

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

Injury No.: 03-145299

Employee: Colleen Prewett, deceased
Dependent/Substitute Party: Chad Prewett, widower
Employer: Jewish Vocational Services (Settled)
Insurer: Missouri Employers Mutual Insurance Company (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 issue 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 Chad Prewett for his lifetime.

Conclusion

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

Employee: Colleen Prewett, deceased

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The award and decision of Administrative Law Judge Mark S. Siedlik, issued August 29, 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: Colleen Prewett, 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

**FINAL AWARD
AS TO SECOND INJURY FUND ONLY**

Employee: Colleen Prewett (deceased)

Injury No. 03-145299

Dependents: Chad Prewett

Employer: Jewish Vocational Services (settled 3/4/11)

Insurer: Missouri Employees Mutual Ins. Co.

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

Hearing Date: May 3, 2011

Checked by: MSS/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 4, 2003
5. State location where accident occurred or occupational disease was contracted: Independence, Jackson 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 as set out above? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was leaving a work meeting when she was hit by a vehicle in the parking lot.
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: Body as a whole referable to neck and back
14. Nature and extent of any permanent disability: Employee is permanently and totally disabled
15. Employee's average weekly wages: \$648.08
16. Weekly compensation rate: \$432.07 temporary and permanent total disability; \$347.05 permanent partial disability
17. Method wages computation: Stipulated and agreed by the parties
18. Compensation paid to date for temporary disability: \$11,972.00
19. Amount of compensation payable: 160 weeks of permanent partial disability (previously paid) and \$11,972.00 of temporary total disability (previously paid)
20. Second Injury Fund liability: Yes

Second Injury Fund differential \$85.02 per week for 160 weeks = \$13,603.20

Effective beginning June 19, 2008 the Second Injury Fund became liable for permanent total disability benefits at the rate of \$432.07 per week and it shall remain liable for such benefits for the life of dependent, Chad Prewett.

The amount awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Lisa R. McWilliams, Attorney, for reasonable and necessary attorney's fees pursuant to Mo. Rev. Stat. §287.260.1.

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FINDINGS OF FACT AND RULINGS OF LAW

Employee: Colleen Prewett (deceased)

Injury No. 03-145299

Dependents: Chad Prewett

Employer: Jewish Vocational Services (settled 3/4/11)

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

Hearing Date: May 3, 2011

Checked by: MSS/lh

STIPULATIONS

At the hearing on May 3, 2011, the parties stipulated:

1. That on or about December 4, 2003 Respondent was subject to the Missouri Workers' compensation law;
2. That Claimant was employed by Respondent on December 4, 2003;
3. That the Claimant suffered a personal injury by accident in Jackson County, Missouri while in the course and scope of her employment with Respondent;
4. That Respondent was given proper and timely notice;
5. That a timely claim was made against the employer and the Second Injury Fund.

EVIDENCE

Evidence presented on behalf of Employee:

Chad Prewett, husband of the deceased, Colleen Prewett, testified. Additionally, claimant's evidence at the hearing consisted of the following:

- Exhibit A - A Motion with exhibits & Order substituting Chad Prewett
- Exhibit B - Original and Amended Claim for Compensation
- Exhibit C - Stipulation for Compromise Settlement with the Employer
- Exhibit D - Deposition of Anita Baker
- Exhibit E - Personnel records from Jewish Vocational Services on Colleen Prewett
- Exhibit F - Deposition of Dr. P. Brent Koprivica including deposition exhibits
- Exhibit G - Deposition of Mike Dreiling, including deposition exhibits
- Exhibits H through S - The following medical records:

H	North Kansas City Hospital 1
I	North Kansas City Hospital 2
J	North Kansas City Hospital 3
K	Heartland Special Hospital
L	Creekwood Internal Medicine
M	Shawnee Mission Medical Center
N	Midwest Neurosurgery
O	Rockhill Orthopaedics
P	KC Neurosurgery
Q	Heartland Hand & Spine
R	Spinal Institute of KC
S	HealthSouth

The Fund cross-examined each witness at deposition and hearing but did not present any additional evidence at hearing. After this case was submitted, the Missouri Supreme Court accepted transfer of Gervich v. Condaire to examine the key issue of survivor benefits if the claimant was found to be permanently, totally disabled, and died of unrelated causes. The parties agreed to hold this case in abeyance until the Court ruled on Gervich. That decision was handed down July 31, 2012, making this case ready for disposition.

ISSUES

The issues to be determined are the following:

- I) Whether claimant suffered any disability for which the Second Injury Fund would be liable?
- II) If claimant is found to have been permanently and totally disabled, is the Second Injury Fund liable for ongoing lifetime benefits to be paid to her dependent husband or should benefits cease on the date of her death?

FINDINGS OF FACT AND RULINGS OF LAW

Employee Colleen Prewett died of causes unrelated to her work injury on May 3, 2010. Due to her death, Employee's attorney filed a Motion to Substitute Chad Prewett, Colleen Prewett's husband and sole dependent. Order for Substitution was made on November 10, 2010. (Ex. A).

Prior to her death, Colleen Prewett settled her claim against the employer for \$67,500.00 which based on the Stipulation for Compromise Settlement represented 40% permanent disability to the body as a whole and \$11,972.00 in temporary total disability. (Ex. C).

On May 2, 2011, employee's spouse, Chad Prewett, appeared in person and by his attorney Lisa R. McWilliams for a hearing on final award of his wife's claim against the Second

Injury Fund. The Second Injury Fund appeared through their counsel Eric Lowe. The Division had jurisdiction to hear the case pursuant to R.S. Mo. § 287.110. For the reasons set out below, I find that Colleen Prewett was permanently and totally disabled and that the Second Injury Fund is liable for permanent total disability benefits. Additionally, I find that Chad Prewett as a dependent of Colleen Prewett is entitled to benefits for the remainder of his life.

Prior History

Colleen Prewett was born April 30, 1976 and graduated from high school in 1994. Ms. Prewett attended college at Mt. Mercy College in Cedar Rapids, Iowa graduating in 1998 with a Bachelors of Social Work degree but never received a license in social work. (Hearing Testimony Chad Prewett; Ex. G, p. 15, l. 1-10).

While in high school Colleen met Chad Prewett and they began dating in 1992. They were married May 8, 1999 and lived together from 1999 through the time of Colleen's death in May 2010. Colleen did not have any children. (Hearing testimony of Chad Prewett, Ex. A).

During high school Colleen worked at Mazzio's Pizza. Her job involved cashiering, waitressing, cooking and taking orders all of which required her to be on her feet on a constant basis. While in college, Colleen interned providing social work services traveling to various homes. Upon graduating from college, Colleen moved to Kansas City to be near her family and help care for her ailing grandmother. While caring for her grandmother she began working at Milano's Restaurant as a server and continued there until approximately 2001. From 1998 – 1999 she also worked in a classroom setting helping special needs students with basic skills such as math and English. In December 1999, Colleen was hired as an Employment Specialist for Jewish Vocational Services. She assisted individuals with disabilities in job placement activities. This job required extensive traveling out in the field. (Ex. G, p. 17, l. 20 – p. 20, l. 9; Ex. E, pgs. 8-10; Ex. D, p.4, l. 3 - 25).

Ms. Prewett had suffered chronic lower back pain and bilateral lower extremity numbness since she was a teenager and was diagnosed with spondylthesis. (Ex. F, Dr. Koprivica Depo, Ex. 2, p. 4). In 2000 these problems worsened and she began treating at Rockhill Orthopaedics receiving epidural injections. An MRI performed on October 4, 2000 revealed diffuse disc bulging at L3-S1 and annular tear at L4-S1. (Ex. O, p. 1-4). Increasing back problems caused Ms. Prewett to quit her job at Milano's because she could no longer perform her job duties there. (Chad Prewett Hearing Testimony). In November 2000, her employer, Jewish Vocational Services, accommodated her back problems by allowing her to work part of the day from home. (Ex. E, p. 13). She was referred to neurosurgeon Dr. Feigenbaum on November 15, 2000. Dr. Feigenbaum found Ms. Prewett was basically non-functional. (Ex. N, p. 9). Based on this finding, Ms. Prewett underwent surgery on December 7, 2000 with Dr. Feigenbaum performing an L5 laminectomy, bilateral S1 foraminotomy, L5-S1 pedicle screw fixation, right iliac crest graft harvest and fusion. Ms. Prewett was off work for approximately 8 weeks following this procedure. (Ex. N, p. 14; Ex. F, Dr. Koprivica depo, Ex. 2, p. 6). However, upon returning to work she had increased back pain and was instructed by Dr. Feigenbaum to limit her work activities, including the extensive driving she had been doing going out in the

field to work with her clients. (Ex. N, p. 6). Her employer provided accommodation by allowing her to work part-time and having others assist her with her caseload in the field. (Ex. E, pgs. 14-15; Ex. F - Dr. Koprivica report, Ex. 2, p. 6). Colleen next treated with pain management specialist Dr. Griffith who performed epidural injections. The injections only provided temporary relief. Colleen was also prescribed narcotic medications to help her cope with the pain and was referred for another surgical consult. (Ex. P, p. 16-19; 43). On July 26, 2002, Dr. Wilson performed a revision laminectomy and spinal fusion. (Ex. R, p. 2). Colleen missed several additional weeks of work following this surgery. Following this surgery, she continued to have back and lower extremity pain. Dr. Wilson referred her back to Dr. Griffith. Dr. Griffith performed a left L4-5 transforaminal injection and prescribed Hydrocodone and Oxycontin. Due to ongoing pain complaints and limitations, Dr. Griffith performed a trial of spinal cord stimulator on March 24, 2003 and implanted a permanent spinal cord stimulator on April 14, 2003. (Ex. L, p. 9-13). While this provided some improvement, she continued to have low back pain, and continued to take anti-inflammatory and narcotic pain medications. (Ex. L, p. 14-21). Her back pain limited her activities of daily living. She could not sit or stand for any long periods of time without causing increased back pain. She had to limit her household chores such as vacuuming and grocery shopping. She could not really enjoy any vacations. She would have to lie down to travel to Oklahoma and used wheelchairs to sightsee in Florida. (Testimony of Chad Prewett). Her co-worker, Anita Baker, even noticed that Colleen appeared to be in pain, having difficulty getting up and down from a seated position and walking slowly. (Ex. D, p. 17, l. 3-11)

Dr. Griffith continued to adjust her spinal cord stimulator and continued to prescribe pain medications such as Roxicodone and Oxycontin. Ms. Prewett had a set back on June 19, 2003 when her left leg gave out and she fell. Dr. Griffith again reprogrammed her spinal cord stimulator and refilled her pain medications. (Ex. L, p. 22).

On August 18, 2003, Dr. Griffith noted that Ms. Prewett was not getting effective pain relief and was having quite a bit of spasm in her back, posterior thighs and buttocks. (Ex. L, p. 24). He started her on Actiq which is a pain medication delivered in sucker form for severe breakthrough pain. (Ex. L, p. 24; Hearing testimony of Chad Prewett).

On September 15, 2003, Dr. Griffith noted that Ms. Prewett had been working full-time but that standing or walking for any extended period of time was causing numbness in her lower extremities. He noted a slightly antalgic gait. He refilled the Actiq, Norco and Roxicodone for breakthrough pain and increased the Oxycontin. (Ex. L, pgs. 26-27).

In October 2003, Dr. Griffith refilled Ms. Prewett's prescriptions and asked her to follow up in 2 months. (Ex. L, pgs. 28-29).

Accident

The Missouri Department of Vocational Rehabilitation hired Jewish Vocational Services to assist them in job placement. Anita Baker is a senior vocational rehabilitation counselor with the Missouri Department of Vocational Rehabilitation. Colleen Prewett worked with Ms. Baker

in attempting to find employment for their clients. On December 4, 2003, Ms. Prewett and Ms. Baker met for lunch at Tippins in Independence to discuss job placement of these mutual clients. Upon leaving lunch, Ms. Prewett was struck by a car in the parking lot and knocked to the ground. She initially thought she was alright but within hours developed neck pain as well as an increase in back pain. (Ex. D, p. 5, l. 10 – p. 7, l. 5). Ms. Prewett's husband took her to the emergency room at North Kansas City Hospital a few hours after the accident. (Hearing testimony Chad Prewett). She was off work for a few days and then saw Dr. Griffith in follow up on December 12, 2003. Dr. Griffith noted increased pain in the left leg and buttock as well as a new complaint of neck pain. (Ex. L, p. 30). Dr. Griffith performed trigger point injections into the left gluteal and left lower lumbar musculature. He also refilled her Actiq, Oxycontin and Roxicodone and started her on Clonopin. (Ex. L, p. 30).

Over the next few months, Dr. Griffith increased her prescription pain medications. Ms. Prewett attempted to continue to work but the amount of pain medications now required to get her through the day caused additional problems with concentration as well as nausea.(ex I p. 249-250). Eventually these problems caused her employer to ask her to leave her employment. Her last day of work was May 12, 2004. (Ex. E, p. 26). Dr Griffith noted her need for pain medications had escalated as her pain became more and more difficult to control and that the pain medications “make it difficult to think straight and clearly” and that he supported “her efforts to obtain complete disability”. (Ex I p 249)

Ms. Prewett was referred to Dr. Amundson and was sent for a lumbar myelogram, discogram and cervical myelogram. (Ex. Q, pgs. 59-60). The testing revealed disc degeneration at L5-S1, L4-5 and L3-4. Since L3-4 was an adjacent segment to the previous 2 surgeries. On June 24, 2004 Ms. Prewett underwent additional surgery in the form of an anterior lumbar interbody fusion from L3-S1 with hardware removal and new posterior instrumentation by Dr. Amundson. (Ex. Q, pgs. 17-21).

Subsequent to the June 2004 surgery, Ms. Prewett continued to have neck and back problems. She participated in physical therapy at HealthSouth from December 7, 2004 – May 26, 2005. (Ex. S). In January 2005, Dr. Griffith implanted an intrathecal pump for delivery of medications in hopes of weaning her off of her oral narcotic medication. (Ex. I, p. 111-113). While Ms. Prewett was able to wean off her medications initially, unfortunately her pain level increased and Dr. Griffith reinstated a narcotic regimen and Ms. Prewett remained on extensive oral medications which affected her clarity and concentration. (Ex. I, p. 2).

Jewish Vocational Services was unable to accommodate Ms. Prewett and she was terminated. (Ex. E, p. 26). She was unable to sit for more than 30-45 minutes at a time. She could not walk or stand more than a few minutes at a time and she needed to lie down frequently during the day. (Ex. F, p. 21, l. 14-25; Ex. F, Dr. Koprivica Depo Ex. 2, p. 9-10; Hearing testimony of Chad Prewett). Additionally, the increased narcotic medications she was prescribed had side effects which included drowsiness. Chad Prewett testified that after the December 4, 2003 accident he was working from home and that Colleen would spend most of her day lying down. While she would attempt some chores and activities, she was extremely limited in what she could do and in how long she could do it and would usually need to lie back down after most any activity. Ms. Prewett and her husband discussed her potential employment options and

could not think of any jobs she could sustain with her limitations. (Hearing Testimony Chad Prewett).

On October 26, 2005, Ms. Prewett was evaluated by Dr. P. Brent Koprivica at the request of her attorney. Dr. Koprivica was deposed on January 15, 2008. Dr. Koprivica reviewed the medical records and interviewed Ms. Prewett. He was unable to perform a physical examination due to the fact that Ms. Prewett was so distressed that she was crying at the thought of the pain she believed a physical examination would cause her. Based on his review of the extensive medical records as well as his interview with Ms. Prewett, Dr. Koprivica testified that Ms. Prewett had a significant industrial disability before December 4, 2003. He testified that based on the fact that she had failed back syndrome with prior multiple operative interventions, a spinal cord stimulator in place and was taking narcotics, her condition was disabling and would be an obstacle to certain types of employment in the open labor market. In addition to her physical pain, he believed that there was some psychological overlay and he assigned a 50% pre-existing disability. (Ex. F, p. 14, l. 23 – p. 15, l. 18; and Dr. Koprivica deposition Ex. 2, p. 12).

He opined that the December 4, 2003 accident caused aggravating injury to her back with adjacent segment involvement at L3-L4 leading to a third back surgery and further pain interventions in the form of an intrathecal pump and increased pain medications. In addition, she suffered a new injury to her neck which was treated non-operatively with physical therapy. Dr. Koprivica felt that Ms. Prewett sustained an additional 40% disability as a result of the December 4, 2003 accident. (Ex. F, p. 15, l. 20 – p. 17, l. 5; p. 18, l. 16-23). He testified that he believed Ms. Prewett reached maximum medical improvement on May 26, 2005. (Ex. F, pg. 17, l. 6 – p. 18, l. 5). Dr. Koprivica opined that Ms. Prewett was permanently and totally disabled in that she would require posterial changes throughout the day including the need to lie down, and the narcotic medications would sedate her. He testified that based on her physical and psychological presentation it was unrealistic to believe she could be accommodated to perform any type of full-time employment no matter how sedentary. (Ex. F, p. 19, l. 23 – p. 20, l. 14). Dr. Koprivica clearly stated that her permanent and total disability was as a result of the profound pre-existing disability combined with the disability attributable to the December 4, 2003 injury. (Ex. F, p. 19, l. 4-16; p. 20, l. 9-14).

On March 28, 2006, Ms. Prewett was evaluated by Michael Dreiling. Mr. Dreiling is a vocational rehabilitation consultant with 35 years of experience working on behalf of both employers and employees. Additionally, he has worked for the State of Kansas Rehabilitation Services as well as Menninger Return to Work Center attempting to place individuals with disabilities into the labor market. (Ex. G, p. 3-8 and Dreiling deposition Ex. 1).

Mr. Dreiling noted that prior to the December 4, 2003 injury, Ms. Prewett had significant medical difficulties for which Jewish Vocational Services had been accommodating her over the years. (Ex. G, Dreiling deposition, p. 4). He noted that after the December 4, 2003 injury she had increased difficulties requiring her to lie down at work. He also noted that she was suffering from nausea due to the increased narcotic medications and had not been able to work since May 2004. He testified that based on the medical restrictions set out by Dr. Koprivica, Ms. Prewett would be unable to return to any of her previous types of employment, and that taking into account the presentation that Ms. Prewett would make to any prospective employer, “it would

not be reasonable to expect that she would be capable of competing for or obtaining employment in the open labor market and that no employer in the usual course of business seeking to perform duties of employment in the usual and customary way would reasonably expect to employ Ms. Prewett in her physical condition.” (Ex. G, Dreiling deposition Ex. 2, p. 9; Ex. G, p. 25, l. 20 – p. 26, l. 8). Mr. Dreiling stated that her inability to return to work in the open labor market was due to the combination of her pre-existing disability and her disability from the December 4, 2003 injuries. (Ex. G, p. 26, l. 9-12).

Finally, Mr. Dreiling testified that he felt that vocational testing was not necessary because due to her significant pain issues, the medications she was taking for chronic pain and her level of functioning that even if she could participate in additional training she would not be employable in the open labor market. (Ex. G, 24, l. 21 – p. 25, l. 17; Dreiling deposition Ex. 2, p. 8).

RULINGS OF LAW

After considering all the evidence including the hearing testimony, Dr. Koprivica’s deposition, Mike Dreiling’s deposition, the extensive medical records and reports as well as personnel records, I find and believe that Chad Prewett met his burden of proving that claimant, his wife, Colleen Prewett, was rendered permanently and totally disabled due to a combination of the disability she sustained as a result of the December 4, 2003 accident and her pre-existing disability. Therefore, the Second Injury Fund is ordered to pay permanent total disability benefits as set out in the Award herein.

Claimant has the burden of proving all material elements of the claim. Fischer v. Arch Diocese of St. Louis, 703 S.W. 2d 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton v. Big Boy Steel, 121 S.W. 3d 220 (Mo. Banc 2003); Griggs v. AB Chance Co., 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met his burden of proof as set out herein.

I. Whether claimant suffered any disability for which the Second Injury Fund would be liable?

Permanent Total Disability

Section 287.020.7 R.S. Mo. defines “total disability” as the “inability to return to any employment and not merely... inability to return to the employment in which the employee was engaged at the time of the accident. The inability to return to any employment means the employee is unable to perform the usual duties of the employment after consideration in the manner that such duties are customarily performed by the average person engaged in such employment”. Kowalski v. M-G Metals and Sales, 632 S.W. 2d 919, 922 (Mo. App. 1982). Any employment means any reasonable or normal employment or occupation and it is not necessary

that the employee be completely inactive or inert. The central question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that physical condition. Id.; see also Ransburg v. Great Plains Drilling, 22 S.W. 3d 726, 732 (Mo. App. 2000). The test for permanent total disability is whether given the employee's condition he or she would be able to compete in the open labor market. Brown v. Treasurer of Missouri, 795 S.W. 2d 479 (Mo. App. 1990). A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker". Grgic v. P&G Constr., 904 S.W. 2d 464, 466 (Mo. App. 1995).

The workers' compensation test for permanent total disability has two components: whether the claimant has the skills, abilities and education to perform any work in the work force and whether the work force would have her. In addition to being on heavy narcotics, Ms. Prewett was extremely limited by her injuries as she could not sit or stand for any length of time and needed to lie down frequently during the day. Mr. Dreiling reviewed the report and deposition testimony of Dr. Koprivica. He also personally evaluated Ms. Prewett and was able to observe her demeanor, appearance, physical movements and speaking ability in order to assess truthfulness and employability including the type of impression she may make to a potential employer. I find Mr. Dreiling's testimony credible that Ms. Prewett is unable to return to any of her previous types of employment and that based on her presentation and medical restrictions, Ms. Prewett would not be able to find and sustain any employment in the open labor market.

Second Injury Fund Liability

Pursuant to R.S. Mo. § 207.220, the Second Injury Fund is liable for permanent total disability benefits if the permanent partial disability from the injury on the job combine with the employee's pre-existing permanent partial disability to render the employee permanently and totally disabled. The employee must also prove that the pre-existing permanent partial disability constituted a hindrance or obstacle to her employment or re-employment. In order to compute total disability compensation to which Claimant is entitled to receive from the Second Injury Fund, not only must Claimant prove the existence of a pre-existing disability but also the degree or percentage of Claimant's pre-existing disability and the percentage of disability from the primary work injury. R.S. Mo. § 287.220.

Claimant proved that the Second Injury Fund is liable for her permanent and total disability.

Claimant settled her case with her employer based on 40% permanent partial disability of the body as a whole plus payment of temporary total disability. The evidence clearly supported the settlement. Dr. Koprivica was the only physician to give an opinion on disability. He testified that Ms. Prewett had a 40% disability as a result of the injuries sustained on December 4, 2003. The Second Injury Fund offered no evidence which contradicted the settlement. Based on the evidence, claimant proved that the settlement properly reflected the amount of disability sustained as a result of the December 4, 2003 accident.

Claimant also proved that she sustained permanent partial disability prior to the December 4, 2003 accident. Dr. Koprivica concluded that prior to December 4, 2003 Ms. Prewett had a 50% disability to the body as a whole. Again, the Second Injury Fund offered no medical opinions, ratings or evidence to contradict the amount of pre-existing disability.

Ms. Prewett had two back surgeries, an implant of a spinal cord stimulator and was taking narcotic medications to control her back pain prior to December 4, 2003. She missed several weeks of work in 2000 and 2001 as well as several additional weeks of work in 2002 due to her back problems. Additionally, upon her return to work her employer provided her accommodations when her treating physicians placed restrictions on her work.

Dr. Koprivica testified that the prior disability was a hindrance or obstacle to claimant's employment in the labor market and that the combination of the disability from the December 2003 accident and pre-existing impairment resulted in a greater overall disability and in fact rendered Ms. Prewett permanently and totally disabled.

In fact, Ms. Prewett's prior back problems caused her to leave her job as a waitress at Milanos. Additionally, Ms. Prewett was on narcotic pain medication prior to December 4, 2003 and, Mr. Dreiling testified that the use of narcotics can be a hindrance or obstacle to employment. (Ex. G, p. 30, l. 8-15). While narcotic usage can be a hindrance to certain types of employment, Ms. Prewett was able to keep and sustain substantial employment in the open labor market at Jewish Vocational Services. She continued to work full time and, in fact, she received praises for her work and salary increases while at Jewish Vocational Services. (Ex. E, p. 20-25). However, the combination of her prior disability with the additional disabilities and limitations resulting from the December 4, 2003 accident made it impossible to continue working.

The Second Injury Fund offered no contrary opinions or evidence. I find Dr. Koprivica and Mr. Dreiling's opinions to be credible. Therefore, Claimant proved that she was permanently and totally disabled and that the permanent and total disability was due to the combination of the disability sustained in December 2003 and the pre-existing disability.

II. If claimant is found to have been permanently and totally disabled, is the Second Injury Fund liable for ongoing lifetime benefits to be paid to her dependent husband or should benefits cease on the date of her death?

Since claimant has been found to be permanently and totally disabled it must be determined whether those benefits should be paid until the time of her death on May 3, 2010 or whether lifetime benefits should be paid to her dependent husband.

Pursuant to R.S.Mo. 287.240, Chad Prewett is the sole dependent of Colleen Prewett. Ms. Prewett had no children. A dependent is defined as husband or wife who is actually dependent in whole or in part on the wages of their deceased spouse. Chad Prewett testified that he lived with Colleen and they depended on both of their salaries to support their household. Therefore, Chad Prewett is a dependent of Colleen Prewett and is entitled to be paid PTD benefits during his lifetime.

In Schoemehl v. Treasurer of Missouri, the Missouri Supreme Court held that the injured worker's right to compensation for both accrued and unaccrued PTD benefits survives to his or her dependents. 217 S.W. 3d 900, 903 (Mo. Bank 2007). In other words, when a claimant dies of causes unrelated to the work injury but is awarded permanent total disability benefits, the claimant's dependents are entitled to receive the awarded benefits for their lifetime. Id. @ 902; Buescher v. Mo. Hwy. and Transpor. Comm'n., 254 S.W. 3d 105 (Mo. App. W.D. 2008). The Court based its ruling on R.S. Mo. 287.230.2 (2000), R.S. Mo. 287.200.1 (2000) and R.S. Mo. 287.020 (2000). The statutory provisions provide that an injured worker's benefits shall cease when the worker dies from causes unrelated to the work injury "unless there are surviving dependents at the time of death"; that permanent total disability benefits shall be paid "for the lifetime of the employee" and that the definition of "employee" includes dependents of a deceased employee. Reading these provisions together the Court held that the right to compensation for the PTD of an injured employee that dies of causes unrelated to the work injury survives to the dependents of the injured employee. Schoemehl @ 901-02.

These statutes were amended in June 2008. The amended statutes redefined employee and clarified that unaccrued PTD benefits do not survive to the insured workers' dependents. R.S. Mo. 287.200.2 (Supp. 2009); and R.S. Mo. 287.230.2 (Supp. 2009), thereby abrogating Schoemehl. However, the statutory amendments are not retroactive and apply only to claims initiated after the effective date of the amendments. Gervich v. Condaire, S.C. 91727 (Mo. en banc 2012); Tilley v. USF Holland, Inc., 325 S.W. 3d 487, 494 (Mo. App. E.D. 2010); Taylor v. Ballard RII School Dist., 274 S.W. 3d 629 (Mo. App. W.D. 2009). Ms. Prewett was injured on December 4, 2003 and her claim was filed on December 3, 2004. (Ex. B). Mr. Prewett had a right to receive continuing permanent total disability payments as a dependent under the statutes in effect on December 4, 2003, the date of his wife's work-related injury. Her injury occurred prior to the 2008 statutory amendments and these statutory changes are substantive and may not be applied retroactively. Therefore, the amendments do not apply to his claim.

Since Schoemehl, Missouri courts have only denied survivors' benefits on procedural grounds where a claim for benefits was not brought before the Commission's final award. The Treasurer relies on Strait v. Treasurer of Missouri, 257 S.W. 3d 600 (Mo. 2008) for the proposition that Schoemehl is limited to cases that were pending in the Commission at the time Schoemehl was decided.

This argument has been previously rejected in Bennett v. Treasurer of Missouri, 271 S.W. 3d 49 (Mo. App. W.D. 2008). The Western District held that recovery under Schoemehl is not limited to claims that were pending before the Commission at the time Schoemehl was decided but instead applicable to all claims pending between June 9, 2007 when Schoemehl was decided and June 26, 2008 when the statutes were amended. Bennett, 271 S.W. 3d @53. Ms. Prewett filed her claim for compensation on December 3, 2004. (Ex. B). Said claim was pending on the date Schoemehl was decided.

It has also been argued that the dependent Chad Prewett did not bring his claim as a dependent until after the statutory amendments and thus he is barred from receiving lifetime benefits. However, it has been held that the right to workers' compensation benefits vests at the

time of injury and thus the dependents' rights also vest on the date of injury and not the date of death. Gervich v. Condaire, S.C. 91727 (Mo. en banc 2012); Petties v. Petties, 129 S.W. 3d 901, 908 (Mo. App. W.D. 2004).

It is clear that the dependent's right to benefits under Schoemehl vests at the time the worker's rights vest which is when the worker suffers the work-related injury. Any argument that the status and rights of the dependent vest at some later time is not supported by the law and is contrary to the logic of R.S. Mo § 287.240 (2000) which defines "dependent".

The facts of this case are similar to Gervich v. Condaire, Inc. In Gervich, Mr. Gervich was injured on April 6, 2006 and filed a claim on May 15, 2006. Mr. Gervich died of unrelated causes on April 5, 2009. The Missouri Supreme Court held that Ms. Gervich's rights as a dependent vested on April 6, 2006 and Ms. Gervich was awarded lifetime PTD benefits. S.C. 91727 (Mo. en banc 2012). As a dependent, Chad Prewett's rights also vested on the date of the injury. Therefore, the 2008 statutory amendments do not apply to Mr. Prewett. Mr. Prewett's status as a dependent was set on December 3, 2004 and he fits within the statutory definition of "employee" in effect on the date of injury. He is therefore entitled to permanent total disability benefits. Gervich v. Condaire, S.C. 91727 (Mo. en banc 2012).

Start Date for Permanent Total Disability Benefits

Dr. P. Brent Koprivica testified that claimant was at MMI on May 26, 2005. Claimant's employer was liable for 160 weeks of PPD from May 26, 2005 – June 19, 2008 at the rate of \$347.05 per week. The Second Injury Fund is liable for the difference in the PTD rate of \$432.07 and the PPD rate of \$347.05 per week for the 160 weeks or \$85.02 per week for a total of \$13,603.20. Effective with the expiration of the 160 weeks on June 19, 2008, the Second Injury Fund became liable for permanent total disability benefits at the rate of \$432.07 per week. The Second Injury Fund is ordered to pay \$13,603.20 as well as \$432.07 per week effective June 19, 2008 and to continue to pay such benefits to Chad Prewett for the remainder of his lifetime.

Claimant's counsel is entitled to a fee of 25% of all benefits awarded herein.

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation