

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

Injury No.: 01-041053

Employee: Donald Ogden, deceased
Dependent: Ronda Ogden
Employer: ConAgra Foods, Inc.
Insurer: Self- Insured

This 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, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the issues: (1) whether employee's surviving spouse, Ronda Ogden, is entitled to permanent total disability benefits pursuant to the decision in *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007); and (2) whether employer unreasonably defended this matter such that Ms. Ogden is entitled to attorneys' fees under § 287.560 RSMo.

The administrative law judge determined that Ms. Ogden is not entitled to permanent total disability benefits because application of the *Schoemehl* case is limited to cases in which a formal claim for compensation is filed with the Division of Workers' Compensation prior to the legislative abrogation of *Schoemehl* effective June 26, 2008, and the formal claim was not filed in this matter until January 23, 2009.

Ms. Ogden filed a timely application for review with the Commission alleging the administrative law judge erred in concluding that she is not entitled to permanent total disability benefits pursuant to the *Schoemehl* decision.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

Findings of Fact

We hereby take administrative notice of the records of the Division of Workers' Compensation (Division) in connection with this matter. From those records, from the Agreed Statement of Facts jointly offered into evidence by the parties, and from the evidence provided at the hearing before the administrative law judge,¹ we find the following facts.

¹ We note that the administrative left the record open for an additional 30 days to allow Ms. Ogden to submit evidence as to the cause of employee's death, owing to some confusion, at the outset of the hearing, regarding the scope of the parties' stipulations. We concur with the administrative law judge's overruling of employer's objection with regard to leaving the record open, and we have considered the additional evidence provided by Ms. Ogden as part of the record in this matter.

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Employee and Ronda Ogden were married on February 26, 1988. On May 3, 2001, employee suffered catastrophic work injuries when the tractor-trailer he was driving for employer crashed and rolled over. At the time of the injury, employee remained lawfully married to Ms. Ogden. The parties have stipulated that Ronda Ogden was employee's only "dependent" for purposes of Chapter 287 at the time of his injury.²

Employer filed a "Report of Injury" (Form WC-1) with the Division on May 4, 2001, and began on that date to pay total disability benefits to employee in the amount of \$599.96 per week. In connection with commencing weekly payments, employer also filed with the Division a "Notice of Commencement of Compensation Payments" (Form WC-3) on May 29, 2001. The Division assigned Injury No. 01-041053 to this matter.

On June 15, 2001, attorney Jeffrey Slattery filed an entry of appearance on behalf of employer in this matter, requesting that the Division furnish him with any notices regarding the claim. On February 18, 2005, Mr. Slattery filed a withdrawal of appearance, and on February 24, 2005, employer's present counsel entered his appearance.

Employee required extensive medical treatment for the catastrophic injuries he suffered in the work injury of May 3, 2001, which included a subarachnoid hemorrhage, intracerebral hemorrhage, left frontal subcutaneous hematoma, and multiple fractures of the cervical spine. Specifically, employee required emergency transportation and treatment immediately following the accident; a subsequent hospitalization of approximately three weeks before his condition could be stabilized; a stay of approximately one month in a rehabilitation facility thereafter; additional emergency transportation and treatment following a neurological emergency on June 14, 2001, following by a month-long hospitalization; another long-term stay in a rehabilitation facility from July through December 2001; and 24/7 nursing home care and treatment thereafter. At the time of the hearing in this matter, employer had paid a total of \$1,995,038.11 for medical treatment rendered to employee.

On January 23, 2009, employee filed a "Claim for Compensation" (Form WC-21-2) with the Division for the injury suffered on May 3, 2001. On that form's Box 10 "Additional Statements," employee indicated as follows:

This claim is also made by Ronda Ogden, wife of Donald, who asserts her claim under *Schoemehl v. Treasurer of State of Mo.*, 217 S.W.3d 900 (Mo. Banc 2007) for benefits as a dependent in the event of the death of her husband.

Authorized care is continuing and the claim is timely filed.

Transcript, page 76.

On February 6, 2009, employee filed an amended "Claim for Compensation" with the Division, advising that dependent had been appointed conservator of employee's estate.

² Consequently, we will hereinafter refer to Ms. Ogden as the "dependent."

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On April 13, 2009, employer filed an "Answer to Claim for Compensation" (Form WC-22), denying "each and every allegation" contained in employee's claim for compensation. *Transcript*, page 80.

Employee died on October 9, 2014. Employer continued to voluntarily pay weekly total disability benefits in the amount of \$599.96 through October 9, 2014, for a total of \$420,571.69.

Dependent has provided expert medical opinion testimony from Dr. Robert Paul, who believes employee was permanently and totally disabled from the date of the work accident until the date of his death; and that employee died of an acute myocardial infarction, which was not a result of the work injury. There is no contrary expert medical opinion evidence on this record. We find the essentially uncontested opinions of Dr. Paul to be persuasive.

We find that employee was permanently and totally disabled as a result of the work injury, and remained permanently and totally disabled through the date of his death. We find that employee died on October 9, 2014, of an acute myocardial infarction, which was a cause unrelated to the work injury.

Conclusions of Law

Permanent total disability benefits under Schoemehl

On January 9, 2007, the Supreme Court of Missouri issued its decision in the case of *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007), holding that when a permanently and totally disabled employee dies of a cause unrelated to the work injury, the employee's surviving dependent(s) become the "employee" entitled to the award of lifetime permanent total disability benefits.³ On June 26, 2008, a legislative amendment abrogating the *Schoemehl* decision became effective.

The question before us is whether dependent is entitled to permanent total disability benefits pursuant to the *Schoemehl* analysis. Employer argues that, because employee did not file a formal claim for compensation until January 23, 2009, employee did not have a claim for permanent total disability benefits that was pending during the "Schoemehl window." See *Bennett v. Treasurer of Missouri-Custodian of the Second Injury Fund*, 271 S.W.3d 49, 53 (Mo. App. 2008), which held that "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, the effective date of HB 1883." Employer argues that employee's claim for permanent total disability benefits cannot be deemed to have been "pending" until the date upon which employee first filed with the Division a "Claim for Compensation" on the Division's Form WC-21-2. Employer suggests that the law as declared in *Schoemehl* only applies to claims wherein a formal claim for compensation is filed before June 26, 2008.

³ We note that in the *Schoemehl* decision, the Court did not purport to change the existing law of the state of Missouri or to create a new right to compensation for injured workers or their dependents; instead, the Court rendered its decision based on language from various legislative provisions that had been in place for decades.

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Dependent responds that, because employee's May 3, 2001, date of injury predates the legislative abrogation of *Schoemehl* effective June 26, 2008, it would be unconstitutional to retroactively apply such abrogation to preclude an award of permanent total disability benefits to her. Dependent relies upon *Gervich v. Condaire, Inc.*, 370 S.W.3d 617 (Mo. 2012), wherein the Supreme Court of Missouri ordered an award of *Schoemehl* benefits to the husband of an employee who died after the *Schoemehl* window closed, because his "right to compensation and the substantive law applicable to his claim are governed by the statutes in effect at the time of the injury." *Id.* at 624. Dependent suggests that where the date of injury occurs before June 26, 2008, the law as declared in the *Schoemehl* decision must be applied—provided the other elements (e.g. the employee predeceases the dependent of a cause unrelated to the work injury, etc.) are met.

The issue before us appears to be one of first impression. On the one hand, the courts have found that an amended claim for compensation filed after abrogation (which, for the first time, alleged an employee was entitled to permanent total disability benefits) related back to the date the employee filed her initial claim for compensation, which was before abrogation, such that the employee had a "claim for permanent total disability benefits" pending during the *Schoemehl* window. *Goad v. Treasurer of Mo.*, 372 S.W.3d 1, 11 (Mo. App. 2011). At first glance, the *Goad* decision would seem to suggest that the court considered the filing of a claim for compensation within the *Schoemehl* window to be a prerequisite to recovery, which would bolster employer's argument.⁴

On the other hand, the *Goad* court provided the "relation back" analysis to reject an argument from the Second Injury Fund without actually reaching the question whether an employee's claim would fall outside the *Schoemehl* window if it was filed after abrogation, and in fact the court specifically noted its reservations as to that proposition when it suggested that "the relevant time for determining H.B. 1883's applicability would appear to be the date of the worker's injury, not the date on which a claim was first asserted." 372 S.W.3d at 11 n.8. The *Goad* decision also predates *Gervich*, wherein the Missouri Supreme Court strongly suggested that the date of injury, rather than some other event such as the employee's death, is the pivotal date for purposes of determining *Schoemehl* applicability.⁵

We note also the decision in *Grubbs v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009), which, although addressing a different provision of Chapter 287 altogether, noted that a "claim" is defined in Black's Law Dictionary as "[t]he aggregate of operative facts giving rise to a right enforceable by a court." *Id.* at 911. Under this definition, there would appear to have been a "claim" for permanent total disability benefits in this matter as soon as employee suffered the

⁴ Employer's brief cites a number of decisions using similar "claim filed and pending" language; employer argues the courts, through such language, have already resolved the issue in this case. We are not persuaded, as employer has failed to identify any decision addressing the *precise* issue presently before us: whether the date of injury or the filing of a formal claim controls the application of *Schoemehl*.

⁵ Though we must conclude the *Gervich* decision is not ultimately *dispositive* here, as it did not address the precise issue before us, the Court therein expressly relied upon the Missouri Constitution to find that the legislative abrogation of *Schoemehl* cannot be retroactively applied. See 370 S.W.3d at 623.

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compensable injury, or in other words, on May 3, 2001, before the closing of the *Schoemehl* window.⁶

This conclusion seems better supported by the very facts and circumstances of this case. We have noted that employer filed statutorily-required notices with the Division as early as May 4, 2001,⁷ and began paying weekly total disability benefits to employee that same day. Also in May 2001, the Division assigned an Injury Number, and in June 2001, an attorney for the employer entered his appearance in this matter. Given these circumstances, it is difficult for us to conclude that proceedings in this case were not “pending” before the Division until employee filed a “Claim for Compensation” on the Division’s Form WC-21-2. To so hold would seem to elevate form over substance, contrary to the longstanding judicial admonition that we are to “enforce substantial rights at the sacrifice of procedural rights” when applying Chapter 287. *Parsons v. Steelman Transp., Inc.*, 335 S.W.3d 6, 18 (Mo. App. 2011). See also *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 737 (Mo. App. 2004); *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 816 (Mo. App. 2002); *Crowell v. Hawkins*, 68 S.W.3d 432, 441 (Mo. App. 2001); *Wiele v. National Super Mkts.*, 948 S.W.2d 142, 146 (Mo. App. 1997); *Vogt v. Ford Motor Co.*, 138 S.W.2d 684, 687 (Mo. App. 1940); and *Schrabauer v. Schneider Engraving Product, Inc.*, 224 Mo. App. 304, 318 (Mo. App. 1930).

We note also that an injured employee need not ever file a claim for compensation in order to receive benefits; instead, the filing of a claim for compensation is statutorily reserved for cases in which there is some dispute between the parties requiring the intervention of an administrative law judge. See § 287.400 RSMo and *Gillespie v. American Bus Lines*, 246 S.W.2d 797, 800 (Mo. 1952), noting that “[n]o ‘pleadings’ are required under [Chapter 287]. Workmen’s compensation proceedings are initiated by the filing of a notice of accident. A ‘Claim’ need be filed only in case of a dispute; and the commission must assist the claimant in filing his ‘Claim’; it need not be signed by an attorney nor state facts sufficient to state a claim for relief or the definite amount of money claimed.”

Employer argues that the legislature’s imposition of a statute of limitations in § 287.430 RSMo suggests a legislative intent that the filing of formal claims for compensation is an important prerequisite to recovery. We note, however, that the legislature therein specifically contemplated the existence of compensable claims *without* the filing of a formal claim for compensation, in that the payment of compensation by an employer—as seen in this case—operates to toll the limitations period:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the

⁶ Although the more recent decision in *Treasurer of Missouri-Custodian of the 2nd Injury Fund v. Couch*, 478 S.W.3d 417 (Mo. App. 2015) ultimately distinguished *Grubbs*, the *Couch* court did not express any disagreement with the dictionary definition of “claim” set forth in *Grubbs*.

⁷ Section 287.380 RSMo required employer to file the “Report of Injury” with the Division within 30 days of learning of employee’s accident, or face various penalties, including criminal proceedings and fines. Likewise, § 287.400 RSMo required employer to provide ongoing notice to the Division of the commencement and termination of compensation payments.

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date of injury or death, or *the last payment made under this chapter on account of the injury or death ...*

§ 287.430 RSMo (emphasis added).

Where our legislature has seen fit to toll the statute of limitations until the last payment made by an employer, it would seem incongruous to punish employee or dependent in this case for failing to file a claim for compensation prior to June 26, 2008, where employer continued to pay for employee's medical treatment and weekly total disability benefits until the date of his death on October 9, 2014, as there would have been no justiciable dispute between the parties so long as employer continued to voluntarily pay benefits under Chapter 287. The courts have made clear that the Division and this Commission are without jurisdiction to order an award of *Schoemehl* benefits where the employee is still living. See *White v. Univ. of Mo.*, 375 S.W.3d 908 (Mo. App. 2012).

Ultimately, in light of all of the foregoing considerations, and because our Supreme Court in *Gervich* strongly suggested that the date of injury, rather than some other triggering event, is the pivotal consideration when determining whether *Schoemehl* applies, we are persuaded that an employee's dependents may recover under *Schoemehl* where the injury giving rise to the claim for permanent total disability benefits occurs before June 26, 2008, regardless of whether a formal claim for compensation is filed before that date. For this reason, we conclude that employer is liable to dependent for the payment of permanent total disability benefits pursuant to *Schoemehl*.

Costs under § 287.560 RSMo

Dependent argues that employer unreasonably defended this matter, and that she is therefore entitled to an award of costs under § 287.560 RSMo, which provides, in relevant part, as follows:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

As discussed above, the primary issue before us is one of law, and one which the appellate courts of our state have not yet specifically considered. It is difficult for us to envision a circumstance in which a party might be found guilty of unreasonably bringing, prosecuting, or defending a claim where the controlling issue is one of first impression. In any event, we conclude that employer has advanced reasonable arguments to support its position in this matter. Dependent's claim for costs under § 287.560 RSMo is therefore denied.

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Decision

We reverse the award of the administrative law judge.

Beginning October 10, 2014, employer is liable to Ronda Ogden for weekly permanent total disability benefits at the stipulated rate of \$599.96. The weekly payments shall continue for Ms. Ogden's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued December 31, 2015, is attached solely for reference.

For necessary legal services rendered to employee, Andrew Buchanan, Attorney at Law, is allowed a fee of \$11,119.00, which shall constitute a lien on said compensation.⁸

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

Given at Jefferson City, State of Missouri, this 5th day of August 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

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

Curtis E. Chick, Jr., Member

Attest:

Secretary

⁸ We acknowledge that employee's counsel requested, at the hearing, approval of an additional fee of \$1,250.00 for an anticipated 5 hours of additional work. Although we do not find a basis for approving such additional fee at this time, our decision herein should not be read to foreclose a future request by employee's attorney for approval of additional fees under § 287.260 RSMo, provided such is accompanied by an itemization of necessary legal services or other such evidence demonstrating that an additional fee is fair and reasonable.

Employee: Donald Ogden, deceased

CONCURRING OPINION

In light of the *Gervich* decision, it appears to me that the legal reasoning of the Commission majority will most likely be adopted when this case (as it surely will) reaches the Missouri Court of Appeals. So I must reluctantly concur in the result that Ms. Ogden is entitled to ongoing permanent total disability benefits following the death of the employee. I write separately, though, to voice my keen displeasure at once again finding myself in the absurd position of awarding more compensation to the dependent of an employee whose death had nothing to do with work, where the same individual would likely receive far less compensation if the employee *had* died as a result of the work injury. In the case of *Spradling v. Treasurer of State*, 415 S.W.3d 126, 135 (Mo. App. 2013), Presiding Judge Gary W. Lynch wrote a concurring decision that aptly describes my dismay at these circumstances:

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.

In light of the holding in *Spradling*, the divestment provisions under § 287.240(4) RSMo are inapplicable to an award of *Schoemehl* benefits, with the result that the Missouri Workers’ Compensation Law provides more protection to employees injured—but not killed—by work prior to June 26, 2008, than it provides to the dependents and families of workers who were killed by work prior to that date. Indeed, I note that at the deposition of Dr. Robert Paul in this matter, employer’s attorney actually advanced the argument that employee’s work injury *did* play a causative role in his death.

I pause to allow the reader to contemplate the perversity of incentivizing employers to argue that an injury did not just permanently and totally disable an employee—but *also killed him*. To be forced to follow, as a member of this Commission, a judicial decision that so fundamentally upends the parties’ rights, duties, and obligations under the law shocks not only the conscience, but also offends notions of fundamental fairness. I eagerly look forward to the day that we will be able to consign *Schoemehl* and its progeny to the dimly lit recesses of a legal library somewhere, to be mentioned only as a short-lived curio of a forgotten era.

Until that day, I will continue to note, as I have every time I have been required to follow *Schoemehl* as a member of this Commission, that there would appear to be an avenue for relief for any employer (or the Second Injury Fund) currently paying benefits under a *Schoemehl* award. Specifically, I note that the Commission retains jurisdiction to consider a “change in condition” as grounds for an order ending any compensation

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previously awarded under § 287.470 RSMo. See, e.g., *Pavia v. Smitty's Supermarket*, 366 S.W.3d 542, 548 (Mo. App. 2012), and *Bunker v. Rural Elec. Coop.*, 46 S.W.3d 641 (Mo. App. 2001). It appears to me that nothing would prevent any party paying an award of *Schoemehl* benefits to an employee's dependent from filing an application with the Commission pursuant to § 287.470 and presenting evidence showing a change in the condition of the "employee" (e.g. pointing out that the substituted "employee" is *not* permanently and totally disabled as a result of the work injury) such that an award of permanent total disability benefits is no longer appropriate. In my view, the Commission would be authorized in such circumstance to terminate permanent total disability benefits to any dependent receiving *Schoemehl* benefits.

James G. Avery, Jr., Member

AWARD

Employee: Donald E. Ogden (deceased) Injury No. 01-041053
Dependents: Ronda Ogden
Employer: ConAgra Foods, Inc. Before the
Additional Party: N/A **DIVISION OF WORKERS'**
COMPENSATION
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Monfort, Inc. Risk Management c/o Sedgwick CMS
Hearing Date: June 24, 2015 Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
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: MAY 3, 2001
5. State location where accident occurred or occupational disease was contracted: JASPER COUNTY, MO
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: N/A
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$1,995,038.11

- 17. Value necessary medical aid not furnished by employer/insurer? \$420,571.69
- 18. Employee's average weekly wages: \$899.94
- 19. Weekly compensation rate: \$\$599.96
- 20. Method wages computation: STIPULATION

COMPENSATION PAYABLE

- 21. Amount of compensation payable: -0-

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

- 22. Second Injury Fund liability:

TOTAL: -0-

- 23. Future requirements awarded: NONE

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Employee: Donald E. Ogden (deceased)

Injury No. 01-041053

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donald E. Ogden (deceased)

Injury No. 01-041053

Dependents: Ronda Ogden

Employer: ConAgra Foods, Inc.

Additional Party: N/A

Insurer: Monfort, Inc. Risk Management c/o Sedgwick CMS

Hearing Date: June 24, 2015

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

Award

This matter came before the undersigned Administrative Law Judge for final hearing on June 24, 2015. The dependent, Ronda Ogden, appeared in person and by her attorneys Charles Buchanan and Andrew Buchanan. The employer and insurer appeared by their attorney Ron Sparlin. The central issue presented by the parties for determination is whether the dependent, Ronda Ogden, is entitled to continued permanent total disability benefits pursuant to *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007). Additionally, the dependent seeks an award of attorneys' fees and expenses under Section 287.560, RSMo., alleging that employer/insurer have opposed continuing benefits to her without reasonable grounds.

Findings of Fact

The parties submitted their Joint Exhibit 1, an "Agreed Statement of Facts" which set out the relevant facts stipulated by the parties. Based on the facts stipulated by the parties in the Agreed Statement of Facts, I make the following findings of fact:

Employee: Donald E. Ogden (deceased)

Injury No. 01-041053

1. On or about May 3, 2001, the Employee, Donald Ogden, was an employee working within the scope and course of his employment for the Employer, ConAgra Foods, Inc. At all times relevant hereto the Employer, ConAgra Foods, Inc., was self-insured and its administrator was Sedgwick Claims Management Services.
2. The employee, Donald Ogden, sustained an injury by accident on May 3, 2001.
3. The employee, Donald Ogden, and Ronda Ogden, were married on February 26, 1988.
4. At the time of his injury on May 3, 2001, the employee was lawfully married to Ronda Ogden.
5. The employee, Donald Ogden, and Ronda Ogden, were married on February 26, 1988.
6. The deceased employee filed his Form 21, claim for compensation, with the Division of Workers' Compensation on January 23, 2009.
7. The employer/insurer filed their answer to the claim for compensation on February 3, 2009.
8. The deceased employee filed an amended claim for compensation with the Division of Workers' Compensation on February 6, 2009.
9. The employer/insurer filed their answer to the amended claim for compensation with the Division of Workers' compensation on February 13, 2009.

Employee: Donald E. Ogden (deceased)

Injury No. 01-041053

10. The employer paid the sum of \$1,995,038.11 for medical treatment for the employee, Donald Ogden, related to the injury of May 3, 2001.
11. The Employer paid temporary total disability benefits from May 5, 2001 through October 9, 2014 in the total amount of \$420,571.69 as a result of the May 3, 2001 injury.
12. The employee's average weekly wage was \$899.94 and employee's rate for temporary total disability benefits was \$599.96.
13. Dr. Robert Paul testified by deposition on behalf of the dependent on February 24, 2015 (Exhibit D).
14. Dr. Dennis Estep authored an IME report on behalf of the employer, dated August 18, 2008 (Exhibit E).
15. On October 9, 2014, the employee, Donald Ogden, died.
16. The death certificate of Donald Ogden (Exhibit F) reflects his causes of death as including myocardial infarction, CVA and seizure.
17. On the date of his death, Donald Ogden was still lawfully married to Ronda Ogden.
18. For purposes of Chapter 287, RSMo., Ronda Ogden was the only dependent of Donald Ogden at the time of his injury and at the time of his death.
19. For purposes of Chapter 287, RSMo., if any person is entitled to any ongoing benefits following the death of Donald Ogden, Ronda Ogden, dependent and surviving spouse, is the only person who would be entitled to receive any

Employee: Donald E. Ogden (deceased)

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ongoing benefits based on the disability and/or death of the employee, Donald Ogden.

20. If the dependent, Ronda Ogden, is entitled to future permanent total disability benefits, they will be payable at the rate of \$599.96 per week.

21. The dependent, Ronda Ogden, is represented by attorneys Buchanan, Williams & Stilley pursuant to an hourly attorney fee contract.

At the hearing of June 24, 2015, the parties presented their legal arguments on the issues to be determined. The dependent requested that the record be left open for an additional thirty days following the conclusion of the hearing so she could generate and submit additional evidence on the issue of the cause of Donald Ogden's death. The dependent's request was granted over the objection of the employer/insurer.

Thereafter, the dependent submitted a deposition of Dr. Robert E. Paul taken on July 6, 2015. In the deposition, Dr. Paul testified that the prevailing factor in causing Donald Ogden's death was a heart attack. He also opined that Ogden did not die as a result of his injuries that occurred on May 3, 2001. Dr. Paul based his conclusion on the fact that Ogden's primary injuries from the 2001 accident were to his brain and spinal cord, and that a heart attack is the common cause of death in a 72-year old man.

Conclusions of Law

The dependent, Ronda Ogden, seeks recovery for lifetime permanent total disability benefits pursuant to *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007). In *Schoemehl*, our Supreme Court ruled that an injured

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employee's surviving dependent was entitled to recover ongoing permanent total disability benefits that had been awarded to the employee, after the employee died from a cause unrelated to his injury. *Schoemehl* at 902. Later, the Supreme ruled that the recovery provided for in *Schoemehl* only applied where the injured employee died while his workers' compensation claim was pending before the Division of Workers' Compensation. *Strait v. Treasurer*, 257 S.W.3d 600,602-603 (Mo. banc 2008).

On June 26, 2008, our state legislature enacted an amendment to Section 287.230, RSMo. which rejected and abrogated the holding in *Schoemehl* and its progeny. The amendment became effective on that date. Later appellate decisions, in particular *Bennett v. Treasurer of the State of Missouri*, 271 S.W.3d 49 (Mo. App. 2008) held that recovery under *Schoemehl* was, therefore, limited to claims for permanent total disability that were pending between January 9, 2007 (the date *Schoemehl* was decided) and June 26, 2008.

Thus, for the dependent to recover she must prove: (1) the employee had reached maximum medical improvement; (2) the employee was permanently and totally disabled; (3) that she was a surviving dependent at the time of her husband's death; (4) that the employee's death was from a cause unrelated to his injury; and (5) that the *Schoemehl* doctrine applies temporally to this case, i.e., a claim was pending during the "*Schoemehl* window".

Maximum Medical Improvement

The medical opinions in evidence are unanimous in finding that Donald Ogden had reached a point of maximum medical improvement well before his death. The

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dependent's medical expert, Dr. Robert Paul, testified regarding the claimant: "He probably reached maximum medical improvement the day of the injury." The employer/insurer's medical expert, Dr. Dennis Estep, stated in his report of August 18, 2009: "It is my opinion that Mr. Ogden has reached maximum medical improvement from injuries he sustained in May 2001".

So there is no question that the employee had reached maximum medical improvement prior to his death.

Permanent Total Disability

The evidence also leads to the conclusion that the deceased employee was permanently and totally disabled. Pursuant to Section 287.020.6, RSMo., "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." The central issue is whether, in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his condition. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726 (Mo. App. 2000).

Dr. Paul stated in his May 20, 2009 report that he felt Donald Ogden "is 100% permanently totally disabled by virtue of this on-the-job injury and this job injury only". He went on to say that Odgen "is having difficulty maintaining his activities of daily living while in a wheelchair. He suffers from neurological loss and chronic pain. His neurologic loss is not amenable to surgery. His pain is only controlled with strong

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narcotics and sedative medications.” Dr. Paul later testified that from the date of Ogden’s injury till his death he was unable to maintain employment.

Dr. Estep did not pronounce the claimant to be permanently and totally disabled. He assessed a permanent partial disability of 73% of the body as a whole from the 2001 work injury. However, Dr. Estep went on to find that Ogden “is in need of constant supervision” and “does require constant care and a guardian”. He also noted that Ogden had spent “several years” as a resident at National Health Care.

When both expert medical opinions are considered I must conclude that Donald Ogden was permanently and totally disabled at the time of his death. Dr. Paul outlined the serious nature of his various injuries leading to the result that Ogden struggled with activities of daily living while wheelchair-bound. Dr. Estep noted that Ogden had resided for years after his injury at National Health Care and believed he would need constant supervision and treatment. Those statements signify a seriously debilitating condition and would be incompatible with working in the open labor market. As a result I find that Donald Ogden was permanently and totally disabled at the time of his death.

Dependency

There is no controversy between the parties regarding this issue in light of the Agreed Statement of Facts. The parties stipulated that Ronda Ogden was the deceased employee’s one and only dependent at the time of his death. They further stipulated that Ronda Ogden is the one person, as dependent, who would be entitled to receive any ongoing benefits if anyone is entitled to such benefits.

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Was Employee's Death Related to the Accident

Under the reasoning of the Court in *Schoemehl*, an employee's dependent steps into his place and assumes his right to permanent total disability benefits where the employee dies from causes unrelated to the work injury. *Schoemehl*, 217 S.W.3d at 901-902. The dependent in those circumstances is then entitled to receive the permanent total disability benefits for her lifetime. *Schoemehl*, 217 S.W.3d at 903

The dependent did not present any evidence at the hearing on the issue of whether Donald Ogden's death was caused by his 2001 work injury or if it was due to unrelated causes. However, the court granted the dependent's motion to leave the record open for 30 additional days so she could generate and produce evidence on that issue. Within the allotted 30 days the dependent submitted the second deposition of Dr. Robert Paul, which was taken on July 6, 2015.

Dr. Paul identified the injuries suffered by Donald Ogden in his 2001 accident as being a traumatic brain injury and a spinal injury. Upon reviewing the employee's death certificate, which listed a heart attack as the cause of death, Dr. Paul opined that Ogden did not die as a result of his work injuries of May 3, 2001. His rationale for this opinion was that the injury in 2001 involved his brain and spinal cord, not his heart, and Ogden was never treated for heart symptoms prior to October 6, 2014. Dr. Paul further found it dispositive that a heart attack is the common cause of death in a 72 year-old man such as Donald Ogden.

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The employer/insurer presented no contradictory evidence on the issue of cause of death. As a result, I find that the dependent has met her burden of establishing that Donald Ogden's death was from causes unrelated to his work injury.

Temporal Application of the *Schoemehl* Doctrine

Our court of appeals has ruled that recovery under the principles of *Schoemehl* is limited to claims for permanent total disability that were pending between January 9, 2007, the date the Supreme Court issued its opinion in *Schoemehl*, and June 26, 2008, the date of the amendment to Section 287.230, RSMo, in which the legislature abrogated *Schoemehl*. *Bennett v. Treasurer of the State of Missouri*, 271 S.W.3d 49 (Mo. App. 2008). See, also *Strait v. Treasurer of Missouri*, 257 S.W.3d 600 (Mo. banc 2008) and *Spradling v. Treasurer of the State of Missouri*, 415 S.W.3d 126 (Mo. App. 2013).

The pertinent timeline in this case is undisputed. It is as follows:

- Donald Ogden's injury occurred on May 3, 2001.
- Donald Ogden filed his original Form 21 claim for compensation, on January 23, 2009.
- The Donald Ogden filed an amended claim for compensation on February 6, 2009.
- Donald Ogden died on October 9, 2014.

The dependent argues that this issue is controlled by *Gervich v. Condaire, Inc.*, 370 S.W.3d 617 (Mo. banc 2012) and that she is within the *Schoemehl* doctrine based solely on the date of injury—as long as it occurred before the enactment of the statute

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abrogating *Schoemehl* (and had not been finally adjudicated by that time). The employer/insurer, on the other hand, argues that it is the filing and pendency of the employee's claim for compensation that is operative to trigger a right to benefits under *Schoemehl*—that the actual Form 21 had to have been filed and pending during the “*Schoemehl* window”.

The determination of this issue becomes apparent upon review of appellate decisions following *Schoemehl*.

In *Bennett v. Treasurer of the State of Missouri*, 271 S.W.3d 49, 53 (Mo. App. 2008), the Western District Court of Appeals held: “. . . 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, the effective date of HB-1883[the amendment to Section 287.230.3 abrogating *Schoemehl*].” (emphasis added)

In 2010 the Eastern District, in *Tilley v. USF Holland, Inc.*, 325 S.W.3d 487, 493 (Mo. App. 2010) held: “The amended statute [abrogating *Schoemehl*] is not retroactive and will only apply to claims initiated after the effective date of the amendment.”

The Southern District likewise applied this same reasoning in *Spradling v. Treasurer of the State of Missouri*, 415 S.W.3d 126 (Mo. App. 2013), when it commented:

Spradling's claim was filed in 1998, it was pending at the time *Schoemehl* was decided and no resolution had been reached when the statutory amendments went into effect. As such, the reasoning in *Schoemehl* and its interpretation of the 1994 versions of the statute at issue, are binding on this Court.

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In all three of these decisions the court's focus was on the actual claim for compensation, and whether that pleading had been filed with the Division of Workers' Compensation (and was still pending) during the *Schoemehl* window. Stated differently, the controlling standard was whether the claim had been filed before the statutory amendment in June 2008 that abrogated *Schoemehl*.

Further verification that this is the proper inquiry was provided by the Labor and Industrial Relations Commission in *Agnew v. AALCO Wrecking Company, Inc.*, Injury No. 99-171802, decided November 21, 2014.

In *Agnew*, the employee was injured in an accident occurring on March 26, 1999 and he subsequently died on November 22, 2008. The deceased employee left one dependent, a minor child, who sought continuation of permanent total disability benefits pursuant to *Schoemehl*. On the pivotal issue of temporal application of *Schoemehl*, the Commission found:

The operative timeline in this case is that Employee's original Claim for compensation was filed on March 13, 2000 for injuries to the body as a whole, temporary total disability benefits and medical care (Exhibit 1). House Bill 1883 became effective on June 26, 2008. Employee died on November 22, 2008. See Exhibit 3. The Amended Claim for Compensation alleging permanent total disability benefits was filed on May 7, 2009 (Exhibit 1).

On this point, *Schoemehl* temporally applies to this case. Employee filed his Claim for Compensation, and it was received by the Division of Workers' Compensation, on February 17, 2000. Therefore, his claim was pending between the January 9, 2007 *Schoemehl* decision and the June 26, 2008 statutory abrogation date. The defense argues in its brief that the amended claim was filed nearly one year after the window closed and that *Schoemehl* cannot apply without a claim for permanent total disability pending prior to June 26, 2008. On the other hand, the claimant could not

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have amended the claim alleging that he was the employee before the now deceased Employee's death. The amended claim relates to the same event or transaction as the original claim and to the same state of facts. It would appear that either the amended Claim relates back to the original claim or that the original Claim is sufficient to constitute the claim upon which to render Compensation in this case from a temporal aspect. (emphasis in original)

Applying this standard to the present facts, the *Schoemehl* doctrine does not temporally apply to Ronda Ogden's claim for benefits. The original claim for compensation was not filed until January 23, 2009, which was outside the *Schoemehl* window, or after the statutory amendment abrogating *Schoemehl*. Therefore, Ronda Ogden has failed to establish entitlement to continuation of permanent total disability benefits and her claim is denied.

Attorney Fees and Expenses

In light of the finding that Ronda Ogden is not entitled to a continuation of the permanent total disability benefits that had been paid to her late husband, there was, necessarily, no unreasonable defense by the Employer/Insurer. Therefore, the dependent's motion for attorney's fees and expenses pursuant to Section 287.560, RSMo., is denied.

Summary

The dependent, Ronda Ogden, sought a continuation of permanent total disability benefits following the death of her husband, Donald Ogden. She claimed the right to ongoing benefits pursuant to the *Schoemehl* doctrine. However, applying the standards set out by *Schoemehl* and its progeny to the facts of this case, the dependent has not

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established the elements entitling her to ongoing permanent total disability benefits. Specifically, the facts indicate the *Schoemehl* doctrine does not temporally apply to Ronda Ogden's claim because the formal Claim for Compensation was filed outside the *Schoemehl* window. Therefore, Ronda Ogden's claim for a continuation of permanent total disability benefits is denied.

Additionally, the dependent alleged that the Employer/Insurer had denied payment of continued benefits to her without reasonable grounds. She sought an award of attorney's fees and expenses pursuant to Section 287.560, RSMo. Since I have found that Ronda Ogden is not entitled to further benefits her motion for attorney's fees and expenses is without merit and is denied.

Made by: _____
Karen Wells Fisher
Administrative Law Judge
Division of Workers' Compensation
Signed 12/24/15