

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

Injury No.: 04-026282

Employee: Murl Seymore
Employer: MLS Construction, Inc. (Settled)
Insurer: Bituminous Ins. Co. (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 for review as provided by § 287.480 RSMo. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 30, 2012, 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.

The parties stipulate that we modify the administrative law judge's award by the inclusion of the following language:

On the condition that Employee Murl Seymore remains eligible for permanent total disability benefits (\$526.30 per week) until his death, Employee's wife, Dianna L. Seymore, is entitled to receive Employee's permanent total disability benefits in the event she remains married to Employee and Employee predeceases her while they remain married. Employee's wife's entitlement to these benefits shall cease upon her death or remarriage.

We accept the stipulation and we modify the award accordingly.

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

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

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued November 3, 2011, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 28th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Murl Seymore

Injury No.: 04-026282

Dependents: N/A

Employer: MLS Construction, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

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

Insurer: N/A

Hearing Date: September 28, 2011

Checked by: HDF/scb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: March 3, 2004.
5. State location where accident occurred or occupational disease was contracted: Osage Beach, Camden County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? No.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right foot at the ankle.
14. Nature and extent of any permanent disability: 42.5% Right ankle.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.

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17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$347.05 for PPD; \$526.30 for PTD.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

22. Second Injury Fund liability: 42.5% x 155 weeks = 65,875
 June 15, 2005 through September 19, 2006 = 65.875 weeks
 65.875 weeks x \$179.25 = \$11,808.09
 \$526.30 per week from September 19, 2006 forward

23. Future Requirements Awarded: - 0 -

Dianna L. Seymore acquired a legal right and marital property interest in claimant's workers' compensation award and is entitled to receive claimant's awarded permanent total disability benefits for her lifetime.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Andrew J. Gregory.

Employee: Murl Seymore

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Murl Seymore

Injury No: 04-026282

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: MLS Construction, Inc.

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

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

Insurer: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on September 28, 2011. Memoranda were received by October 7, 2011

The parties stipulated that on or about March 3, 2004, the claimant, Murl Seymore, sustained an injury by accident while employed by MLS Construction Company (MLS Construction); the accident arose out of and in the course of employment.

The parties stipulated that all facts relevant to the claimant's relationship with the employer/insurer are resolved in the claimant's favor in his claim against the Second Injury Fund. The parties further stipulated that the claim against the employer/insurer settled based on a permanent disability of 42.5 percent of the right foot at the ankle; the parties did not, however, agree that this represents the extent of permanent partial disability resulting from the injury of March 3, 2004, in the pending claim against the Second Injury Fund. The parties stipulated that June 15, 2005, is the date on which Mr. Seymore achieved maximum medical improvement.

The parties stipulated that the compensation rate is \$347.05 per week for permanent partial disability benefits and \$526.30 per week for permanent total disability benefits.

The issues to be resolved by hearing include 1) the liability of the Second Injury Fund for permanent disability benefits (permanent total disability is alleged), and 2) the liability of the Second Injury Fund for benefits for Dianna L. Seymore as spouse of the claimant, Murl Seymore in the event that Mr. Seymore is determined to be entitled to permanent total disability benefits from the Second Injury Fund.

FACTS

The claimant, Murl Seymore, was born in 1946. Mr. Seymore has been married to Dianna L. Seymore for the past 44 years, including on the date of his March 3, 2004 work injury. Mr. Seymore graduated from high school in 1963 and has had no college education or vocational

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training since then. Mr. Seymore worked at his uncle's filling station after high school as well as at Kingsford Charcoal. Mr. Seymore worked at United Telephone until 2000 or 20001 in a variety of positions, including cable splicer, install and repair technician and service technician. Before beginning his employment with MLS Construction, Mr. Seymore worked as a mail carrier and worked in snow removal for the Missouri Department of Transportation.

On March 3, 2004, while employed by MLS Construction Mr. Seymore injured his right foot when he was running backwards, stepped into a hole and was hit with falling steel pipes. Eventually after conservative treatment methods failed, Mr. Seymore had surgery on his right foot and ankle; bone was removed from the left leg for repair of the right foot and a plate and screws were put into the right foot during surgery. Mr. Seymore testified that his foot is "not good" and that he thinks he needs additional surgery. Mr. Seymore said that his foot burns and goes to sleep, that he awakes three to four times a night because of the foot, that he can stand no more than 15 minutes because of the foot and that he can walk only half a block and can barely climb stairs due to the condition of the right foot.

Mr. Seymore testified that while he was working for the telephone company he had bilateral carpal tunnel surgeries and that while his hands improved after surgery, the strength in his hands never came back and the numbness and tingling in his hands continued.

Mr. Seymore also testified to a repair and then a rerepair of a hernia prior to the 2004 right foot injury and that the hernia repair has left him with some difficulty in bending and lifting.

Prior to 2004, Mr. Seymore also had a left shoulder injury which resulted in two surgeries, the second of which was performed by Dr. Galbraith; the left shoulder causes Mr. Seymore difficulty with reaching, especially with weight.

Mr. Seymore mentioned sinus surgery prior to 2004; Mr. Seymore takes over the counter medications for his nose.

Finally, Mr. Seymore had back problems dating back to the 1980s when he was lifting a 400 pound generator and pulled muscles in his back. Mr. Seymore was treated with traction for a week; since then Mr. Seymore has constant back pain and needs assistance when lifting. Mr. Seymore testified that he no longer fishes because casting bothers his hands, cannot vacuum because of the left shoulder injury, and cannot manage lawn care because of back pain.

Since 2004, Mr. Seymore has had four coronary bypasses and problems with his right shoulder and right elbow.

Dr. Volarich testified by deposition that Mr. Seymore sustained a permanent disability of 65 percent of the right foot at the ankle as the result of the March 3, 2004 accident and injury. Preexisting disabilities were found to be disabling to the extent of 30 percent of each hand at the wrist, 40 percent of the left shoulder, 15 percent of the body as the result of the hernia, and 5 percent of the body for the sinus problems. Dr. Volarich found that Mr. Seymore's disabilities combine to create a "substantially greater disability than the simple sum or total of each separate injury/illness." Dr. Volarich also noted additional disability resulting from the condition of the

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right shoulder and the right elbow as well as the cardiovascular system. Dr. Volarich opined that Mr. Seymore is “unable to engage in any substantial gainful activity nor can he be expected to perform in an ongoing working capacity in the future.”

Delores Gonzalez, vocational rehabilitation counselor, testified by deposition and opined that Mr. Seymore is not employable on the open labor market as the result of his disabilities to his feet, his left shoulder, his upper extremities, and his abdominal wall in combination with his age, education, and lack of transferable skills.

APPLICABLE LAW

RSMo. Section 287.220.1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund

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known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

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

Under Missouri law it is well settled that pending means undecided. *Ex parte Munford*, 57 Mo. 603, 606 (Mo. 1847); *State v. Hahn*, 142 S.W.2d 1064, 1067 (Mo. 1940) (holding that a suit is pending from the time it is instituted until it is finally disposed of). Furthermore, an injured worker acquires a legal right or interest in a workers' compensation award when he or she suffers the work-related injury. *Petties v. Petties*, 129 S.W.3d 901, 908 (Mo.App. W.D. 2004). To the extent that it compensates for earnings lost during the marriage, a workers' compensation award is marital property. *Seyler v. Seyler*, 201 S.W.3d 57, 62 (Mo.App. E.D. 2006). The dependent's right to the property vests when the worker suffers the injury. *Gervich v. Condaire, Inc.*, 2011 WL 794996 at 4 (Mo.App. E.D., dec'd March 8, 2011).

AWARD

The claimant, Murl Seymore, has sustained his burden of proof that he is permanently and totally disabled as the result of his accident and injury of March 3, 2004, combined with his preexisting disabilities to his upper extremities at the wrists and his left shoulder. Mr. Seymore's testimony in conjunction with the testimonies of Dr. Volarich and Ms. Gonzalez is sufficiently convincing that Mr. Seymore is incapable of returning to gainful employment as the result of the combination of his injuries from the March 3, 2004 accident and injury and those disabilities preexisting 2004. I find that Mr. Seymore's permanent disability resulting from the March 3, 2004 accident and injuries is 42.5 percent of the right foot at the ankle. Permanent disability is found as of June 15, 2005.

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Mr. Seymore's case was still pending during the period of recovery under *Schoemehl*. Should Mr. Seymore die leaving the dependent, Dianna L. Seymore, her rights to Mr. Seymore's award of permanent and total disability will have vested when Mr. Seymore suffered his injury on March 3, 2004.

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