

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-042115

Employee: Willard R. Haag, deceased  
Substitute Party: Viola Louise Haag, widow  
Dependent: Brittney Michelle Haag, dependent daughter  
Employer: Goodyear Tire & Rubber/Wingfoot Commercial Tire Systems, LLC  
Insurer: Liberty Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge.

For purposes of clarification, we note that this matter was heard together with employee's claim for Injury No. 03-125432. Thereafter, the administrative law judge issued two identical awards, bearing both injury numbers. With respect to this case, the administrative law judge recounted the parties' stipulations that employee has suffered a compensable injury herein, and that employer has paid for employee's past medical expenses, but thereafter did not award any additional compensation versus the employer, finding that employee did not sustain any permanent disability, was not temporarily and totally disabled after June 1, 2003, and does not have a need for future medical care. Instead, the administrative law judge made an award of compensation versus the employer in Injury No. 03-125432. See *Award*, pages 10-11. In employer's Application for Review filed with the Commission, employer made clear that it was requesting Commission review of each injury number and of each date of injury.

Rather than issue a single award bearing two injury numbers, we are issuing a separate award for each case in order to make the record clear should the matter be appealed. In issuing our award herein, we wish to make clear we agree with the administrative law judge's findings and conclusions with respect to each of the issues pertinent to Injury No. 03-042115. We have issued a separate award addressing the issues pertinent to Injury No. 03-125432.

Employee: Willard R. Haag, deceased

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Having rendered the foregoing clarifications and comments, we attach and incorporate the award and decision of Administrative Law Judge Karen Wells Fisher, issued July 25, 2011, by this reference.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

**AWARD**

Employee:	Willard R. Haag	Injury Numbers: 03-125432 and 03-042115
Dependents:	Viola Louise Haag and Brittney Michelle Haag	
Employer:	Goodyear Tire & Robber/Wingfoot Commercial Tire Systems, LLC	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Liberty Mutual Insurance Company	
Hearing Date:	March 29, 2011	Checked by:

**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: Injury No. 03-042115 – May 12, 2003;  
Injury No. 03-125432 – August 22, 2003.
5. State location where accident occurred or occupational disease was contracted: Injury No.  
03-042115 – Newton County, Missouri; Injury No. 03-125432 – Jasper County, Missouri.
6. Was above Employee in employ of above Employer at time of alleged accident or  
occupational disease? Injury No. 03-042115 – Yes; Injury No. 03-125432 – Yes.
7. Did Employer receive proper notice? Injury No. 03-042115 – Yes; Injury No. 03-125432  
– Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?  
Injury No. 03-042115 – Yes; Injury No. 03-125432 – Yes.
9. Was claim for compensation filed within time required by Law? Injury No. 03-042115 –  
Yes; Injury No. 03-125432 – Yes.

10. Was Employer insured by above insurer? Injury No. 03-042115 – Yes; Injury No. 03-125432 – Yes.
11. Describe work Employee was doing and how accident occurred or occupational disease contracted: Injury No. 03-042115 – Working to loosen bolts on tandem alignment; Injury No. 03-125432 – Moving tractor wheel from tractor to service truck.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Low back and hip.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to date for temporary disability: Injury No. 03-042115 – \$0; Injury No. 03-125432 – \$176,225.87.
16. Value necessary medical aid paid to date by Employer/insurer? \$227,824.96.
17. Value necessary medical aid not furnished by Employer/insurer? \$0.
18. Employee's average weekly wages: Injury No. 03-042115 – \$793.05; Injury No. 03-125432 – \$904.24.
19. Weekly compensation rate: Injury No. 03-042115 – \$528.70 (TTD and PTD)/\$340.12 (PPD); Injury No. 03-125432 – \$602.83 (TTD and PTD)/\$347.05 (PPD).
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
  - a. Unpaid medical expenses: \$0.
  - b. Employer and Insurer are ordered to provide future medical care (see award).

- c. \$602.83 per week to be paid by Employer and Insurer to Viola Louise Haag and Brittney Michelle Haag, beginning June 2, 2009 and weekly thereafter for the lifetime of the longer to live of Viola Louise Haag or Brittney Michelle Haag.

TOTAL: UNDETERMINED

- 22. Second Injury Fund liability: No
- 23. Future requirements awarded: See above.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law. Any past due compensation shall bear interest as provided by law.

- 24. 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: Bruce A. Copeland

## FINDINGS OF FACT AND RULINGS OF LAW:

Employee:	Willard R. Haag	Injury Numbers: 03-125432 and 03-042115
Dependents:	Viola Louise Haag and Brittney Michelle Haag	
Employer:	Goodyear Tire & Robber/Wingfoot Commercial Tire Systems, LLC	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Liberty Mutual Insurance Company	
Hearing Date:	March 29, 2011	Checked by:

### AWARD ON HEARING

The Court has considered and hereby adopts as its own the proposed award as submitted by claimant.

The above-referenced workers' compensation claims were consolidated for hearing and were heard before the undersigned Administrative Law Judge on March 29, 2011. Mr. Haag appeared in person and with his attorney, Bruce A. Copeland. Employer and Insurer appeared through their attorney, James K. Blickhan. The Second Injury Fund appeared through its attorney, Christina M. Hammers. Prior to going on the record the parties agreed that the following issues needed to be determined by this Court:

1. The nature and extent of Willard R. Haag's permanent disability resulting from both the May 12, 2003 and August 22, 2003 injuries.
2. Whether Willard R. Haag sustained injuries that will require additional or future medical care in order to cure and relieve him from the effects of such injuries, and if so, the Employer's and Insurer's obligations to provide and pay for same.

3. Whether the Treasurer of Missouri, as custodian of the Second Injury Fund, is liable for payment of disability compensation resulting from either the May 12, 2003 or the August 22, 2003 injury.

4. The dependency status, and resulting entitlement to disability benefits, of Viola Louise Haag and Brittney Michelle Haag under Schoemehl v. Treasurer, 217 S.W.3d 900 (Mo. banc. 2007).

5. Whether Employer/Insurer should be liable for the whole cost of proceedings under §287.560 and, if so, in what amount.

6. Whether the Employer/Insurer are entitled to a credit of \$20,956.19 as overpayment of TTD benefits.

#### EVIDENCE PRESENTED

The Parties stipulated to the following facts:

1. On both May 12, 2003, and August 22, 2003, Goodyear Tire & Rubber/Wingfoot Commercial Tire Systems, LLC (“Employer”) was an employer operating under and subject to the Missouri Workers’ Compensation Law and on these dates was fully insured by Liberty Mutual Insurance Company (“Insurer”).

2. On both May 12, 2003, and August 22, 2003, Willard R. Haag (“Haag”) was an employee of the Employer and was working under and subject to the Missouri Workers’ Compensation Law.

3. On both May 12, 2003, and August 22, 2003, Haag sustained injuries as a result of accidents which arose out of and in the course and scope of his employment with Employer.

4. The above-referenced employment was at Employer's 233 Glendale Road, Joplin, MO 64804 location. Haag's May 12, 2003, accident occurred at Employer's address. Haag's August 22, 2003, accident occurred on a service call in rural Jasper County, Missouri. The parties agree to venue in Newton County, Missouri. Venue is proper.

5. Employer was properly notified of Haag's May 12, 2003, and August 22, 2003, injuries as required by Section 287.420, RSMo.

6. Haag's claims for compensation for both accidents were filed within the time prescribed by Section 287.430, RSMo. Specifically:

- a. Haag filed his Claim for Compensation (Claim #03-125432) for the injuries he had sustained in the August 22, 2003, accident on December 16, 2003; and
- b. Haag filed his Claim for Compensation (Claim #03-042115) for the injuries he had sustained in the May 12, 2003, accident on April 20, 2005.

7. Both of Haag's claims (#03-042115 and #03-125432) have been pending before the Division continuously since the dates they were filed by Haag.

8. As a result of Haag's May 12, 2003, injuries, Employer and Insurer provided to Haag temporary total disability benefits in the total amount of \$0.00.

9. As a result of Haag's August 22, 2003, injuries, Employer and Insurer have provided to Haag temporary total disability benefits in the total amount of \$176,225.87, with the last payment being for the period of time ending June 1, 2009.

10. Employer and Insurer have provided medical treatment to Haag for the injuries sustained by Haag on May 12, 2003, and August 22, 2003. The value of the necessary medical aid paid to date by Employer/Insurer for such injury totals \$227,824.96.

11. Haag's average weekly wages prior to the May 12, 2003, injury date were \$793.05.

12. Haag's average weekly wages prior to the August 22, 2003, injury date were \$904.24.

13. The weekly compensation rates for Haag's May 12, 2003, injury date are: \$528.70 (TTD & PTD) AND \$340.12 (PPD).

14. The weekly compensation rates for Haag's August 22, 2003, injury date are: \$602.83 (TTD & PTD) and \$347.05 (PPD).

15. Haag makes no claim for unpaid past medical care or expenses.

16. Haag obtained maximum medical improvement on June 1, 2009.

17. Should permanent total disability benefits be ordered, they should commence retroactive to June 2, 2009.

Willard R. Haag testified in person at the hearing. I found his testimony to be both credible and persuasive and accept same as true and accurate. In addition to his testimony he offered the following exhibits which were admitted into evidence:

- A. Norbert T. Belz, M.D. IME (including all records reviewed by Dr. Belz) and CV
- B. Phillip Eldred, M.S., C.R.C., Rehabilitation Evaluation Report and CV
- G. Wingfoot Pay Stubs (5/31/03 – 8/23/03) & Summary
- H. Marriage License
- I. Brittney's Birth Certificate

- J. Wingfoot Pay Stubs (8/24/03 – 9/6/03)
- K. Photo of Bill (stimulator)
- L. Request for Emergency Hardship (12/16/03)
- M. Letters re: Initial Denial of Medical Treatment & TTD (10/23/03 – 1/26/04)

	<u>Date</u>	<u>FROM</u>	<u>TO</u>
1.	10/23/03	Bruce Copeland	Bridget Gannon
2.	11/21/03	Copeland	Jim Blickhan
3.	11/21/03	Blickhan	Copeland
4.	01/06/04	Copeland	Blickhan
5.	01/12/04	Copeland	Blickhan
6.	01/23/04	Blickhan	Copeland
7.	01/23/04	Copeland	Blickhan
8.	01/26/04	Copeland	Blickhan
9.	01/26/04	Copeland	Blickhan

- N. Letters re: Unpaid Medical Bills/Delays in Authorizing Medical Care (2/11/04 – 2/1/06) BF

	<u>Date</u>	<u>FROM</u>	<u>TO</u>
1.	02/11/04	Copeland	Blickhan
2.	05/17/04	Copeland	Blickhan
3.	06/21/04	Copeland	Blickhan
4.	09/30/04	Copeland	Blickhan
5.	11/16/04	Copeland	Blickhan
6.	01/06/05	Copeland	Blickhan
7.	04/14/05	Copeland	Colleen O’Neill
8.	04/18/05	Copeland	O’Neill & Lynn Walker
9.	05/16/05	Copeland	O’Neill & Walker
10.	11/10/05	Copeland	Blickhan
11.	11/10/05	Copeland	Blickhan
12.	01/10/06	Copeland	Blickhan
13.	02/01/06	Copeland	Blickhan

- O. Second Request for Emergency Hardship Hearing (3/21/06)
- P. Letters re: Second Denial of TTD & Delays in Authorizing Medical Care (3/24/06 – 6/19/06)

	<u>Date</u>	<u>FROM</u>	<u>TO</u>
1.	03/24/06	Copeland	Blickhan
2.	03/30/06	Copeland	Blickhan
3.	03/31/06	Copeland	Blickhan
4.	05/22/06	Copeland	Blickhan
5.	06/19/06	Copeland	Blickhan

Q. Liberty Mutual TTD Pay Stubs (1/22/04 – 6/3/09)

R. Copeland & Brown Time & Expenses

U. Request for hearing

EE. Adoption decree

FF. Willard R. Haag Death Certificate (4/11/11)

As a result of Employee's counsel's motion filed April 21, 2011, Exhibit FF was admitted into evidence by order of this Court dated April 28, 2011 to supplement the record because of Willard R. Haag's April 11, 2011 death which occurred after the hearing but before this Award was entered.

Also, on April 21, 2011 counsel for Employee filed Suggestions of Death and a Motion for Substitution of Parties seeking to substitute Viola Louise Haag, individually, and as mother and natural guardian of Brittney Michelle Haag, for Haag for all purposes herein, which motion was amended following a conference among the Court and counsel regarding these issues. Consistent with the observations and decision of the Court of Appeals in Taylor v. Ballard R-II School District, 274 S.W.3d 629 (Mo. App. W.D. 2009), as well as that of the Supreme Court in Strait v. Treasurer of Missouri, 257 S.W.3d 600 (Mo. banc 2008), on May 13, 2011 this Court entered its Order Substituting Parties, ordering that Viola Louise Haag, both in her individual capacity and as the mother and natural guardian of the minor child Brittney Michelle Haag, be

substituted as parties in the place of Willard R. Haag, deceased, for all purposes in the claims asserted in Injury Nos. 03-042115 and 03-125432.

The Employer and Insurer did not present any witnesses at the hearing of this case. The Employer and Insurer, however, offered the following exhibits which the Court admitted into evidence:

1. Deposition of Jeffrey Woodward, M.D.
2. Deposition of Terry L. Cordray, M.S., CRC, CCM, ABVE
3. Stipulation for Compromise Settlement – September 1999
4. April 8, 2011 correspondence from James Blickhan enclosing multiple correspondence from Blickhan to Copeland dated April 28, 2006, May 2, 2006 and May 8, 2006.

The Second Injury Fund did not present any witnesses or offer any exhibits at the hearing of this case.

#### INJURY NO. 03-042115

Haag testified that he suffered an injury to his low back and hip on May 12, 2003 at Employer's place of business while working to loosen bolts on a tandem alignment. He testified that the Employer provided and paid for a medical examination, medications and physical therapy which he performed without missing any time from work during which period the Employer provided accommodation in the form of light duty assignments. Haag testified that when he was finished with the physical therapy he was able to return to his regular job activities and regularly worked overtime, experiencing no limitations of his work-related activities. Exhibit G includes copies of Haag's paystubs following his return to regular work activities which paystubs show, without exception, that Haag not only worked a full schedule of hours but

substantial amounts of overtime. Haag testified that he felt that he had fully recovered from the injuries he suffered on May 12, 2003, which enabled him to perform his regular work activities during the work periods represented in Exhibit G.

With regard to Haag's May 12, 2003 injury Dr. Belz opined that Haag reached maximum medical improvement from same by June 1, 2003, that he required no future medical for such injury, that he had no restrictions as a result of such injury and that he suffered no permanent partial disability from such injury. Dr. Woodward made no specific finding as to any disability suffered by Haag from the May 12, 2003 injury. Based on the evidence presented, I find that Haag suffered no permanent disability resulting from his May 12, 2003 injury, nor any temporary disability from such injury after June 1, 2003. As a result, I order no future medical care for the injuries suffered by Haag on May 12, 2003, and find no Second Injury Fund liability resulting from such injuries.

#### INJURY NO. 03-125432

Haag testified that he was 66 years of age at the time of the hearing, that his reading and arithmetic skills were the equivalent of a seventh grader and fifth grader respectively, and that the only job he had held since his early teens was that as a "tire man", the same position he held with Employer. Haag testified that he suffered an injury to his low back and hip on August 22, 2003, while on a service call for Employer in rural Jasper County, Missouri, when the large tractor tire he was attempting to remove and place on his truck started to fall over on him, causing such injury. Haag testified that he attempted to live and work through the injury but it became so severe and disabling that medical care was necessary. From September 2003 through May 2009, the Employer provided and paid for Haag's injury-necessitated medical treatment,

including medications, physical and radiological examinations, epidural injections, physical therapy, surgical implantation of an internal stimulator, and discectomy surgery at L4-5 and L5-S1 from the posterior with interbody fusion and instrumentation which was performed on February 18, 2005. However, by May 2006, Haag's neurosurgeon, Dr. Strang, concluded that the fusion had failed and that problems with the internal instrumentation made it imperative that the surgery be re-done. On July 26, 2006, Dr. Strang again performed discectomy surgery at L4-5 and L5-S1, this time from the anterior side, with new instrumentation and fusion. During such surgery Dr. Strang confirmed that the fusion had failed at L4-5, that there was inadequate fusion at L5-S1, that the hardware implementation had failed and that there had developed a spinal fluid fistula. After the 2006 surgery, Haag experienced a protracted and complicated post-operative course of treatment. Ultimately, on June 1, 2009, slightly less than six full years after Mr. Haag's injury, Dr. Strang determined that there was adequate fusion to declare Haag at maximum medical improvement.

### Disability

Haag testified regarding substantial disability and pain resulting from the August 22, 2003, injury, including inability to walk (not more than two minutes), stand (not more than thirty minutes) or sit upright (not more than thirty minutes without substantial discomfort), except for very limited periods of time, the need to recline frequently during the day, an inability to lift more than ten pounds from floor to knuckle, as well as an inability to run, jump, climb ladders or operate foot controls with his left foot. Haag indicated that he has constant pain in his left hip rating same as an 8-9 on a scale of 10, constant pain in his low back which he rated at a 7, and continuing problems with his left leg giving out, causing falls. Haag testified that because of his

pain and limitations, he spends approximately 12-14 hours per day in bed and most of the rest of the day in a reclining chair.

Dr. Belz stated that Haag suffered the following resulting from his August 22, 2003, work related injury: permanent left lower extremity radiculopathy with frequent give-out resulting in falls and near falls; persistent low back pain; failed back syndrome; adjacent segment disease; symptomatic spinal stenosis at L4-5 and L5-S1; 50% compression fracture of the T-12 vertebrae; 60% - 80% compression fracture of the L-3 vertebrae; instability at L4-5 and L5-S1; and spondylolisthesis. As a result of such injuries, Dr. Belz placed the following restrictions on Haag:

“As stated, the individual’s condition and diagnoses are best managed through very significant activity modifications.

The individual is not to lift in excess of 10 pounds. Proper body mechanics and biomechanics are to be utilized. The individual is to lift 0 pounds from floor level to knuckle level.

Mr. Haag is to be afforded a sit/stand/recline work station with symptom limited posture changes. The individual is required now to recline multiple times per day. On 4/4/06, Mr. Haag was required to recline four to five times during any shift. Now the individual is required to recline much more than that (see above).

The individual spends the majority of his day reclining full back in a recliner. Standing and walking about limited to 10 minutes. Seated upright in a padded chair with padded armrests no longer than 30 minutes and the ability to change position and/or recline.

Obviously the individual is not to run or jump as a condition of employment. The individual is not to function on ladders. The individual is not to function at unprotected heights.

The individual is not to operate foot controls with the left lower extremity. The individual is not to work in the vicinity of moving equipment such as forklifts or trucks. The individual is not to function on assembly lines with potential pinch points. The individual is not to be exposed to whole body vibrations such as operating an over-the-road 18 wheeler.”

Based upon his examinations of Haag and review of the medical records, which were introduced along with his report, Dr. Belz opined that Haag is permanently and totally disabled as a result of the August 22, 2003, injury alone, that his permanent and total disability is occupational and that his August 22, 2003, injuries, and limitations therefrom, make him unable to compete in the open labor market such that he is unable to be placed in the open labor market. With regard to disabilities associated with specific body parts, Dr. Belz opined that, “Mr. Haag demonstrates at least a ninety percent (90%) permanent partial disability to the body as a whole. This represents two failed multi-level fusions, L4-5 and L5-S1. These are rated a thirty-five percent (35%) to the body as a whole each. These would total seventy percent (70%) permanent partial disability to the body as a whole. Then referencing significant occupational compression fractures (T12 and L3), and referencing the adjacent segment disease (L3), and referencing the spinal fluid fistula with repair, and referencing the failed spinal cord stimulator permanent implant – then Mr. Haag demonstrates an additional twenty to thirty percent (20%-30%) permanent partial disability to the body as a whole. Each significant compression fracture (T12

and L3) would rate at least ten percent (10%) permanent partial disability to the body as a whole (range of each disability is ten percent to fifteen percent (10% – 15%). At the very least, this would be ninety percent (90%) permanent partial disability to the body as a whole. More realistically, this would represent one hundred percent (100%) permanent partial disability to the body as a whole (400-week level).”

Without examination of Haag, on February 2, 2006, more than three and a half months since he had last examined Haag on October 13, 2005 (at which time he did not find Haag to be at maximum medical improvement), while Haag was still under the treatment of Dr. Strang, and prior to Haag’s second back surgery, Dr. Woodward found Haag to be at maximum medical improvement, released him to return to “full-time modified work duties with the following permanent restrictions: frequent lift, push, pull 0-50 lbs maximum. No other restrictions.” At the same time, Dr. Woodward recommended “a permanent partial impairment rating of 25% at the 400-week level for the work-related condition.” Dr. Woodward admitted that he so released and rated Haag at the Insurer’s request, despite knowledge that Haag was scheduled in March 2006 for a follow-up appointment with his treating neurosurgeon, Dr. Strang, because of Dr. Strang’s previously-expressed concern that the February 18, 2005 fusion was failing. Dr. Woodward admitted that releasing and rating Haag when he knew that Dr. Strang had scheduled Haag for a follow-up appointment out of concern for failure of the back surgery was not his normal practice. He further admitted that he so rated and released Haag because the Insurer had requested he do so.

Following Dr. Strang’s June 1, 2006, release of Haag after his second surgery on Haag’s back, Dr. Woodward again released and rated Haag, on June 26, 2009, finding that Haag had again reached maximum medical improvement and releasing him to “full time modified work

duties with continuous lift/pull/push 0-30 lbs maximum” and recommending “a permanent partial impairment and disability rating of 18% at the 400-week level for the work-related condition superimposed on an 8% pre-existing rating.” Notwithstanding such rating, Dr. Woodward admitted that it was his opinion that Haag suffered from failed back syndrome and that if he were to base his disability rating on the most recent limitations Dr. Strang had placed on Haag rather than those he assigned to Haag, he would rate Haag at 90 to 100% disability.

Phillip Eldred conducted a rehabilitation evaluation of Haag for the purposes of this case. Based upon Eldred’s examination, assessments and testing of Haag, his history taken from Haag, his review of Haag’s medical records and his review of the independent medical examinations of Dr. Belz, and after consideration of the restrictions and limitations placed upon Haag by both Dr. Woodward and Dr. Belz, Eldred concluded that Haag did not have an impairment which was vocationally disabling such as to constitute a hindrance or obstacle to employment before August 22, 2003, that Haag is now unable to perform any of his past work, that Haag is unemployable in the open labor market, that it is highly unlikely that any reasonable employer in the normal course of business would hire Haag for competitive, gainful employment, that Haag has no transferable work skills for the sedentary work level even if he could perform work at the sedentary work level, that Haag has no transferable work skills for the light work level even if he could perform work at the light work level, that Haag would have problems being retrained in a formal training program due to his constant pain and low academic test scores and that Haag is permanently and totaling disabled as a result of his injury on August 22, 2003, in isolation.

Terry Cordray also conducted a rehabilitation evaluation of Haag for the purposes of this case. While Mr. Cordray did not do any vocational testing of Haag, he did interview Haag and review the medical records and the restrictions and limitations placed on Haag by Dr. Woodward

and Dr. Belz. Mr. Cordray's opinion was that if he adopts Dr. Belz' limitations and restrictions placed on Mr. Haag, that Haag is incapable of employment, and that no employer would hire Mr. Haag even for unskilled labor, and that Haag is permanently and totally disabled. On the other hand, it is Mr. Cordray's opinion that if he adopts Dr. Woodward's restrictions, Haag is employable. Mr. Cordray testified that he felt that it was not his role to adopt either set of restrictions/limitations, that such was a function for the Court, with his role to be solely as to opine as to Haag's employability under the different sets of limitations/restrictions provided to him.

Upon consideration of all the evidence germane to Haag's disability, I find Dr. Woodward's opinions regarding Haag's limitations, restrictions and disability to be not credible, particularly in light of his testimony elicited on cross-examination regarding these and other issues. I find the evaluation and opinions of Dr. Belz to be persuasive. I find the limitations and restrictions imposed by Dr. Belz to be both reasonable and necessary. Based upon the limitations and restrictions Dr. Belz placed on Haag, both Mr. Eldred and Mr. Cordray opined that Haag is unemployable and, therefore, permanently and totally disabled. Accordingly, I find that Haag was permanently and totally disabled as a result of his last injury alone, specifically his work-related injury suffered on August 22, 2003. Based upon the parties' stipulations regarding maximum medical improvement and the proper effective date of permanent total disability benefits, I therefore order the Employer and Insurer to pay permanent total disability benefits in the amount of \$602.83 per week beginning, and retroactive to, June 2, 2009.

#### Schoemehl Benefits

Submitted to this Court for determination is the claim that Viola Louise Haag and Brittney Michelle Haag were dependents of Willard R. Haag such that they are entitled to receive continuing permanent total disability benefits in the event of Willard R. Haag's death from causes unrelated to his injuries which are the subject of the above-referenced claims, as provided for in Schoemehl v. Treasurer of the State, 217 S.W.3d 900 (Mo. 2007). See Exhibit U.

Haag filed his Claim for Compensation (Claim No. 03-125432) on December 16, 2003 for the injuries he sustained in the August 22, 2003 work-related accident. Such claim has been pending continuously from that date to the date of this award. I therefore find that Haag's Claim No. 03-125432 for injuries sustained on August 22, 2003 was pending (and that no final award on such claim had been made) during the entire period of time between the Supreme Court's Schoemehl decision (January 9, 2007) and the statutory revisions abrogating Schoemehl (June 26, 2008), as well as on the date of Haag's death, April 11, 2011. As a result, the rule announced by the Supreme Court in Schoemehl applies to this claim.

As set forth above, I have found that Haag was permanently and totally disabled solely because of the work-related injuries he suffered on August 22, 2003 which are the subject of this claim (03-125432). I also find that Haag had not recovered from the disabilities resulting from such injuries.

Haag died on April 11, 2011 while this claim was still pending and before a final award had been entered. The cause of Haag's death was metastatic non-small cell lung cancer. See Exhibit FF. I find that Haag's death ensued from a cause not resulting from the August 22, 2003 injuries which are the subject of Haag's claim herein.

Based upon Haag's uncontradicted testimony, and Exhibits H, I, EE and G confirming such testimony, I find that both Viola Louise Haag and Brittney Michelle Haag were Haag's

relatives by marriage who were actually dependent for their support upon Haag's wages both at the time of Haag's August 22, 2003 work-related injury and at the time of his death. Viola Louise Haag had been Haag's wife since August 30, 1991. Brittney Michelle Haag was Viola Louise Haag's granddaughter, and therefore related to Haag by marriage, and had been living continuously with Haag since February 28, 2003 for the purpose of adoption, which adoption was granted on March 28, 2005. Both Viola Louise Haag and Brittney Michelle Haag were living in the home provided by Haag prior to, on, and after Haag's work-related injuries of August 22, 2003. Haag's wages were used to support Viola Louise Haag and Brittney Michelle Haag by paying for housing, utilities, food, clothing, transportation and other living expenses.

Section 287.240(4) provides:

“The word “**dependent**” as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury.”

The Supreme Court, in Schoemehl, has found that the provision set forth above governs the issue of dependency in permanent total disability cases where the employee dies from causes other than the injuries sustained at work. The sentence of §287.240 set forth above, by its express terms, has chapter-wide applicability, while the other provisions of §287.240, by their express terms, relate only to cases involving death benefits. Because this is a case regarding permanent total disability benefits, and not one involving death benefits, the only provision of §287.240 applicable to this case is that set forth above, a point confirmed by the Supreme Court's reference to only the above provision of §287.240 in Schoemehl, which, like this case, dealt with permanent total disability benefits and not with death benefits.

Based on the above, I find that both Viola Louise Haag and Brittney Michelle Haag were dependents of Haag, as defined in §287.240(4), at the time of Haag's August 22, 2003 work-related injury and at the time of his death. In addition, I find that both Viola Louise Haag and Brittney Michelle Haag survived Haag's death.

Under the rule announced in Schoemehl, I find that Haag's right to compensation for both accrued and unaccrued permanent total disability benefits survives to Viola Louise Haag and Brittney Michelle Haag because they were dependents at the time of Haag's August 22, 2003 work-related injury who survived Haag's death and are therefore properly substituted parties for the purposes of workers' compensation benefits entitled to the employee's permanent total disability benefit for their lifetimes. Therefore, I order that the Employer and Insurer pay to Viola Louise Haag and Brittney Michelle Haag permanent total disability benefits in the amount of \$602.83 per week beginning, and retroactive to, June 2, 2009 and weekly thereafter for the lifetime of the longer to live of Viola Louise Haag or Brittney Michelle Haag.

### Second Injury Fund Liability

As indicated above, I have found that Haag suffered no permanent disability resulting from his May 12, 2003 injury and have found that Haag was permanently and totally disabled as a result of his last injury alone, specifically his work-related injury suffered on August 22, 2003. As a result, I find no Second Injury Fund liability on either Injury #03-042115 or Injury #03-125432.

### Future Medical

Haag makes no claim for unpaid past medical care or expenses, but does make a claim for future medical care. Based on the testimony of Haag and the opinions of Dr. Belz, which I find to be persuasive, I order that the Employer and Insurer provide Haag with such additional and future medical care as is necessary to cure and relieve him in the effects of his work-related injuries suffered on August 22, 2003, from the date of this Court's hearing, March 29, 2011, through the date of Haag's death, April 11, 2011.

#### TTD Credit

Employer and Insurer claim that they are entitled to a credit for overpaid TTD in the amount of \$20,956.19. This assertion is based on the contention that Haag's disability emanates from the May 12, 2003 injury and that his TTD compensation rate for such injury date was less than the \$600.00 per week TTD benefit paid by Employer/Insurer following Haag's August 22, 2003 injury. I have found that Haag suffered no permanent disability from his May 12, 2003 injury and no temporary disability from such injury after June 1, 2003. I also find that Haag's temporary total disability following his August 22, 2003 injury was the sole result of his work-related injury suffered on August 22, 2003. I also find the evidence to be that following Haag's August 22, 2003 injury Employer and Insurer paid TTD benefits to Haag in the amount of \$600.00 per week rather than \$602.83 per week which is the TTD rate for the August 22, 2003 injury stipulated to by the parties. Notwithstanding such difference, it appears from the evidence that Haag makes no claim for underpaid TTD benefits associated with his August 22, 2003 work-related injury. Based on the above, I deny Employer's and Insurer's claim for a credit for overpaid temporary total disability benefits.

Whole Cost of the Proceedings.

Haag submitted voluminous documentary evidence and extensive testimony in support of his claim for whole cost of the proceedings penalties under §287.560. Employer/Insurer argues that the whole cost of the proceedings issues were fully resolved by settlement in 2006. After careful consideration of all of the evidence submitted by the parties on this issue, I deny Haag's claim for whole cost of the proceedings benefits under §287.560.

Attorney Fees

Claimant's attorney, Bruce A. Copeland, seeks an attorney's fee of 25 percent. I find that that is a reasonable request. I allow Claimant's attorney, Bruce A. Copeland, an attorney's fee of 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Interest on this award is as provided by law is applicable.

Date: July 25, 2011

/s/ Karen Wells Fisher  
Karen Wells Fisher  
Administrative Law Judge

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

Injury No.: 03-125432

Employee: Willard R. Haag, deceased  
Substitute Party: Viola Louise Haag, widow  
Dependent: Brittney Michelle Haag, dependent daughter  
Employer: Goodyear Tire & Rubber/Wingfoot Commercial Tire Systems, LLC  
Insurer: Liberty Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

On appeal before this Commission, the employer argues that the administrative law judge erred in awarding benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007) to employee's dependents. Among other grounds for challenging the award of benefits under *Schoemehl*, employer argues that the divestment provisions applicable to death benefits under § 287.240(4) RSMo are applicable here and that they preclude a lifetime award of benefits under *Schoemehl* to employee's dependents. Employer asks that, in the event we affirm the administrative law judge's award of benefits under *Schoemehl*, we modify the administrative law judge's findings to provide that benefits under *Schoemehl* are subject to revocation under § 287.240(4).

We write this supplemental opinion to note the decision by the Missouri Court of Appeals, Southern District, in *Spradling v. Treasurer of Missouri*, SD31907 (April 24, 2013). There, the court addressed an appeal arguing that the Commission erred in awarding permanent total disability benefits under *Schoemehl* to a deceased employee's dependents "for life." *Id.* at pg. \*3. The Court determined that the Commission did not err because *Schoemehl* "require[s] compensation be paid for permanent total disability not only over the lifetime of [the employee], but also over the lifetime of any of his surviving dependents." *Id.* at pg. \*8.

We conclude that the holding in *Spradling* is dispositive of employer's argument herein regarding the application of the divestment provisions under § 287.240(4) RSMo. In light of the holding in *Spradling*, we will not disturb the administrative law judge's award

Employee: Willard R. Haag, deceased

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granting weekly permanent total disability benefits under *Schoemehl* to Viola Haag for her lifetime and to Brittney Michelle Haag for her lifetime.

**Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued July 25, 2011, is attached and incorporated by this reference.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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DISSENTING OPINION FILED  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Willard R. Haag, deceased

### **DISSENTING IN PART**

First, I wish to voice my agreement with certain of the views expressed by Presiding Judge Gary W. Lynch in the case of *Spradling v. Treasurer of Missouri*, SD31907 (April 24, 2013). Writing separately, Judge Lynch drew attention to the absurdity of providing lifetime benefits under the Missouri Workers' Compensation Law to the family of an employee whose death has nothing to do with work, where the same family would receive far less compensation if the employee had died as a result of the work injury:

One of the two rationales stated in *Schoemehl* ... was to prevent the "unreasonable result" of allowing surviving dependents to receive permanent *partial* disability benefits but not permanent *total* disability benefits. *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 903 (Mo. banc 2007). I write separately to lament that our constitutional obligation to follow *Schoemehl*, MO. CONST. art. V, § 2 (1945), now requires this Court to affirm what I consider to be the unreasonable result of awarding lifetime benefits to surviving dependents where the employee's death was *unrelated* to the work injury, when the surviving dependents would have only received benefits during the time of their dependency if the employee's death had been *caused* by the work injury.

*Spradling v. Treasurer of Missouri*, SD31907 (April 24, 2013) (Lynch, P.J., concurring) at pg. \*15.

Before issuance of the *Spradling* decision, I was of the belief that *Gervich v. Condaire, Inc.*, 370 S.W.3d 617 (Mo. 2012) and *White v. Univ. of Mo.*, 375 S.W.3d 908 (Mo. App. 2012) provided ample authority for reading § 287.240(4) RSMo in such a way as to prevent the unreasonable result identified by Judge Lynch. But in light of the holding in *Spradling*, which I agree is dispositive of the issue whether the divestment provisions under § 287.240(4) are applicable to an award of *Schoemehl* benefits, I must reluctantly join in the majority's decision to affirm the administrative law judge's award of lifetime permanent total disability benefits to employee's dependent widow, Viola Louise Haag.

I dissent, however, from the decision to award such benefits to Brittney Michelle Haag, because she is not a conclusively presumed total dependent under the Missouri Workers' Compensation Law. Section 287.240(4) RSMo defines a dependent, as follows:

The word "dependent" as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:

- (a) A wife upon a husband with whom she lives or who is legally liable

Employee: Willard R. Haag, deceased

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for her support, and a husband upon a wife with whom he lives or who is legally liable for his support; ...

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent legally liable for the support or with whom he, she, or they are living at the time of the death of the parent.

Dependency is determined at the time of the work injury. *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 622 (Mo. 2012). Brittney Michelle Haag is Viola Louise Haag's granddaughter. She is not employee's natural child. At the time of the work injury in this case, employee was not the legal guardian of Brittney Michelle Haag, and he had not adopted her. Accordingly, unlike Viola Louise Haag, Brittney Michelle Haag does not fall within the definition of a conclusively presumed total dependent for purposes of § 287.240(4). Because the statute provides that benefits are payable to conclusively presumed total dependents "to the exclusion of other total dependents," only Viola Louise Haag is entitled to permanent total disability benefits in this case.

I disagree with the majority's choice to overlook the plain language of § 287.240(4) defining a conclusively presumed total dependent for purposes of the Missouri Workers' Compensation Law. I conclude that, at the time of the work injury, Brittney Michelle Haag was not a conclusively presumed total dependent of the employee. I would modify the decision of the administrative law judge to vacate the award of lifetime permanent total disability benefits to Brittney Michelle Haag.

Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

**AWARD**

Employee:	Willard R. Haag	Injury Numbers: 03-125432 and 03-042115
Dependents:	Viola Louise Haag and Brittney Michelle Haag	
Employer:	Goodyear Tire & Robber/Wingfoot Commercial Tire Systems, LLC	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Liberty Mutual Insurance Company	
Hearing Date:	March 29, 2011	Checked by:

**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: Injury No. 03-042115 – May 12, 2003;  
Injury No. 03-125432 – August 22, 2003.
5. State location where accident occurred or occupational disease was contracted: Injury No.  
03-042115 – Newton County, Missouri; Injury No. 03-125432 – Jasper County, Missouri.
6. Was above Employee in employ of above Employer at time of alleged accident or  
occupational disease? Injury No. 03-042115 – Yes; Injury No. 03-125432 – Yes.
7. Did Employer receive proper notice? Injury No. 03-042115 – Yes; Injury No. 03-125432  
– Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?  
Injury No. 03-042115 – Yes; Injury No. 03-125432 – Yes.
9. Was claim for compensation filed within time required by Law? Injury No. 03-042115 –  
Yes; Injury No. 03-125432 – Yes.

10. Was Employer insured by above insurer? Injury No. 03-042115 – Yes; Injury No. 03-125432 – Yes.
11. Describe work Employee was doing and how accident occurred or occupational disease contracted: Injury No. 03-042115 – Working to loosen bolts on tandem alignment; Injury No. 03-125432 – Moving tractor wheel from tractor to service truck.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Low back and hip.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to date for temporary disability: Injury No. 03-042115 – \$0; Injury No. 03-125432 – \$176,225.87.
16. Value necessary medical aid paid to date by Employer/insurer? \$227,824.96.
17. Value necessary medical aid not furnished by Employer/insurer? \$0.
18. Employee's average weekly wages: Injury No. 03-042115 – \$793.05; Injury No. 03-125432 – \$904.24.
19. Weekly compensation rate: Injury No. 03-042115 – \$528.70 (TTD and PTD)/\$340.12 (PPD); Injury No. 03-125432 – \$602.83 (TTD and PTD)/\$347.05 (PPD).
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
  - a. Unpaid medical expenses: \$0.
  - b. Employer and Insurer are ordered to provide future medical care (see award).

- c. \$602.83 per week to be paid by Employer and Insurer to Viola Louise Haag and Brittney Michelle Haag, beginning June 2, 2009 and weekly thereafter for the lifetime of the longer to live of Viola Louise Haag or Brittney Michelle Haag.

TOTAL: UNDETERMINED

- 22. Second Injury Fund liability: No
- 23. Future requirements awarded: See above.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law. Any past due compensation shall bear interest as provided by law.

- 24. 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: Bruce A. Copeland

## FINDINGS OF FACT AND RULINGS OF LAW:

Employee:	Willard R. Haag	Injury Numbers: 03-125432 and 03-042115
Dependents:	Viola Louise Haag and Brittney Michelle Haag	
Employer:	Goodyear Tire & Robber/Wingfoot Commercial Tire Systems, LLC	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Liberty Mutual Insurance Company	
Hearing Date:	March 29, 2011	Checked by:

### AWARD ON HEARING

The Court has considered and hereby adopts as its own the proposed award as submitted by claimant.

The above-referenced workers' compensation claims were consolidated for hearing and were heard before the undersigned Administrative Law Judge on March 29, 2011. Mr. Haag appeared in person and with his attorney, Bruce A. Copeland. Employer and Insurer appeared through their attorney, James K. Blickhan. The Second Injury Fund appeared through its attorney, Christina M. Hammers. Prior to going on the record the parties agreed that the following issues needed to be determined by this Court:

1. The nature and extent of Willard R. Haag's permanent disability resulting from both the May 12, 2003 and August 22, 2003 injuries.
2. Whether Willard R. Haag sustained injuries that will require additional or future medical care in order to cure and relieve him from the effects of such injuries, and if so, the Employer's and Insurer's obligations to provide and pay for same.

3. Whether the Treasurer of Missouri, as custodian of the Second Injury Fund, is liable for payment of disability compensation resulting from either the May 12, 2003 or the August 22, 2003 injury.

4. The dependency status, and resulting entitlement to disability benefits, of Viola Louise Haag and Brittney Michelle Haag under Schoemehl v. Treasurer, 217 S.W.3d 900 (Mo. banc. 2007).

5. Whether Employer/Insurer should be liable for the whole cost of proceedings under §287.560 and, if so, in what amount.

6. Whether the Employer/Insurer are entitled to a credit of \$20,956.19 as overpayment of TTD benefits.

#### EVIDENCE PRESENTED

The Parties stipulated to the following facts:

1. On both May 12, 2003, and August 22, 2003, Goodyear Tire & Rubber/Wingfoot Commercial Tire Systems, LLC (“Employer”) was an employer operating under and subject to the Missouri Workers’ Compensation Law and on these dates was fully insured by Liberty Mutual Insurance Company (“Insurer”).

2. On both May 12, 2003, and August 22, 2003, Willard R. Haag (“Haag”) was an employee of the Employer and was working under and subject to the Missouri Workers’ Compensation Law.

3. On both May 12, 2003, and August 22, 2003, Haag sustained injuries as a result of accidents which arose out of and in the course and scope of his employment with Employer.

4. The above-referenced employment was at Employer's 233 Glendale Road, Joplin, MO 64804 location. Haag's May 12, 2003, accident occurred at Employer's address. Haag's August 22, 2003, accident occurred on a service call in rural Jasper County, Missouri. The parties agree to venue in Newton County, Missouri. Venue is proper.

5. Employer was properly notified of Haag's May 12, 2003, and August 22, 2003, injuries as required by Section 287.420, RSMo.

6. Haag's claims for compensation for both accidents were filed within the time prescribed by Section 287.430, RSMo. Specifically:

- a. Haag filed his Claim for Compensation (Claim #03-125432) for the injuries he had sustained in the August 22, 2003, accident on December 16, 2003; and
- b. Haag filed his Claim for Compensation (Claim #03-042115) for the injuries he had sustained in the May 12, 2003, accident on April 20, 2005.

7. Both of Haag's claims (#03-042115 and #03-125432) have been pending before the Division continuously since the dates they were filed by Haag.

8. As a result of Haag's May 12, 2003, injuries, Employer and Insurer provided to Haag temporary total disability benefits in the total amount of \$0.00.

9. As a result of Haag's August 22, 2003, injuries, Employer and Insurer have provided to Haag temporary total disability benefits in the total amount of \$176,225.87, with the last payment being for the period of time ending June 1, 2009.

10. Employer and Insurer have provided medical treatment to Haag for the injuries sustained by Haag on May 12, 2003, and August 22, 2003. The value of the necessary medical aid paid to date by Employer/Insurer for such injury totals \$227,824.96.

11. Haag's average weekly wages prior to the May 12, 2003, injury date were \$793.05.

12. Haag's average weekly wages prior to the August 22, 2003, injury date were \$904.24.

13. The weekly compensation rates for Haag's May 12, 2003, injury date are: \$528.70 (TTD & PTD) AND \$340.12 (PPD).

14. The weekly compensation rates for Haag's August 22, 2003, injury date are: \$602.83 (TTD & PTD) and \$347.05 (PPD).

15. Haag makes no claim for unpaid past medical care or expenses.

16. Haag obtained maximum medical improvement on June 1, 2009.

17. Should permanent total disability benefits be ordered, they should commence retroactive to June 2, 2009.

Willard R. Haag testified in person at the hearing. I found his testimony to be both credible and persuasive and accept same as true and accurate. In addition to his testimony he offered the following exhibits which were admitted into evidence:

- A. Norbert T. Belz, M.D. IME (including all records reviewed by Dr. Belz) and CV
- B. Phillip Eldred, M.S., C.R.C., Rehabilitation Evaluation Report and CV
- G. Wingfoot Pay Stubs (5/31/03 – 8/23/03) & Summary
- H. Marriage License
- I. Brittney's Birth Certificate

- J. Wingfoot Pay Stubs (8/24/03 – 9/6/03)
- K. Photo of Bill (stimulator)
- L. Request for Emergency Hardship (12/16/03)
- M. Letters re: Initial Denial of Medical Treatment & TTD (10/23/03 – 1/26/04)

	<u>Date</u>	<u>FROM</u>	<u>TO</u>
1.	10/23/03	Bruce Copeland	Bridget Gannon
2.	11/21/03	Copeland	Jim Blickhan
3.	11/21/03	Blickhan	Copeland
4.	01/06/04	Copeland	Blickhan
5.	01/12/04	Copeland	Blickhan
6.	01/23/04	Blickhan	Copeland
7.	01/23/04	Copeland	Blickhan
8.	01/26/04	Copeland	Blickhan
9.	01/26/04	Copeland	Blickhan

- N. Letters re: Unpaid Medical Bills/Delays in Authorizing Medical Care (2/11/04 – 2/1/06) BF

	<u>Date</u>	<u>FROM</u>	<u>TO</u>
1.	02/11/04	Copeland	Blickhan
2.	05/17/04	Copeland	Blickhan
3.	06/21/04	Copeland	Blickhan
4.	09/30/04	Copeland	Blickhan
5.	11/16/04	Copeland	Blickhan
6.	01/06/05	Copeland	Blickhan
7.	04/14/05	Copeland	Colleen O’Neill
8.	04/18/05	Copeland	O’Neill & Lynn Walker
9.	05/16/05	Copeland	O’Neill & Walker
10.	11/10/05	Copeland	Blickhan
11.	11/10/05	Copeland	Blickhan
12.	01/10/06	Copeland	Blickhan
13.	02/01/06	Copeland	Blickhan

- O. Second Request for Emergency Hardship Hearing (3/21/06)
- P. Letters re: Second Denial of TTD & Delays in Authorizing Medical Care (3/24/06 – 6/19/06)

	<u>Date</u>	<u>FROM</u>	<u>TO</u>
1.	03/24/06	Copeland	Blickhan
2.	03/30/06	Copeland	Blickhan
3.	03/31/06	Copeland	Blickhan
4.	05/22/06	Copeland	Blickhan
5.	06/19/06	Copeland	Blickhan

Q. Liberty Mutual TTD Pay Stubs (1/22/04 – 6/3/09)

R. Copeland & Brown Time & Expenses

U. Request for hearing

EE. Adoption decree

FF. Willard R. Haag Death Certificate (4/11/11)

As a result of Employee's counsel's motion filed April 21, 2011, Exhibit FF was admitted into evidence by order of this Court dated April 28, 2011 to supplement the record because of Willard R. Haag's April 11, 2011 death which occurred after the hearing but before this Award was entered.

Also, on April 21, 2011 counsel for Employee filed Suggestions of Death and a Motion for Substitution of Parties seeking to substitute Viola Louise Haag, individually, and as mother and natural guardian of Brittney Michelle Haag, for Haag for all purposes herein, which motion was amended following a conference among the Court and counsel regarding these issues. Consistent with the observations and decision of the Court of Appeals in Taylor v. Ballard R-II School District, 274 S.W.3d 629 (Mo. App. W.D. 2009), as well as that of the Supreme Court in Strait v. Treasurer of Missouri, 257 S.W.3d 600 (Mo. banc 2008), on May 13, 2011 this Court entered its Order Substituting Parties, ordering that Viola Louise Haag, both in her individual capacity and as the mother and natural guardian of the minor child Brittney Michelle Haag, be

substituted as parties in the place of Willard R. Haag, deceased, for all purposes in the claims asserted in Injury Nos. 03-042115 and 03-125432.

The Employer and Insurer did not present any witnesses at the hearing of this case. The Employer and Insurer, however, offered the following exhibits which the Court admitted into evidence:

1. Deposition of Jeffrey Woodward, M.D.
2. Deposition of Terry L. Cordray, M.S., CRC, CCM, ABVE
3. Stipulation for Compromise Settlement – September 1999
4. April 8, 2011 correspondence from James Blickhan enclosing multiple correspondence from Blickhan to Copeland dated April 28, 2006, May 2, 2006 and May 8, 2006.

The Second Injury Fund did not present any witnesses or offer any exhibits at the hearing of this case.

#### INJURY NO. 03-042115

Haag testified that he suffered an injury to his low back and hip on May 12, 2003 at Employer's place of business while working to loosen bolts on a tandem alignment. He testified that the Employer provided and paid for a medical examination, medications and physical therapy which he performed without missing any time from work during which period the Employer provided accommodation in the form of light duty assignments. Haag testified that when he was finished with the physical therapy he was able to return to his regular job activities and regularly worked overtime, experiencing no limitations of his work-related activities. Exhibit G includes copies of Haag's paystubs following his return to regular work activities which paystubs show, without exception, that Haag not only worked a full schedule of hours but

substantial amounts of overtime. Haag testified that he felt that he had fully recovered from the injuries he suffered on May 12, 2003, which enabled him to perform his regular work activities during the work periods represented in Exhibit G.

With regard to Haag's May 12, 2003 injury Dr. Belz opined that Haag reached maximum medical improvement from same by June 1, 2003, that he required no future medical for such injury, that he had no restrictions as a result of such injury and that he suffered no permanent partial disability from such injury. Dr. Woodward made no specific finding as to any disability suffered by Haag from the May 12, 2003 injury. Based on the evidence presented, I find that Haag suffered no permanent disability resulting from his May 12, 2003 injury, nor any temporary disability from such injury after June 1, 2003. As a result, I order no future medical care for the injuries suffered by Haag on May 12, 2003, and find no Second Injury Fund liability resulting from such injuries.

#### INJURY NO. 03-125432

Haag testified that he was 66 years of age at the time of the hearing, that his reading and arithmetic skills were the equivalent of a seventh grader and fifth grader respectively, and that the only job he had held since his early teens was that as a "tire man", the same position he held with Employer. Haag testified that he suffered an injury to his low back and hip on August 22, 2003, while on a service call for Employer in rural Jasper County, Missouri, when the large tractor tire he was attempting to remove and place on his truck started to fall over on him, causing such injury. Haag testified that he attempted to live and work through the injury but it became so severe and disabling that medical care was necessary. From September 2003 through May 2009, the Employer provided and paid for Haag's injury-necessitated medical treatment,

including medications, physical and radiological examinations, epidural injections, physical therapy, surgical implantation of an internal stimulator, and discectomy surgery at L4-5 and L5-S1 from the posterior with interbody fusion and instrumentation which was performed on February 18, 2005. However, by May 2006, Haag's neurosurgeon, Dr. Strang, concluded that the fusion had failed and that problems with the internal instrumentation made it imperative that the surgery be re-done. On July 26, 2006, Dr. Strang again performed discectomy surgery at L4-5 and L5-S1, this time from the anterior side, with new instrumentation and fusion. During such surgery Dr. Strang confirmed that the fusion had failed at L4-5, that there was inadequate fusion at L5-S1, that the hardware implementation had failed and that there had developed a spinal fluid fistula. After the 2006 surgery, Haag experienced a protracted and complicated post-operative course of treatment. Ultimately, on June 1, 2009, slightly less than six full years after Mr. Haag's injury, Dr. Strang determined that there was adequate fusion to declare Haag at maximum medical improvement.

### Disability

Haag testified regarding substantial disability and pain resulting from the August 22, 2003, injury, including inability to walk (not more than two minutes), stand (not more than thirty minutes) or sit upright (not more than thirty minutes without substantial discomfort), except for very limited periods of time, the need to recline frequently during the day, an inability to lift more than ten pounds from floor to knuckle, as well as an inability to run, jump, climb ladders or operate foot controls with his left foot. Haag indicated that he has constant pain in his left hip rating same as an 8-9 on a scale of 10, constant pain in his low back which he rated at a 7, and continuing problems with his left leg giving out, causing falls. Haag testified that because of his

pain and limitations, he spends approximately 12-14 hours per day in bed and most of the rest of the day in a reclining chair.

Dr. Belz stated that Haag suffered the following resulting from his August 22, 2003, work related injury: permanent left lower extremity radiculopathy with frequent give-out resulting in falls and near falls; persistent low back pain; failed back syndrome; adjacent segment disease; symptomatic spinal stenosis at L4-5 and L5-S1; 50% compression fracture of the T-12 vertebrae; 60% - 80% compression fracture of the L-3 vertebrae; instability at L4-5 and L5-S1; and spondylolisthesis. As a result of such injuries, Dr. Belz placed the following restrictions on Haag:

“As stated, the individual’s condition and diagnoses are best managed through very significant activity modifications.

The individual is not to lift in excess of 10 pounds. Proper body mechanics and biomechanics are to be utilized. The individual is to lift 0 pounds from floor level to knuckle level.

Mr. Haag is to be afforded a sit/stand/recline work station with symptom limited posture changes. The individual is required now to recline multiple times per day. On 4/4/06, Mr. Haag was required to recline four to five times during any shift. Now the individual is required to recline much more than that (see above).

The individual spends the majority of his day reclining full back in a recliner. Standing and walking about limited to 10 minutes. Seated upright in a padded chair with padded armrests no longer than 30 minutes and the ability to change position and/or recline.

Obviously the individual is not to run or jump as a condition of employment. The individual is not to function on ladders. The individual is not to function at unprotected heights.

The individual is not to operate foot controls with the left lower extremity. The individual is not to work in the vicinity of moving equipment such as forklifts or trucks. The individual is not to function on assembly lines with potential pinch points. The individual is not to be exposed to whole body vibrations such as operating an over-the-road 18 wheeler.”

Based upon his examinations of Haag and review of the medical records, which were introduced along with his report, Dr. Belz opined that Haag is permanently and totally disabled as a result of the August 22, 2003, injury alone, that his permanent and total disability is occupational and that his August 22, 2003, injuries, and limitations therefrom, make him unable to compete in the open labor market such that he is unable to be placed in the open labor market. With regard to disabilities associated with specific body parts, Dr. Belz opined that, “Mr. Haag demonstrates at least a ninety percent (90%) permanent partial disability to the body as a whole. This represents two failed multi-level fusions, L4-5 and L5-S1. These are rated a thirty-five percent (35%) to the body as a whole each. These would total seventy percent (70%) permanent partial disability to the body as a whole. Then referencing significant occupational compression fractures (T12 and L3), and referencing the adjacent segment disease (L3), and referencing the spinal fluid fistula with repair, and referencing the failed spinal cord stimulator permanent implant – then Mr. Haag demonstrates an additional twenty to thirty percent (20%-30%) permanent partial disability to the body as a whole. Each significant compression fracture (T12

and L3) would rate at least ten percent (10%) permanent partial disability to the body as a whole (range of each disability is ten percent to fifteen percent (10% – 15%). At the very least, this would be ninety percent (90%) permanent partial disability to the body as a whole. More realistically, this would represent one hundred percent (100%) permanent partial disability to the body as a whole (400-week level).”

Without examination of Haag, on February 2, 2006, more than three and a half months since he had last examined Haag on October 13, 2005 (at which time he did not find Haag to be at maximum medical improvement), while Haag was still under the treatment of Dr. Strang, and prior to Haag’s second back surgery, Dr. Woodward found Haag to be at maximum medical improvement, released him to return to “full-time modified work duties with the following permanent restrictions: frequent lift, push, pull 0-50 lbs maximum. No other restrictions.” At the same time, Dr. Woodward recommended “a permanent partial impairment rating of 25% at the 400-week level for the work-related condition.” Dr. Woodward admitted that he so released and rated Haag at the Insurer’s request, despite knowledge that Haag was scheduled in March 2006 for a follow-up appointment with his treating neurosurgeon, Dr. Strang, because of Dr. Strang’s previously-expressed concern that the February 18, 2005 fusion was failing. Dr. Woodward admitted that releasing and rating Haag when he knew that Dr. Strang had scheduled Haag for a follow-up appointment out of concern for failure of the back surgery was not his normal practice. He further admitted that he so rated and released Haag because the Insurer had requested he do so.

Following Dr. Strang’s June 1, 2006, release of Haag after his second surgery on Haag’s back, Dr. Woodward again released and rated Haag, on June 26, 2009, finding that Haag had again reached maximum medical improvement and releasing him to “full time modified work

duties with continuous lift/pull/push 0-30 lbs maximum” and recommending “a permanent partial impairment and disability rating of 18% at the 400-week level for the work-related condition superimposed on an 8% pre-existing rating.” Notwithstanding such rating, Dr. Woodward admitted that it was his opinion that Haag suffered from failed back syndrome and that if he were to base his disability rating on the most recent limitations Dr. Strang had placed on Haag rather than those he assigned to Haag, he would rate Haag at 90 to 100% disability.

Phillip Eldred conducted a rehabilitation evaluation of Haag for the purposes of this case. Based upon Eldred’s examination, assessments and testing of Haag, his history taken from Haag, his review of Haag’s medical records and his review of the independent medical examinations of Dr. Belz, and after consideration of the restrictions and limitations placed upon Haag by both Dr. Woodward and Dr. Belz, Eldred concluded that Haag did not have an impairment which was vocationally disabling such as to constitute a hindrance or obstacle to employment before August 22, 2003, that Haag is now unable to perform any of his past work, that Haag is unemployable in the open labor market, that it is highly unlikely that any reasonable employer in the normal course of business would hire Haag for competitive, gainful employment, that Haag has no transferable work skills for the sedentary work level even if he could perform work at the sedentary work level, that Haag has no transferable work skills for the light work level even if he could perform work at the light work level, that Haag would have problems being retrained in a formal training program due to his constant pain and low academic test scores and that Haag is permanently and totally disabled as a result of his injury on August 22, 2003, in isolation.

Terry Cordray also conducted a rehabilitation evaluation of Haag for the purposes of this case. While Mr. Cordray did not do any vocational testing of Haag, he did interview Haag and review the medical records and the restrictions and limitations placed on Haag by Dr. Woodward

and Dr. Belz. Mr. Cordray's opinion was that if he adopts Dr. Belz' limitations and restrictions placed on Mr. Haag, that Haag is incapable of employment, and that no employer would hire Mr. Haag even for unskilled labor, and that Haag is permanently and totally disabled. On the other hand, it is Mr. Cordray's opinion that if he adopts Dr. Woodward's restrictions, Haag is employable. Mr. Cordray testified that he felt that it was not his role to adopt either set of restrictions/limitations, that such was a function for the Court, with his role to be solely as to opine as to Haag's employability under the different sets of limitations/restrictions provided to him.

Upon consideration of all the evidence germane to Haag's disability, I find Dr. Woodward's opinions regarding Haag's limitations, restrictions and disability to be not credible, particularly in light of his testimony elicited on cross-examination regarding these and other issues. I find the evaluation and opinions of Dr. Belz to be persuasive. I find the limitations and restrictions imposed by Dr. Belz to be both reasonable and necessary. Based upon the limitations and restrictions Dr. Belz placed on Haag, both Mr. Eldred and Mr. Cordray opined that Haag is unemployable and, therefore, permanently and totally disabled. Accordingly, I find that Haag was permanently and totally disabled as a result of his last injury alone, specifically his work-related injury suffered on August 22, 2003. Based upon the parties' stipulations regarding maximum medical improvement and the proper effective date of permanent total disability benefits, I therefore order the Employer and Insurer to pay permanent total disability benefits in the amount of \$602.83 per week beginning, and retroactive to, June 2, 2009.

#### Schoemehl Benefits

Submitted to this Court for determination is the claim that Viola Louise Haag and Brittney Michelle Haag were dependents of Willard R. Haag such that they are entitled to receive continuing permanent total disability benefits in the event of Willard R. Haag's death from causes unrelated to his injuries which are the subject of the above-referenced claims, as provided for in Schoemehl v. Treasurer of the State, 217 S.W.3d 900 (Mo. 2007). See Exhibit U.

Haag filed his Claim for Compensation (Claim No. 03-125432) on December 16, 2003 for the injuries he sustained in the August 22, 2003 work-related accident. Such claim has been pending continuously from that date to the date of this award. I therefore find that Haag's Claim No. 03-125432 for injuries sustained on August 22, 2003 was pending (and that no final award on such claim had been made) during the entire period of time between the Supreme Court's Schoemehl decision (January 9, 2007) and the statutory revisions abrogating Schoemehl (June 26, 2008), as well as on the date of Haag's death, April 11, 2011. As a result, the rule announced by the Supreme Court in Schoemehl applies to this claim.

As set forth above, I have found that Haag was permanently and totally disabled solely because of the work-related injuries he suffered on August 22, 2003 which are the subject of this claim (03-125432). I also find that Haag had not recovered from the disabilities resulting from such injuries.

Haag died on April 11, 2011 while this claim was still pending and before a final award had been entered. The cause of Haag's death was metastatic non-small cell lung cancer. See Exhibit FF. I find that Haag's death ensued from a cause not resulting from the August 22, 2003 injuries which are the subject of Haag's claim herein.

Based upon Haag's uncontradicted testimony, and Exhibits H, I, EE and G confirming such testimony, I find that both Viola Louise Haag and Brittney Michelle Haag were Haag's

relatives by marriage who were actually dependent for their support upon Haag's wages both at the time of Haag's August 22, 2003 work-related injury and at the time of his death. Viola Louise Haag had been Haag's wife since August 30, 1991. Brittney Michelle Haag was Viola Louise Haag's granddaughter, and therefore related to Haag by marriage, and had been living continuously with Haag since February 28, 2003 for the purpose of adoption, which adoption was granted on March 28, 2005. Both Viola Louise Haag and Brittney Michelle Haag were living in the home provided by Haag prior to, on, and after Haag's work-related injuries of August 22, 2003. Haag's wages were used to support Viola Louise Haag and Brittney Michelle Haag by paying for housing, utilities, food, clothing, transportation and other living expenses.

Section 287.240(4) provides:

“The word “**dependent**” as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury.”

The Supreme Court, in Schoemehl, has found that the provision set forth above governs the issue of dependency in permanent total disability cases where the employee dies from causes other than the injuries sustained at work. The sentence of §287.240 set forth above, by its express terms, has chapter-wide applicability, while the other provisions of §287.240, by their express terms, relate only to cases involving death benefits. Because this is a case regarding permanent total disability benefits, and not one involving death benefits, the only provision of §287.240 applicable to this case is that set forth above, a point confirmed by the Supreme Court's reference to only the above provision of §287.240 in Schoemehl, which, like this case, dealt with permanent total disability benefits and not with death benefits.

Based on the above, I find that both Viola Louise Haag and Brittney Michelle Haag were dependents of Haag, as defined in §287.240(4), at the time of Haag's August 22, 2003 work-related injury and at the time of his death. In addition, I find that both Viola Louise Haag and Brittney Michelle Haag survived Haag's death.

Under the rule announced in Schoemehl, I find that Haag's right to compensation for both accrued and unaccrued permanent total disability benefits survives to Viola Louise Haag and Brittney Michelle Haag because they were dependents at the time of Haag's August 22, 2003 work-related injury who survived Haag's death and are therefore properly substituted parties for the purposes of workers' compensation benefits entitled to the employee's permanent total disability benefit for their lifetimes. Therefore, I order that the Employer and Insurer pay to Viola Louise Haag and Brittney Michelle Haag permanent total disability benefits in the amount of \$602.83 per week beginning, and retroactive to, June 2, 2009 and weekly thereafter for the lifetime of the longer to live of Viola Louise Haag or Brittney Michelle Haag.

### Second Injury Fund Liability

As indicated above, I have found that Haag suffered no permanent disability resulting from his May 12, 2003 injury and have found that Haag was permanently and totally disabled as a result of his last injury alone, specifically his work-related injury suffered on August 22, 2003. As a result, I find no Second Injury Fund liability on either Injury #03-042115 or Injury #03-125432.

### Future Medical

Haag makes no claim for unpaid past medical care or expenses, but does make a claim for future medical care. Based on the testimony of Haag and the opinions of Dr. Belz, which I find to be persuasive, I order that the Employer and Insurer provide Haag with such additional and future medical care as is necessary to cure and relieve him in the effects of his work-related injuries suffered on August 22, 2003, from the date of this Court's hearing, March 29, 2011, through the date of Haag's death, April 11, 2011.

#### TTD Credit

Employer and Insurer claim that they are entitled to a credit for overpaid TTD in the amount of \$20,956.19. This assertion is based on the contention that Haag's disability emanates from the May 12, 2003 injury and that his TTD compensation rate for such injury date was less than the \$600.00 per week TTD benefit paid by Employer/Insurer following Haag's August 22, 2003 injury. I have found that Haag suffered no permanent disability from his May 12, 2003 injury and no temporary disability from such injury after June 1, 2003. I also find that Haag's temporary total disability following his August 22, 2003 injury was the sole result of his work-related injury suffered on August 22, 2003. I also find the evidence to be that following Haag's August 22, 2003 injury Employer and Insurer paid TTD benefits to Haag in the amount of \$600.00 per week rather than \$602.83 per week which is the TTD rate for the August 22, 2003 injury stipulated to by the parties. Notwithstanding such difference, it appears from the evidence that Haag makes no claim for underpaid TTD benefits associated with his August 22, 2003 work-related injury. Based on the above, I deny Employer's and Insurer's claim for a credit for overpaid temporary total disability benefits.

Whole Cost of the Proceedings.

Haag submitted voluminous documentary evidence and extensive testimony in support of his claim for whole cost of the proceedings penalties under §287.560. Employer/Insurer argues that the whole cost of the proceedings issues were fully resolved by settlement in 2006. After careful consideration of all of the evidence submitted by the parties on this issue, I deny Haag's claim for whole cost of the proceedings benefits under §287.560.

Attorney Fees

Claimant's attorney, Bruce A. Copeland, seeks an attorney's fee of 25 percent. I find that that is a reasonable request. I allow Claimant's attorney, Bruce A. Copeland, an attorney's fee of 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Interest on this award is as provided by law is applicable.

Date: July 25, 2011

/s/ Karen Wells Fisher  
Karen Wells Fisher  
Administrative Law Judge