

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

Injury No.: 00-001295

Employee: Sandra Mazzocco, deceased
Dependents: Carmel Mazzocco, widower
Employer: Department of Elementary and Secondary Education
Insurer: C A R O

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 October 21, 2013. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued October 21, 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 19th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Sandra Mazzocco

Injury No.: 00-001295

Dependents: Carmel Mazzocco

Employer: Dept. of Elementary and Secondary Education

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: N/A

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

Insurer: CARO

Hearing Date: September 5, 2013

Checked by: HDF/scb

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: January 10, 2000
5. State location where accident occurred or occupational disease was contracted: Cole 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:
See award
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: See award
14. Nature and extent of any permanent disability: Permanent and total disability
15. Compensation paid to-date for temporary disability: \$116,601.62
16. Value necessary medical aid paid to date by employer/insurer? \$302,706.07

Employee: Sandra Mazzacco

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17. Value necessary medical aid not furnished by employer/insurer? - 0 -
18. Employee's average weekly wages: ----
19. Weekly compensation rate: \$578.48 for temporary and permanent total disability benefits
\$303.01 for permanent partial disability benefits
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: \$578.48 per week from and including December 27, 2005 forward
22. Second Injury Fund liability:
23. Future Requirements Awarded: None

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: Russell Still.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sandra Mazzocco

Injury No: 00-001295

Dependents: Carmel Mazzocco

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Dept. of Elementary and Secondary Education

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

Additional Party: N/A

Insurer: CARO

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on September 5, 2013. Memoranda were filed by September 16, 2013.

The parties stipulated that on or about January 10, 2000, the employee, Sandra Mazzocco, was in the employment of the Department of Elementary and Secondary Education (DESE). Ms. Mazzocco sustained an injury by accident on or about January 10, 2000; the accident arose out of and in the course of her employment. The employer was operating under the provisions of Missouri's workers' compensation law; liability for workers' compensation benefits was self-insured through the Central Accident Reporting Office. The employer had notice of the injury; a claim for compensation was timely filed. The compensation rate is \$303.01 per week for permanent partial disability benefits and \$578.48 per week for temporary and permanent total disability benefits.

Temporary disability benefits have been paid to date in the amount of \$116,601.62, representing 191 weeks of benefits paid through and including December 26, 2005. Medical aid has been provided in the amount of \$302,706.07.

The issue to be resolved by hearing is the liability of the employer/insurer for permanent total disability death benefits as of and including December 27, 2005, to the surviving spouse, Carmel Mazzocco, pursuant to the decision in *Schoemehl*.

At the inception of the hearing an amended claim for compensation was filed listing Carmel Mazzocco as the dependent of Sandra Mazzocco.

FACTS

Sandra Mazzocco was employed as a health and physical education consultant for DESE in its curriculum division. On January 10, 2000, Ms. Mazzocco was traveling to a conference in Osage Beach, Missouri, when she was in an automobile accident. Ms. Mazzocco injured both knees, her right leg, her collar bone, her ribs, a toe in her left foot, her right thumb, and her pneumothorax bilaterally in the accident, although her most serious injury was to her right leg where her femur was broken in three places. Ms. Mazzocco spent time at Rusk Rehabilitation Center after her

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release from the University of Missouri Hospital and then continued therapy on an outpatient basis at home.

Carmel Mazzocco testified that he was married to Sandra Mazzocco in 1997, and that they remained married until Ms. Mazzocco's death in 2005. Mr. Mazzocco described Ms. Mazzocco's multiple surgeries, including a right knee replacement in 2002. Mr. Mazzocco also described Ms. Mazzocco's attempts to deal with her chronic pain, including oral prescription medications, nerve blocks, a spinal cord stimulator, and an implanted pain pump. Mr. Mazzocco described Ms. Mazzocco's condition as deteriorating between the time of the accident and her death in 2005. By the time of Ms. Mazzocco's death she was spending a great deal of time in her recliner and using her wheelchair as transportation outside of her home rather than her cane or walker.

Ms. Mazzocco continued to work after her accident until September 30, 2000, working both at her office in Jefferson City and from her home in Columbia, finishing projects she had started before the accident. Ms. Mazzocco attended two conferences during this nine-month time period in Indianapolis, accompanied by either her husband or co-workers. Ms. Mazzocco was not gainfully employed after September 30, 2000.

Mr. Mazzocco testified that Ms. Mazzocco was still receiving treatment for her right leg as well as a broken hip when she died in 2005.

Dr. Garth Russell testified by deposition that he is board certified in orthopaedic surgery and carries a certificate of injury and disability evaluation. Dr. Russell testified that he has reviewed Ms. Mazzocco's medical records and that his report pertaining thereto is dated April 14, 2009. Dr. Russell testified that Ms. Mazzocco would not have been able to return to gainful employment due to her pain and her use of narcotic and chemical medications, both as the result of her accident of January 10, 2000. Dr. Russell opined that as of January 10, 2000, Ms. Mazzocco was incapable of a return to employment. Dr. Russell stated that Ms. Mazzocco was not found to be at maximum medical improvement when she died, stating that "her injury from January the 10th of 2000, was continuing at the time that she died" and that she was continuing to receive treatment. (Russell depo p 51) Dr. Russell later stated that his report refers to Ms. Mazzocco as having been permanently and totally disabled from the date of her injury forward.

APPLICABLE LAW

RSMo Section 287.200.1 (4) Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made. The word "employee" as used in this section shall not include the injured worker's dependents, estate, or other persons to whom compensation may be payable as provided in subsection 1 of section 287.020. The amount of such compensation shall be computed as follows:

(4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly

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earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

The Missouri Supreme Court in *Schoemehl* held that “the surviving dependent of an injured worker who has been awarded permanent total disability benefits is entitled to the unpaid, unaccrued balance of benefits for the duration of the dependent’s life.” *Tilley v. USF Holland Inc.*, 325 S.W.3d 487, 494 (Mo.App. E.D. 2010) (citing *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. banc 2007)). However, the Missouri Legislature amended §§ 287.020.1, 287.200.1 and 287.230, R.S.Mo. to specifically deny PTD benefits to dependents of permanently and totally disabled employees in workers’ compensation cases arising out of injuries that would occur after the enactment of the amendments. The holding in *Schoemehl* was specifically abrogated on June 26, 2008, the effective date of HB 1883. *Bennett v. Treasurer of State*, 271 S.W.3d 49, 53 (Mo.App. W.D. 2008). As a result, “recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in *Schoemehl*, and June 26, 2008.” *Id.* The test is whether the case was pending during the effective dates, not whether the employee died during the relevant time period. *Roller v. Steelman*, 297 S.W.3d 128, 133 (Mo.App. W.D. 2009).

Under Missouri law it is well settled that pending means undecided. *Ex parte Munford*, 57 Mo. 603, 606 (Mo. 1847); *State v. Hahn*, 142 S.W.2d 1064, 1067 (Mo. 1940) (holding that a suit is pending from the time it is instituted until it is finally disposed of). Furthermore, 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). To the extent that it compensates for earnings lost during the marriage, a workers’ compensation award is marital property. *Seyler v. Seyler*, 201 S.W.3d 57, 62 (Mo.App. E.D. 2006). The dependent’s right to the property vests when the worker suffers the injury. *Gervich v. Condaire, Inc.*, 2011 WL 794996 at 4 (Mo.App. E.D., dec’d March 8, 2011).

RSMo Section 287.140.1 In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri

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shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

AWARD

The claimant, Carmel Mazzocco, has sustained his burden of proof that he is entitled to permanent and total workers' compensation benefits as the result of the injuries sustained by Sandra Mazzocco as the result of the January 10, 2000 accident. The testimonies of Mr. Mazzocco and Dr. Russell support a finding of permanent and total disability resulting from the injuries sustained in the January 10, 2000 accident. The finding of maximum medical improvement is not inconsistent with the receipt of additional medical treatment where Section 287.140.1 dictates the continuation of medical treatment to cure and relieve from the effects of the injury throughout the employee's need for such treatment. The responsibility for medical treatment is not extinguished by a finding of maximum medical improvement. All of the medications and treatments cited by the employer/insurer in its brief (pages one through three) from 2003 until the time of Ms. Mazzocco's passing are modalities designed to relieve pain rather than cure Ms. Mazzocco from the effects of her injury. Ms. Mazzocco reached maximum medical improvement when medical efforts to cure her of her injuries ceased. The fact that the employer/insurer recognized the severity of Ms. Mazzocco's injuries by continuing her temporary total disability benefits should not serve as a contraindication of maximum medical improvement, particularly where both temporary and permanent total disability benefits are paid at the same compensation rate. Ms. Mazzocco was injured in early 2000 and was continuing to receive workers' compensation temporary total disability benefits when she died in late 2005, a period of almost six years. This length of treatment alone points to a diminished likelihood of a finding of permanent partial disability at any point. For purposes of calculation of benefits a specific date of maximum medical improvement is not necessary.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation