

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 07-104044

Employee: Cheryl Goad, deceased
Claimant/Dependent: Wesley Goad, widower
Employer: Blue Cross/Blue Shield (Settled)
Insurer: Federal Insurance Company
c/o Chubb Insurance Companies (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. We have reviewed the evidence, read the briefs of the parties, 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 her analysis for denying Wesley Goad (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 August 13, 2007. Employee filed her claim for compensation under the Missouri Workers' Compensation Law on October 31, 2007. 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

Employee: Cheryl Goad, deceased

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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 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.

Claimant died on April 15, 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 he has no right to employee's permanent total disability benefits that accrued after employee's 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

Employee: Cheryl Goad, deceased

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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).

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. He might have remarried or pre-deceased employee. Claimant's rights as a dependent, thus, did not vest until April 15, 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 15, 2009, employee's right to unaccrued permanent total disability benefits terminated at the time of her death and did not survive to her dependent: claimant.

The award and decision of Administrative Law Judge Lisa Meiners issued February 1, 2010, 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 22nd day of July 2010

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

Attest:

John J. Hickey, Member

Secretary

Employee: Cheryl Goad, 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 Wesley Goad'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 Wesley Goad 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 her claim with the Division of Workers' Compensation (Division) in 2007. As of the time employee filed her claim with the Division, her 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 Wesley Goad 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 her 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 his right to such benefits. Therefore, with respect to this dependent issue, I must respectfully dissent.

John J. Hickey, Member

FINAL AWARD

Employee: Cheryl Goad

Injury No. 07-104044

Employers: Blue Cross/Blue Shield

Insurers: Federal Insurance Company
c/o Chubb Insurance Companies

Additional Party: Missouri Treasurer as the Custodian of the Second Injury Fund

Hearing Date: December 11, 2009

Checked by: LM/cg

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: August 13, 2007
5. State location where accident occurred or occupational disease was contracted: Kansas City, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee lifted a tub overflowing with mail causing injury of her low back that occurred within the course and scope of her employment.
12. Did accident or occupational disease cause death? No. Date of death? April 15, 2007
13. Part(s) of body injured by accident or occupational disease: low back
14. Nature and extent of any permanent disability: 19% permanent partial disability body as a whole
15. Compensation paid to-date for temporary disability: \$13,332.86

- 16. Value necessary medical aid paid to date by employer/insurer? \$45,007.72
- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$404.28/\$389.04
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: The Second Injury Fund is ordered to pay permanent total disability benefits beginning May 29, 2008 up to her date of death on April 15, 2009.

TOTAL: \$5,358.20

22. Future requirements awarded: None.

This Award is subject to an attorney's lien in the amount of 24 percent for services rendered by Keith Yarwood.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Cheryl Goad

Injury No. 07-104044

Employers: Blue Cross/Blue Shield

Insurers: Federal Insurance Company
c/o Chubb Insurance Companies

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Hearing Date: December 11, 2009

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On December 11, 2009, the parties appeared for hearing. The widower of Cheryl Goad, Wesley Goad, appeared through his attorney Keith Yarwood. The Second Injury Fund as the remaining party was represented by Benita Seliga.

STIPULATIONS

The parties stipulate to the following:

- 1) That Ms. Goad sustained an accident that occurred within the course and scope of her employment on August 13, 2007;
- 2) That the employee provided notice of the injury as well as filed her claim within the time allowed by law;
- 3) The employer has paid \$45,007.72 in medical expenses, as well as \$13,332.86 in temporary total disability benefits for a total of 33 weeks;
- 4) That the wage rates are \$404.28/\$389.04.

ISSUES

The parties request this Award address: 1) whether the Second Injury Fund is liable to the Claimant for permanent total disability benefits and; 2) whether the Schoemehl decision applies in this matter.

Claimant had a long history of back problems. In 1969 she was involved in an automobile accident which almost severed her spine at the L4-L5 and resulted in several fractured vertebra. Although Claimant did not undergo an operation, she was in the hospital for 26 days. Claimant remained off work between six and eight months. Indeed, no doctors issued permanent work restrictions. Regardless, Claimant continued to experience back pain since 1969.

In 1998 she aggravated her back condition from bouncing in a pickup truck going over ruts in the snow. A 1998 MRI revealed a central disk protrusion at L4-L5. Orthopedic surgeon Roger Jackson, M.D. suspected diskogenic pain at the L4-L5 level in January 2000 and ordered a bone SPECT study and an MRI. The studies revealed a central and leftward L4-L5 disk herniation and a focal uptake on the right at the L3-L4 facet, on the left at the L4-L5 facet and on the right at the L5-S1 facet.

Dr. Jackson performed a left L4-L5 discectomy with fat graft on Ms. Goad on March 22, 2000. Dr. Jackson placed permanent restrictions on Ms. Goad of no bending, twisting or lifting. Ms. Goad continued experiencing back pain after the surgery, according to her personal physician, Dr. David Wilson's office notes. An MRI in June 2000 revealed degenerative changes and epidural fibrosis that narrowed the lateral recess bilaterally and caused L5 radiculopathy.

In February 2006, Ms. Goad fell at home and re-injured her back. Dr. Jackson ordered another MRI scan and discovered a small central and left-sided recurrent disk herniation at L4-L5. He referred her to Dr. Scowcroft for pain management. Three epidural steroid injections provided only temporary relief. Dr. Jackson then prescribed a Medrol DosePak but Ms. Goad's problems continued to worsen and she developed radiculopathy. A repeat MRI in January 2007 showed a large recurrent disk herniation.

On February 14, 2007, orthopedic surgeon, John Ciccarelli, M.D. performed a revision laminectomy at L4 and L5 and revision lateral recess decompression and recurrent discectomy at L4-L5. Dr. Ciccarelli took Ms. Goad off work for six weeks after the surgery. After reaching maximum medical improvement, she then returned to work at Blue Cross/Blue Shield with restrictions of no lifting, bending, standing or twisting.

The company was in the process of cross-training employees in the "premier" division of the company with the "Blue Cross/Blue Shield" division when Ms. Goad returned to work. Her new responsibilities included collecting and distributing the mail. On August 13, 2007, Ms. Goad moved a large tub of mail weighing about 50 pounds from approximately her chest level and twisted to the right to lower the tub when she felt a sharp pain in her low back. She reported the problem immediately to a co-worker and later reported it to a supervisor by email.

Claimant was prescribed physical therapy but eventually was referred for an MRI and then to Dr. Ciccarelli who identified a new herniated disk at the L4-L5 level. Dr. Ciccarelli, as well as Dr. Ebelke, found the August 13, 2007 incident was the prevailing factor of the herniated disk at the L4-L5 level. Thereafter, Claimant was terminated on August 30, 2007.

On December 5, 2007, Dr. Ciccarelli performed a recurrent decompression at the L4-L5, along with a discectomy and intertransverse and fusion with screw fixation at L4-L5. Thereafter, Dr. Ciccarelli released Claimant on May 29, 2008 with permanent restrictions of no lifting of more than 20 pounds and to avoid repetitive bending and lifting. Dr. Ciccarelli noted that Claimant experienced intermittent aches and pains with prolonged sitting or standing. Once released from treatment on May 29, 2008, Claimant attempted to find employment without success.

Indeed, medical records as well as evidence presented reveal that the low back complaints never completely resolved. Mr. Goad, Claimant's widower, observed that Claimant continued to have problems with prolonged sitting and standing and continued with significant lifting restrictions.

The parties request this Award address whether the Second Injury Fund is liable to Claimant for permanent total disability benefits. In order to establish Second Injury Fund liability for permanent total disability benefits, the Claimant must prove the following:

- 1) That she has sustained permanent disability resulting from a compensable work-related injury;
- 2) That she has permanent disability predating the compensable work-related injury which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee becomes unemployable." §287 RSMo 1994, Messex v. Sachs Electric Company, 989 S.W. 2d (Mo.App. 1997); Garibay v. Treasurer, 964 S.W. 2d 474 (Mo.App. 1998); Rose v. Treasurer, 899 S.W. 2d 563 (Mo.App. 1995);
- 3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. Boring v. Treasurer, 947 S.W. 2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo.App. 1992).

Regarding the first requirement, I find Claimant sustained 19% permanent partial disability body as a whole referable to the August 13, 2007 accident. Although Claimant had preexisting disability of her low back, the last accident resulted in greater hindrances and obstacles to her employment. As a result of her last accident, Claimant was limited to 30 minutes of sitting, walking/standing of 15 minutes, as well as restricted to lifting less than 20 pounds. This finding is based on the medical records, medical reports, and Mr. Goad's observations.

Regarding the second requirement, Claimant experienced disability of her low back prior to August 13, 2007 that I find was a hindrance and obstacle to her employment. Claimant had consistent medical treatment of her low back prior to August 13, 2007. Objective diagnostic testing of 2004 reveal epidural granulation of low back tissue. Other medical records made in 2000 note chronic low back pain.

Indeed, I find prior to August 13, 2007 that Claimant had to modify her activities in order to control her chronic low back pain. Claimant had limitations of bending, squatting, sitting and standing prior to August 13, 2007. This finding is based on the medical records as well as Mr. Goad's observations. Dr. Koprivica opined on June 23, 2008 that Claimant sustained 35 percent permanent partial disability body as a whole prior to the last accident. Therefore, I find Claimant sustained 30 percent permanent partial disability body as a whole as a result of the chronic low back condition that preexisted August 13, 2007.

Regarding the third requirement, I find it is the combined effects of the disability resulting from the last injury, combined with Claimant's preexisting condition of her low back to render her permanently and totally disabled. Indeed Dr. Koprivica and Dr. Ebelke opined

Claimant underwent a fusion due to past history of disk herniations at the L4-5 level and the last accident. Moreover, Dr. Koprivica testified Claimant unemployable in the open labor market based on Claimant's preexisting condition combined with the last accident.

As further support for my finding that the Second Injury is liable to Claimant for permanent total disability benefits is the vocational expert Mike Dreiling. Mike Dreiling, Claimant's vocational expert who testified by deposition, saw the Claimant. Dreiling conducted a review of the medical records and reports and then offered an opinion regarding the Claimant's employability. Dreiling, after considering the restrictions placed by the various doctors with regard to the physical limitations and capacities, concluded that Claimant was no longer employable in the open labor market.

It is Dreiling's opinion that there could be no expectation that an employer would hire Claimant to perform a job as it is customarily performed in the open labor market. Dreiling opined that Claimant did not have the capacity or ability to actively compete for a full time position in the open labor market. He believed that given her disabilities, an employer would not be expected to hire her. As such, based on the evidence presented, I find the Second Injury Fund is liable to Claimant for permanent total disability benefits beginning May 29, 2008.

The next issue is whether Claimant's widower, Mr. Goad, is entitled to survivor benefits under Schoemehl versus Treasurer of the State of Missouri 17 S.W. 3rd 900 (Mobanc 2007) as surviving dependent spouse.

Claimant filed her original claim on October 31, 2007 alleging a permanent partial claim with an injury date of August 31, 2007 involving her lower back and body as a whole. Medical records show she received medical treatment for her claim. The Division files reflect on July 17, 2008 she filed an amended claim alleging permanent total liability. On August 14, 2009, Mr. Goad filed an amended claim stating Ms. Goad had died on April 15, 2009. Because Mr. Goad was Mrs. Goad's spouse at the time of her death, Mr. Goad alleges that he is entitled to lifetime benefits under Schoemehl versus Treasurer of the State of Missouri.

Numerous decision have defined what type of claim qualifies for survivorship benefits; see Buescher v. Mo. Highway & Transp. Comm'n, 254 S.W.3d 105, 108 (Mo.App. W.D. 2008); Cox v. Treasurer of the State of Missouri, 2008 WL 2079106 (Mo.App. E.D. 2008) and Winberry v. Treasurer of Missouri as Custodian of Second Injury Fund, WL 208054. These decisions strictly limited recovery under Schoemehl to situations where the injured worker's case was still pending before the Commission, when no determination had been made on the injured worker's claim against the Second Injury Fund, and when the claim is for permanent total disability benefits. Strait v. Treasurer of Mo., 257 S.W. 3d 600 (Mo.banc 2008); Cox v. Treasurer of State, 258 S.W. 3d 835 (Mo.App. 2008); Buescher v. Mo. Highway & Transp. Comm'n, 254 S.W. 3d 105 (Mo.App. 2008). Finally, the Schoemehl decision was rejected and abrogated by the Legislature through House Bill No. 1883. The legislation became effective June 26, 2008.¹

¹ In Bennett v. SIF, the Court noted the effective date of HB 1883 was June 26, 2008. 271 S.W. 49, 52 (W.D. 2008)

After discussing all the relevant cases, the Court in Bennett v. Treasurer of The State of Missouri-Custodian of the Second Injury fund, Respondent, 271 S.W. 49 (W.D. 2008), ruled on the timeframe of the Schoemehl decision. The Court ruled that ...[] under HB 1883 and the Missouri Supreme Court's later decision in Strait, recovery under Schoemehl is limited to claims for permanent total disability benefits that were pending between January 9, 2007 and June 26, 2008, the effective date of HB 1883. Id @ 52.

Between the date of January 9, 2007 and June 26, 2008, Ms. Goad's claim was a permanent partial liability claim. As the Bennet Court held, recovery under Schoemehl was narrowed to pending permanent total claims between January 9, 2007 and June 26, 2008. As such, based on strict construction of the statute, this claim does not qualify for Schoemehl recovery, as it was alleged as permanent partial disability during the limited time period of January 9, 2007 to June 26, 2008.

Regardless, the Second Injury Fund is liable to Claimant for permanent total disability benefits beginning on May 29, 2008, the date of maximum medical improvement up to Claimant's death on April 15, 2009. Beginning on May 29, 2008, the Second Injury Fund is ordered to pay the difference between the permanent total disability rate and the permanent partial disability rate of \$404.28 minus \$389.04 for 76 weeks and, thereafter, to pay permanent total disability benefits of \$404.28 up to her death on April 15, 2009.

This Award is subject to an attorney's lien in the amount of 24 percent for services rendered by Keith Yarwood.

Date: _____

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2010
by:

Naomi Pearson
Division of Workers' Compensation