

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

Injury No. 07-131974

Employee: Terry Lankford, deceased
Dependent: Carol Lankford, widow
Employer: Newton County
Insurer: Missouri Association of Counties
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, 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.

Discussion

Occupational disease arising out of and in the course of employment

The administrative law judge determined that employee sustained an occupational disease arising out of and in the course of his employment for employer. Employer appeals, arguing (among other things) that employee failed to show he was exposed to the pathogens that caused his occupational disease to a greater extent or degree than workers in normal, nonemployment life. We are not persuaded by employer's argument, for the following reasons.

The "unequal exposure" requirement to which employer refers is found in § 287.020.3 RSMo, which sets forth the following criteria for compensability of an injury by accident:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

In contrast, the criteria for compensability of an injury by occupational disease are set forth in § 287.067 RSMo, which provides, in relevant part, as follows:

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1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An injury or death by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Applying the plain language of the foregoing statutory provisions (which we must strictly construe by virtue of § 287.800.1 RSMo) we cannot impose the “unequal exposure” requirement found in § 287.020.3 to this claim, because the foregoing language contains no such requirement. We note that the legislature amended § 287.067.2 in 2005 to remove language requiring that an occupational disease “meet the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020,” as well as language providing that “[a]n occupational disease is not compensable merely because work was a triggering or precipitating factor.” The obvious intent and effect of this amendment is clear: in evaluating claims of injury by occupational disease, we must no longer refer to the criteria for a compensable injury by accident under §§ 287.020.2 and 287.020.3.

Accordingly, we conclude that the recent cases discussing the “unequal exposure” requirement under § 287.020.3, e.g., *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012), and *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009), are not applicable to this claim alleging an injury by occupational disease. Instead, following the 2005 amendments to Chapter 287, it is sufficient for employee to demonstrate that the disease he suffered is not an “ordinary disease of life to which the general public is exposed outside of the employment.”

By all accounts, the Mycobacterium avium complex (MAC) in employee's lungs was not an “ordinary disease of life.” Rather, the medical experts agree it is an extremely rare disease that is typically only seen in individuals with compromised immune systems. As a result, we conclude that employee's MAC qualifies as an “occupational disease” under the law, and is compensable if employee is able to prove the other requisite elements, namely, that the disease (1) had its origin in a risk connected with the employment; (2) flowed from that

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source as a rational consequence; and (3) that employee's occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.

We have carefully reviewed the medical opinions relevant to these factual issues, and we commend the parties for their insightful and thorough briefing. We believe this is a close case. Having said that, we are of the opinion that the administrative law judge capably sorted through the conflicting expert medical testimony, and we discern no need to disturb his well-reasoned analysis. For this reason, we will defer to his findings.

Conclusion

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

The award and decision of Administrative Law Judge Robert House, issued March 3, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

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 10th day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

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

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Terry Lankford, deceased

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the majority errs in affirming the administrative law judge's award allowing compensation to employee's surviving spouse.

Employee died on June 15, 2012, of pneumonia and chronic obstructive pulmonary disease (COPD) resulting from his lifelong habit of smoking as many as two packs of cigarettes per day. The administrative law judge and now a majority of this Commission have awarded lifetime permanent total disability benefits from his employer to his surviving spouse, based on the premise that employee's pastime of smoking cigarettes on employer's roof caused him to suffer a work-related infection of his lungs. I cannot agree to this result.

Employee worked for employer as an investigator. His job was to locate witnesses and collect evidence for use in criminal prosecutions. His duties as an investigator never required his presence on employer's roof. Yet, employee could be found on employer's roof up to 10 times per day, smoking cigarettes.

Employee became a chronic smoker at the age of 14, a habit he continued right up until the day of his lung surgery on December 21, 2007. Employee persisted smoking two packs of cigarettes per day against the advice from his doctors and despite the numerous health problems that resulted, including the aforementioned COPD diagnosis as well as significant medical treatment for pneumonia, lung masses, bronchitis, and various pulmonary infections in 2003, 2004, 2005, and 2006. He died from complications related to cigarette smoking. How is it that we are now tasked with considering whether to award lifetime benefits to his surviving spouse in a workers' compensation case?

The short answer is that employee (through his surviving spouse) alleges that his personal, daily habit of taking time away from his work duties to smoke cigarettes on employer's roof exposed him to the risk of contracting Mycobacterium avium complex (MAC) from his proximity to pigeon droppings. To support this novel theory of workers' compensation liability, employee procured an opinion from Dr. Alan Parmet, an aerospace and occupational medicine doctor, who opined that the infection of employee's lungs which prompted the 2007 surgery was the product of employee's exposure to two different pathogens: Mycobacterium avium-intracellulare (MAI) and Cryptococcus Laurentii. Dr. Parmet reasoned that employee's personal, habitual practice of smoking on employer's roof placed him in close enough proximity to dried pigeon droppings that employee must have inhaled these pathogens.

In other words, this workers' compensation claim is premised on employee's allegation that his voluntary, personal choice to disregard his work duties at least ten times per day in favor of visiting employer's roof for the purpose of smoking cigarettes exposed him to an occupational disease arising out of and in the course of employment as an investigator. I strongly disagree with the Commission majority's conclusion that this claim satisfies the relevant statutory requirements under § 287.067 RSMo. Before we even consider the opinion from employee's paid expert as to the cause of his lung

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infections, employee's claim fails. This is because, even if Dr. Parmet is believed, employee's lung infections simply did not have their "origin in a risk connected with the employment" as required under § 287.067.1 RSMo. The relevant risk here is exposure to pigeons and pigeon droppings, one that bears no connection whatsoever to employee's actual work duties as an investigator. The *only* reason employee was ever exposed to pigeons or pigeon droppings was because of his wholly voluntary and personal choice—against all medical advice even as his COPD worsened—to smoke, on employer's roof, the cigarettes that would eventually kill him. Because there is no work connection, the alleged occupational disease is not compensable.

Assuming *arguendo* that some work connection can be manufactured from the evidence that employee's coworkers sometimes followed him onto the roof to discuss work issues, I am convinced that the claim alternatively fails on the issue of medical causation. Dr. Parmet readily admitted that he has no background whatsoever with the MAI bacteria that allegedly caused employee's lung infection. He has never treated it. He has never studied it. Instead, to support his testimony in this case, he read one and a half pages from the Control of Communicable Disease manual discussing the *Cryptococcus neoformans* bacterium—an organism to which employee does not even allege he was exposed. This is the expert the administrative law judge, and now the majority of this Commission, have credited.

Employer, on the other hand, advances testimony from Dr. Paul Jost and Dr. Hunter Hofmann, board-certified experts in infectious and pulmonary diseases, respectively. Dr. Jost explained that MAI bacteria are so prevalent in the world at large that establishing any probability of exposure from a particular source is impossible. Dr. Hofmann found that employee's cigarette smoking and related COPD, rather than any alleged exposure to disease causing pathogens on employer's roof, was the root cause of the lung infection for which employee underwent surgery in 2007. Dr. Hofmann pointed out that MAI bacteria are commonly found in the cigarettes that employee smoked daily. Finally, Drs. Jost and Hofmann agreed with the treating physician Dr. Eden Esguerra that employee did not actually suffer an infection related to *Cryptococcus Laurentii*, and that this organism likely appeared in the lung biopsy owing to contamination in the laboratory. Instead, the MAI bacterium was the sole causative pathogen.

Faced with this incontrovertible evidence from better-qualified specialists that his initial opinion incorrectly identified *Cryptococcus Laurentii* as playing some role in employee's lung infection and need for surgery in 2007, Dr. Parmet was forced to revisit the facts. However, rather than acknowledge that his initial opinions lack any value, Dr. Parmet asserted his opinions were "unchanged," even as he silently amended them to identify the MAI bacteria as the sole causative pathogen. See *Transcript*, page 218. Upon what evidence did Dr. Parmet rely in reaching this new, amended opinion? The same Control of Communicable Disease manual discussing the *Cryptococcus neoformans* bacterium. *Transcript*, page 114. In other words: *no evidence whatsoever*.

Worse, Dr. Parmet premised his (demonstrably unfounded) opinion on the (indisputably false) assumption that the roof where employee enjoyed his smoke breaks was partially

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covered: it was not. Dr. Parmet agreed that rain would otherwise wash away the pigeon droppings, preventing growth of the MAI bacteria. So, not only is Dr. Parmet's opinion rendered without the necessary medical foundation, but it also relies on incorrect facts. To characterize such an opinion as mere conjecture or speculation would be, in my view, unduly generous. Because it relies on incorrect facts, Dr. Parmet's ultimate opinion cannot be considered competent and substantial evidence upon which to support an award of lifetime benefits in favor of employee's widow for employee's death resulting from a lifetime of chronic cigarette smoking.

To be clear, I have utmost sympathy for Ms. Lankford, and I wish to express my sincere condolences for her loss. However, I simply cannot join in the majority's choice to turn these sad events into a compensable workers' compensation case. I would credit the opinions from Drs. Jost and Hofmann, reverse the award of the administrative law judge, and deny this claim. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Terry Lankford, deceased Injury No. 07-131974
Dependent: Carol Lankford, widow (Claimant)
Employer: Newton County
Additional Party: Second Injury Fund
Insurer: Missouri Association of Counties,
c/o Gallagher Bassett Services
Hearing Date: January 9, 2015

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

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: December 14, 2007
5. State location where accident occurred or occupational disease was contracted: Neosho, Newton 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 occurred or occupational disease contracted: Claimant contracted an occupational disease affecting his lungs as a result of exposure to pigeon droppings.
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: Lungs
14. Nature and extent of any permanent disability: permanent total disability
15. Compensation paid to-date for temporary disability: \$-0-
16. Value necessary medical aid paid to date by employer/insurer? \$-0-

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$753.65
19. Weekly compensation rate: \$502.43/\$389.04
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: For accrued permanent total disability benefits, the sum of \$502.43 for 334 weeks, which corresponds to a total lump sum of \$167,811.62
22. Second Injury Fund liability: No
23. Future requirements awarded: Beginning January 10, 2015, and continuing for the remainder of Carol Lankford's life, the Employer/Insurer shall pay \$502.43 each week as permanent total disability benefits.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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: John Wise

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Terry Lankford, deceased	Injury No. 07-131974
Dependent:	Carol Lankford, widow (Claimant)	
Employer:	Newton County	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Missouri Association of Counties, c/o Gallagher Bassett Services	Jefferson City, Missouri
Hearing Date:	January 9, 2015	Checked by:

AWARD

The parties presented evidence at a hearing on January 9, 2015. Claimant (Mrs. Lankford) appeared in person and with her attorney, John Wise. Employer/Insurer appeared with its attorney, Alex Wulff. The Second Injury Fund appeared through its attorney, Sandra McDowell. The parties presented five issues for determination:

1. Whether Mr. Lankford sustained an occupational disease arising out of and in the course of employment with Employer;
2. Medical causation;
3. The nature and extent of permanent disability attributable to Mr. Lankford's occupational disease, with Claimant alleging that Mr. Lankford was permanently and totally disabled;
4. *Schoemehl* dependency;
5. Whether the Second Injury Fund has any liability and the extent of that liability.

Claimant (Mrs. Lankford's) attorney, John Wise, also seeks an attorney's fee of 25%.

Terry Lankford (Employee) died on June 15, 2012, at the age of 63. Mr. Lankford was born on March 5, 1949. The Certificate of Death reflects that Mr. Lankford died from causes unrelated to his occupational injury. That document reflects that he passed away from pneumonia and COPD. The order substituting as Claimant Mr. Lankford's surviving spouse, Carol Lankford, was signed by Administrative Law Judge Karen Fisher on September 6, 2012.

Both Mr. and Mrs. Lankford testified by deposition. Mr. Lankford graduated from high school and briefly attended college. He also served in the United States Army from 1967 to 1969. His last employment was with Newton County. Mr. Lankford was employed by Newton County for over 21 years. He spent the last 10 years of his employment with Newton County working as an investigator for the prosecutor's office. As an investigator, he interviewed victims and witnesses and located evidence for the prosecutors.

During his employment with the prosecutor's office, he took frequent smoke breaks on the roof of the Newton County Courthouse, the place of his employment. He took 10 smoke breaks per day, and would remain on the roof for 5 to 10 minutes at a time during such smoke breaks. While taking such smoke breaks, he would discuss his job activities with prosecutors, other investigators, and deputies and detectives. Those individuals would "run some questions" by Mr. Lankford.

Mrs. Lankford testified that she had opportunities to visit Mr. Lankford during his smoke breaks on the rooftop. She would visit him during such smoke breaks about once a month. She described the condition of the roof as being covered by pigeon droppings. She observed his co-workers going out to the rooftop during smoke breaks to discuss Mr. Lankford's job activities with him. She also testified that Mr. Lankford was not exposed to such a large number of pigeons in a concentrated area, or pigeon droppings, in his activities outside of work as he was during his employment with Newton County.

Dr. Parmet also described the history Mr. Lankford provided to him. Mr. Lankford described smoking breaks on the roof of the courthouse; he described "extensive amounts of pigeons and pigeons nesting there." He also described it as an "occasional site of confidential conversations with other individuals including his supervisor."

Mrs. Lankford married Mr. Lankford on June 5, 1970. A copy of their marriage certificate was admitted into evidence as an exhibit. She confirmed that Mr. Lankford passed away from causes unrelated to his occupational injury. Mrs. Lankford was married to Mr. Lankford continuously from June 5, 1970, to June 15, 2012, the date of his death. She confirmed that she was married to him on the date of his occupational injury, December 14, 2007.

Mr. and Mrs. Lankford and she had two children, who were not dependent on Mr. Lankford for support at the time of his occupational injury. Mrs. Lankford testified that no one, other than her, was dependent on Mr. Lankford for support as of December 14, 2007, the date of his death, or any time between such dates.

In December 2007, Mr. Lankford underwent a CT scan of the chest, which disclosed a mass on the right upper lobe of his lung. Mr. Lankford underwent a lobectomy on December 21, 2007. While recovering from that surgery, he suffered a stroke. Mr. Lankford did not work anywhere following the stroke in December 2007.

Dr. Allen Parmet, a physician board-certified in occupational medicine and aeronautic medicine, testified by way of deposition. Dr. Parmet examined Mr. Lankford on August 7, 2008. Dr. Parmet explained that, following the lobectomy procedure, the mass removed from Mr. Lankford's lung was biopsied. Those tests disclosed 2 infectious agents: a fungus called *Cryptococcus laurentii* ("Crypto") and a bacteria, *mycobacterium avium intracellulare* ("MAI").

Dr. Parmet opined that the Crypto and MAI arose from Mr. Lankford's repeated and periodic exposure to pigeon droppings during his employment with Newton County. Dr. Parmet concluded that Mr. Lankford's occupational activities with Newton County were the prevailing factor in causing the Crypto and MAI. The lobectomy was necessary to treat those conditions and the surgical complication, i.e., the stroke, was a direct consequence of treatment Mr. Lankford received for the two infections.

Dr. Parmet opined that Mr. Lankford had reached maximum medical improvement as of the time of his examination and concluded that Mr. Lankford was permanently totally disabled.

- Q. Did you form an opinion as to whether Mr. Lankford has any permanent disability as a result of the Crypto, M. avium, and the resulting stroke?
- A. Yes.
- Q. And what is that opinion?
- A. Unfortunately, he's – he's permanently and totally disabled. This is due to the effects of the stroke since he's got hemiparesis, he's got contractures, and he's got cognitive dysfunction. This is not something that you could take a person and readily put them back to work under any circumstances.
- Q. And, Dr. Parmet, he – you say that the permanent total disability arises solely because of the stroke which you think was a direct result of the Crypto and M. Avium and the treatment he received for that, and that's independent of all the prior problems he had before this?
- A. Correct.

All of Dr. Parmet's opinions were given within a reasonable degree of medical certainty.

Mr. Lankford was also examined by Dr. Paul Jost, on January 6, 2010. Dr. Jost is a physician board certified in internal medicine and infectious disease. Dr. Jost concluded that Mr. Lankford did not suffer from Crypto but suffered from MAI. Dr. Jost did not think that the MAI was caused by Mr. Lankford's exposure to pigeon droppings during his employment at Newton County. Dr. Jost testified

that the MAI "organism is so prevalent in the environment that he could have picked it up on numerous possible occasions and to tie it to one specific location at this time would basically be impossible". However, on cross-examination, Dr. Jost agreed that Mr. Lankford could have been exposed to the risk of contracting MAI as a result of his employment with Newton County. He also opined that he could not rule out Mr. Lankford's work as a source of Mr. Lankford's exposure to MAI. All of Dr. Jost's opinions were given within a reasonable degree of medical certainty.

Dr. Hunter Hofmann conducted a record review and issued 2 reports concerning Mr. Lankford. Those reports were admitted into evidence. Dr. Hofmann's curriculum vitae reflects that he is a physician practicing in Columbia, Missouri, and is board certified in internal medicine.

Dr. Hofmann, like Dr. Jost, concluded that Mr. Lankford did not suffer from Crypto but rather suffered from MAI, only. Dr. Hofmann opined that Mr. Lankford's cigarette smoking was the primary cause of his pulmonary conditions, including his contraction of MAI. However, in his report, Dr. Hofmann noted it was "also possible that he was exposed with his habit of taking smoking breaks." He also concluded that the MAI was the diagnosis that resulted in the lobectomy Mr. Lankford underwent in December 2007.

In addition to his deposition testimony, Dr. Parmet authored a report of June 11, 2014, which was submitted into evidence. Dr. Parmet issued that report after reviewing additional materials, including the reports of Dr. Hofmann and Dr. Jost and the deposition of Dr. Jost. Dr. Parmet noted the opinions of Dr. Jost and Dr. Hofmann that Mr. Lankford did not suffer from Crypto. However, he noted as did those doctors, that the MAI infection "clearly was present". "The subsequent complications . . . of Mr. Lankford stems from the evaluation of the fungal infection and biopsy, which resulted in the complication". Dr. Parmet concluded that "while smoking is certainly the initial cause of his chronic obstructive pulmonary disease which potentiated the infection, my opinion remains that Mr. Lankford's occupational exposure at the Newton County Courthouse was the most likely cause of his MAI infection and therefore ultimately rendered him Permanently and Totally Disabled and led to his death. Clearly, his pre-existing pulmonary conditions and other pre-existing problems were contributing factors and hastened his demise."

The first issues to address are whether Mr. Lankford sustained an occupational disease arising out of and during the course of his employment with Employer, and whether his occupational disease was caused by such exposure. It is uncontradicted that Mr. Lankford was exposed to pigeons and pigeon droppings during the course of his employment. He took smoke breaks, ten times a day, on the roof of

the Newton County Courthouse. Both Mr. and Mrs. Lankford described that site as one with numerous pigeons and pigeon droppings. Also, during his smoke breaks, Mr. Lankford discussed with co-employees work activities. His supervisors, the prosecutors, would also discuss cases with him during such smoke breaks. He so testified in his deposition, and also provided a similar history to Dr. Parmet. Mrs. Lankford also described observing Mr. Lankford's supervisors discussing work issues with him during the smoke breaks on the roof of the courthouse. That uncontradicted evidence clearly establishes that Mr. Lankford's exposure to the pigeons and pigeon droppings arose out of and in the course of his employment with Employer.

There is some disagreement among the medical experts as to what medical conditions Mr. Lankford contracted. Dr. Parmet opined that Mr. Lankford had contracted both Crypto and MAI. However, Dr. Jost and Dr. Hofmann opined that Mr. Lankford did not suffer from Crypto. However, both doctors agreed that Mr. Lankford suffered from MAI. Moreover, the experts agreed that the lobectomy, which Mr. Lankford underwent in December 2007, was necessary to treat the MAI. As opined by Dr. Parmet, Mr. Lankford suffered a disabling stroke as a result of that surgical procedure.

Dr. Parmet opined that the MAI from which Mr. Lankford suffered arose from his exposure to pigeon droppings during the course of his employment with Employer. Dr. Parmet opined that such exposure was the prevailing factor in causing the MAI. Although Dr. Jost and Dr. Hofmann essentially testified that they could not pinpoint the site of Mr. Lankford's exposure to MAI, they acknowledged that it was possible that he had contracted such condition because of his employment at Employer. They both testified that it was possible he was exposed to the risk of contracting MAI during his employment with Employer.

Dr. Jost and Dr. Hofmann placed great emphasis on Mr. Lankford's longstanding history of chronic obstructive pulmonary disease ("COPD"). Dr. Parmet also discussed that condition. However, as noted above, the doctors agreed that the condition for which Mr. Lankford underwent a lobectomy in December 2007 was the MAI and not COPD.

Moreover, Mrs. Lankford testified that Mr. Lankford was not exposed to pigeons or pigeon droppings outside of work to the extent he was so exposed during his employment with Newton County. A claimant does not have the burden of proof in an occupational disease case such as this to pinpoint the specific exposure. *Smith v. Capital Region Medical Center*, 412 S.W. 3rd 252 (Mo. App. 2013). The totality of the evidence clearly establishes a probability that Mr. Lankford's occupational activities at Employer caused the MAI. It is clear that he experienced a greater risk of exposure to contracting MAI

during his employment with Employer than in his non-work activities. I find Dr. Parmet's opinion regarding exposure and causation to be more persuasive than the opinions of Dr. Jost and Dr. Hofmann.

With respect to the issue of the nature and extent of Mr. Lankford's disability, it is clear that he was rendered permanently totally disabled as a result of contracting the occupational disease. All doctors discussed the stroke that Mr. Lankford suffered as a consequence of undergoing the lobectomy. Dr. Parmet testified, without impeachment or contradiction, that the sequelae of that stroke, alone, rendered Mr. Lankford permanently totally disabled. As such, I find and conclude that Mr. Lankford is permanently totally disabled solely as a result of his occupational disease contracted during the course of his employment with Employer. I also note that the parties stipulated that Mr. Lankford reached maximum medical improvement with respect to that occupational disease as of August 7, 2008.

Consequently, I find and conclude that Mr. Lankford contracted an occupational disease, MAI, as a result of his exposure to pigeon droppings during the course and scope of his employment with Employer and that such exposure was the prevailing factor in causing both his condition and disability that ultimately led to his stroke which rendered him permanently and totally disabled.

Pursuant to *Schoemehl v. Treasure of Missouri*, 217 S.W. 3rd 900 (Mo. banc 2008) employee's right to compensation for both accrued and unaccrued permanent total disability benefits survives to his dependent (Carol Lankford). Although the holding in *Schoemehl* subsequently was abrogated by statutory amendment, such amendment is not effective in this case. *Gervich v. Condaire, Inc.*, 370 S.W. 3rd 617 (Mo. banc 2012).

Employee's right to Workers' Compensation benefits vested when he contracted the occupational disease at issue in this case. Mr. Lankford was married to Mrs. Lankford from that date through the date of Mr. Lankford's death, June 15, 2012. There is no evidence that Mr. Lankford had any other dependent on the date of his injury or during any other relevant time frame. When Mrs. Lankford was substituted as a party, she stepped into the shoes of Mr. Lankford. Given that Mr. Lankford's Workers' Compensation Claim was pending when *Schoemehl* was decided, the 2008 statutory amendment abrogating *Schoemehl* does not apply to Ms. Lankford. Pursuant to *Gervich*, Mrs. Lankford is entitled to assume her late husband's place as the Employee/Claimant for the purpose of receiving continuing permanent total disability benefits pursuant to *Schoemehl*. See also *Spradling v. Treasurer of the State of Missouri*, 415 S.W. 3rd 126 (Mo. App. 2013).

The parties have stipulated that Mr. Lankford reached maximum medical improvement as of August 7, 2008. The period of past permanent total disability benefits, from August 8, 2008, through the date of hearing, represents 334 weeks. Based on the stipulated rate for permanent total disability benefits, \$502.43, past benefits to the date of hearing correspond to a lump sum of \$167,811.62. As a result, I order Employer/Insurer to pay Claimant said amount.

I also order The Employer/Insurer to pay ongoing permanent total disability benefits to Claimant, Carol Lankford, in the weekly amount of \$502.43 from the day following the hearing (January 10, 2015) for the remainder of her life, subject to review and modification as provided by law.

Given that I have found the Employer/Insurer liable for permanent total disability, I find no liability on the part of the Second Injury Fund in this matter.

I allow Claimant's attorney, John Wise, an attorneys fee of 25 percent of all amounts awarded herein as a reasonable fee for necessary legal work performed on behalf of Claimant which fee shall constitute a lien upon this award..

Made by: _____

Robert House
Administrative Law Judge
Division of Workers' Compensation
Signed 2/25/15