

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 07-116601

Employee: Jeffrey McBride, deceased

Dependents: Christa McBride Brown, widow; Kolter Austin McBride and
Gryffin William McBride, dependent sons

Employer: Missouri Department of Transportation

Insurer: Self-Insured c/o Missouri Highway and Transportation Commission

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence and briefs, heard the parties' oral arguments and considered the whole record. Pursuant to §286.090 RSMo, we issue this final award and decision modifying the October 2, 2008, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminary Matters

The administrative law judge heard this matter to consider: 1) dependency; and 2) distribution of death benefits.

The administrative law judge found that Christa McBride (Christa), Gryffin McBride (Gryffin) and Kolter McBride (Kolter) were all conclusively presumed total dependents of employee. The administrative law judge further found that from December 8, 2007 (the day after employee's death) through June 5, 2008 (the day of Christa McBride's remarriage), employee's death benefits of \$345.08 per week were to be distributed equally among Christa, Gryffin and Kolter (\$115.03 each, or $\$345.08 \div 3$). Due to Christa's remarriage on June 5, 2008, the administrative law judge ordered employer to pay a remarriage lump sum payment to Christa equal to 104 times the weekly death benefit of \$345.08, for a total of \$35,888.32. Thereafter, Christa's death benefits were to cease. Starting June 6, 2008 and going forward from that date, employer was ordered to pay and distribute employee's death benefits equally between just Gryffin and Kolter (\$172.54 each, or $\$345.08 \div 2$). The administrative law judge ordered that both Gryffin and Kolter are entitled to their portion of the death benefits as long as they meet the definition of "dependent" under §287.240(4).

The employer appealed to the Commission alleging the administrative law judge erred in awarding Christa a remarriage lump sum payment equal to 104 times the weekly benefit of \$345.08, for a total of \$35,888.32. Employer alleges that, pursuant to section 287.240(4)(a), Christa's remarriage lump sum payment should have only been equal to 104 times the weekly benefit of \$115.03 (the portion of the weekly death benefits she was awarded for the period of time between employee's death and her remarriage), for a total of \$11,962.77.

Summary of Facts

The findings of fact and stipulations of the parties were recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

On December 7, 2007, employee sustained a fatal accident arising out of and in the course of his employment with employer. Employee was survived by his wife, Christa, their son, Kolter, and his son from a previous marriage, Gryffin.

A Joint Stipulation was filed with the administrative law judge at the September 4, 2008 hearing. The stipulation contains the following language, "It is the claimant, Christa McBride's, position that she would receive 100% of the remarriage benefit of 104 weeks of compensation under R.S.M.O. § 287.240 as of June 5, 2008, which totals \$35,888.32 (104 weeks X \$345.08)." Employer did not object to the language in the Joint Stipulation regarding Christa's position on what lump sum she should receive or to her testimony regarding the same. The administrative law judge then awarded Christa the lump sum amount of \$35,888.32 for her remarriage benefit. This amount equals two years worth of employee's total weekly death benefit.

Conclusions of Law

All parties are in agreement that Christa is entitled to a remarriage benefit of 104 weeks of compensation under §287.240 RSMo. The issue is whether the administrative law judge awarded the proper amount of remarriage lump sum payment to Christa.

Section 287.240(4) (a) RSMo. provides that a dependent spouse's death benefits shall cease upon the widow or widower's death or remarriage. That section goes on to state that "In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be paid to the widow or widower."

Prior cases interpreting this statutory provision support employer's argument that a remarried widow or widower is to receive a lump sum remarriage benefit equal only to two years worth of the portion of weekly death benefits they were entitled to prior to their remarriage.

In *Yardley v. Montgomery*, 580 S.W.2d 263 (Mo. banc 1979), an employee sustained a fatal accident while in the course of his employment and was survived by his wife and two children. *Id.* at 265-66. Employee's total weekly death benefits amounted to \$93.33. *Id.* at 266. The widow was awarded \$73.33 of the weekly death benefits and their two children were awarded \$10.00 each. *Id.* Upon the widow's remarriage, she was awarded a lump sum remarriage benefit of \$7,626.32, or \$73.33 multiplied by 104 weeks. This lump sum remarriage benefit was calculated by using only the widow's portion of weekly death benefits she was entitled to prior to her remarriage times 104 weeks. This is contrary to the calculation used in this case in that Christa's remarriage lump sum benefit was calculated by using employee's entire weekly death benefit in arriving at the amount \$35,888.32.

The same method that was used in *Yardley* for calculating the remarriage lump sum benefit was also used in the following analogous cases: *Mouser v. St. Joe Minerals Corporation*, 709 S.W.2d 950 (Mo.App. 1986), *Battles v. Massman Construction Company*, 580 S.W.2d 280 (Mo. banc 1979), and *Ikerman v. Koch*, 580 S.W.2d 273 (Mo. banc 1979). In all of the aforementioned cases, the deceased employee left a widow and at least one child as his survivors. The death benefits were divided among the widow and children. Upon the widow's remarriage, her remarriage lump sum payment was calculated by using her portion of the weekly death benefits times 104 weeks, not the entire weekly death benefit times 104 weeks.

Counsel for Christa argues that despite what §287.240(4)(a) RSMo says regarding the amount of remarriage benefit Christa is entitled to, the parties both signed and submitted a Joint Stipulation Agreement on September 4, 2008 which stipulated that employer would pay Christa \$35,888.32 for the remarriage benefit representing 104 weeks (two years) at the stipulated rate of \$345.08. Christa's attorney further argues that the case was settled by way of the Joint Stipulation Agreement.

First of all, the signed Joint Stipulation Agreement is not a final settlement as Christa's attorney argues because it was not approved by the administrative law judge. This is further evidenced by the fact that a final hearing was held before the administrative law judge on September 4, 2008 and a Final Award was issued. Also, the plain language of the agreement only states that it is Christa's "position" that she was to receive \$35,888.32 (104 weeks X \$345.08) as her remarriage lump sum payment, not that the parties were agreeing that she was owed that amount. Lastly, even if the Joint Stipulation Agreement is deemed a final settlement between the parties and the calculation used by the administrative law judge had been stipulated to, it would be in contravention of §287.240(4) (a) RSMo because it would allow more recovery than the amount prescribed in the statute. The Southern District Court of Appeals has previously held that such a stipulation would not be allowed because, "a stipulation in contravention of a statute is not permitted." *Tidwell v. Walker Construction*, 151 S.W.3d 127, 133 (Mo.App. S.D. 2004).

Another point relied on by Christa's attorney is that employer's argument regarding the incorrect calculation of the remarriage benefit should have been raised before the administrative law judge and that it is improperly addressed for the first time before the Commission. As employer correctly cites in its brief, this argument by Christa's attorney is without foundation in light of the Eastern District Court of Appeals decision in *Long v. City of Hannibal*, 670 S.W.2d 567 (Mo.App. E.D. 1984). In that case the Court held that "[s]ince the decision of the ALJ is not final or in any way binding on the Commission," the failure of a party to raise an issue before the administrative law judge does not result in its failure to preserve the issue for review by the Commission. *Id.* at 570.

Upon careful review of the entire record and relevant Missouri law, the Commission determines and concludes that, pursuant to §287.240(4)(a), Christa is only entitled to a remarriage lump sum payment equal to 104 times the weekly benefit of \$115.03, for a total of \$11,962.77.

Award

We modify the award of the administrative law judge on the issue of Christa's remarriage benefit calculation. Christa is entitled to be paid by employer a remarriage lump sum payment equal to 104 times the weekly benefit of \$115.03, for a total of \$11,962.77. In all other respects, we affirm the award.

The award and decision of Chief Administrative Law Judge Lawrence Kasten issued October 2, 2008, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Given at Jefferson City, State of Missouri, this 24th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Jeffery McBride, deceased

Injury No. 07-116601

Dependents: Christa McBride Brown, widow
Kolter Austin McBride, son
Gryffin William McBride, son

Employer: Missouri Department of Transportation

Additional Party: Second Injury Fund (Dismissed on day of hearing)

Insurer: Self c/o Missouri Highway and Transportation Commission

Appearances: Jeffrey Gault for Christina McBride Brown and Kolter Austin McBride
Matthew Hoffman for Gryffin William McBride
Jason Saey for Employer.

Hearing Date: Commenced: September 4, 2008
Completed on: September 9, 2008

Checked by: LCK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes
- Was the injury or occupational disease compensable under Chapter 287? Yes
- Was there an accident or incident of occupational disease under the Law? Yes

- Date of accident or onset of occupational disease? December 7, 2007
- State location where accident occurred or occupational disease contracted: Jefferson County, Missouri
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Yes
- Did accident or occupational disease arise out of and in the course of the employment? Yes
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee was fatally injured while operating a salt spreader.
- Did accident or occupational disease cause death? Yes
- Parts of body injured by accident or occupational disease: N/A
- Nature and extent of any permanent disability: N/A
- Compensation paid to date for temporary total disability: N/A
- Value necessary medical aid paid to date by employer-insurer: \$5,000 for funeral bill
- Value necessary medical aid not furnished by employer-insurer: N/A

- Employee's average weekly wage: \$517.62
- Weekly compensation rate: \$345.08 per week for death benefits
- Method wages computation: By agreement
- Amount of compensation payable: \$345.08 per week for death benefits. See Rulings of Law.
- Second Injury Fund liability: N/A
- Future requirements awarded: \$345.08 per week for death benefits payable to conclusively presumed total dependents (See Findings of Fact and 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 Christa McBride Brown shall be subject to a lien in the amount of \$500.00 in favor of the following attorney for necessary legal services rendered: Jeffrey Gault

Attorney Mathew Hoffman waived any attorney's fees.

FINDINGS OF FACT AND RULINGS OF LAW

On September 4, 2008, the employee's widow, Christa McBride Brown, appeared in person and with her attorney, Jeffrey Gault, for a final hearing. Kerry McBride, the mother and natural guardian of Gryffin McBride, the deceased employee's minor son, appeared in person and with her attorney, Mathew Hoffman. The employer was represented at the hearing by its attorney, Jason Saey. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

- On December 7, 2007, the employer, Missouri Department of Transportation, was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act and was duly qualified as a self-insured employer through the Missouri Highway and Transportation Commission.
- On December 7, 2007, Jeffrey McBride was an employee of Missouri Department of Transportation and was working under the provisions of the Workers' Compensation Act.
- On December 7, 2007, the employee sustained a fatal accident arising out and in the course of his employment.
- The employer had notice of the employee's accident and death.
- The claims filed by Christa McBride and Kerry McBride were filed within the time allowed by law.
- The employee's average weekly wage was \$517.62. The rate of compensation for death benefits is \$345.08 per

week.

- The employee's injury and resulting death were medically causally related to his accident.
- The employer paid \$5,000.00 in funeral expenses. The employer has not paid any death benefits.

ISSUES

- Dependency
- Distribution of death benefits

EXHIBITS

The following exhibits were offered and admitted into evidence:

- Death certificate of Jeffrey McBride
- Marriage License and Certificate of Marriage of Jeffrey McBride and Christa West McBride dated June 23, 2001
- Birth certificate of Kolter Austin McBride
- Marriage license and Certificate of Marriage of Jeremy Scott Brown and Christa McBride Brown dated June 5, 2008

- Birth Certificate of Gryffin William McBride
- Medical records of Gryffin McBride (The record was left open for the submission of this exhibit. This exhibit was received and admitted into evidence on September 9, 2008).

- Joint Stipulation Agreement

In the claim for compensation filed by Christa McBride, the Second Injury Fund was included as an additional party. At the hearing, Christa McBride Brown dismissed the Second Injury Fund.

Christa McBride listed Kelsie West as an alleged dependent in her claim for compensation. Kelsie West is her daughter from a prior marriage who lived with the employee and her mother. The employee never adopted Kelsie West. Since the three conclusively presumed dependents would take the death benefits to the exclusion of Kelsie West, Christa McBride Brown dismissed any claim by Kelsie West as an alleged dependent of the deceased employee at the hearing.

WITNESSES: Christa McBride Brown and Kerry McBride

FINDINGS OF FACT

Based upon a review of the evidence, exhibits and the testimony of Christa McBride Brown and Kerry McBride, I make the following Findings of Fact:

Kerry McBride was married to the employee, Jeffery McBride in July of 1997. Kerry McBride and Jeffery McBride had one child born of the marriage, Gryffin William McBride, who was born on October 8, 1997. Gryffin McBride has Cerebral Palsy and as a result has low muscle tone and motor skills; and has cognitive delays. Introduced into evidence were medical records from 1998 and 1999 for treatment he received from Dr. Altman at St.

Louis Child Neurology Services. Dr. Altman's diagnosis was right hemiplegia, which is a form of Cerebral Palsy. Dr. Altman stated that Gryffin McBride had a rather complex brain malformation. There was atrophy of the right frontal lobe with schizencephaly and there appeared to be abnormal gyration and pachygyria. Dr. Altman prescribed physical therapy and occupational therapy. Due to the lack of expressive speech and language, Dr. Altman ordered speech and language therapy. In April of 1999, Gryffin continued to have significant language deficits and the speech and language therapy were continued. Dr. Altman stated that developmental outcomes can be quite variable and time would tell how severe the developmental outcomes would be for Gryffin. Kerry McBride and Jeffery McBride were divorced on August 4, 1999. Jeffery McBride was liable for the support of Gryffin McBride. At the time of the employee's death, Gryffin McBride was under the age of 18 and was dependent upon Jeffery McBride for support.

Jeffery McBride and Christa West McBride were married on June 23, 2001. They remained married and were living together as husband and wife at the time of the employee's death on December 7, 2007. Christa McBride and Jeffery McBride had one child born of the marriage, Kolter Austin McBride, who was born on March 26, 2002. At the time of the employee's death, Kolter Austin McBride was under the age of 18 and was dependent upon Jeffery McBride for support. Christa McBride married Jeremy Scott Brown on June 5, 2008.

RULINGS OF LAW:

Issue 1. Dependency

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 her 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 upon a deceased employee. However upon the remarriage of a widow, the death benefit shall cease unless there are other total dependents entitled to any death benefits under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be paid to the widow. Upon then the periodic death benefit shall cease unless there are other total dependents entitled to any death benefit, in which event the periodic benefits to which such widow would have been entitled had she not remarried shall be divided among such other total dependents and paid to them during their period of entitlement under this chapter.

Based upon a review of the evidence and my findings of fact, I find that Christa McBride was a conclusively presumed total dependent at the time of the employee's death and was entitled to benefits until the time of her remarriage on June 5, 2008.

Under Section 287.240(4) RSMo., a natural, posthumous, or adopted child or children under the age of 18, or over the age if physically or mentally incapacitated from wage earning upon the parent legally liable for the support or with whom he is living at the time of the death of the parent.

Based upon a review of the evidence and my findings of fact, I find that Gryffin William McBride is a conclusively presumed total dependent of Jeffrey McBride under the provisions of Section 287.240(4) RSMo.

Based upon a review of the evidence and my findings of fact, I find that Kolter Austin McBride is a conclusively presumed total dependent of Jeffrey McBride under the provisions of Section 287.240(4) RSMo.

I find that the employee was not survived by any other conclusively presumed dependents.

Issue 2. Distribution of Death Benefits

Under Section 287.240 RSMo., dependents by conclusive presumption take death benefits to the exclusion of a total dependent proved by fact. Pursuant to Section 287.240 RSMo., the employer is directed to pay the sum of \$345.08 per week to the conclusively presumed total dependents of the deceased employee in equal shares commencing on December 8, 2007, and continuing until all of the conclusively presumed total dependents are no

longer entitled to death benefits as provided below.

Based upon evidence and the stipulations between the parties, I find that the weekly death benefit shall be allocated as follows:

Death Benefits from December 8, 2007 through June 5, 2008.

The employer shall pay the sum of \$345.08 per week from December 8, 2007 through June 5, 2008. Those benefits shall be divided equally between Christa McBride, Kolter McBride, and Gryffin McBride. The employer is ordered to pay a total of \$8,972.08 for this 26 week period of time. The employer is directed to pay to Christa McBride Brown the sum of \$2,990.69. The employer is ordered to pay the sum of \$2,990.69 to Kolter Austin McBride, by and through Christa McBride Brown, his mother, natural guardian and conservator. The employer is ordered to pay the sum of \$2,990.69 to Gryffin William McBride, by and through Kerry McBride, his mother, natural guardian and conservator.

Death Benefits due to the Remarriage of Christa McBride Brown:

Due to the remarriage of Christa McBride Brown on June 5, 2008, the employer is ordered to pay a remarriage lump sum payment to Christa McBride Brown equal to 104 times the weekly death benefit of \$345.08 for a total of \$35,888.32.

After the payment of the remarriage lump sum payment of \$35,888.32 and the payment for the accrued death benefits in the amount of \$2,990.69, the payment of death benefits to Christa McBride Brown shall cease and the employer shall have no further obligation to pay benefits to her under the terms of this award.

Death Benefits to Kolter Austin McBride starting on June 6, 2008:

Starting on June 6, 2008, the employer is ordered to pay the sum of \$172.54 per week to Kolter Austin McBride by and through Christa McBride Brown, his mother, natural guardian and conservator. The weekly death benefit payable to Kolter Austin McBride shall terminate in accordance with the provisions of Section 287.240(4) RSMo., which provides as follows:

Payment of death benefits to the child or other dependents as provided in this paragraph shall cease when the dependent dies, turns the age of 18 or becomes physically or mentally capable of wage earning over that age, or until 22 years of age if the child of the deceased is in attendance and remains a full time student in any accredited educational institution, or at the age of 18 years of age, the dependent child is a member of the armed forces of the United States on active duty; provided, however, that such dependent child be entitled to compensation during four years of full attendance at a fully accredited educational institution to commence prior to 23 years of age and immediately upon cessation of his active duty in the armed forces, however, unless there are other total dependents to the death benefit under this chapter.

Upon the termination of the entitlement of death benefits to Gryffin William McBride, in the event that Kolter Austin McBride is still entitled to death benefits under Section 287.240 RSMo., the death benefits to which Gryffin William McBride was entitled to (\$172.54 per week) shall be paid to Kolter Austin McBride, by and through Christa McBride Brown, his mother, natural guardian and conservator, so that the total benefit paid to Kolter Austin McBride during his remaining period of entitlement would be \$345.08 per week.

Death Benefits to Gryffin William McBride starting on June 6, 2008:

Starting on June 6, 2008, the employer is ordered to pay the sum of \$172.54 per week to Gryffin William McBride by and through Kerry McBride, his mother, natural guardian and conservator. The weekly death benefit payable to Gryffin William McBride shall terminate in accordance with the provisions of Section 287.240(4) RSMo., which provides as follows:

Payment of death benefits to the child or other dependents as provided in this paragraph shall cease when the dependent dies, turns the age of 18 or becomes physically or mentally capable of wage earning over that age, or until 22 years of age if the child of the deceased is in attendance and remains a full time student in any accredited educational institution, or at the age of 18 years of age, the dependent child is a member of the armed forces of the United States on active duty; provided, however, that such dependent child be entitled to compensation during four years of full attendance at a fully accredited educational institution to commence prior to 23 years of age and immediately upon cessation of his active duty in the armed forces, however, unless there are other total dependents to the death benefit under this chapter.

Upon the termination of the entitlement of death benefits to Kolter Austin McBride, in the event that Gryffin William McBride is still entitled to death benefits under Section 287.240 RSMo., the death benefits to which Kolter Austin McBride was entitled to (\$172.54 per week) shall be paid to Gryffin William McBride, by and through Kerry McBride, his mother, natural guardian and conservator, so that the total benefit paid to Gryffin William McBride during his remaining period of entitlement would be \$345.08 per week.

When neither Gryffin William McBride nor Kolter Austin McBride qualifies for death benefits as defined under the terms of this award, the payment of death benefits by the employer shall cease and the employer shall have no further obligation to pay benefits under the terms of this award.

Annual Reporting:

Christa McBride Brown, shall annually report to the Division the age, physical and mental condition, and educational status of Kolter Austin McBride, as a dependent receiving death benefits under the provisions of this award.

Kerry McBride, shall annually report to the Division, the age; physical condition including the effect of Cerebral Palsy; mental condition; and educational status of Gryffin William McBride, as a dependent receiving death benefits under the provisions of this award.

ATTORNEY'S FEE:

Based upon the request of Jeffery Gault and Christa McBride Brown and the evidence presented, I find that Jeffery Gault, attorney at law is entitled to a fee of \$500.00 for necessary legal services rendered to his clients. The amount of this attorney's lien shall constitute a lien on the compensation awarded herein to Christa McBride Brown. This amount shall be paid out of the lump sum of death benefits owed.

Mathew Hoffman waived any attorney's fees.

INTEREST

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

Date: _____

Made by:

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

A true copy: Attest:

Mr. Jeff Buker
Division Director
Division of Workers' Compensation