Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 03-129301

Employee: Joe Lacy, deceased

Dependent: Shirley Lacy, widow

Employer: Ken-Mo Agric Center (Settled)

Insurer: Travelers Insurance Company (Settled)

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence 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 dated March 25, 2013. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued March 25, 2013, is attached and incorporated by this reference.

The Commission further approves and affirms 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 6th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

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

Curtis E. Chick, Jr., Member

Attest:

Secretary

CONCURRING OPINION

I write this concurring opinion to voice my disagreement with the outcome of *Schoemehl v. Treasurer of State of Missouri*, 217 S.W.3d 900 (Mo. en banc 2007) and the cases that have followed.

In cases where the ruling of *Schoemehl* applies, "when an injured employee dies from causes unrelated to the work injury, the employee's dependents assume his or her place to become the 'employee' for purposes of receiving permanent total disability benefits." *Spradling v. Treasurer of State of Missouri*, No. SD 31907 (Mo. App. S.D. 2013); citing *Schoemehl* at 901-902. This ruling creates what I agree is "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* (Lynch, P.J., concurring). Not only does this create a windfall to dependents of employees whose deaths are unrelated to the work injury compared to the dependents of employees whose deaths are caused by the work injuries, but this also creates an undue burden on industries for deaths resulting from natural causes.

I believe that *Schoemehl* and its progeny are dispositive on this issue, and I lament that it is our constitutional obligation to follow its ruling. Mo. Const. Art. V, § 2 (1945). Therefore, 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, Shirley Lacy, subject to the conditions of § 287.240(4).

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James G. Avery, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee:	Joe Lacy (deceased)	Injury No. 03-129301
Dependents:	Shirley Lacy	
Employer:	Ken-MO Agric Center (settled)	
Additional Party:	Second Injury Fund	
Insurer:	Travelers (settled)	
Appearances:	James Turnbow, attorney for the claimant, employee's widow Shirley Lacy. Jon Lintner, attorney for Second Injury Fund.	
Hearing Date:	December 20, 2012	Checked by: LCK/rm

SUMMARY OF FINDINGS

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? On or about December 1, 2003.

5. State location where accident occurred or occupational disease contracted: Dunklin 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 time required by law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee breathed chemicals, fertilizer and grain dust while performing his job related duties.

12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: Body as a whole referable to the lungs.

14. Nature and extent of any permanent disability: 49% permanent partial disability of the body as a whole referable to the lungs.

15. Compensation paid to date for temporary total disability: Undetermined.

16. Value necessary medical aid paid to date by employer-insurer: Undetermined.

17. Value necessary medical aid not furnished by employer-insurer: N/A.

18. Employee's average weekly wage: $324.00.

19. Weekly compensation rate: $216.00.

20. Method wages computation: By agreement.

21. Amount of compensation payable: Permanent total disability against the Second Injury Fund.

22. Second Injury Fund liability: Permanent total disability.

23. Future requirements awarded: See Rulings of Law.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: James M. Turnbow.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On December 20, 2012, the claimant, Shirley Lacy, who is the employee's widow, appeared in person and with her attorney, James M. Turnbow for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General, Jon Lintner. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Ken-MO Agric Center was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Travelers.
2. On or about December 1, 2003, Joe Lacy, was an employee of Ken-MO Agric Center and was working under the Workers' Compensation Act.
3. On or about December 1, 2003, the employee sustained an occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's occupational disease.
5. The employee's claim for compensation was filed within the time allowed by law.
6. The employee's average weekly wage was $324.00. The rate of compensation for permanent partial disability is $216.00 per week.
7. The employee's injury was medically causally related to the occupational disease.
8. The employer-insurer furnished and paid an undetermined amount of medical aid.
9. The employer-insurer paid an undetermined amount of temporary disability benefits. The date of the employee's maximum medical improvement was January 25, 2006.
10. The parties stipulated that the employee's death on January 25, 2006, was caused by a medical condition unrelated to the compensable occupational disease.

ISSUES:

1. Liability of the Second Injury Fund for permanent total disability or permanent partial disability.
2. Dependency under Schomehl v. Treasurer of the State of Missouri.
3. Distribution of permanent total disability benefits under Schomehl v. Treasurer of the State of Missouri or permanent partial disability benefits under Section 287.230 RSMo.

EXHIBITS:

<u>Employees Exhibits:</u>

A. Death Certificate of the employee.
B. Deposition of Dr. Volarich including his curriculum vitae and medical report.
C. Deposition of James England including his vocational rehabilitation evaluation and curriculum vitae.
D. Deposition of Hubert Snipes.

E. Medical records of Dr. Hussain.
F. Medical reports of Dr. Jacobs.
G. Medical records of Dr. Quenan.
H. Medical records of Northeast Arkansas Clinic.
I. Medical records of Dr. Smith.
J. Medical records of Regional Medical Center of Northeast Arkansas.
K. Medical records of St. Bernard's Medical Center.
L. Medical records of Dr. Sinasa.
M. Medical records of Twin Rivers Medical Center.

Second Injury Fund Exhibits:

1. Deposition of Joe Lacy.

Judicial Notice of the contents of the Division's file for the employee was taken.

WITNESS: Shirley Lacy.

BRIEFS: The claimant filed her brief on January 22, 2013. The Second Injury Fund filed its brief on February 7, 2013.

STATEMENT OF THE FINDINGS OF FACT:

Shirley Lacy, the employee's widow, testified that she lives in Kennett, and has lived there for 40 years. She was born on August 30, 1938. The employee was born in 1934. The employee graduated from high school, was in the Army and served in France for about a year. He was honorably discharged. She was married to the employee for 53 years. They had one child, a daughter, who is now 50 years old. Her daughter is married with three children. The employee was the breadwinner for his family and worked for one company for a number of years. Ms. Lacy did not work outside of the home while they were married. Shirley Lacy was married to and lived with the employee up until his death on January 25, 2006. She was dependent upon the employee and was his only dependent. Ms. Lacy is now working full time and receives social security benefits based upon employee's employment. The employee was the only person she has been married to. The employee's hobbies included hunting and fishing. He was a full time preacher on Sunday morning, Sunday evening, and Wednesday evening.

The employee's deposition testimony was taken on November 18, 2004. The employee lived with his wife, Shirley Lacy. He was a warehouse manager at the employer the whole time he was there and worked until he had to stop due to his age, heart and lung problems. His major health conditions were his heart, his lungs and being a diabetic.

Mrs. Lacy testified that the employee started working for Ken Mo Ag Center in 1963. The employee worked there for about 40 years until he stopped working in November of 2003 due to his health. He became warehouse manager and was a working manager. He worked with fertilizer including mixing it, cleaning wheat and rice, and cleaning and loading seed. His job

involved some lifting. The employee was exposed to dust and chemicals the whole time he worked at the employer. Most days when he got home he was covered from head to toe with dust. The dust got into his throat and lungs, and at times he nearly choked to death coughing things up. The employee had several heart attacks and the first one was around 1990. The employee was treated by Dr. White.

On August 25, 1990, the employee was admitted to St. Bernard's Regional Medical Center. A cardiac catheterization showed a severe 95-99% lesion in the LAD and a 35-40% right coronary circumflex disease. The 99% LAD lesion was reduced to 30-40% residual. The overall ejection fraction was estimated to be 40-45%. He was discharged on September 5 with a diagnosis of anterior myocardial infarction, hypertension and hyperlipidemia.

On December 11, 1990, the employee told Dr. White that he had returned to work and was driving his fork lift, but not performing any lifting. The employee's wife felt like he had some chest pain and shortness of breath that he was not reporting. Dr. White stated his right ventricular function was impaired and prescribed medications.

Mrs. Lacy testified that the employee missed about four months from work after the heart attack and when he returned to work he had trouble breathing after walking about 100 yards. He just performed light work. His breathing got worse from 1990 on.

In his deposition, the employee testified that after his first heart attack he returned to full duty but did not work as hard. He has been on medications since his 1990 heart attack.

In March of 1992, Dr. White noted that the employee had fatigue and Dr. White adjusted his medications. In October of 1992, Dr. White noted that the employee was having fatigue but no real shortness of breath or chest discomfort. The employee's wife was very concerned about his health and stated that he fatigued easily. The employee was working eight hours per day and sometimes up to 12 hours a day. He felt fatigued and needed to rest when he got home. Dr. White noted significant LV dysfunction and advised to pace himself at work and not to overdo it.

The employee saw Dr. White in May of 1993. The employee's wife stated that he was fatigued. In November of 1993, the employee had some fatigue and Dr. White noted that there was a T wave abnormality. In February of 1994, the employee's wife told Dr. White that the employee had fatigue. The employee stated he just got tired and liked to rest.

In December of 1997, the employee saw Dr. White and stated that he was not having trouble but his wife stated that the employee was having lots of problems including a lot of shortness of breath. The employee related his shortness of breath to working in the dust and he was coughing a lot of phlegm up. A chest x-ray showed an enlarged heart and pulmonary vasculature appeared slightly increased. When compared to prior chest x-rays, the interstitial markings appeared increased and the heart size appeared about the same. Dr. White stated that the employee may be having more interstitial pheumonitis type problems; and that the increase in interstitial markings were probably related to his dust inhalation, but some heart failure could not be excluded. The employee saw Dr. White in January of 1998. Since he had been out of the dust

the last few weeks his symptoms have resolved and he was feeling much better. Dr. White prescribed medications including an inhaler to use when working in the dust.

In his deposition, the employee testified that he was diagnosed with a lung problem and had problems breathing, which came on gradually.

The employee was admitted to St. Bernard's Regional Medical Center on July 2, 1999. The employee had a myocardial infarction in August of 1990 complicated with congestive heart failure with an ejection fraction of 40-45%. Due to the current rather extensive inferior myocardial infarction with lateral involvement on electrocardiogram, the employee had a cardiac catheterization which showed a 95% lesion in the right coronary artery with thrombus present. The diagnosis was severe stenosis of the right coronary artery with thrombus present and ongoing acute myocardial infarction. Performed was an angioplasty and stenting of the proximal right coronary artery with a stent. There was moderate stenosis in the left anterior descending and circumflex vessels and severe left ventricular dysfunction with ejection fraction around 35%. The employee was discharged on July 6 with a diagnosis of acute inferior myocardial infarction complicated by heart block, thrombolytic and subsequent right coronary artery stenting undertaken; remote anterior myocardial infarction; and diabetes.

In his deposition, the employee testified when he was first diagnosed with diabetes he immediately went on insulin. Part of his symptoms from that includes memory loss.

Dr. White in September of 1999 noted that the coronary artery disease appeared to be stable. The last ejection fraction was estimated to be 35%; and the employee was on several different medications. A chest x-ray in November of 1999 showed slightly increased interstitial markings. The enlarged heart had not changed much since 1997.

Mrs. Lacy testified that after the 1999 heart attack he missed about four months from work and started back on light duty. After the heart attack, he would miss one to two weeks a year due to his health. She started noticing memory loss after his 1999 heart attack.

In his deposition, the employee testified that as a result of his heart condition he had slowed down quite a bit. He was taking medication for his lungs, heart and diabetes.

Mrs. Lacy testified that the last couple of years prior to leaving work in November of 2003, the employee did not work during the winter months due to his problems. He received his overtime pay for the rest of the year in the winter time when he was not working. He had trouble walking very far, and had to stop fishing and hunting. The employee was diabetic and receiving insulin shots; and he developed dementia and had a lot of trouble with memory and keeping track of his medicine. Just prior to leaving employment, he was spitting up blood and dust due to his lung problems.

On March 20, 2000, a chest x-ray showed increased interstitial changes in both lung fields with bilateral plural thickening. The x-ray appeared to be basically unchanged as compared to the previous exam in 1999. On March 30, 2000, the employee had shortness of

breath with exertion; chest tightness; and cough with brownish sputum production. His energy level was extremely low. On exam the employee's lungs had crackles in the posterior bases. Dr. White diagnosed congestive heart failure secondary to decreased LV function; severe ischemic cardiomyopathy with ejection fraction of 30-35%; coronary artery disease; and diabetes. The employee's medications were adjusted. In September of 2000, the employee saw Dr. Sinasa for tightness in his chest with some shortness of breath.

A chest x-ray in April of 2001 showed bilateral increased interstitial changes which may be due to interstitial fibrosis. It was unchanged as compared with the previous x-ray on March of 2000. In May of 2001, a carotid Doppler showed moderate ICA plaque bilaterally with less than 40% stenosis on either side. In May of 2001 Dr. White noted that new medications helped with his breathing.

In January of 2002, the employee saw Dr. White with some shortness of breath. His wife stated the employee coughed all the time. On exam the employee had rales in the bases of his lungs. In April of 2002, the employee saw Dr. Sinasa with congestion and a productive cough. A history of myocardial infarctions and COPD was noted. There was wheezing in the chest and bronchitis was diagnosed.

The employee saw Dr. Sinasa with shortness of breath on exertion in February of 2003. In March, the employee saw Dr. Sinasa for shortness of breath and coughing. On exam there was wheezing in the chest and bronchitis was diagnosed. In June, Dr. Sinasa noted wheezing sounds in the chest and diagnosed COPD and congestive heart failure.

In June of 2003, the employee saw Dr. White for his coronary disease. He had increased shortness of breath; coughing and wheezing; and had been sleeping a lot. Dr. White diagnosed worsening congestive heart failure with known severely diminished left ventricular function; history of coronary artery disease that appeared to be stable; and diabetes. A chest x-ray showed an enlarged heart and increased interstitial markings on the right and some haziness consistent with heart failure. The chest x-ray suggested decompensative heart failure.

In July of 2003, the employee saw Dr. Sinasa with a history of congestive heart failure. On August 14, 2003, Dr. White noted chronic shortness of breath on exertion. An echocardiogram performed that day showed ischemic cardiomyopathy with wall motion abnormalities; ejection fraction estimated at 30-35%; evidence of LV diastolic dysfunction; and mild left atrial enlargement. A carotid doppler showed large plaque in the proximal right ICA with 40-60% stenosis; moderate plaque in the left bifurcation with less than 40% stenosis and mild to moderate stenosis in the mid to left common carotid. On exam, there were crackles to the scapula on the right and left posterior base. Dr. White diagnosed coronary artery disease, carotid artery stenosis and interstitial lung disease.

On August 20, 2003, the employee saw Dr. Sinasa due to getting overheated in an unvented building that morning. There was wheezing in his chest.

On September 18, 2003, the employee was not better with the recent increase in medications; and he had shortness of breath with exertion. Dr. White stated that the chest x-ray showed continuing cardiomegaly, elevation of the right diaphragm and increased interstitial markings. On October 21, Dr. White noted chest tightness and increased shortness of breath; and ordered a heart catheterization.

On November 7, 2003, the employee saw Dr. Savage, a pulmonologist, after being referred by Dr. White due to interstitial lung disease and shortness of breath. The employee has had progressive shortness of breath for quite some time. He gave out when walking short distances; he coughed up thick grey sputum especially at nighttime; and his wife noticed wheezing. The employee had marked fatigue and weakness. On exam, there were coarse rales in both bases with diminished breath sounds. Chest x-ray showed significant volume loss to both lungs especially to the right and there were increased interstitial markings and honeycomb pattern consistent with pulmonary fibrosis. The pulmonary function test revealed severe restrictive lung disease with severe reduction in diffusing capacity with the predicted capacity at 10%. Dr. Savage diagnosed interstitial lung disease; pulmonary fibrosis; atherosclerotic heart disease; and diabetes. An exercise oximetry was performed and his oxygen saturation dropped precipitously and quickly to 82% after a brief walk through the clinic at regular pace. Dr. Savage ordered oxygen at nighttime and noted that he would most likely require continuous oxygen in the near future. A chest CT scan and a bronchoscopy with lung biopsies were ordered.

The November 11, 2003 CT of the chest showed probable diffuse interstitial lung disease predominately in the lower lobes and overall diminished lung volume. The November 11 bronchoscopy with lung biopsy of the right upper lobe was performed and the diagnosis was interstitial lung disease with areas consistent with pulmonary fibrosis. Prednisone was prescribed.

On November 17 Dr. Savage noted that the bronchoscopy biopsy revealed chronic inflammation which was mostly fibrosis. Dr. Savage diagnosed idiopathic pulmonary fibrosis and a possible small component of inflammation. He continued the prednisone and the nighttime oxygen.

On November 19, 2003, a cardiac catheterization was performed by Dr. White. The conclusion was significant stenosis in the right coronary distal to the previously placed right coronary stent; mild high grade stenosis in the left coronary system; LV dysfunction with anterior apical akinesis; and overall ejection fraction of 35-40%. Dr. White performed a right coronary angioplasty and stenting. The 80 to 90% lesion of the right coronary was reduced to zero percent residual and a stent was placed.

Mrs. Lacy testified that the employee left his church work before he stopped working due to his health. When he left employment, the employee could not do much, and was sitting in a recliner a lot. He did not do much. If they went grocery shopping, he sat down and did not carry groceries. He was basically home bound and did not do much. He was in a recliner all day, would get up to eat meals, and then sit back down. He had to take naps in the daytime.

Hubert Snipes testified by deposition on November 18, 2004. Mr. Snipes was the manager of Ken MO Agric Center. The employee stopped working sometime in November of 2003. For the last two or three years the employee did not work during the winter because he did not want to work during the cold. His overtime from the rest of the year was held back so he could draw a check in the wintertime. A few times Mr. Snipes noticed changes in the employee with regard to his ability to do his job and he had difficulty doing his job. The employee had forgetfulness which had been going on after two or three seizures in 2002 and 2003. When the employee came back to work after the last heart attack in 1999 he did not perform near the lifting that he did prior. Mr. Snipes tried to protect the employee as much as he could because he did not want him to have any more trouble. Mr. Snipes had a man helping the employee as much as possible.

The employee went to Twin Rivers Regional Medical Center on December 3, 2003, due to confusion and weakness. His blood sugar was 523 and he was admitted for uncontrolled diabetes, weakness and confusion. Chest x-ray showed chronic interstitial changes in both lungs. He was discharged on December 5 with a diagnosis of uncontrolled diabetes; chronic obstructive pulmonary disease; congestive heart failure; coronary heart disease; and hypertension. On December 7 the employee went to the emergency room at Twin Rivers Regional Medical Center due to feeling weak, confusion, and almost passing out.

On December 15, 2003, the employee saw Dr. Savage with continued severe shortness of breath with exercise intolerance and apparently some confusion. He was using oxygen at night. Examination of the lungs revealed Velcro rales in both bases with decreased breath sounds. The chest x-ray was unchanged from November 7 with significant volume loss in both lungs and fibrosis in the right upper, right lower, and left lower lobe. Dr. Savage diagnosed idiopathic pulmonary fibrosis, severe in-stage and significant hyperglycemia with the high blood sugar secondary to prednisone. Dr. Savage decreased the prednisone, changed other medications, and recommended oxygen a minimum of 12 hours a day. Dr. Savage again recommended that the employee consider retirement from work since he did not think he would be able to keep up very much longer.

On December 30, 2003, the employee went to the emergency room due to weakness, confusion and almost passing out. A chest x-ray was performed and compared to the December 3, 2003 x-ray; there were no changes. There were peripheral increased interstitial markings within both lungs consistent with chronic lung disease.

On December 31, 2003, the employee saw Dr. Savage with a two to three day history of increased shortness of breath with fatigue and weakness. The chest x-ray showed volume loss in both lungs with fibrosis changes in both bases and the right upper lobe. Dr. Savage diagnosed idiopathic pulmonary fibrosis severe in-stage; chronic respiratory failure secondary to the pulmonary fibrosis; and mild acute bronchitis. He prescribed medication and recommended using oxygen and rest continuously and to increase oxygen while exercising or walking. Dr. Savage ordered a brain MRI to evaluate his dementia which was performed on January 6, 2004.

The employee saw Dr. Savage on January 13, 2004, having a lot of problems with memory and forgetfulness. The brain MRI revealed some atrophy as well as ischemic gliosis and lacunar infarcts; and there appeared to be old cortical infarcts in the right temporal, the right parietal lobes as well as the superior aspect of the right cerebella hemisphere. The employee's breathing was about the same. He used oxygen in the nighttime, but rarely in the daytime and almost never with any exercise although he pretty much remained sedentary. A chest x-ray showed significant volume loss; bilateral interstitial infiltrates with perhaps slight improvement in the left upper lobe area; and the heart was in the upper limits of normal size. There was no significant interval change from the December 31, 2003 films. Dr. Savage diagnosed idiopathic pulmonary fibrosis severe in-stage; and dementia multi infarct versus secondary to Alzheimer's disease. He referred the employee to a neurologist.

On January 28, 2004, the employee saw Dr. Sinasa with wheezing in his chest. Diagnosed was chronic heart disease and COPD. On February 5 the employee saw Dr. Cauli, a neurologist, for follow-up of dementia. Dr. Cauli assessed multi-infarct dementia. Medications were continued. There were sensory abnormalities seen on the exam that were probably due to small fiber polyneuropathy. On February 9, 2004, Dr. Sinasa noted wheezing in his chest.

On February 13, 2004, Dr. Quenan performed surgery for colon cancer. The employee saw Dr. Quenan on March 7. It was noted that the employee had severe chronic lung disease. On March 22, Dr. Sinasa noted weakness, the employee was pale; and there was wheezing sounds in his chest. On April 21 and April 26, 2004, Dr. Sinasa noted wheezing sounds in his chest; and diagnosed bronchitis.

On April 22, 2004, Dr. White noted that the employee had recently had surgery for colon cancer. The employee has had a lot of problems due to his severe LV dysfunction and severe interstitial lung disease. The employee's ejection fraction was 30-35% and he is on home oxygen, but not using it all the time. The employee had some changes in respirations and his lungs have rales throughout as before and which have been present for some time. Dr. White diagnosed severe cardiomyopathy; severe interstitial lung disease with hypoxia; and a recent diagnosis of colon cancer.

On May 3, 2004, Dr. Savage stated that the employee had a severe in-stage idiopathic pulmonary fibrosis, arteriosclerotic heart disease with congestive cardiomyopathy, multi-infarct dementia, hypertension, elevated lipids and diabetes. On exam there were rales in both bases of the lungs. Dr. Savage diagnosed idiopathic pulmonary fibrosis severe in-stage and chronic respiratory failure; and encouraged the employee to use oxygen 24 hours per day. Dr. Savage noted the employee was extremely inactive spending most of his day in bed or sitting in a chair; and he doubted that employee could tolerate much activity at all.

The employee saw Dr. Sinasa in June and ordered a chest CT scan which was performed on June 10, 2004. The impression was COPD and moderately severe emphysematous changes bilaterally, plus chronic interstitial scarring more pronounced in the lower lobes and seen in the right middle lobe. There was partial atelectasis of both lower lobes; minimal cardiomegaly with

left ventricular enlargement; small bilateral calcified nodules throughout both lungs; and moderately severe ASCVD.

On June 24, 2004, an echocardiogram showed an ischemic cardiomyopathy with ejection fraction of 30-35%; mild left atrial enlargement; and left ventricular diastolic dysfunction. Dr. White noted the echocardiogram showed no change from August of 2003. A chest x-ray showed cardiomegaly; marked pulmonary abnormalities; diffuse severe infiltrates noted throughout the lung; and a mildly enlarged heart. The employee had a known diagnosis of severe interstitial fibrosis and the x-ray was markedly abnormal. On exam, the employee had rales in all lung fields which were chronic due to the interstitial disease. The employee was on multiple medications including prednisone for his lung disease. Dr. White diagnosed severe pulmonary disease, pulmonary fibrosis, severe dyspnea and hypoxia, and severe ischemic cardiomyopathy. Dr. White noted that the employee's lung disease and heart disease was very severe.

On July 20, 2004, a pulmonary function test was performed and compared with the previous study of November 7, 2003. There was severe restricted defect and the lung volumes revealed severe restrictive lung disease. Diffusing capacity was severely reduced but improved when compared with the prior study.

The employee saw Dr. Savage on July 20, 2004, with a mild nonproductive cough and shortness of breath with any type of activity. The employee lies around in bed all day long and uses oxygen continuously. He has progressive memory loss according to his wife and apparently has multi-infarct dementia. Chest x-rays shows elevation of the right hemidiaphragm with bilateral interstitial changes consistent with pulmonary fibrosis. The pulmonary function tests revealed severe restrictive lung disease and severe reduction in diffusing capacity, both most likely on the basis of his idiopathic pulmonary fibrosis. Diagnosed was idiopathic pulmonary fibrosis, severe, in-stage; arteriosclerotic heart disease with ischemic cardiomyopathy; and history of colon cancer.

The employee continued treating with Dr. Sinasa in July, August, September, and October of 2004 and on exam had wheezing in his chest.

On October 13, 2004, the employee went to Twin Rivers Regional Medical Center with generalized weakness. The employee was admitted to St. Bernard's Medical Center the same day. It was noted that the employee had a long history of coronary disease; hypertension, diabetes, bilateral carotid disease, colon cancer, severe interstitial lung disease and mild dementia. Due to a 95% stenosis in the right coronary artery a stent was placed. He was discharged on October 16 with a discharge diagnosis of myocardial infarction; congestive cardiomyopathy, an ejection fraction 35-40%; severe pulmonary fibrosis; history of colon cancer with resection; and hypertension.

In his October of 2004 deposition, the employee testified that he did not know whether he could sit at a desk to work. He was not able to walk a great distance and could walk about two blocks without having undue pain or problems. He can no longer mow his yard with a push

mower due to running out of wind. The employee did not know of any job that he could do. He quit work because he could not do the job like it needed to be done.

The employee treated with Dr. Sinasa in November and December of 2004 and on exam had wheezing in his chest.

The employee saw Dr. White on January 20, 2005. The employee was having chronic shortness of breath secondary to his lung disease. On exam the lungs had rales bilaterally in the bases. Dr. White diagnosed severe pulmonary fibrosis that is end-stage; ischemic cardiomyopathy with ejection fraction estimated at 30-35%; history of coronary artery disease; history of diabetes; history of hypertension that appeared to be well-controlled; and dementia versus Alzheimer's disease. Dr. White noted that the employee was at high risk for any type of surgery secondary to his coronary artery disease, cardiomyopathy and severe lung disease.

The employee saw Dr. Savage on January 20 with fatigue and shortness of breath according to his wife. His wife reported that his memory problems are getting worse. On examination his lungs had bibasilar rales. Chest x-ray showed volume loss, and bilateral interstitial fibrosis which was unchanged compared with the July of 2004 film. Dr. Savage diagnosed idiopathic pulmonary fibrosis, severe, end-stage.

In July of 2005, Dr. Savage noted the employee had a lot of fatigue and does not do much at all. Chest x-ray showed reticular pattern and honeycomb changes throughout both lungs and volume loss as before. The employee was to continue his current medication regimen and oxygen. In August the employee saw Dr. Sinasa with shortness of breath, tightness in his chest, and wheezing sounds in his chest. The employee was admitted to Twin Rivers Regional Medical Center on September 6, 2005 and discharged on September 12. The discharge diagnosis was uncontrolled diabetes; color cancer with liver and lung metastases; cardiomyopathy end-stage; pulmonary fibrosis; and vascular dementia post cerebrovascular accidents.

The employee was admitted to Twin Rivers Regional Medical Center on January 15, 2006, after presenting with chest pain and shortness of breath. He was discharged on January 17 and diagnosed with acute congestive heart failure; atherosclerotic heart disease; chronic obstructive pulmonary disease; and metastatic colon cancer. He was in the hospice program due to the cancer.

The death certificate stated that the employee passed away on January 25, 2006, due to cancer of the colon with metastasis. Other significant conditions were coronary artery disease and COPD.

On February 6, 2006, a First Amended Claim for Compensation was filed listing Shirley Lacy as a dependent. On November 28, 2008, the Mrs. Lacy, the dependent of the deceased employee, settled the claim against the employer-insurer for $42,500.00. At the rate of $216.00 per week the $42,500.00 represented 196.76 weeks of compensation which is approximately 49% of the body as a whole.

Dr. Volarich prepared a report dated August 10, 2011. His deposition was taken on February 28, 2012. Due to the employee being deceased, he reviewed the medical records and the deposition of the employee; and he spoke to the employee's widow, Shirley Lacy.

It was Dr. Volarich's opinion that as a direct result of his exposure to multiple chemicals and particulate dust particles the employee had severe interstitial pulmonary fibrosis which is a severe inflammatory disease of the lungs which causes excessive scarring and loss of function of the lungs. The employee had significant loss in pulmonary function and diffusing capacity where the oxygen could not pass through the lungs and into the blood properly. Leading up to December of 2003 the employee developed progressive shortness of breath. He continued to have significant difficulties with pulmonary function and breathing. Due to the shortness of breath and coughing the employee had difficulty functioning at work. The employee became forgetful and was unable to fulfill his job duties properly. He had difficulty walking to work as he had to park 30 to 40 yards from the front entrance. He had difficulty lifting at work and experienced shortness of breath and weakness when performing maintenance. His shortness of breath affected his activities of daily living, including walking short distances on level ground, lifting laundry and groceries and participating in hunting and fishing. He had difficulty with self-care including bathing and dressing, due to exertional shortness of breath and became progressively more dependent on friends and family. It was Dr. Volarich's opinion that the employee sustained a 45% permanent partial disability of the body as a whole rated at the pulmonary system due to the interstitial pulmonary fibrosis causing severe restrictive lung disease and diminished diffusing capacity.

Preexisting the December of 2003 occupational disease, it was Dr. Volarich's opinion that the employee had a 45% permanent partial disability of the body as a whole rated at the cardiovascular system due to the severe ischemic cardiomyopathy with ejection fraction of 35% due to the prior anterior and inferior wall myocardial infarctions; and was a hindrance to his employment or reemployment. The employee had signs and symptoms of heart failure and congestive cardiomyopathy after his two infarctions. Prior to December of 2003, the employee was diagnosed with congestive heart failure. Due to the heart failure and severe congestive cardiomyopathy, the pumping ability of his heart was severely diminished with an ejection fraction of 35% instead of the normal 55%. Leading up to and beyond December 1, 2003, the employee had persistent signs and symptoms of organic heart disease and his performance at work was limited and over time he was slower and less efficient completing his duties. He missed work on a number of occasions for doctor visits and complications of his organic heart disease. With regard to his preexisting organic heart disease and congestive heart failure he had recurrent problems with chest tightness as well as angina, nocturnal shortness of breath, orthopnea, and peripheral edema.

Prior to December of 2003, he was not able to do his job as efficiently or quickly and he slowed down due to his physical problems. His difficulty walking 30-40 yards to work was due to the severity of his heart and lung problems. Dr. Volarich stated that the heart and lungs are so closely intertwined with common symptoms for both that it is hard to exclude one from the other. Due to all of his problems, the employee could not do the simple things and activities of daily living.

It was Dr. Volarich's opinion that preexisting the December 2003 occupational disease the employee had a 20% permanent partial disability of the body as a whole due to the insulin dependent Type II diabetes, causing cataracts, retinopathy, nephropathy, and small vessel cerebrovascular disease including multiple small infarcts and TIAs. It was his opinion that it was a hindrance or obstacle to employment or reemployment. Dr. Volarich stated the organic heart disease and lung disease prevented an activity level that would have been of benefit to the management of his pre-existing type II diabetes. Dr. Savage treated the employee with oral prednisone due to his pulmonary fibrosis and that complicated the management of diabetes. Leading up to December 1, 2003, the employee continued to have difficulties with his diabetes, including hospitalizations related to TIA's, myocardial infarctions, kidney failure and dehydration. He missed multiple days from work due to complications from his diabetes. The diabetic control remained poor and this contributed to his multiple organ failure over the years. The diabetes and its complications slowed him down at work leading up to December 1, 2003.

The employee began using oxygen prior to leaving work in December of 2003 due to a combination of his heart and lung problems. The employee had damage on both sides of the heart, one from the lungs and one from the organic heart disease. The diabetes also played a role.

It was Dr. Volarich's opinion that the combination of his disabilities created a substantially greater disability than the simple sum or total of each separate injury/illness and a loading factor should be added. It was Dr. Volarich's opinion that the employee was permanently and totally disabled as a direct result of the work related exposure to multiple chemicals and particulate matter leading up to December of 2003 causing his severe interstitial pulmonary fibrosis in combination with his preexisting medical conditions including coronary artery disease and insulin dependent diabetes. The employee was unable to continue working after December of 2003.

Jim England issued a vocational rehabilitation evaluation on October 31, 2011. His deposition was taken on April 18, 2012. Mr. England evaluated the employee's employability prior to his death. Mr. England reviewed the employee's November of 2004 deposition along with numerous medical records. The employee being 69 years old when he stopped work placed him beyond normal retirement age. The employee had been working full time up to that point, but finally, because of what appeared to be the combination of his heart and lung problems, he had to stop working. Mr. England stated even absent the development of the colon cancer he did not believe the employee would have been able to continue working in any capacity due primarily to the problems he was having from his heart and lungs. That would be true even without the degree of other issues such as his diabetes and colon. Mr. England stated someone who is having to be on oxygen up to 24 hours a day and wearing a respirator and who was having trouble with dementia would not, in his opinion, be able to do alternate, less physically demanding work activity. It was Mr. England's opinion that those medical problems would have totally disabled him in isolation.

Mr. England stated that the employee had preexisting problems with his heart, which according to the records had slowed him down. The employee was still working at the time of the development of the pulmonary problems but he had to slow down his work activities. It was

causing problems as far as fatigue and just getting through the work days. Mr. England agreed that it was fair to state that the employee had several problems with his heart that were continuing before December of 2003. He had already been diagnosed with congestive heart failure and his ejection fraction was certainly below normal. The efficiency of the functioning of his heart was below normal before the development of the lung problems. The records revealed that the employee had some dementia that became a problem and finally got to the point where he was having significant problems with it. That was occurring on or before December of 2003.

When asked what restrictions he thought the employee had in December of 2003, Mr. England stated there was a combination of difficulties with breathing. It had gotten to a point where he eventually was on oxygen and was very fatigued. It was Mr. England's opinion that between the heart problems and the breathing problems it did not appear to him that he would have had the physical capacity to do any type of work at that point. It was Mr. England's opinion that the employee's heart condition before December of 2003 was a hindrance or obstacle to employment. With regard to his diabetes he thought it could be a hindrance or obstacle to employment it if affected the employee's ability to function and in this case the employee began to have some in organ damage so he thought that certainly could affect his ability to function in a work setting. Mr. England believed that the problems with the lungs would be a hindrance or obstacle to employment.

It was Mr. England's opinion that the employee was not employable in the open labor market in December of 2003. The basis of his opinion was his review of the medical records and considering the combination of the medical problems he was having at that point, Mr. England did not see how the employee would be able to work. The combination was the problems with his heart, the difficulties he was having as a result of the diabetes and the effect of the breathing problems.

RULINGS OF LAW:

Issue 1. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

The term "total disability" in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. See *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See *Brown v. Treasurer of State of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990). The question is whether any employer in the usual course of business would reasonably be expected to employ

the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See *Reiner* at 367, *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo. App. 1993), and *Garcia v. St. Louis County*, 916 S.W.2d 263 (Mo. App. 1995).

The first question that must be addressed is whether the employee was permanently and totally disabled.

I find that the deposition testimony of the employee and the hearing testimony of Mrs. Lacy was credible and persuasive concerning the impact his condition had on his daily ability to function in the work place and at home prior to his passing.

There is medical and vocational evidence that addresses whether the employee was permanently and totally disabled.

In December of 2003, Dr. Savage recommended that the employee stop working because he did not think that the employee would be able to keep up very much longer. In May of 2004, Dr. Savage doubted that the employee could tolerate much activity at all. It was Dr. Volarich's opinion that the employee was permanently and totally disabled and was unable to continue working after December of 2003. Mr. England did not believe the employee would have been able to continue working in any capacity and he was totally disabled. It was Mr. England's opinion that the employee was not employable in the open labor market in December of 2003.

I find that the opinions of Dr. Savage, Dr. Volarich and Mr. England on the issue of whether the employee was permanently and total disabled are very persuasive and credible. Based on the credible testimony of the employee and Mrs. Lacy and the supporting medical and vocational rehabilitation evidence, I find that no employer in the usual course of business would have reasonably be expected to employ the employee in his condition and reasonably expect the employee to perform the work for which he was hired. I find that the employee was unable to compete in the open labor market and was permanently and totally disabled. Given the finding that the employee was permanently and totally disabled, it must be determined whether the occupational disease on or about December 1, 2003, to the employee's lungs resulted in permanent total disability.

It was Dr. Volarich's opinion that the employee sustained a 45% permanent partial disability of the body as a whole rated at the pulmonary system due to the interstitial pulmonary fibrosis causing severe restrictive lung disease and diminished diffusing capacity.

It was Dr. Volarich's opinion that the employee was permanently and totally disabled as a direct result of the work related exposure to multiple chemicals and particulate matter leading up to December of 2003 causing his severe interstitial pulmonary fibrosis in combination with his preexisting medical conditions including coronary artery disease and insulin dependent diabetes.

Mr. England stated that the reason of not being able to continue working in any capacity was due primarily to the problems from his heart and lungs. It was Mr. England's opinion that

between the heart problems and the breathing problems it did not appear that the employee would have had the physical capacity to do any type of work. It was Mr. England's opinion that the employee was not employable in the open labor market in December of 2003 due to the combination of the medical problems from his heart; the difficulties he was having as a result of the diabetes and the effect of the breathing problems.

The employee's widow settled the claim with the employer-insurer by Compromise Settlement for the December 1, 2003 occupational disease for an approximate disability of 49% of the body as a whole.

Based on a review of all the evidence, I find that the opinions of Dr. Volarich and Mr. England on the cause of the employee's permanent total disability are persuasive and credible.

I find that the employee's permanent and total disability was not the result of the last injury alone. Based on the evidence, I find that as a result of the occupational disease on or about December 1, 2003 alone, that the employee sustained permanent partial disability. I find that as a direct result of the occupational disease on or about December 1, 2003 alone**,** the employee sustained a permanent partial disability of 49% of the body as a whole referable to the lungs. I find that the employee's occupational disease on or about December 1, 2003 alone did not cause the employee to be permanently and totally disabled.

It must be determined whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or re-employment.

With regard to his pre-existing heart condition, the employee's performance at work was limited and over time he was slower and less efficient completing his duties. He missed work on a number of occasions due to complications from his heart disease. He was not able to do his job as efficiently or quickly and he slowed down due to his physical problems. The employee did not lift as much and did not work as hard. After the last heart attack in 1999, the employer tried to protect the employee and had another employee help Mr. Lacy as much as possible.

Pre-existing the December of 2003 occupational disease, it was Dr. Volarich's opinion that the employee had a 45% permanent partial disability of the body as a whole rated at the cardiovascular system due to the severe ischemic cardiomyopathy with ejection fraction of 35%. It was Dr. Volarich and Mr. England's credible opinion that the pre-existing heart condition was a hindrance to his employment or reemployment.

With regard to his pre-existing diabetes, the diabetic control remained poor which contributed to multiple problems over the years. The diabetes and complications of the diabetes slowed him down at work leading up to December 1, 2003. He missed multiple days from work due to complications from his diabetes. It was Dr. Volarich's opinion that pre-existing the December 2003 occupational disease the employee had a 20% permanent partial disability of the body as a whole due to the insulin dependent Type II diabetes, causing cataracts, retinopathy, nephropathy, and small vessel cerebrovascular disease including multiple small infarcts and

TIAs. It was Dr. Volarich's credible opinion that the pre-existing diabetic condition was a hindrance to his employment or reemployment.

I find that the employee's pre-existing heart and diabetic conditions constituted a hindrance or obstacle to employment or to obtaining re-employment.

It was Dr. Volarich's credible opinion that the combination of his disabilities created a substantially greater disability than the simple sum or total of each separate injury/illness. It was Dr. Volarich's credible opinion that the employee was permanently and totally disabled as a direct result of the work related exposure to multiple chemicals and particulate matter leading up to December of 2003 causing his severe interstitial pulmonary fibrosis in combination with his preexisting medical conditions including coronary artery disease and insulin dependent diabetes.

It was Mr. England's credible opinion that the employee was not able to work in any capacity due primarily to the heart and lung problems. It was Mr. England's credible opinion that the employee was not employable in the open labor market due to the combination of the medical problems he was having in December of 2003 from his heart, diabetes and breathing problems.

I find that the employee's pre-existing heart and diabetes conditions combined synergistically with the primary December of 2003 occupational disease and injury to the lungs to cause the employee's overall condition and symptoms. Based on the evidence, I find that the employee was permanently and totally disabled as a result of the combination of his pre-existing heart and diabetes conditions and the conditions caused by the occupational lung disease and injury on or about December 1, 2003.

The parties stipulated that the employee reached maximum medical improvement on January 25, 2006. I find that the employee was in his healing period and had not reached the point where further progress was expected until January 25, 2006. I find that for the purpose of determining liability of the Second Injury Fund, the permanent partial disability of 49% of the body as a whole at the 400 week level referable to the lungs would have been payable in 196 weekly installments commencing on January 26, 2006 at the end of the healing period and continuing through October 29, 2009. Commencing on October 30, 2009, the Second Injury Fund is responsible for and is ordered to pay permanent total disability benefits at the rate of $216.00 per week to Shirley Lacy as set forth in my rulings in Issue 2 and Issue 3.

Issue 2. Dependency under Schoemehl v. Treasurer of the State of Missouri

Under Section 287.240 RSMo, a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or wages at the time of the injury. Under Section 287.240 RSMo, a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support. I find that Shirley Lacy, the wife of the employee, was the sole conclusively presumed total dependent at the time of the employee's accident and injury and remained in the same capacity until his death on January 25, 2006.

Issue 3. Distribution of permanent total disability benefits under Schoemehl v. Treasurer of the State of Missouri or permanent partial disability benefits under Section 287.230 RSMo.

Based on my rulings in Issue 1 and Issue 2, and under *Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007),* I find that Shirley Lacy is entitled to the employee's permanent total disability benefits during her lifetime. The Second Injury Fund is ordered to pay permanent total disability benefits to Shirley Lacy at the rate of $216.00 per week beginning on October 30, 2009. The weekly permanent total disability payments shall be paid to Mrs. Lacy for the remainder of her life.

ATTORNEY'S FEE:

James M. Turnbow, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

_____

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation