employee could read at a high school level and do arithmetic at the sixth-grade level. Mr. England suggested that these "would be adequate for a variety of vocational alternatives." Employee admitted that he never had any problems with reading, writing or math in high school or college. Employee never served in the military.
- 4) In addition to working as a pipefitter, from 1984 until 1996, Employee and his wife owned a furniture store. Mrs. Gervich said she was the "brains" while her husband did the loading, unloading and deliveries. Depending on the hours he was working as a pipefitter, Employee testified that he worked at the furniture store before or after his pipefitting jobs, and on weekends.
- 5) Medical treatment records from the **Plumbers' & Pipefitters' Local 562 Health Center** (Exhibit M) document treatment Employee received at that facility for various conditions from December 15, 1981 through July 24, 2006. Although there are a number of visits for various illnesses and conditions, the most pertinent treatment to this case dealt with his diabetes, high blood pressure, high cholesterol and prior neck complaints. On February 11, 1997, Employee presented with an acute onset of right neck, right shoulder, and right elbow pain. He was diagnosed with acute cervical radiculopathy and given some Darvocet for pain. He continued refilling that medication up through March 4, 1997. Although the records are somewhat difficult to decipher, it appears his next visit for neck complaints occurred on July 25, 2002. At that time Employee was complaining of a pinched nerve in his right neck and right upper extremity (RUE) area which had been bothering him for 30 days. He was

diagnosed with cervical radiculopathy. The doctor suggested that he have an MRI and physical therapy. On August 1, 2002, the note indicates that the Imaging Center was contacted and they could not do an MRI because of the patient's size. The next reference to neck complaints is on September 30, 2005 when Employee called and reported a pinched nerve with pain in the neck and radiating down the right arm, identical to what he experienced in 2002. He was given a Medrol Dosepack and Skelaxin. By October 3, 2005, he called and reported he was feeling much better, but then on October 6, 2005, he was seeking a refill of the Medrol Dosepack. The note on October 6, 2005 indicates that Employee needs to be seen by an "ortho" (orthopedic doctor). Despite being on a course of medication and treatment for his diabetes, by January 30, 2006, he was diagnosed with diabetic neuropathy as a result of his complaints of burning and tingling in his feet. It appears Employee maintained poor control of his hypertension and diabetes throughout these records.

- 6) Chiropractic treatment records from **Hoffman Chiropractic Clinic** (Exhibit O) document visits Employee had at that facility from July 1, 2002 through August 27, 2002 for neck pain and pain into the right shoulder and down the right arm. Employee had 18 treatments over that 2-month period and was diagnosed intermittently with cervical nerve root compression or cervical neuralgia.
- 7) Medical records from **DePaul Health Center** (Exhibit N) document Employee's admission at that facility on July 17, 2002 for a complaint of neck and right arm pain and tingling. Employee noted the onset of the complaints about 3 weeks prior to admission and stated that the onset was gradual. He described the pain as coming from the neck and radiating into the right arm. He stated that he had had similar symptoms previously and had sought treatment from a chiropractor who told him he had a pinched nerve in the neck. Cervical spine X-rays were normal. Employee was diagnosed with an acute cervical strain and right shoulder sprain.
- 8) Employee was working as a pipefitter for Condaire, Inc. (Employer) at the time of his April 6, 2006 injury. He had been working for Employer for approximately six months before he was injured. He was working approximately 60-hour weeks on the second shift for Employer, and was making \$32.00 per hour. His job for Employer included getting into a basket suspended from a rig and being lowered down into a pit where they would install hangers and pipe on a vertical wall. The job required them to drill holes in the wall with guns, install the platforms that the pipe would sit on, and then install the pipe on the platforms. In addition to the drilling, there was also some welding involved in this work. Although the pipe was lowered down on cranes, he estimated that he would have to lift between 100 and 200 pounds as a part of his job for Employer.
- 9) Medical records from **Concentra Medical Centers** (Exhibit I) document treatment Employee received there for a toe injury on February 28, 2006. The first visit at that facility on that same date contained a description of Employee sustaining a toe laceration at work from stepping on a piece of steel. The toe wound was dressed and he was released to light duty work. After one other follow-up exam on March 3, 2006, Employee was discharged from care and sent back to regular duty work as of March 8, 2006.

- 10) On April 6, 2006, Employee was being lowered down into the pit in the basket and was trying to ensure that the basket would be brought down out of the way of the other rigs coming down there. He got out of the basket and pulled it out of the way of the rebar. As he turned around, he tripped over some conduit and fell to the ground, striking his head on some other conduit pipe that was sticking out of the ground. He split his head open and blood was gushing out of his head. He did not lose consciousness. Employee stood up, got back in the basket, and told his partner to bring the basket up. Employee did not finish work that day because his supervisor took him to the hospital for treatment.
- 11) The medical treatment records from **St. Anthony's Medical Center** (Exhibit F) document the treatment Employee received at that facility's emergency department on April 6, 2006. The emergency department admitting form shows Employee's wife was employed by a "deli." Employee provided a consistent history of falling over a pipe coming out of the ground at work and sustaining a large laceration in the middle of his forehead. On physical examination, he was found to have a 4.1 cm laceration on his forehead, but there was no neck tenderness, no CN (2-12) [cranial nerve 2-12] deficits, and no motor weakness or sensory deficits. He was diagnosed with a facial laceration, received sutures to close the laceration and was discharged home in good condition.
- 12) Medical treatment records from **Unity Corporate Health** (Exhibit G) reveal that Employee first visited with **Dr. Sun** at that facility on April 7, 2006 following his injury the prior day at work. He described a consistent history of the injury at work. He complained of a headache, a "foggy" feeling, and that he is easily forgetting things. He voiced no complaints about his neck and, in fact, his neck examination was negative for tenderness. He had good flexibility in his back. X-rays of the neck and facial bones were negative for fracture. However, his cervical x-rays revealed degenerative disc disease with hypertrophic spurring and foraminal narrowing at C6-7. While getting the X-rays, Employee began complaining of dizziness and lightheadedness, so Dr. Sun sent Employee back to the Emergency Room for additional tests.
- 13) Employee returned to the **St. Anthony's Medical Center Emergency Department** (Exhibit F) that day, April 7, 2006, because of a complaint of dizziness since his fall the prior day. On the physical examination, Employee denied neck pain or tenderness, headache, memory loss, or loss of strength or feeling in his arms, legs or torso. A CT scan of the head was negative. He was diagnosed with a minor head injury and again discharged home.
- 14) Employee returned to Dr. Sun on April 10, 2006 indicating that he had gone back to light duty work (sitting duty) but he still had a headache, facial pain, some dizziness and some forgetfulness. There were again no neck complaints and a negative examination of the neck. He was diagnosed with a facial laceration and facial contusion which was improving.

- 15) For the first time on April 14, 2006, Employee complained to Dr. Sun (Exhibit G) that he was “still” feeling numbness in both thumbs, and he felt like the pain was coming from his neck, through his shoulders, into his thumbs. The physical examination again revealed no tenderness in the neck, good range of motion in the back and both shoulders, and normal symmetric strength in both shoulders. Employee was also still voicing complaints of dizziness, and said he is unable to drive himself. Dr. Sun recommended a referral to a neurosurgeon specializing in the spine for further evaluation and treatment because of the residual dizziness. Dr. Sun examined Employee one last time on April 21, 2006 at which time Employee had the same complaints and basically the same examination results as the prior visit. Dr. Sun continued to recommend a referral to a spine specialist for the dizziness and numbness into his thumbs. Employee was still working light duty at that time.
- 16) Pursuant to Dr. Sun’s recommendation, Employee was referred to **Dr. Daniel Kitchens at Cardinal Neurosurgery & Spine, Inc.** (Exhibit K) for a neurosurgical consultation on May 4, 2006. He reported a consistent history of injury, but he complained of neck pain and pain into his right shoulder, right arm, right hand, and his index and long fingers of the right hand, as well as some numbness into the index and long fingers of his left hand. He also reported some dizziness, headaches and forgetfulness. There was no suggestion of Employee having had any prior problems with his neck. On physical examination, Dr. Kitchens found right triceps weakness. Dr. Kitchens suggested additional workup including an MRI of the cervical spine, since Employee’s complaints were suggestive of a C7 radiculopathy.
- 17) Employee had the MRI of the cervical spine performed at **Metro Imaging** (Exhibit J) on May 17, 2006. The radiologist at Metro Imaging, **Dr. Richard Koch**, read the MRI as showing degenerative hypertrophic ridging at C6-7, which effaces the cerebral spinal fluid pathway but does not flatten the cervical cord, and a lesser amount of degenerative hypertrophic change present at C3-4. He identified no focal disc protrusion, and no intrinsic abnormality involving the cervical cord.
- 18) When Dr. Kitchens (Exhibit K) reviewed the MRI at Employee’s next visit on May 23, 2006, he believed it showed a broad-based disc herniation at C6-7 with some cervical spondylosis at that same level. He also believed there was some spinal cord compression. He disagreed with the radiologist’s reading of the MRI. Dr. Kitchens discussed Employee’s treatment options including continued conservative treatment versus an anterior cervical discectomy and fusion at C6-7. Employee wished to continue with conservative treatment including medications and physical therapy.
- 19) Dr. Richard Koch (Exhibit J) again reviewed the MRI on May 23, 2006 and confirmed that his original reading was accurate. He believed the abnormality at C6-7 was more consistent with degenerative hypertrophic spurring because of the signal findings and because it was broad and extended across the entire circumference of the vertebral body.
- 20) Employee then began a course of physical therapy at **PRORehab** (Exhibit H) on May 26, 2006. He attended a number of physical therapy appointments and, at best, voiced only a temporary lessening of complaints after therapy, but noted that the

complaints would then return. He was discharged from physical therapy on June 20, 2006, with the physical therapist noting that his level of pain, quality of movement patterns, and level of activity/work was unchanged from the beginning of the course of therapy. He achieved no functional goals during his course of therapy.

- 21) When Employee returned to Dr. Kitchens (Exhibit K) on June 21, 2006, Dr. Kitchens noted that the physical therapy had basically had no effect on his condition. Dr. Kitchens again discussed the surgical option, but Employee apparently did not want to pursue that option. Instead, Dr. Kitchens placed permanent restrictions on Employee's ability to work, including no lifting over 20 pounds and no overhead work, and gave him a prescription for a muscle relaxer and non-narcotic pain reliever. He also released Employee from his care at that point.
- 22) On September 14, 2006, Dr. Kitchens (Exhibit K) rated Employee as having 5% permanent partial disability of the body as a whole referable to the neck related to the cervical disc herniation and cervical injury. He related the cervical disc herniation and subsequent complaints to the injury on April 6, 2006 when Employee fell at work. He also noted that Employee had recovered without the need for surgical intervention.
- 23) Employer paid medical benefits totaling \$6,102.17 for treatment in connection with this injury. Employer also paid TTD benefits from May 3, 2006 until June 20, 2006 (7 3/7 weeks) at a rate of \$696.97, or \$5,177.50.
- 24) **Dr. Robert Poetz** (Exhibit 3), a board certified family practitioner, evaluated Employee on October 24, 2006 at the request of Employee's attorney. Employer took Dr. Poetz's deposition on April 7, 2009 to make his opinions in this case admissible at hearing. Although Dr. Poetz was Employee's first rating physician in this case, Employer/Insurer submitted his deposition testimony in support of their case. Dr. Poetz reviewed the medical treatment records, performed a physical examination and issued a report dated December 5, 2006. Employee provided a consistent history of the injury at work and a consistent recitation of his complaints. On the physical examination, Dr. Poetz found decreased pinprick sensation at the mid finger bilaterally, markedly restricted range of motion in the neck, and radicular pain down the C6-7 nerve root distribution bilaterally. Referable to the April 6, 2006 accident, Dr. Poetz diagnosed a closed head injury with facial laceration, and a cervical strain with a possible herniated disc at C6-7 and exacerbation of cervical degenerative disc disease. He diagnosed pre-existing hypertension, diabetes mellitus, and cervical degenerative disc disease. He rated Employee as having 20% permanent partial disability of the body as a whole referable to the head and 25% permanent partial disability of the body as a whole referable to the cervical spine as a result of the April 6, 2006 accident. He also rated pre-existing permanent partial disabilities of 10% of the body as a whole for the hypertension, 20% of the body as a whole for the diabetes mellitus, and 10% of the body as a whole for the cervical spine degenerative disc disease. He further opined that Employee was permanently and totally disabled as a result of the combination of the April 6, 2006 injuries and Employee's pre-existing conditions.

- 25) Dr. Poetz testified consistent with his report and the opinions expressed above. He explained during his testimony how he arrived at the percentages of disability that he assessed for the pre-existing hypertension and diabetes, and basically explained how they would affect Employee's ability to work. Thus, he essentially explained how those conditions were hindrances or obstacles to employment. He did admit that leading up to the accident on April 6, 2006, Employee was working full duty, with no specific restrictions, and without missing time from work as a result of these pre-existing conditions. He also noted, however, that Employee's hypertension was not well-controlled with the medications he was taking, and the prior records did document symptoms consistent with diabetic neuropathy in the feet.
- 26) Employee sought further treatment from **Dr. Stephen Schmidt at Pain Management Services** (Exhibit L). Dr. Schmidt first examined Employee on April 17, 2007. The medical records contain a consistent history of the injury at work and of continued complaints of neck pain and symptoms into his arms. Dr. Schmidt found that Employee had neck pain with arm pain and numbness into the C7 distribution. Dr. Schmidt diagnosed right cervical radiculopathy. Dr. Schmidt recommended a right C7 selective epidural steroid injection under fluoroscopic guidance. That procedure was carried out on April 18, 2007. When Employee followed up on May 9, 2007, he reported that he obtained 25% improvement in his pain complaints following the injection. Dr. Schmidt noted that they could not perform any more of these injections because he was difficult to sedate the last time, required a large amount of medication, and even then continued to move and have trouble with his airway. In short, it was not safe to sedate him anymore. Employee was continued on medications, but no further injections were scheduled.
- 27) **Dr. Russell Cantrell** (Exhibit 1), who is board certified in physical medicine and rehabilitation, evaluated Employee on January 7, 2008 at the request of Employer's attorney. Employer took Dr. Cantrell's deposition on January 20, 2009 to make his opinions in this case admissible at hearing. Dr. Cantrell admitted that he is not a neurosurgeon and does not operate on the spine as a part of his practice, but he would not necessarily defer to a neurosurgeon regarding the need for spine surgery. Dr. Cantrell reviewed the medical treatment records, performed a physical examination and issued a report dated January 7, 2008. Employee provided a consistent history of the injury at work and a consistent description of his complaints. On the physical examination, Dr. Cantrell found limited range of motion in the cervical spine, tenderness to palpation, weakness which was not in a myotomal distribution, and no paraspinal muscle spasms. In reviewing the pre-existing medical records and the treatment records from immediately following the April 6, 2006 injury, Dr. Cantrell found the prior cervical and radicular complaints for which Employee had received periodic treatment, and he also noted the absence of any frank cervical or radicular complaints after the April 6, 2006 accident until the visit at Unity Corporate Health on April 14, 2006. Dr. Cantrell reviewed the cervical MRI from May 17, 2006 and he found no evidence of a disc herniation, but he did note degenerative disc disease at C3-4 and C6-7.
- 28) Dr. Cantrell opined that Employee sustained a head contusion with associated forehead laceration as a result of the April 6, 2006 injury. He rated Employee as

having 2% permanent partial disability of the body as a whole referable to the healed forehead laceration related to the April 6, 2006 injury. Dr. Cantrell did not believe that the work injury was the prevailing factor in causing Employee's neck pain and radicular arm pain. He believed those complains were related to Employee's pre-existing degenerative disc disease for which he rated Employee as having 8% permanent partial disability of the body as a whole referable to the cervical spine. He opined that Employee needed no work restrictions and no further treatment on account of the work accident, but restrictions based on his pre-existing cervical degenerative disc disease would be appropriate.

- 29) **Dr. Thomas Musich** (Exhibit C), a board certified family practitioner, evaluated Employee on March 7, 2008 at the request of Employee's attorney. Employee took Dr. Musich's deposition on January 27, 2009 to make his opinions in this case admissible at hearing. Dr. Musich reviewed the medical treatment records, performed a physical examination and issued a report dated March 7, 2008. On the physical examination, Dr. Musich found no upper extremity weakness or atrophy, nor any other objective physical finding consistent with cervical radiculopathy. However, he did find paresthesia in the hands consistent with cervical radiculopathy. He agreed that based on his review of the MRIs and his review of the reports of Drs. Koch and Kitchens, he did not believe the MRI showed an acute lesion at C6-7 impinging on a nerve root. In that report, Dr. Musich opined that the injury of April 6, 2006 was the prevailing factor in the development of acute cervical symptomology, including chronic cervical pain, severe limitation of cervical motion, and bilateral upper extremity radiculopathy, right greater than left. He agreed with the work restrictions placed on Employee by other physicians such as Dr. Kitchens. He also agreed that Claimant was a poor surgical candidate given his morbid obesity, diabetes, hypertension and suspected sleep apnea. Dr. Musich did not believe Employee would ever be able to return to his work as a pipefitter. He further opined that due to Employee's post-traumatic symptoms, his ongoing need for analgesic medication, and his activity restrictions, Employee was permanently and totally disabled. Dr. Musich opined that Employee's inability to work was the sole result of his present condition from the April 6, 2006 injury by itself. While there was no doubt that Employee had pre-existing morbid obesity, diabetes, diabetic neuropathy, and hypertension, Dr. Musich opined that none of those conditions represented a hindrance or obstacle to his employment as a pipefitter prior to the April 6, 2006 injury.
- 30) The deposition of **Dr. Daniel Kitchens** (Exhibit D) was taken by Employee on February 11, 2009 to make his opinions in this case admissible at trial. Although Dr. Kitchens was Employer's authorized treating physician in this case, Employee submitted his deposition testimony in support of his case. Dr. Kitchens is a board certified neurological surgeon. He testified consistent with his reports and opinions enumerated above. Most importantly, Dr. Kitchens noted that he had not reviewed the initial medical treatment records following this accident and also had not reviewed any of Employee's pre-existing medical treatment records on his neck at the time he had issued his initial reports in this matter. However, prior to his deposition testimony, Dr. Kitchens had now reviewed all of those medical records. Dr. Kitchens quite clearly testified that none of those records changed any of the opinions he initially formulated in this case.

- 31) He agreed that Employee had apparently had some prior neck and right arm complaints from the pre-existing cervical spondylosis, but he was convinced that the disc herniation at C6-7 and the subsequent complaints were related to the injury at work on April 6, 2006. He reached this conclusion by considering the timing of the symptoms in conjunction with the progression of the symptoms of his spinal cord. He also considered the mechanism of injury and found that the axial loading from striking his head while falling produces the type of force and direction of force likely to cause a disc herniation. Further, he noted that the C6-7 disc is the one most prone to this type of pressure, so a disc herniation at C6-7 is relatively common given this mechanism of injury. He explained that Claimant's complaints, as well as the finding of right triceps weakness, were consistent with the finding on the MRI of the disc herniation at C6-7. Although he did not provide a numerical rating of disability for the pre-existing neck problems, he suggested that Employee would have a small amount of disability, if any, in the neck prior to his injury as a result of the cervical spondylosis since his symptoms were sporadic.
- 32) Employee was evaluated by **Mr. James England** (Exhibit E), a vocational counselor, on January 9, 2007, after which Mr. England issued a report dated January 15, 2007. Employee took Mr. England's deposition on March 10, 2009 to make his opinions in this case admissible at hearing. Mr. England interviewed, tested and evaluated Employee and reviewed his medical records for the purpose of rendering a vocational opinion. Mr. England opined that because of Employee's prior extensive work history as a pipefitter, he believed Employee had transferable skills down to a medium level of work, but not below that. He found that the restrictions from Dr. Kitchens limited Employee to a light level of lifting and he found that Dr. Poetz did not believe Employee was capable of returning to any type of work. Mr. England concluded that given Employee's presentation and complaints, his age, size, and his lack of any highly marketable skills, he would be unable to compete for, or sustain, any work in the open labor market considering the effects of his overall medical problems. Mr. England noted that he did review some additional records after he issued his original report, and none of those records would necessarily change his opinions in this matter, except that if you just consider Dr. Cantrell's restrictions, then perhaps Employee would be able to work in a sedentary-to-light level of employment. But even then, he agreed it would not be reasonable for an employer to allow Employee to rest or recline during the workday when he feels like he needs to do that to relieve his complaints. Mr. England also testified that Employee's pre-existing conditions of morbid obesity and diabetes mellitus with peripheral neuropathy would have impacted Employee's ability to work and would have constituted a hindrance or obstacle to his employment. However, he admitted on cross-examination that he found no records and heard no history from Employee that described any restrictions on his activities or any difficulties he had performing his heavy work as a pipefitter up until the date of the April 6, 2006 injury.
- 33) Employee was evaluated by **Mr. Bob Hammond** (Exhibit 2), a vocational consultant, at Employer's request on November 21, 2008, after which Mr. Hammond issued a report dated November 25, 2008. Employer took Mr. Hammond's deposition on February 16, 2009 to make his opinions in this case admissible at hearing. Mr.

Hammond interviewed and evaluated Employee, as well as reviewed his medical records for the purpose of rendering an opinion on Employee's ability to work in the open labor market. Relying heavily on his impressions of Employee's extensive prior involvement in running a furniture business with his wife for 12 years, Mr. Hammond essentially concluded that Employee had vocationally relevant transferable skills from that work, and he was capable of working in the light-to-sedentary levels of employment. He further noted that the medical restrictions placed on Employee by Drs. Cantrell and Kitchens also only limited Employee to the light-to-sedentary levels of employment. He noted that his interview of Employee ended when Employee became angry with his questions about whether or not Employee was capable of performing certain types of jobs. He concluded that Employee was able to compete for and maintain employment in the general labor market, if he so desired, based on his transferrable skills, his residual abilities, and the medical restrictions of Dr. Cantrell (light level) and Dr. Kitchens (sedentary level).

- 34) On cross-examination, Mr. Hammond admitted that he only noted Dr. Kitchens released Employee to light duty, without enumerating what specific restrictions Dr. Kitchens placed on Employee's ability to work. Mr. Hammond was not able to specifically name any other doctor who treated Employee after Dr. Kitchens released him, only the doctors who evaluated Employee, such as Dr. Poetz, Dr. Musich and Dr. Cantrell. He admitted that his opinions on employability were based on the medical restrictions and limitations, not Employee's description of his problems, complaints, or abilities. Mr. Hammond was questioned about whether or not he asked Employee if he would be willing to work selling pencils for Jimmy Swaggart, and Mr. Hammond responded that he may have asked that question, but he did not remember for sure if he did. Mr. Hammond also admitted that he did not specifically know what duties were included in the light duty work Employee returned to for a period of time after his injury in April 2006. He also had little, if any, specific information on the activities such as walking, driving, going to dinner and going to labor meetings which he included as relevant information in his report.
- 35) In terms of his continued complaints following the April 6, 2006 injury, Employee testified in his deposition on July 13, 2007 (Exhibit A) that he was unable to maintain the checking account and handle financial affairs because he had a hard time concentrating for any length of time. His cervical range of motion is limited by pain and he cannot look up at all. If he is laying flat on his back, standing too long, or sitting too long with his head leaning over, he feels increased pain, and he must move. He described a constant headache that radiates from the back of his head. He also testified that he believed his memory had been affected by the injury. He said it hurts to drive for any length of time and it hurts to go up and down steps. Employee described radiating pain from his neck, down his arms, into his fingers on each hand. Employee testified that on a typical day he will get up from the recliner where he was sleeping (because he cannot sleep in bed very well), will sometimes go to the neighborhood pool to sit around or swim a little, and then sometimes will drive his wife to work. Perhaps once a month he will go to the North County Labor Club. He is able to read, but his neck will hurt if he holds his head down to read for too long. Employee was also taking numerous medications for high blood pressure, diabetes, high cholesterol and pain.

- 36) In his second deposition dated March 20, 2009 (Exhibit B), Employee testified that when he worked the light duty job following his April 6, 2006 accident, a co-worker drove him to and from work. He testified that although he had some treatment and took some medication for his neck prior to April 6, 2006, he never missed time from work, and in his opinion, it was not debilitating. He only drove his wife to work, up the street about a mile, maybe less than once a week. He did not drive more than that because it hurt, he could not turn his neck, and he did not feel it would be safe. He would only go out to eat perhaps once a week to a restaurant about a mile from his house, and sometimes he would leave the meal early because of pain. He testified that he perhaps has attended three labor club meetings and four union meetings since his injury, but a relative would drive him back and forth to the meetings, and he did not always stay for the whole meeting because of increased pain complaints.
- 37) Employee's wife, **Deborah Gervich**, testified consistent with the rest of the medical records and with Employee's prior testimony about his continued problems and functional limitations after the injury at work on April 6, 2006. She noted that he could not stand up straight and his head moved forward more and more causing him to have hunched shoulders. He had complaints of headaches, was confused about their new home, and even forgot who she was for a period of time. She testified that the doctors seemed more concerned about his head injury immediately after the fall because of the bleeding and confusion. She also consistently described his problems with attending the union meetings, visiting family members and going out to eat after his injury. She confirmed that Employee was given an option for neck surgery, but then the doctor recommended against it because he was not a good candidate.
- 38) Employee's co-worker and friend, **Bernard K. Grewe, Jr.**, also testified on Employee's behalf at the hearing. Mr. Grewe knew Employee for approximately 20 years and was working with him on April 6, 2006 when he was injured. He described Employee as a hard worker who never missed work prior to his injury. He was the one who drove Employee to and from work for the 3 to 3 ½ weeks of light duty after his injury on April 6, 2006. During this time he would have to help Employee step up into, and down out of, the trailer where he performed the light duty work. Based on what he observed of Employee after the injury, he did not believe Employee was capable of doing any sustained work after the accident.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including Employee's credible testimony, the expert medical opinions and depositions, the medical records, the vocational opinions and depositions, the testimony of the other witnesses at hearing, as well as my personal observations of the other witnesses at hearing, and based upon the applicable laws of the State of Missouri, I find:

Employee suffered an accident at work on April 6, 2006, which arose out of and in the course and scope of his employment for Employer.

Considering the date of the injury, it is important to note that the new statutory provisions are in effect including, **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court “shall construe the provisions of this chapter strictly” and that “the division of workers’ compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Issue 1: Were Employee’s neck (cervical) complaints, as well as any resultant disability, medically causally connected to his injury at work on April 6, 2006?

Under **Mo. Rev. Stat. § 287.020.3 (1) (2005)**, “An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. ‘**The prevailing factor**’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”

Employee bears the burden of proof on all essential elements of his Workers’ Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo.App.E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Employee must establish a causal connection between the accident and injury. ***Id.*** at 198. The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id.*** at 199.

In a Workers’ Compensation case, expert medical testimony is not necessarily needed to establish the cause of the injury, if causation is a matter within the understanding of laypersons. ***Knipp v. Nordyne, Inc.***, 969 S.W.2d 236 (Mo.App.W.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). When the condition presented in a case is a sophisticated injury that requires surgical intervention or highly scientific technique for diagnosis, and especially when there is a serious question of pre-existing disability, then the proof of causation is not within the realm of lay understanding. ***Id.*** at 240.

Based on the competent and substantial evidence described above, and pursuant to the further reasoning described below, I find that Employee sustained a broad-based disc herniation at C6-7 medically causally related to his accident at work on April 6, 2006. I further find that Employee’s accident on April 6, 2006 caused additional disability to the cervical spine as a result of the effect of the cervical disc herniation at C6-7. More specifically, I find that the accident at work on April 6, 2006 was the prevailing factor in causing both the resulting medical condition, the herniated disc at C6-7, and the disability. Thus, the cervical diagnosis and disability is properly considered a part of this otherwise fully compensable accident.

The real issue surrounding Employee's cervical condition is the presence of pre-existing degenerative changes in the cervical spine as identified on the X-rays and MRI, as well as Employee's prior medical treatment for neck and right arm complaints, and his apparent failure to fully describe those prior problems to his treating doctors following this injury on April 6, 2006. Additionally, there is an issue regarding whether or not Employee actually has a broad-based disc herniation at C6-7 or rather just degenerative hypertrophic spurring at that level without a herniation.

With regard to the issue surrounding the presence of a disc herniation at C6-7, there are medical opinions from Dr. Kitchens, Dr. Koch, Dr. Schmidt, Dr. Poetz, Dr. Musich, and Dr. Cantrell. In determining whether there is a disc herniation at C6-7 or rather just degenerative hypertrophic spurring at that level without a herniation, I find the opinion of Dr. Daniel Kitchens more competent, credible and persuasive than the contrary opinions of Drs. Koch, Musich and Cantrell. Unlike Dr. Koch, who is a radiologist who never examined Employee, Dr. Musich, who is a family doctor who only examined Employee one time, and Dr. Cantrell, who is a physiatrist who only examined Employee on one occasion, Dr. Kitchens is a board certified neurosurgeon who personally treated Employee following this accident. He personally reviewed the MRI in question, and based on his reading of the MRI and Employee's physical examination which was consistent with a C7 radiculopathy, he recommended surgery to treat the disc herniation he found at C6-7. Further, Dr. Schmidt's examination and findings support the conclusion of Dr. Kitchens since Dr. Schmidt found a C7 radiculopathy as well. Based on his greater expertise as a neurosurgeon and his greater level of contact and examination of Employee, Dr. Kitchens' diagnosis of a C6-7 disc herniation is more competent, credible and persuasive than the contrary opinions of Drs. Koch, Musich and Cantrell.

With regard to the overall medical causation issue, I again find the opinion of Dr. Kitchens, that the accident at work on April 6, 2006 caused both the resulting medical condition and the disability, more competent, credible and persuasive than the contrary opinion from Dr. Cantrell. Dr. Kitchens was chosen by Employer as the authorized treating physician in this case. He causally related the cervical disc herniation and additional disability in the neck to Employee's accident at work. Employer argues that Employee did not give Dr. Kitchens a complete history of his prior cervical problems, and further argues that Dr. Kitchens did not have all of the pre-existing medical records or the records from the treaters immediately after the accident, to see if Employee's history and description of problems was consistent. While it is true that Dr. Kitchens apparently did not have all of this information at the time he originally rendered his medical causation opinion, there is no doubt that he was presented with this information at the time of his deposition and he clearly testified that this additional information did not change his opinion on the medical causation of Employee's cervical condition, complaints and disability. He credibly and convincingly explained why he continued to believe the cervical condition was causally related to the April 6, 2006 accident at work. Additionally, his opinions in that regard are supported by the medical findings of Dr. Schmidt and the medical opinions of Dr. Poetz. Therefore, after a thorough review of all the medical evidence, I find Dr. Kitchens' opinion on medical causation the most competent, credible and persuasive opinion in this case.

For all of these reasons, I find that Employee has met his burden of proof to show that the accident at work on April 6, 2006 was the prevailing factor in causing both the resulting medical

condition, the herniated disc at C6-7, and the additional disability to the cervical spine as a result of the effect of the cervical disc herniation at C6-7.

Given the nature of this Claim and the evidence submitted, the next two issues in this case can also be addressed at the same time.

Issue 2: What is the nature and extent of Employee's permanent partial and/or permanent total disability attributable to this accident?

Issue 3: What is the liability of the Second Injury Fund?

Under **Mo. Rev. Stat. § 287.190.6 (2005)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The employee bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id.*** at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Under **Mo. Rev. Stat. § 287.020.6 (2005)**, “total disability” is defined as “inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” The test for permanent total disability is employee’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ employee in his present physical condition. ***Searcy v. McDonnell Douglas Aircraft Co.***, 894 S.W.2d 173 (Mo.App.E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to **Mo.Rev.Stat. § 287.220 (2005)** for the appropriate apportionment of benefits under the statute. The analysis of the case essentially takes on a three-step process:

First, is Employee permanently and totally disabled?;

Second, what is the extent of Employer’s liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, we will follow this three-step approach to award all appropriate benefits under the Statute.

Considering the competent and substantial evidence listed above, I find that Employee was permanently and totally disabled prior to his death. Employee, in his depositions, credibly described the continuing pain and problems he had with his neck, and the radicular problems he continued to have in his arms, that kept him from functioning normally on a daily basis. He continued to take medication on a daily basis to deal with the pain and problems. His credible testimony was supported by the consistent description of his complaints and functional problems in the medical records, as well as the credible and consistent testimony of his wife, Deborah Gervich, and his co-worker, Bernard K. Grewe, Jr.

I find that Employee met his burden of proof on this issue, not only with his own credible testimony and the credible testimony of his wife and co-worker, but also with the competent, credible and persuasive medical opinions of Drs. Musich and Poetz, and the competent, credible and persuasive vocational opinion of Mr. James England.

All of the physicians who had examined and treated Employee (and whose records and reports have been placed into evidence) had placed significant restrictions on Employee's ability to function in the workplace. Drs. Poetz and Musich, who provided comprehensive reports not only on Employee's cervical condition, but also concerning the rest of Employee's pre-existing conditions, ultimately opined that Employee was permanently and totally disabled. While Dr. Kitchens provided work restrictions and credible opinions on Employee's cervical condition, he really did not look at Employee's pre-existing conditions or provide any medical opinions concerning those conditions. Therefore, on this issue, I find that his reports do not contain opinions as complete and credible as those of Drs. Poetz and Musich. Dr. Cantrell did review all of Employee's medical history and conditions, and restricted his work activity based on his pre-existing cervical condition, but opined that no further work restrictions were needed as a result of the April 6, 2006 injury. For many of the same reasons enumerated above, I simply do not find Dr. Cantrell's opinion credible or well-founded. When Employer's authorized treating physician, Dr. Kitchens, is placing significant restrictions on Employee's ability to work as a result of the April 6, 2006 injury, it seems ridiculous for Dr. Cantrell to say that Employee has absolutely no restrictions on account of that same injury. In this case though, not only does Dr. Cantrell's opinion run counter to Dr. Kitchens, but also Drs. Musich and Poetz. Therefore, I find the opinions of Drs. Poetz and Musich on this issue of permanent total disability to more competent, credible and persuasive than the other opinions in the record.

Dr. Poetz's and Dr. Musich's opinions, and Employee's allegation of permanent total disability, was bolstered by the testimony of Mr. James England, a vocational rehabilitation counselor, who confirmed that Claimant was not employable in the open labor market given the totality of his condition. I find that Mr. England authored a comprehensive report after a thorough review of the medical treatment records and extensive evaluation and testing of Employee. His testimony and his opinions were competent, credible and persuasive. On the other hand, Employer offered the report and testimony of Mr. Bob Hammond. I find Mr. Hammond's opinions were not competent or persuasive. He was unable to describe the specific restrictions placed on Employee by Dr. Kitchens, even though that was part of the basis of his opinion that Employee was able to work. He simply summarized them as "light duty" restrictions. He showed that he did not have a good understanding of the medical evidence by having no idea who might have treated Employee after he was released by Dr. Kitchens. I was also shocked that he may have actually asked Employee if he would be physically able to sell pencils for Jimmy Swaggart as a possible employment option as a part of his evaluation. If, in

fact, this question was asked, I can understand why Employee may have been angry during his evaluation. In comparing the reports and opinions of Mr. England and Mr. Hammond, I find that Mr. England's well-founded opinions are more competent, credible and persuasive than the contrary opinions of Mr. Hammond.

Based on the totality of the evidence submitted at hearing, I find the opinions of Dr. Poetz, Dr. Musich and Mr. England, that Employee is permanently and totally disabled, to be credible and properly supported by the rest of the medical evidence in this case, as well as supported by the credible testimony of Employee and his witnesses.

Since Employee is found to be permanently and totally disabled, the next step of the inquiry then is to determine the extent of Employer's liability for the last injury alone, and specifically to determine if Employer is solely responsible for that permanent total disability.

Based on my review of the competent and substantial evidence, I do not believe the last injury alone caused Employee to be permanently and totally disabled. Employee had a number of pre-existing conditions (diabetes mellitus with peripheral neuropathy, hypertension, and degenerative changes in the cervical spine) that impacted his ability to receive treatment or otherwise recover from the effects of the last cervical spine injury. A number of the doctors testified that because of the pre-existing obesity, hypertension and diabetes mellitus, Employee was not a good surgical candidate despite Dr. Kitchens' belief that surgery could have addressed some of the problems Employee was having as a result of the cervical herniated disc. Although it is impossible to know for sure if the surgery would have had a positive outcome on Employee's overall cervical condition, it is clear that because of those pre-existing conditions, Employee was never able to realize any improvement in his condition. I find that it is only because of the combination of the pre-existing conditions and the cervical condition from the last injury that could not be surgically treated, that Employee ended up permanently and totally disabled, and unable to compete for employment in the open labor market.

In reaching the decision above that Employee was permanently and totally disabled, I found the opinions of Drs. Poetz and Musich more credible and persuasive on that issue than the other medical opinions on that issue in evidence. However, when it comes to determining whether the Employer or perhaps the Second Injury Fund is responsible for the permanent total disability, there is a divergence of opinion between these experts. Dr. Poetz opined that Employee was permanently and totally disabled as a result of the combination of the April 6, 2006 injuries and Employee's pre-existing conditions, thus, invoking Second Injury Fund liability. Dr. Musich, on the other hand, opined that Employee's inability to work was the sole result of his present condition from the April 6, 2006 injury by itself. Having considered all of the evidence, I find the opinion of Dr. Poetz on this issue, more competent, credible and persuasive than the opinion of Dr. Musich. While both doctors are family physicians and, thus, equally qualified to render such opinions in this case, I find that Dr. Poetz provided a more thorough explanation of how the pre-existing conditions would affect Employee's ability to work, and, thus, how those conditions were hindrances or obstacles to employment. Additionally, Dr. Poetz's opinion that the combination of the disabilities rendered Employee permanently and totally disabled was supported by the vocational opinion of Mr. England, which I had also previously found credible. In short, I find Dr. Poetz's opinion in this regard is more in line with the rest of the competent and credible evidence than is the opinion of Dr. Musich on this issue.

Therefore, based on the totality of the competent, credible and persuasive evidence, including the opinions of Dr. Poetz and Mr. England, I find that Claimant's permanent total disability resulted from the combination of the disability from the April 6, 2006 accident along with Employee's pre-existing disabilities. I further find that the injury of April 6, 2006 alone did not render Employee permanently and totally disabled.

Accordingly, I find that Employer is responsible for the payment of permanent partial disability benefits in this case. Since I had previously found Dr. Poetz and Dr. Kitchens more credible than the other physicians in earlier portions of this award, I will rely on their opinions on permanency, as well as Employee's and Employee's witnesses' credible testimony, to reach a conclusion on this issue. Dr. Poetz rated Employee as having 20% permanent partial disability of the body as a whole referable to the head and 25% permanent partial disability of the body as a whole referable to the cervical spine as a result of the April 6, 2006 accident. Dr. Kitchens rated Employee as having 5% permanent partial disability of the body as a whole referable to the neck related to the cervical disc herniation and cervical injury. Employee and Employee's witnesses testified extensively and consistently about the continued neck pain, radicular symptoms into the arms, loss of function, headaches, and memory problems that Employee suffered from as a result of the injury sustained by Employee on or about April 6, 2006.

Therefore, I find that this accident on April 6, 2006 resulted in a permanent partial disability of 20% of the body as a whole referable to the neck and 10% of the body as a whole referable to the head. Employer is responsible for the payment of 120 weeks of permanent partial disability benefits as a result of this accident on April 6, 2006.

I further find that Dr. Kitchens released Employee from care with permanent restrictions on June 21, 2006 and TTD benefits were terminated on June 20, 2006. Therefore, Employee reached maximum medical improvement for this injury on June 21, 2006, and Employer paid all appropriate TTD up to that point of maximum medical improvement.

The final step of the inquiry then is whether the permanent total disability is the result of the combination of the primary (last) injury and pre-existing disabilities so that the Second Injury Fund would have liability for the permanent total disability. As alluded to above, the medical opinion of Dr. Poetz, the vocational opinion of Mr. England, as well as the credible testimony of Employee, his wife and co-worker, all support the finding that Employee is permanently and totally disabled as a result of the combination of his primary and pre-existing disabilities, and, thus, the Second Injury Fund has liability for that disability.

Employee had significant pre-existing uncontrolled hypertension and diabetes mellitus, along with peripheral neuropathy. He was morbidly obese and had significant degenerative changes and hypertrophic spurring in the cervical spine. Dr. Poetz assigned a rating of permanent partial disability for the pre-existing hypertension, diabetes and cervical degenerative changes. He also explained in his deposition testimony how these conditions would have impacted Employee's ability to work, and, thus, how they were hindrances or obstacles to employment. Additionally, Mr. England offered vocational testimony that Employee's pre-existing conditions of morbid obesity and diabetes mellitus with peripheral neuropathy would have impacted Employee's ability to work and would have constituted a hindrance or obstacle to his employment.

The Second Injury Fund argues that since Employee did not miss work on account of these pre-existing conditions, and since he was unable to identify any specific way in which these conditions impacted his ability to perform his heavy work as a pipefitter, then they should not be considered hindrances or obstacles to employment, and the Second Injury Fund should have no liability in this case. However, the statutory standard is not just hindrance or obstacle to employment, but also, "or to obtaining reemployment if the employee becomes unemployed..." It is clear to me, based on the medical evidence in the record, as well as the credible opinions of Dr. Poetz and Mr. England, that these pre-existing disabilities were hindrances or obstacles to Employee obtaining reemployment by virtue of their preventing Employee from being able to obtain surgical relief of the herniated disc in his neck. I find it was the very combination of these pre-existing disabilities with the disability from the last injury that prevented Employee from being able to compete for employment in the open labor market.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this claim, there is yet one issue regarding the amount and timing of the payments under the statute. Since Employee reached maximum medical improvement on June 21, 2006 and Employer paid all appropriate TTD up through June 20, 2006, I find that Employee was permanently and totally disabled as of June 21, 2006.

Employer is paying 120 weeks of permanent partial disability at a rate of \$365.08. Therefore, from June 21, 2006 until October 8, 2008 (120 weeks), Employee is to receive \$331.89 per week or the difference between the permanent partial and permanent total disability rates ($\$696.97 - \$365.08 = \$331.89$), for a total of \$39,826.80 from the Second Injury Fund.

Starting then on October 8, 2008, the Second Injury Fund is to pay \$696.97 per week for Employee's lifetime, subject to review and modification by law.

Issue 4: Does the Schoemehl case apply to the facts of this case and, if so, what effect does the Schoemehl case have on the payment of benefits in this matter?

The final issue to be addressed in this award is the applicability of the *Schoemehl* decision to the facts of this case and a determination of what effect, if any, it has on the benefits awarded in this matter.

The *Schoemehl* decision turns on an interpretation of three statutory sections that are applicable to this case as well. **Mo. Rev. Stat. § 287.230.2 (2005)** states:

Where an employee is entitled to compensation under this chapter for an injury received and death ensues for any cause not resulting from the injury for which he was entitled to compensation, payments of the unpaid accrued compensation shall be paid, but payments of the unpaid unaccrued balance for the injury shall cease and all liability therefor shall terminate unless there are surviving dependents at the time of death.

Then, **Mo. Rev. Stat. § 287.200.1 (2005)** provides:

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

Finally, **Mo. Rev. Stat. § 287.020.1 (2005)** defines “employee” by indicating:

Any reference to any employee who has been injured shall, when the employee is dead, also include his dependents, and other persons to whom compensation may be payable.

It is the applicability of these three sections to the facts of this case that will determine the balance of the appropriate benefits to be awarded.

In *Schoemehl v. Treasurer of the State*, 217 S.W.3d 900 (Mo. 2007), Mr. Schoemehl sustained a work-related knee injury on May 11, 2001 and filed a claim for compensation seeking benefits from his employer and the Second Injury Fund. A month after benefits began, Mr. Schoemehl died from a cause unrelated to his work injury. Mr. Schoemehl’s wife was his sole dependent at the time of his death. She settled the claim against his employer and then obtained a ruling after a hearing that her husband was permanently and totally disabled against the Second Injury Fund. She was awarded a closed period of benefits for the permanent total disability up to the date of his death. She appealed alleging that she was now the employee under the law and, thus, entitled to collect the permanent total disability benefits for the remainder of her life.

Beginning their decision by noting that the workers’ compensation law, at that time, “shall be liberally construed with a view to the public welfare” [Mo. Rev. Stat. § 287.800 (2000)], and that any doubt as to an employee’s right to compensation should be resolved in favor of the injured employee [*Wolfgeher v. Wagner Cartage Serv., Inc.*, 646 S.W.2d 781, 783 (Mo. banc 1983)], the Supreme Court interpreted these three sections jointly to award continued permanent total disability benefits to Mrs. Schoemehl for the remainder of her life. The Supreme

Court held that under 287.020.1, since Mrs. Schoemehl was Mr. Schoemehl's dependent at the time of his death, Mrs. Schoemehl "is considered the 'employee' in this case." *Schoemehl* at 902. As the "employee" under 287.200.1, she is entitled then to collect the continued permanent total disability benefits during her lifetime. The Court ruled that the "continuance of the disability" clause extinguishes PTD benefits in the event the injured worker recovers from his disability, and the "during the lifetime of the employee" clause provides for continued compensation if the worker does not recover. *Schoemehl* at 903.

In the case at hand, it is clear that Employee died on April 5, 2009 from a cause not resulting from, nor related to, the injury for which compensation benefits are being awarded. Applying the rulings made earlier in this award, I further find that Employee was permanently and totally disabled against the Second Injury Fund at the time of his death. It is equally clear that Mrs. Gervich was Employee's sole surviving dependent at the time of his death. Therefore, she is entitled to collect any benefits awarded in this matter for her husband's disability up to the time of his death.

The question, however, is whether she has met her burden of proof to show an entitlement to continued permanent total disability benefits for the rest of *her life* pursuant to the Court's ruling in *Schoemehl*.

In attempting to apply the ruling in *Schoemehl* to the facts of this case, I am mindful of a significant change in the law that occurred in 2005 that affects the interpretation of the workers' compensation statute in the instant case, but was not in effect at the time of the injury which was the subject of the Supreme Court ruling in *Schoemehl*. That change was the 2005 amendment to Mo. Rev. Stat. § 287.800. At the time of Schoemehl's injury, 287.800 stated that, "All of the provisions of this chapter shall be liberally construed with a view to the public welfare..." In 2005, the Legislature changed 287.800 to a mandate that the provisions of the chapter are to be strictly construed, and the evidence weighed impartially without giving the benefit of the doubt to any party. I am especially mindful of this significant change when in the *Schoemehl* case, the Supreme Court began their analysis with the statement that their interpretation would be guided by a liberal construction of the law, with an eye toward resolving any doubt as to the right of an employee to compensation in favor of the injured employee. Clearly, those premises upon which the Court grounded its interpretation of the law in the *Schoemehl* case have changed in light of the strict construction and impartial weighing of the evidence now mandated by 287.800.

Therefore, while the *Schoemehl* decision must be considered and must be appropriately applied to the facts of this case, since it is still controlling law for a case such as this, which was pending at the time of the *Schoemehl* decision, I do not believe it is necessarily dispositive of this case, and, in fact, can be distinguished, in light of the significant change in statutory interpretation mandated by Mo. Rev. Stat. § 287.800 (2005).

Strictly construing Mo. Rev. Stat. § 287.020.1, I find that since Employee is dead, his dependent at the time of his death, Mrs. Gervich, becomes the employee under the statute for the purposes of determining any other appropriate benefits due and owing on account of this accident.

The determination of this issue then shifts to the interpretation of Mo. Rev. Stat. § 287.200.1. The *Schoemehl* Court ruled that, "The 'continuance of the disability' clause

extinguishes PTD benefits in the event the injured worker recovers from his or her disability.” It further ruled that, “The ‘during the lifetime of the employee’ clause provides that, if the worker does not recover, the ‘employee’ is entitled to compensation during his or her lifetime.” By this interpretation, the Court, therefore, suggests that these clauses are applied based on the condition of the “injured worker.” If the “injured worker” recovers, then PTD benefits are extinguished, but if the “injured worker” does not recover, then the “employee” continues to receive benefits for his or her lifetime.

However, nowhere in 287.200.1 do I find the term “injured worker.” The statute uses the term “employee” which is defined earlier in the chapter, as set out above. Therefore, under strict construction, I find it is the “employee’s” condition that drives the application of this section not the “injured worker.” So in the case at bar, once Mrs. Gervich becomes the “employee” by operation of 287.020.1 at the time of her husband’s death, I find that it is no longer Mr. Gervich’s condition and ability to work that is controlling on the determination of further PTD benefits in this matter, but rather it is Mrs. Gervich’s condition and ability to compete for work in the open labor market that controls, since she is now the “employee.”

In that respect, I find evidence in the record on the St. Anthony’s Emergency Room admitting sheet (Exhibit F) that Mrs. Gervich was working at a “deli” at the time of his injury on April 6, 2006. I find further testimony in the record that Mr. Gervich was periodically (approximately once a week) driving his wife to work after he was no longer able to work himself after the April 6, 2006 injury, leading up to the time of his death. More importantly, however, since “employee” has the burden of proof on this issue, I find no evidence in the record, either medical or vocational, indicating that Mrs. Gervich is incapable of competing for employment in the open labor market, and thus, permanently and totally disabled at the time she became the “employee” by operation of the statute on April 5, 2009. Mrs. Gervich has offered no evidence and has not met her burden of proof to show that she as the “employee” is still permanently and totally disabled under the statute.

Therefore, under 287.200.1, I find that “employee’s” condition improved or changed when Mrs. Gervich became the “employee,” in that “employee” did not continue to be permanently and totally disabled. Since “employee” did not continue to be permanently and totally disabled, I find the “continuance of the disability” clause extinguishes the PTD benefits that had previously been properly payable when Mr. Gervich was the “employee” as of the date of his death, April 5, 2009.

Finally then, applying Mo. Rev. Stat. § 287.230.2 (2005) to the facts of this case, I find that Mrs. Gervich is entitled to recover the unpaid accrued compensation for permanent partial disability from Employer (\$43,809.60) and for permanent total disability from the Second Injury Fund (\$57,649.31) up through the date of her husband’s death, April 5, 2009. Although Mrs. Gervich became the “employee” by operation of 287.020.1 on April 5, 2009, strictly construing and applying 287.200.1, I find she has failed to meet her burden of proving that she, as the “employee,” remained permanently and totally disabled after that date, and so no further benefits for PTD (no unpaid unaccrued balance) are payable under the statute for that reason.

CONCLUSION:

Employee sustained an accident arising out of and in the course of his employment for Employer. The injuries to his body as a whole referable to the head and neck, including a herniated disc at C6-7 with radiculopathy, are medically causally connected to that April 6, 2006 injury at work. Employer is responsible for 120 weeks of compensation, 20% of the body as a whole referable to the neck and 10% of the body as a whole referable to the head (\$43,809.60), for permanent partial disability attributable to the April 6, 2006 injury. Employee was permanently and totally disabled as a result of the combination of the primary injury and pre-existing disabilities from hypertension, diabetes mellitus with peripheral neuropathy, and significant degenerative changes and hypertrophic spurring in the cervical spine. Compensation from the Second Injury Fund is payable in the amount of \$331.89 per week from June 21, 2006 until October 8, 2008, or 120 weeks (\$39,826.80). Compensation from the Second Injury Fund is then payable from October 8, 2008 until the date of Employee’s death, April 5, 2009 in the amount of \$696.97 per week (\$17,822.51).

Since Employee died, his dependent at the time of his death, Mrs. Gervich, becomes the “employee” under the statute for the purposes of determining any other appropriate benefits due and owing on account of this accident. “Employee’s” condition improved or changed when Mrs. Gervich became the “employee,” in that “employee” did not continue to be permanently and totally disabled. Since “employee” did not continue to be permanently and totally disabled, the “continuance of the disability” clause extinguishes the PTD benefits that had previously been properly payable when Mr. Gervich was the “employee” as of the date of his death, April 5, 2009. Mrs. Gervich is entitled to recover the unpaid accrued compensation for permanent partial disability from Employer and the unpaid accrued permanent total disability from the Second Injury Fund. She has failed to meet her burden of proving that she, as the “employee,” remained permanently and totally disabled after that date, and so no further benefits for PTD (no unpaid unaccrued balance) are payable under the statute for that reason. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Richard T. Grossman, for necessary legal services.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

 Naomi Pearson
Division of Workers' Compensation