

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 03-138099

Employee: Alva D. Goff
Alleged Dependent: Irene Goff
Employer: Union Electric Company (Settled)
Insurer: Union Electric Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard the arguments and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award of the administrative law judge by this separate opinion.

While we agree with the award of the administrative law judge concerning the merits of employee's claim for compensation, we do not agree with his analysis and award concerning the right of Irene Goff (Ms. Goff) to continuing permanent total disability benefits after employee's death.

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 December 29, 2003. Employee filed his claim for compensation under the Missouri Workers' Compensation Law on December 6, 2004. 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's death

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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.

As of the date of the hearing regarding this matter, employee was still alive. The question then arises as to whether or not the statutes (that were amended in June 2008) were applicable or effective to Ms. Goff.

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).

In the case at hand and as of June 26, 2008 (when the amending statutes were effective), Ms. Goff's rights as a dependent were subject to divestment. She might have

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remarried or pre-deceased employee. Ms. Goff's rights as a dependent, thus, had not (and even as of the time of the hearing had not) vested.

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 Ms. Goff. Therefore, we hold that under the laws relevant to Ms. Goff as of June 26, 2008, employee's right to unaccrued permanent total disability benefits will terminate at the time of his death and will not survive to his dependent: Ms. Goff.

The award and decision of Administrative Law Judge Matthew D. Vacca issued May 5, 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 18th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary