

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

Injury No.: 06-021233

Employee: Robert G. Lee, deceased

Dependent/Substitute Party: Cynthia Lee, widow

Employer: PeopLease Corporation (Settled)

Insurer: Insurance Company of State of Pennsylvania (Settled)

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

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

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

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

We conclude that the holding in *Spradling* is dispositive of the argument raised by the Second Injury Fund, herein. In light of the holding in *Spradling*, we will not disturb the administrative law judge's award granting weekly permanent total disability benefits under *Schoemehl* to Cynthia Lee for her lifetime.

Conclusion

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

Employee: Robert G. Lee, deceased

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The award and decision of Administrative Law Judge Karen Fisher, issued April 27, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 16th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

CONCURRING OPINION FILED

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Robert G. Lee, deceased

CONCURRING OPINION

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

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

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

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

James Avery, Member

AWARD

Employee: Robert G. Lee (deceased) Injury No. 06-021233

Dependents: Cynthia Lee – sole dependent & substituted party

Employer: PeopLease Corporation

Additional Party: Second Injury Fund

Insurer: Insurance Co. of State of Pennsylvania

Hearing Date: January 20, 2012

Checked by:

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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: February 7, 2006
5. State location where accident occurred or occupational disease was contracted: Noble, Illinois
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 injured his back as the result of falling from a truck.
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: Lower back
14. Nature and extent of any permanent disability: Settled as to Employer/Insurer. PTD as against the Second Injury Fund.
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? N/A

- 18. Employee's average weekly wages: \$775.88
- 19. Weekly compensation rate: \$517.25 / \$365.08
- 20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Settled as against Employer and its Insurer.
- 22. Second Injury Fund liability:

For accrued permanent total disability benefits,
The sum of \$152.17 for 60 weeks, and the sum of \$517.25 for 205 2/7 weeks

TOTAL: \$115,314.23

- 23. Future requirements awarded:

Beginning January 20, 2012 and continuing for the remainder of Cynthia Lee's life, the Second Injury Fund shall pay \$517.25 each week as permanent total disability benefits.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent 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: Robert G. Lee (deceased)

Injury No. 06-021233

Dependents: Cynthia Lee – sole dependent & substituted party

Before the

Employer: PeopLease Corporation

**Division of Workers'
Compensation**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Insurance Co. of State of Pennsylvania

Hearing Date: January 20, 2012

Checked by:

INTRODUCTION

The undersigned Administrative Law Judge conducted a final hearing in this case on January 20, 2012, in Joplin, Missouri. The claim against the employer and its insurer settled prior to the hearing. The hearing was held to determine the extent of any liability against the Second Injury Fund. Attorney, John Wise, appeared with his client, Cynthia Lee (claimant). Assistant Attorney General Todd Smith represented the Treasurer of Missouri as Custodian of the Second Injury Fund of Missouri.

STIPULATIONS

The parties stipulated that Claimant sustained a work related injury while employed by PeopLease Corporation on February 7, 2006. Claimant was a covered employee at the time of the injury and his employer was subject to the workers' compensation law. The parties further stipulated that the contract of hire was entered into in Mount Vernon, Lawrence County, Missouri. Thus, jurisdiction is proper. Claimant's average weekly wage was \$775.88, yielding a permanent partial disability rate of \$365.08 and a permanent total disability rate of 517.25. There is no dispute as to notice, statute of limitations, venue, or course and scope of employment.

ISSUES

The parties agree that the sole issues are whether the Second Injury Fund has any liability and the extent of that liability. Claimant's attorney, John Wise, also seeks an attorney fee of 25 percent.

EXHIBITS

The following exhibits were admitted on behalf of Claimant:

- A. Stipulation for Compromise Settlement 06-021233
- B. Stipulation for Compromise Settlement 02-055352
- C. Order substituting Cynthia Lee as claimant in place of the deceased employee, Robert G. Lee
- D. Marriage Certificate
- E. Deposition of Robert Lee
- F. Deposition of Dr. Robert Paul
- G. Medical Records – Bridges Medical Center
- H. Medical Records – St. John's
- I. Medical Records – Dr. Hish Majzoub
- J. Medical Records – St. John's
- K. Medical Records – Doctors Hospital
- L. Medical Records – St. John's
- M. Medical Records – St. John's Spine
- N. Curriculum Vitae – Phillip Eldred
- O. Report – Phillip Eldred

The follow exhibit was admitted on behalf of the Second Injury Fund:

Deposition of Dr. Daniel Kitchens

FINDINGS OF FACT

Robert Lee (Employee) died on June 12, 2011, at the age of 50 years. The Certificate of Death reflects that Mr. Lee died from causes unrelated to his occupational injury of February 7, 2006. That document reflects that he passed away from cardiac arrest and possible cardiac arrhythmia. An order substituting as claimant his surviving spouse, Cynthia Lee, was signed by Administrative Law Robert House on July 9, 2011.

Ms. Lee testified at the hearing in this matter. She testified that she and Mr. Lee were married on April 30, 1987. She confirmed that he passed away from causes unrelated to his occupational injury. Ms. Lee was married to Mr. Lee continuously from April 30, 1987 to June 12, 2011, the date of his death. She confirmed that she was married to him on the date of his occupational injury, February 7, 2006.

Ms. Lee also testified that she and Mr. Lee had one child, who did not survive infancy. She testified that no one, other than herself, was dependent on Mr. Lee for support as of February 7, 2006, the date of his death, or anytime between such dates. Mr. Lee was deposed by Elijah Haahr, counsel for employer and insurer, and Christina Hammers, counsel for the Second Injury Fund, on April 1, 2009. A transcript of that deposition testimony was admitted into evidence.

Mr. Lee completed the 11th grade and obtained a GED in 1979. He attended no formal education after high school other than plumbing school and truck driving school. Mr. Lee spent six years in the U.S. Navy. During his life, Mr. Lee worked primarily as a plumber or truck driver.

On February 7, 2006, during his employment with PeopLease Corporation, Mr. Lee was exiting his truck when he slipped on ice and fell from the truck, landing on his tailbone. He described immediate pain in his back after falling, testifying that “[i]t felt like I was on fire. It felt like I had knives coming out or – and down both my legs which was just killing me.” Claimant underwent diagnostic studies following the injury and, ultimately, surgery on April 17, 2006. That surgery was performed by Dr. Hadi, at St. John’s Regional Hospital. The surgery involved a L5-S1 redo discectomy bilaterally with instrumentation and fusion at L5-S1.

Mr. Lee described severe complaints and restrictions following the 2006 injury. He described pain “from my back down to my legs, lower back down to my toes. It feels like I’m burning and stabbing and cramping, and it’s just hard to explain. I can’t bend forward at all, like I said, you know, do anything like that or anything.” He described significant limitations as well with respect to walking and driving. He also testified he needed assistance with activities of daily living from his wife, Cynthia.

Claimant’s complaints are amply corroborated by medical records in evidence. A May 4, 2007 record entry from Dr. Bridges reflects that Mr. Lee was “very uncomfortable. He must be managed by a pain clinic for pain issues. The pain is rated at a 4 to 10/10 frequently. His endurance is very low. He can transfer from a chair to another object, but walking distances is painful, dangerous and impractical.” Dr. Bridges noted at that time that “[a] powered wheelchair would be most beneficial to him for mobility moving from room to room. His endurance is low. Walking stirs up his pain.” The doctor further noted that “[a]ll activities about the house, such as grooming, feeding himself, toileting, bathing, etc. would be facilitated by him being able to move from room to room with a powered wheelchair. A cane or a walker is not sufficient. He

cannot use a scooter because he is not able to keep his arm extended long enough to operate the scooter.”

Mr. Lee also experienced significant lower back problems prior to February 7, 2006. As he testified during his deposition: “Oh, yeah, I’ve always – yeah, I’ve had pain in my lower back.” Those longstanding complaints are also amply corroborated by medical records from treating physicians. A record entry from Dr. Kenneth Sharlin, of March 21, 2007, describes the progression of those complaints. “His back problems started when he was in his 30’s. The first insult occurred in 1999 when he fell from a ladder, though he did not have surgery on his low back until 2005.” A March 9, 2005 entry from Dr. Bridges notes that Mr. Lee had “degenerative spine disease and is in constant back pain. He rates his pain today a 6/10. He is unable to sleep more than 20-30 minutes at a time. He appears tired. He states he simply cannot get into any position that is actually comfortable. The pain radiates down to the thigh and legs, he states.”

Mr. Lee ultimately underwent surgery for those complaints on October 4, 2005. That surgery was performed by Dr. Hadi, at St. John’s Regional Health Center. The surgery involved a right L5-S1 discectomy with foraminotomy. Dr. Hadi’s postoperative diagnosis was a right L5-S1 disc herniation. Dr. Hadi’s office note of October 13, 2005 indicated that Mr. Lee had improved following the surgery. However, Paul Strecker, Dr. Hadi’s nurse practitioner, noted at that time that Mr. Lee should still not do “any significant bending, lifting, or twisting.”

Mr. Lee also suffered an injury to his cervical spine in 2002. Dr. Majzoub’s office note of August 8, 2002 reflects the following history: “This 41-year-old right-handed white male stated that on 5/30/02 he woke up in the morning with the feeling of a pulled muscle in the shoulder. He then developed tingling in the right arm involving all the fingers. Following that, began having neck pain with radiation into the right arm down to the hand and occasionally to

his left arm.” Dr. Majzoub performed surgery for those complaints on August 8, 2002. The surgery was performed at St. John’s Regional Medical Center, in Joplin, Missouri, and involved the following: anterior cervical discectomy of C5-C6 and also C6-C7 with micro decompression of the nerve roots; and anterior cervical fusion of C5-C6 and C6-C7 with allografts.

Following that neck surgery, Mr. Lee was unable to continue working as a plumber and attended truck driving school through vocational rehabilitation. He also described ongoing soreness with his neck and noted that it popped a lot.

Mr. Lee also described an accident in 1999 when a ladder broke and he fell approximately 20 feet. He underwent left knee surgery following that injury. The settlement stipulation entered into evidence reflects that Mr. Lee settled a claim based on an August 13, 1999 injury for disability of 12.5% to the body as a whole “referring to back and lower extremities.”

Mr. Lee described ongoing problems with his left knee. Although he was able to perform his job, he noted that he did so with pain. He testified that “it hurts to crawl around in crawl spaces and stuff, you know, but I just toughed it out and did it. That’s with both my knees, you know, crawling around, you know, but something you had to do, you had to do.” He also testified that his left knee bothered him while driving a truck “because of the clutch, when you clutched and stuff all the time.” He testified that his left knee would pop and snap when holding in a clutch on a truck.

Dr. Robert Paul, a physical medicine physician, credibly testified on behalf of employee and Claimant by way of deposition. Dr. Paul examined Mr. Lee on September 14, 2006. Dr. Paul noted significant findings on his physical examination of Mr. Lee. He described diminished

reflexes in the left biceps and triceps which, he testified were consistent with the cervical spine injury. He also described loss of range of motion in the cervical spine.

Dr. Paul also noted loss of range of motion in the lumbar spine and decreased sensation in the outside of the right foot which, he indicated, reflected ongoing sensory loss in the S1 dermatome.

With respect to the left knee, Dr. Paul noted a scar consistent with the prior surgery. He also noted a loss of muscle mass in the quadriceps due to the left knee injury. He further noted a valgus deformity in the left knee, which he testified indicated significant degeneration in the left knee. He also noted loss of range of motion in the left knee. Dr. Paul assessed permanent partial disability ratings as follows: 37% to the body as a whole due to the injury of February 7, 2006; 13% to the body as a whole due to the prior low back condition; 26% to the body as a whole for the prior cervical spine condition; and 15% at the level of the left knee for the prior left injury. Dr. Paul opined that the low back condition, the cervical spine condition, and the left knee injury existing prior to February 7, 2006 constituted a hindrance or obstacle to employment or reemployment prior to that date. Dr. Paul also opined that Mr. Lee was permanently totally disabled as a result of a combination of the February 7, 2006 injury and the pre-existing disabling conditions.

Dr. Paul also assessed significant functional restrictions, including limitations on sitting, bending and lifting. He also opined that Mr. Lee should have the option to change positions to relieve pain every ten minutes and that he needed to lie down during the day to relieve his pain. Dr. Paul opined that all of the restrictions he assessed resulted from a combination or synergistic effect of the 2006 back injury and all of Mr. Lee's prior back problems. All of Dr. Paul's opinions were offered within a reasonable degree of medical certainty.

Phillip Eldred, a certified rehabilitation counselor, credibly testified live at the hearing. He conducted a vocational evaluation of Mr. Lee on February 15, 2007. As part of that evaluation, he obtained a history regarding Mr. Lee's educational and work background, reviewed medical records from treating and examining physicians, and conducted an OASYS search.

Mr. Eldred explained that Dr. Paul's restrictions placed Mr. Lee in the less than sedentary work level. Given such restrictions, Mr. Eldred concluded that Mr. Lee could not return to any of his past work and had no transferable skills for other work. He also opined that Mr. Lee was not employable in the open labor market and no reasonable employer in the normal course of business would hire him for competitive gainful employment. Therefore, he concluded that Mr. Lee was permanently and totally disabled as a result of a combination of the February 7, 2006 low back injury and prior disabling conditions involving the low back, neck, and left knee.

Mr. Eldred also concluded that the injury of February 7, 2006, in isolation, would not have rendered Mr. Lee totally disabled. In arriving at that conclusion, Mr. Eldred noted that Dr. Paul had opined that the restrictions he assessed were attributable to a combination of the 2006 low back injury and prior low back injuries. Mr. Eldred also noted that no doctor, including Dr. Paul, had assessed functional restrictions solely to the injury of February 7, 2006.

CONCLUSIONS OF LAW

Section 287.220 RSMo. creates the Second Injury Fund and prescribes the compensation that shall be paid from the Fund in "all cases of permanent disability where there has been previous disability." To trigger liability of the Second Injury Fund, Claimant must show the presence of an actual and measurable disability at the time the work injury is sustained, and that the work-related injury is of such seriousness as to constitute a hindrance or obstacle to

employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Claimant also must show “either that (1) a preexisting disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.” *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004).

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

No expert has suggested that Mr. Lee was permanently and totally disabled from the last injury alone. The restrictions assessed by Dr. Paul are related to a combination of the last injury and pre-existing conditions. There is absolutely no medical evidence attributing any restrictions solely to the injury of February 7, 2006. To the contrary, the only expert to impose restrictions is Dr. Robert Paul. He expressly opined (without contradiction or impeachment on cross-examination) that all such restrictions were caused by a combination of the 2006 low back injury and prior low back injuries. I find no basis to disregard Dr. Paul’s attribution of such restrictions

to a combination of the last injury and preexisting disabling conditions. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo. banc 1994), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003); *Treasurer of State-Custodian of Second Injury Fund v. Steck*, 341 S.W.3d 69 (Mo.App. 2011).

I also note that the restrictions assessed by Dr. Paul are consistent with the treatment records of Dr. Sharlin and Dr. Bridges. The latter doctor prescribed a wheelchair for Mr. Lee and noted that he needed assistance with activities of daily living.

Moreover, it is clear that Mr. Lee's preexisting lower back condition was disabling. That is documented by his deposition testimony, records from Dr. Sharlin, Dr. Bridges, and Dr. Hadi, and the fact that Dr. Hadi continued to impose functional restrictions with respect to Mr. Lee's lower back condition as of October 13, 2005. There is nothing in the record to indicate that those restrictions were lifted prior to February 7, 2006.

I thus find and conclude that Mr. Lee is not permanently and totally disabled from the last injury but instead suffered a 15% permanent partial disability to the body as a whole, or 60 weeks of permanent disability.

I find and conclude that Mr. Lee was permanently and totally disabled at the time of his death and that such permanent total disability exists from a combination of the pre-existing disabling conditions and the injury of February 7, 2006. Mr. Lee's pre-existing disabling conditions (lower back, neck, and left knee, as well as the disability from the February 7, 2006 injury) constituted a hindrance or obstacle to employment or reemployment. He describes significant ongoing problems from the multiple pre-existing injuries, and had to change professions as a result of his prior cervical spine injury.

As noted above, both Dr. Paul and Mr. Eldred opined that Mr. Lee was permanently totally disabled. Mr. Eldred concluded that Dr. Paul's restrictions limited Mr. Lee to a less than sedentary exertional level, he was unemployable in the open labor market, and he was permanently totally disabled as a result of a combination of the 2006 lower back injury and prior disabling conditions. Mr. Eldred's vocational opinion is not contradicted by any other vocational opinion. I accept the vocational opinion of Mr. Eldred as credible in this case.

I acknowledge that Dr. Kitchens attributed no disability to the injury of February 7, 2006. However, that opinion was offered in the context of Dr. Kitchens' assessment that the February 7, 2006 accident did not result in injury to Mr. Lee's lower back. The issues of accident and causation have not been raised in this matter. In that or any other context, I cannot accept Dr. Kitchens' assessment of disability as credible given that Mr. Lee suffered a herniated disc and underwent a lower back fusion as the result of the injury of February 7, 2006.

I find and conclude that Mr. Lee obtained maximum medical improvement with respect to the February 7, 2006 injury as of December 14, 2006, the date of Dr. Paul's independent medical examination.

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

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

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

Gervich v. Condaire, Inc., Slip Op. 3, 2011 WL 794996 (Mo.App. E.D. March 8, 2011) (rehearing and/or transfer denied April 21, 2011), cause ordered transferred to Mo. Supreme Court (June 28, 2011).

Employee's right to workers' compensation benefits vested when he suffered his work related injury – February 7, 2006. Claimant was married to Employee from that date through the date of his death – June 12, 2011. There is no evidence that Employee had any other dependent on the date of his injury or during any other relevant timeframe. When Claimant was substituted as a party, she stepped into the shoes of Employee. Given that Employee's workers' compensation claim was pending when *Schoemehl* was decided, the 2008 statutory amendment abrogating *Schoemehl* does not apply to Ms. Lee. Pursuant to *Gervich*, Claimant is entitled to assume her late husband's place as the "employee" for purpose of receiving continuing permanent total disability benefits pursuant to *Schoemehl*. See Also, *Goad v. Treasurer of State*, ___ S.W.3d ___, 2011 WL5838699 (Mo.App.WD 2011).

The period of past permanent total disability benefits represents 265 2/7 weeks (from December 14, 2006 to the date of hearing). The first 60 weeks are to be paid at the rate of \$153.17, the differential between the permanent total and permanent partial disability rates. The

remaining 205 2/7 weeks of past benefits are to be paid at the rate of \$517.25. Past benefits to the date of hearing correspond to a lump sum of \$115,314.23.

The Second Injury Fund shall pay ongoing permanent total disability benefits to Claimant, Cynthia Lee, in the weekly amount of \$517.25 from the date following the hearing (January 20, 2012) for the remainder of her life, subject to review and modification as provided by law.

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

Date: April 27, 2012

Made by: /s/ Karen Wells Fisher

Karen Fisher
Administrative Law Judge
Division of Workers' Compensation