

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

Injury No.: 02-055352

Employee: Jasper Hall, deceased  
Dependent/Substitute Party: Sandra Hall, widow  
Employer: Dallas County (Settled)  
Insurer: MAC/c/o Gallagher Bassett Services (Settled)  
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 Second Injury Fund 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 dependent. The Second Injury Fund 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 dependent. The Second Injury Fund asks that 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 the argument raised by the Second Injury Fund, herein. In light of the holding in *Spradling*, we will not disturb the administrative law judge's award granting weekly permanent total disability benefits under *Schoemehl* to Sandra Hall for her lifetime.

**Conclusion**

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

Employee: Jasper Hall, deceased

- 2 -

The award and decision of Administrative Law Judge Victorine R. Mahon, issued June 13, 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 17<sup>th</sup> day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

CONCURRING OPINION FILED

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Jasper Hall, deceased

**CONCURRING OPINION**

I write this concurring opinion to voice my agreement with certain of the views expressed by Presiding Judge Gary W. Lynch in the *Spradling* case. 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 decision to affirm the administrative law judge's award of lifetime permanent total disability benefits to employee's dependent.

---

James Avery, Member

## **AWARD**

Employee: Jasper Hall (deceased)

Injury No. 02-055352

Dependents: Sandra Hall – sole dependent & substituted party

Employer: Dallas County (settled)

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

Insurer: MAC / Gallagher Bassett Services (settled)

Hearing Date: April 7, 2011

Before the  
**DIVISION OF  
WORKERS'  
COMPENSATION**  
Department of Labor and  
Industrial Relations of  
Missouri  
Jefferson City, Missouri

Checked by: VRM/ps

### **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: March 21, 2002.
5. State location where accident occurred or occupational disease was contracted:  
Dallas County, 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 the time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant injured his neck while cutting tree limbs.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Neck.

14. Nature and extent of any permanent disability: Settled as to Employer/Insurer. PTD as against the Second Injury Fund.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$300.00.
17. Value necessary medical aid not paid by employer/insurer? Not applicable.
18. Employee's average weekly wages? \$336.24.
19. Weekly compensation rate: \$224.16.
20. Method of computation: By stipulation.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Settled as against Employer and its Insurer.
22. Second Injury Fund liability:  
For accrued permanent total disability benefits,  
the sum of \$224.16 for 306 weeks.

**TOTAL: \$68,592.96.**

23. Future requirements:

Beginning April 8, 2011, and continuing for the remainder of Sandra Hall's life, the Second Injury Fund shall pay \$224.16 each week as permanent total disability benefits.

The compensation awarded shall be subject to a lien in the amount of 25 percent of all payments in favor of the following attorney for necessary legal services rendered to Claimant: John Wise.

**FINDINGS OF FACT AND RULINGS OF LAW**

Employee: Jasper Hall (deceased)

Injury No. 02-055352

Dependents: Sandra Hall – sole dependent & substituted party

Employer: Dallas County (settled)

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

Insurer: MAC / Gallagher Bassett Services (settled)

Hearing Date: April 7, 2011

Before the  
**DIVISION OF  
WORKERS'  
COMPENSATION**  
Department of Labor and  
Industrial Relations of  
Missouri  
Jefferson City, Missouri

Checked by: VRM/ps

**INTRODUCTION**

The undersigned Administrative Law Judge conducted a final hearing in this case on April 7, 2011, in Springfield, Missouri. The claim against the employer and its insurer settled prior to the hearing. The hearing was held to determine the extent of any liability against the Second Injury Fund. Attorney, John Wise, appeared with his client, Sandra Hall (Claimant). Assistant Attorney General Susan Colburn represented the Treasurer of Missouri as Custodian of the Second Injury Fund of Missouri. Following the close of evidence, the parties were invited to file proposed awards.

**STIPULATIONS**

The parties stipulated that Claimant sustained a work related injury while employed by Dallas County on March 21, 2002. Claimant was a covered employee at the time of the injury and his employer was subject to the workers' compensation law. Claimant's average weekly wage was \$336.24, yielding a permanent partial disability rate of \$224.16 and a permanent total disability rate of \$224.16. There is no dispute as to notice, statute of limitations, jurisdiction, venue, or course and scope of employment.

## **ISSUES**

The parties agree that the sole issues are whether the Second Injury Fund has any liability and the extent of that liability. Claimant alleges that employee, Jasper Hall, was permanently and totally disabled as against the Second Injury at the time of his death.

## **EXHIBITS**

The following exhibits were admitted on behalf of Claimant:

- A. Order substituting Sandra Hall as Claimant in place of the deceased employee, Jasper Hall
- B. Stipulation for Compromise Settlement 02-055352
- C. Deposition of Jasper Hall
- D. Deposition of Dr. Robert Paul
- E. Medical Records – Clarke Orthopedic Clinic
- F. Independent Medical Examination – Dr. Jeffrey Woodward
- G. Medical Records – Springfield Neurological & Spine Institute
- H. Medical Records – Citizens Memorial Hospital
- I. Medical Records – Breech Medical Center
- J. Medical Records – Smith-Glynn-Callaway Clinic
- K. Chiropractic Records – Dr. Howell
- L. Medical Records – Physical Medicine and Rehabilitation
- M. Medical Records – Lebanon Internal Medicine
- N. Medical Records – Cox Medical Center
- O. Medical Records – Harry S. Truman Veterans Hospital
- P. A copy of the Claim for Compensation
- Q. Answer of the Second Injury Fund
- R. Curriculum Vitae – Phillip Eldred
- S. Report – Phillip Eldred

No exhibits were offered or admitted on behalf of the Second Injury Fund

## **FINDINGS OF FACT**

Jasper Hall (Employee) died on March 7, 2011, at the age of 56 years. The Certificate of Death reflects that Mr. Hall died from causes unrelated to his occupational injury of March 21, 2002. That document reflects that he passed away from post obstructive pneumonia and adenocarcinoma. An order substituting as claimant his surviving spouse, Sandra Hall, was signed by Administrative Law Judge Mahon on March 25, 2011.

Ms. Hall testified at the hearing in this matter. She testified that she and Mr. Hall were married on November 15, 1975. She confirmed that he passed away from causes unrelated to his occupational injury. Ms. Hall was married to Mr. Hall continuously from November 15, 1975 to March 7, 2011, the date of his death. She confirmed that she was married to him as of the date of his occupational injury, March 21, 2002.

Ms. Hall also testified that she and Mr. Hall had one child, a son, 31 years of age. She testified that no one, other than herself, was dependent on Mr. Hall for support as of March 21, 2002, as of the date of his death, or anytime between such dates.

Mr. Hall was deposed by Assistant Attorney General Susan Colburn on February 26, 2009. A transcript of that deposition testimony was admitted into evidence.

On March 21, 2002, Mr. Hall was cutting a tree limb during the course of his employment with Dallas County. While doing so, the chain in the chain saw started to bind in the limb. In an effort to prevent the chain from binding in the limb, Mr. Hall jerked forcefully back on the chainsaw. He thereafter experienced immediate pain in his neck, along with pain into his left arm. Mr. Hall underwent numerous diagnostic studies, injections, and physical therapy for his neck and left upper extremity complaints. He did not, however, undergo a surgical procedure for that injury.

Mr. Hall described significant ongoing complaints related to his occupational injury of March 2002. He described limited range of motion in his neck. If he looked up for a period of time, he nearly passed out. He therefore had to be careful when he looked up. He also has a limited range of motion in his left shoulder. He also described ongoing pain in both his neck and left upper extremity. He experienced a shooting pain down the back of his left arm with activity and diminished grip strength in his left hand. He described instances of dropping things because

of diminished grip strength in his left hand. He also described limitations on sitting. He testified that he could sit no more than 30 to 40 minutes at a time and then would have to get up to move around. He also described limitation with respect to standing, indicating he was limited to standing for 30 to 40 minutes at a time. He also testified that he had to lie down every day because of pain.

Claimant also took a number of medications for pain, including Gabapentin, methadone, and methocarbamol.

### **Educational Background**

Mr. Eldred described, in his report, Mr. Hall's educational background. Mr. Hall attended Buffalo High School, in Buffalo, Missouri, but quit during the 12<sup>th</sup> grade. He obtained a GED in 1982. He also took an auto mechanics course for three to six months at Graff Vocational Technical School, in Springfield, Missouri and received some training in the United States Navy for steam turbines. Mr. Hall served in the United States Navy from June 1972 through December 1975, and was honorably discharged.

### **Prior Work History**

Claimant worked from 1999 through April 2002 at Dallas County Road and Bridge, as a bush cutter. He also had prior employment, described by Mr. Eldred, as a siding installer, a die-casting machine operator, automobile mechanic, injection-molding-machine operator, construction worker, material handler, and heavy truck driver. Mr. Eldred described Mr. Hall's prior work to be in the medium to heavy exertional level.

### **Preexisting Disabilities**

Mr. Hall suffered an injury to his left knee in approximately 1990. He described getting up from a sitting position and twisting his left knee, resulting in a meniscal injury. He underwent

an arthroscopic surgery, at Cox Medical Center, for that injury. He described ongoing problems after that injury. He described intermittent pain and swelling in his left knee following the initial injury, and testified that fluid would occasionally build up in his left knee. He described pain when lying in bed and testified that, when he woke up in the morning, it would take a while before he could put weight on his left knee. He also testified that his left knee would buckle when he worked to clear brush during his employment with Dallas County.

Mr. Hall also described an injury to his lower back, which occurred in the late 1970's or early 1980's. He described ongoing problems thereafter. He described spasms related to his low back as "outrageous, I mean, just unreal." He experienced those on the inside of his left leg from his knee through his buttocks and up into his low back. He also would experience back spasms, at night. Mr. Hall described having to take care in how he bent and twisted to prevent back pain. For example, he testified that "as far as work goes after that period, it wasn't a matter of stooping down to pick things up. It'd be kind of like you'd have to get down on a knee instead of try to stoop and pick it up, and lift up a certain part a certain distance, you know, and then get up and lift it the rest of the way." He limited himself to lifting no more than 90 to 100 pounds. He testified that if he tried to lift too much, he would be unable to lift even the foregoing amounts.

Mr. Hall also testified that he requested assistance from co-employees in lifting things because of his low back problems. If he attempted to lift too much, he would experience back spasms. When the spasms would occur, his left leg would often buckle, causing him to fall. Prior to March 21, 2002, Mr. Hall testified that he had to change positions to relieve his back pain.

### **Primary Settlement**

As a result of the primary or last injury, Mr. Hall settled his claim for compensation against Dallas County and its insurer for 22.5% percent permanent partial disability to the body as a whole (Claimant's Exhibit B).

### **Independent Medical Examinations**

Dr. Jeffrey Woodward conducted an independent medical examination of Mr. Hall on September 5, 2003. Dr. Woodward concluded that Claimant suffered from "chronic neck pain with right upper extremity pain and left upper extremity sensory symptoms ..." He noted that Mr. Hall's "two prior cervical MRI scans reveal multiple level degenerative disease consistent with chronic cervical spondylosis, which is a non-work-related condition. However, the patient, in my opinion, does also have substantial work-related cervical strain and left sensory cervical radiculitis." (Exhibit F). Dr. Woodward opined that Mr. Hall had reached maximum medical improvement for the 2002 work-related injury at the time of his examination of September 5, 2003. Dr. Woodward assessed a work-related permanent partial impairment rating of 15 percent to the body as a whole, including the work-related cervical and bilateral upper extremity radicular pain condition. Dr. Woodward assessed the following permanent work restrictions:

[F]requent lifting 0-20 pounds maximum; occasional lifting up to 35 pounds maximum. Very occasional overhead work only with up to maximum of 15 pounds overhead. No other physical or work restriction. In my opinion the permanent physical restrictions are 50% due to chronic non-work-related cervical spondylosis, and 50% due to work-related injury.

(Exhibit F).

Dr. Robert Paul, a physical medicine physician, credibly testified on behalf of Employee and Claimant by way of deposition. Dr. Paul examined Mr. Hall on two occasions: November 19, 2002 and October 15, 2008. He testified that he had reviewed reports regarding various

diagnostic studies at the time of his initial examination. He testified that a May 17, 2002 MRI scan of the lumbar spine disclosed degenerative changes throughout the lumbar spine, moderate stenosis at L4 intervertebral foramina, and L5 spondylolysis. Dr. Paul opined that such changes would have existed prior to the accident of March 21, 2002. He also noted that Mr. Hall described a history of long-standing low back problems prior to March 21, 2002. Dr. Paul concluded that Mr. Hall had sustained a left sided C6-C7 disc herniation as a result of the accident of March 21, 2002.

Dr. Paul also discussed the effect of medication that Mr. Hall was taking, including methadone for chronic pain. Dr. Paul indicated that methadone was prescribed for both Mr. Hall's neck and low back pain. He explained that the use of such drugs can adversely affect employability. He also noted that Mr. Hall described having to lie down throughout the day because of pain in his back and neck.

Dr. Paul noted significant findings as a result of his physical examination, including spasms of the lumbar spine and a diminished left ankle reflex. He said such finding indicates an involvement of the left S1 motor portion of the left S1 nerve. He also found loss of range of motion in the lower back. Dr. Paul also found crepitation in the left knee with the patella compression test. He explained that crepitation is indicative of degeneration in the cartilage or meniscus of the left knee and is an objective finding.

Dr. Paul assessed permanent partial disability ratings, as follows: 30 percent to the body as a whole attributable to the injury of March 21, 2002; 15 percent to the body as a whole for the low back condition and 20 percent at the level of the left knee. Dr. Paul further opined that Mr. Hall's low back and left knee conditions existing prior to March 21, 2002 constituted a hindrance or obstacle to employment or re-employment prior to that date. He also opined that Mr. Hall was

permanently totally disabled due to the combined effects of the March 21, 2002 injury and the prior disabling conditions involving his low back and left knee.

Dr. Paul explained that the restrictions he assessed, i.e., for sitting, the need to change positions, prescribed narcotic pain medicine, and the need to lie down during the day, related both to the neck injury of March 21, 2002 and the preexisting low back condition.

### **Vocational Opinion**

Phillip Eldred, a certified rehabilitation counselor, credibly testified live at the hearing. He conducted a vocational evaluation of Mr. Hall on February 22, 2011. As part of that evaluation, he obtained a history regarding Mr. Hall's educational and work background, reviewed medical records from treating and examining physicians, and conducted an OASYS search.

Mr. Eldred explained that Dr. Paul's restrictions placed Mr. Hall in the less than sedentary work level. Given such restrictions, Mr. Eldred concluded that Mr. Hall could not return to any of his past work and had no transferable skills for other work. Mr. Eldred opined that Mr. Hall was not employable in the open labor market and that no reasonable employer in the normal course of business would hire him for competitive gainful employment. Therefore, he concluded that Mr. Hall was permanently and totally disabled as a result of a combination of the March 21, 2002 neck and left upper extremity injury and prior disabling conditions involving the low back and left knee. Mr. Eldred concluded that the injury of March 21, 2002, in isolation, would not have rendered Mr. Hall totally disabled.

### **CONCLUSIONS OF LAW**

Section 287.220 RSMo 2000, creates the Second Injury Fund and prescribes the compensation that shall be paid from the Fund in "all cases of permanent disability where there

has been previous disability.” To trigger liability of the Second Injury Fund, Claimant must show the presence of an actual and measurable disability at the time the work injury is sustained, and that the work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo. App. W.D. 2002), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Claimant also must show “either that (1) a preexisting disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.” *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App. W.D. 2004).

In this case, where permanent total disability is alleged, the Administrative Law Judge must first consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo.App. W.D. 2007). If Claimant is not permanently and totally disabled from the last accident, then the degree of disability attributable to all injuries is determined. 227 S.W.3d at 4. Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo.App. E.D. 2005). “The critical question is whether an employer could reasonably be expected to hire the claimant, considering his present physical condition, and reasonably expect him to successfully perform the work.” *Id.*

### **Disability from Last Accident**

No expert has suggested that Claimant is permanently and totally disabled from the last accident alone. Restrictions assessed by examining physicians are the result of both the last injury and preexisting conditions. It is within the province of the Administrative Law Judge to

determine the extent of any permanent disability. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. E.D. 1998). Having reviewed all of the evidence and stipulations, I conclude that the compromise settlement accurately reflects the true degree of disability resulting from the last injury. I find and conclude that Claimant is not permanently and totally disabled from the last accident, but suffered a 25 percent permanent partial disability to the body as a whole, or 90 weeks of permanent disability.

### **Combined Disabilities**

The inability to return to any employment means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). In determining whether Claimant can return to employment, Missouri law allows the consideration of an employee's age, education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). While "total disability" does not require that the Claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W. 2d 220 (Mo. banc 2003), it does require a finding that the Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving CO.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). The central question is: In the ordinary course of business, would any employer reasonably be expected to hire Claimant in his physical condition? *Ransburg v. Great Plains*

*Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

Section 287.020.6 RSMo 2000, does not distinguish between full and part-time employment. Moreover, a person is not necessarily permanently and totally disabled simply because he must take medication and observe physician-imposed restrictions in order to return to work. *See e.g., Rector v. Gary's Heating and Cooling*, 293 S.W.3d 143 (Mo. App. S.D. 2009) (finding that an injured employee was not permanently and totally disabled upon returning to part-time supervisory work with the aid of medication and diligent observation of the restrictions placed on him by his doctors). Further, the Second Injury Fund is not liable if post accident progression of the Claimant's preexisting condition causes the permanent total disability. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-32 (Mo. App. S.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

I find and conclude that Claimant was permanently and totally disabled at the time of his death and that such permanent total disability exists from a combination of the preexisting and primary disabilities. Mr. Hall's preexisting, disabling conditions, as well as the disability from the last work accident, constituted a hindrance or obstacle to employment. He described significant ongoing problems resulting from multiple preexisting injuries, including ongoing spasms in his lower back and restrictions on lifting, as well as reduced mobility related to his left knee. He also described seeking help from co-employees when lifting to accommodate his work activities.

As noted above, both Dr. Paul and Mr. Eldred opined that Claimant was permanently totally disabled. Mr. Eldred concluded that Dr. Paul's restrictions limited Claimant to a less than sedentary exertional level, and that he was unemployable in the open labor market and was

permanently totally disabled as a result of a combination of the 2002 cervical spine and left upper extremity injury and preexisting disabling conditions. I accept the vocational opinion of Mr. Eldred as credible in this case.

At the time of Employee's injury, § 287.800 RSMo 2000, required that the provisions of the Workers' Compensation Law be liberally construed with a view to the public welfare. Giving the Law a liberal construction, and considering all of the evidence, I find and conclude that Employee was at maximum medical improvement as of September 5, 2003, based on Dr. Woodward's report. I find and conclude that on that date Employee was permanently and totally disabled due to a combination of the 2002 work injuries to the neck and left upper extremity injury and his preexisting conditions involving the low back and left knee. Although Mr. Hall received conservative treatment thereafter, there is no indication in the record that he was not at maximum medical improvement as of that date. The medical records suggest that he thereafter only received conservative treatment to relieve pain and discomfort, rather than improve his condition or alleviate the disability. In fact, Employee never returned to work.

### **Claimant Entitled To Benefits**

Pursuant to *Schoemehl v. Treasurer of Missouri*, 257 S.W.3d 900 (Mo. banc 2008), Employee's right to compensation for both accrued *and unaccrued* permanent total disability benefits survive to his dependent (Claimant). Although the holding in *Schoemehl*, subsequently was abrogated by statutory amendment, such amendment is not effective in this case.

First, the 2008 statutory amendments do not apply retroactively, but apply only to claims initiated after the effective date of the amendments. *Tilley*, 325 S.W.3d at 494; *Taylor*, 274 S.W.3d at 633. *See also Bennett v. Treasurer of Missouri*, 271 S.W.3d 49, 53 (Mo. App. W.D.2008)(observing that statutory amendments became effective June 26, 2008).

Second, *Schoemehl's* fundamental logic is that when an injured worker dies from causes unrelated to the work injury, the worker's dependents assume his or her

place to become the “employee” for purposes of receiving PTD benefits. *See Schoemehl*, 217 S.W.3d at 901–02. “[D]isability benefits shall be paid to the employee's dependents for their lifetime because the surviving dependents are deemed to have the same rights as the employee under the Workers' Compensation Law.” *Buescher*, 254 S.W.3d at 108. An injured worker acquires a legal right or interest in a workers' compensation award when he or she suffers the work-related injury. *Petties v. Petties*, 129 S.W.3d 901, 908 (Mo.App. W.D.2004). In other words, the worker's right to benefits vests at the time of injury.

*Gervich v. Condaire, Inc.*, Slip Op. 3, 2011 WL 794996 (Mo. App. E. D. March 8, 2011) (rehearing and/or transfer denied April 21, 2011).

Employee’s right to workers’ compensation benefits vested when he suffered his work related injury –March 21, 2002. Claimant was married to Employee from that date through the date of his death—March 7, 2011. There is no evidence that Employee had any other dependent on the date of his injury or at any other relevant timeframe. When Claimant was substituted as a party, she stepped into the shoes of Employee. Given that Employee’s workers’ compensation claim was pending when *Schoemehl* was decided, the 2008 statutory amendment abrogating *Schoemehl* does not apply to Ms. Hall. Pursuant to *Gervich*, Claimant is entitled to assume her late husband’s place as the “employee” for purpose of receiving continuing permanent total disability benefits pursuant to *Schoemehl*.

There is no differential in this case as the permanent partial and permanent total disability rates are the same. The period of past permanent total disability benefits represents 396 weeks (from September 5, 2003 through the date of hearing). After deducting 90 weeks of compensation (representing the amount for which Mr. Hall settled his claim against the employer/insurer), the Second Injury Fund is liable for accrued past permanent total disability benefits of 306 weeks, which corresponds to a lump sum of \$68,592.96.

The Second Injury Fund shall pay ongoing permanent total disability benefits to Claimant, Sandra Hall, in the weekly benefit amount of \$224.16, from the date following the hearing (April 8, 2011) for the remainder of her life, subject to review and modification as provided by law.

Attorney John Wise shall have a lien of 25 percent of all amounts awarded as a reasonable fee for necessary legal work performed on behalf of Claimant.

Date: June 13, 2011

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
Division of Workers' Compensation