

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

Injury No.: 98-105462

Employee: David Spradling, Deceased

Dependents: Lee Spradling, Brittinee Spradling and Marinda Spradling

Employer: Russell Stover Candies, Inc. (Settled)  
d/b/a Smiley Container Corporation

Insurer: Hartford Casualty Insurance Company (Settled)

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> Having reviewed the evidence, read the briefs, heard oral argument, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated June 22, 2011, as supplemented herein.

The Second Injury Fund argues on appeal that the ALJ misapplied the definition of "dependent" provided in § 287.240 RSMo and consequently erred in awarding employee's permanent total disability benefits to his children. The Second Injury Fund reasons that because § 287.240 RSMo deals with injury-related deaths, "the definition of dependent and the conclusive presumption about minor children is inapplicable" to a determination of who is a dependent under § 287.230 RSMo.

We find that a logical reading of the pertinent statutory sections reveals that the ALJ properly applied the definition of "dependent."

Section 287.240 RSMo provides, in relevant part:

(4) The word "dependent" **as used in this chapter** shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. (emphasis added). The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:

...

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, ... upon the parent legally liable for the support or with whom he, she, or they are living at the time of the death of the parent. (emphasis added).

Section 287.230.1 RSMo provides, as follows:

The death of the injured employee shall not affect the liability of the employer to furnish compensation as in this chapter provided, so far as the liability has

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 1998 unless otherwise indicated.

Employee: David Spradling, Deceased

accrued and become payable at the time of the death, and **any accrued and unpaid compensation due the employee shall be paid to his dependents without administration**, or if there are no dependents, to his personal representative or other persons entitled thereto, but the death shall be deemed to be the termination of the disability. (emphasis added).

Section 287.240(4) RSMo makes it clear that the detailed definitions are provided to determine an employee's "dependents" whenever necessary within Chapter 287 of the Revised Statutes of Missouri. In fact, the Missouri Supreme Court confirmed that § 287.240.4(b) applies to the entire workers' compensation chapter in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, 902 (Mo. App. 2007).

In this case, there is no dispute that on the date of employee's work accident and injury, September 3, 1998, employee was single and unmarried with three children under the age of 18: Lee Spradling (11 years old), Brittinee Spradling (6 years old), and Marinda Spradling (4 years old). We find, as the children's father, employee was legally liable for the support of said children. In accordance with § 287.240 RSMo, the children are employee's conclusively presumed total dependents and, therefore, we find that the ALJ's award is fully supported by the competent and substantial evidence.

The Commission affirms the award and decision of the ALJ, as supplemented herein.

The award and decision of Administrative Law Judge Carl Strange, issued June 22, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

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

We advise the parties that Division of Workers' Compensation (Division) records reveal that on various dates the Director of the Division mailed to necessary parties Notice(s) of Lien(s) on Workers' Compensation Benefits in accordance with § 454.517.5 RSMo. Consequently, this award may be subject to a lien or liens in favor of the Director of the Family Support Division, Missouri Department of Social Services pursuant to the provisions of §§ 454.517 and 287.260 RSMo.

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

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**AWARD**

Employee: David Spradling (Deceased)

Injury No. 98-105462

Dependents: Lee Spradling, Brittinee Spradling, and Marinda Spradling

Employer: Russell Stover Candies Inc. dba Smiley Container Corporation

Additional Party: Second Injury Fund

Insurer: Hartford Casualty Insurance Company

Hearing Date: February 18, 2011

Checked by: CS/rf

**SUMMARY OF FINDINGS**

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? September 3, 1998.
5. State location where accident occurred or occupational disease contracted: Butler County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was lifting paper and pallets that caused injury to his low back.
12. Did accident or occupational disease cause death? N/A.

13. Parts of body injured by accident or occupational disease: Body as a Whole referable to his lumbar spine.
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: \$619.06.
16. Value necessary medical aid paid to date by employer-insurer: \$3,006.24.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: \$234.00.
19. Weekly compensation rate:  

\$156.00 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable: (See Findings).
22. Second Injury Fund liability: (See Findings).
23. Future requirements awarded: N/A.

Said payments shall be payable to Dependents (Lee Spradling, Brittinee Spradling and Marinda Spradling) as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to Dependents shall be subject to a lien in the amount of 25% of all payments hereunder in favor of Little, Schellhammer, Richardson & Knowlan Law Offices, P.C. for necessary legal services rendered to the Dependents.

## FINDINGS OF FACT AND RULINGS OF LAW

Employee, David Spradling, did not appear at the trial since he departed this life on November 30, 2005. Since his death, his three children Lee Spradling (dob 07/23/1986), Brittinee Spradling (dob 02/08/1991) and Marinda Spradling (dob 02/25/1993), have pursued their claim for benefits based on their father's work accident and injury as total dependents of Employee David Spradling pursuant to Section 287.230 RSMo. Prior to commencement of the final hearing, Dependents Lee Spradling, Brittinee Spradling and Marinda Spradling settled their claim for benefits against the Employer/Insurer.

On February 18, 2011, the employee's dependents, Brittinee Spradling and Marinda Spradling, appeared in person and by their attorneys, John Beaton and Sheila Rae Blaylock, for a hearing for a final award. The Second Injury Fund was represented at the hearing by its attorney, Assistant Attorney General Jonathan Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

### UNDISPUTED FACTS:

1. On or about September 3, 1998, Russell Stover Candies Inc. dba Smiley Container Corporation was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Hartford Casualty Insurance Company.
2. The employee's claim was filed within the time allowed by law.
3. The employee's average weekly wage was \$234.00 and his rate for temporary total disability, permanent total disability, and permanent partial disability is \$156.00.
4. The employer has furnished \$3,006.24 in medical aid to employee.
5. The employer has paid temporary total disability benefits at a rate of \$156.00 per week for a total of \$619.06.

### ISSUES:

1. Covered Employee.
2. Accident.
3. Notice.
4. Statute of Limitations regarding Dependents' Claim.
5. Medical Causation.
6. Nature and Extent of Disability.
7. Liability of the Fund.
8. Dependency under Schoemehl.

### EXHIBITS:

The following exhibits were offered and admitted into evidence:

Dependents' Exhibits

- Exhibit A Death Certificate – David Spradling;  
 Exhibit B Birth Certificates – Lee Spradling, Brittinee Spradling;  
 Exhibit C Adoption Judgment & Birth Certificate – Marinda Spradling;  
 Exhibit D High School Transcript – David Spradling;  
 Exhibit E Deposition and Report of Mr. James England;  
 Exhibit F Deposition and Report of Dr. Raymond Cohen;  
 Exhibit G Deposition and Report of Dr. Matthew Gornet;  
 Exhibit H Medical Records of Semmes Murphey Clinic – Dr. Joseph Miller (7/30/82 to 9/17/98);  
 Exhibit I Medical Records of Life Chiropractic Center (8/16/98 to 8/26/92);  
 Exhibit J Medical Records of Lucy Lee Hospital (10/4/96 to 9/9/98);  
 Exhibit K Medical Records of Ripley County Memorial Hospital (2/23/98 to 11/9/99);  
 Exhibit L Medical Records of Ripley County Primary Care Center (5/19/98 to 10/8/99);  
 Exhibit M Medical Records of Department of Vocational Rehabilitation (8/16/98 to 1/10/00);  
 Exhibit N Medical Records of North Family Clinic – Dr. Burton Cox (9/4/98 to 9/24/98);  
 Exhibit O Medical Records of Dr. Charles Cheung (9/28/98 to 12/7/98);  
 Exhibit P Medical Records of Washington University Medical Center – Dr. Michael Chicoine (10/14/98 to 2/7/00);  
 Exhibit Q Medical Records of Poplar Bluff Neurology Center – Dr. S.K. Choudhary (2/26/99 to 12/16/99);  
 Exhibit R Medical Records of Barnes Jewish Hospital (9/30/99);  
 Exhibit S Medical Records of Samuel Medical Clinic (2/21/00 to 1/6/01) (2/10/00 to 8/30/00);  
 Exhibit T Medical Records of Cape Neurological Surgeons – Dr. Kee Park (3/27/00 to 6/5/00);  
 Exhibit U Medical Records of Pain Management Clinic – Dr. Ben Soeter (12/5/00 to 2/5/01);  
 Exhibit V Medical Records of Poplar Bluff Regional Medical Center – North (12/12/00 to 11/3/03);  
 Exhibit W Medical Records of Poplar Bluff Regional Medical Center – South (5/25/02);  
 Exhibit X Medical Records of Three Rivers Healthcare (2/5/01 to 2/2/02);  
 Exhibit Y Medical Records of Dr. Stephen Nagy (2/13/03 to 1/20/05)(4/20/05 to 10/28/05);  
 Exhibit Z Medical Records of St. Francis Medical Center (10/28/03);  
 Exhibit AA Wage Statement;  
 Exhibit AB *Withdrawn*;  
 Exhibit AC Certificate of Insurance Status; and  
 Exhibit AD Attorney Contracts of Dependents.

#### Second Injury Fund's Exhibits

- Exhibit I Deposition of Dr. Rolin Duncan;  
 Exhibit II Deposition of Dr. Shahid Choudhary;  
 Exhibit III Deposition of Dr. Garth Russell; and  
 Exhibit IV *Withdrawn*.

**FINDINGS OF FACT:**

David Spradling (“Employee”) filed his original claim for compensation in September of 1998 and departed this life on November 30, 2005 at 42 years of age. By an amended claim filed with the Division on October 30, 2008, the three children of Employee were named as Employee’s dependents. Employee’s dependent children are Lee Spradling, Brittinee Spradling and Marinda Spradling and were living on the date of the hearing.

On July 29, 1982, Employee, then 19 years old, saw neurosurgeon Dr. Joseph Miller at the Neurosurgical Group of Memphis (Ex H, p 4-5). Employee reported a history of two months of left hip and left thigh pain along with a fractured left fibula and tibia several years before. On examination, Employee had lumbar spasm and positive leg raising. One week later, on August 5, 1982, Employee returned to Dr. Miller in Poplar Bluff and gave a history of injuring his back working on a farm. He was admitted to a hospital for x-rays and myelogram.

Employee saw Steven Honomichl, D.C. on August 13, 1989, for a sore back from playing golf. Also he had chiropractic treatment for low back pain after working at Holden Pallet in Dexter in April, 1991. He was released to return to work on April 27, 1991. On October 10, 1991, Employee saw the chiropractor once for LPB (low back pain) after rolling over in bed. There were no further chiropractic treatments after that date (Ex I, p 5-20).

Exhibit D, Employee’s high school transcript, shows that he received limited passing grades during the two semesters covered by the transcript and dropped out of school after the 10<sup>th</sup> grade.

In 1998, Rolin Duncan, M.D., of Ripley County Primary Care Center provided medical care for Employee as his family physician (Ex L, p 4-7). On May 19, 1998, Dr. Duncan examined Employee for sleep disturbance, a sore ear and left shoulder pain. On June 24, 1998, Employee saw Dr. Duncan after he got too hot working the day before, passed out, fell off equipment at work, and complained of pain in his left shoulder and left ribs and chest. He was ordered off work until the next Monday. On August 27, 1998, Employee saw Dr. Duncan and complained of a knot on his back, pain when wearing a rib brace, pain when he coughed and reported being nauseated 2 days before. Upon examination, Employee had loss of lumbar lordosis, decreased range of motion; but normal reflexes and motor strength. Dr. Duncan documented scoliosis and a past medical history of “HNP” (herniated nucleus pulposis). He was instructed to “RTC” (return to clinic) in one month.

On September 4, 1998, Employee saw Burton Cox, D.O. (Ex N, p 3-5). Employee reported to Dr. Cox that he “was lifting boxes from a machine. . . (and) felt it twinge in his lower lumbar area.” Employee noted his prior back surgery at age sixteen with removal of a disc and complained of increasing back pain and a little hip pain. Dr Cox informed Employee to come back in “four to five days.” On September 8, 1998, Dr. Cox saw Employee again and an MRI was scheduled. The notes from the Doctor’s visit indicate they “called Teri at Smiley Container and received approval for the MRI.” The employee’s wage statement, Exhibit AA, and also the Report of Injury were both signed by Teri Johnson. On the following day, Dr. Cox reviewed the MRI which he reported “indicates there is some herniated disc bulging with possibilities of the

cord or thecal sac being involved.” (Ex J, p 5-6). The records from Lucy Lee Hospital show that on September 9, 1998 an admitting form was filled out with the admitting diagnosis as “herniated disc,” and the guarantor was “Smiley Container” (as was the employer). MRI records at Lucy Lee Hospital, under past surgical history, show Employee had a previous back surgery and left leg surgery (Ex J, p 16). The MRI showed annular bulging and disc degeneration at L2-L3; L3-L4 degenerative annular bulging and posterior longitudinal ligamentous thickening with moderate facet arthrosis; L4-L5 scar. . . associated with degenerative annular bulging. . . (and) previous laminectomy performed at this site; and mild annular bulging at L5-S1 with mild facet degenerative disease (Ex J, p 17-18).

On September 14, 1998, Employee returned to Dr. Cox with complaints of back pain (Ex N, p 5). Employee was given medication for back pain and sleeping pills. The doctor’s chart indicates that a member of his staff, T. Stamps, spoke with Teri at “Smiley Container.” She wanted to know when Employee could return to work. T. Stamps advised that Dr. Cox did not want him working until he saw Dr. Miller.

On September 17, 1998, neurosurgeon Dr. Miller saw Employee who complained of low back pain and some numbness in both legs and pain in both hips (Ex H, p 4-5). Employee gave a history of stacking material and felt his back pull which occurred about three weeks ago. Since that time, Employee continued to have pain and not work. After examining the Employee and reviewing the MRI, Dr. Miller noted some degenerative changes and “[t]here is one view that suggested to me the possibility of some recurrent disc, slightly paracentral at L4.” Dr. Miller diagnosed a back strain and prescribed exercises and scheduled a follow-up. On September 22, 1998, he sent a copy of his report to “Terri Johnson, WCC, L.C.” (Ex H, p 5).

On September 29, 1998, Employee saw Dr. Duncan at Ripley County (Ex L, p 7). Employee reported the injury at work on September 3, 1998 and indicated that he had back pain, low and high and both shoulders. Dr. Duncan examined him and noted that Employee had “chronic back pain.” After noting that Employee was seeing workers compensation doctors, Dr. Duncan attempted to schedule a follow-up with Dr. Goldring who was retired.

On October 14, 1998, Employee saw Dr. Michael Chicoine at the Washington University Medical Center, Department of Neurosurgery (Ex P, p 3-5). Employee reported an injury “in early September of this year” while working at the box factory and complained of low back and right leg pain and bilateral foot numbness. Since the existing lumbar MRI was not of good quality, Dr. Chicoine recommended a cervical spine MRI and if his low back and right leg pain persisted he recommended evaluation with a CT myelogram to determine if any of the degenerative spine changes are associated with significant nerve root compression. Dr. Chicoine recommended physical therapy while Employee considered having a CT myelogram.

On September 28, 1998, at the request of Employer/Insurer, Employee saw Dr. K. Charles Cheung, a neurosurgeon in Cape Girardeau (Ex O, p 5-7). Employee reported he last worked at “Box factory Smiley Container” on September 3, 1998, which was also his injury date. In describing how the accident happened, Employee wrote “Hand stacking some cardboard.” At that time, Employee had hurt his “legs, neck, back” and had problems walking, bending and moving, tingling in his toes, and leg numbness. Employee reported to Dr. Cheung that at the

time he had been on three weeks of bed rest lying on a heating pad (Ex O, p 9-12). Dr. Cheung's exam revealed positive straight-leg raising on the right with pain coming down the right buttock, thigh and calf area. Dr. Cheung opined that Employee had "a right S1 radiculopathy, probably from the HNP at L4/5." Dr. Cheung returned Employee to light duty so he could sit and stand as needed with 10 pound lifting restriction with no bending, stooping or twisting, plus "sedentary work."

On December 2, 1998, Employee returned to Dr. Duncan, his personal physician at Ripley County Primary Care Center with continued back and neck pain (Ex L, p 8). In January 1999, Employee returned to Dr. Duncan and noted that Worker's Comp reportedly wouldn't pay for the myelogram that was recommended by Dr. Chicoine.

On February 26, 1999, Employee saw Dr. Shahid Choudhary at Poplar Bluff Neurology Center (Ex. Q, p 3-10). A report was sent to Disability Determinations in Cape Girardeau where Employee reported hurting his back at work in August of 1998 with persistent back pain since October 1998, radiating down to his right leg and right foot. Dr. Choudhary reviewed his old MRI record and opined that the back pain was caused by degenerative disease as well as disc bulging.

On August 3, 1999, Employee saw Dr. Raymond A. Ritter, Jr. at Orthopaedic Associates in Cape Girardeau for possible vocational rehabilitation (Ex M, exam report of August 3, 1999. Pages not numbered). Employee noted that his pain began in September, 1998. Following his exam, Dr. Ritter stated that "the patient would have difficulty doing activities that required repeated bending and heavy lifting of any kind. . . He would have difficulty doing overhead work with the right shoulder. He could have training for sedentary work activities. . . [T]here is a good chance that he will have some chronic problems with his back on a long-standing basis."

On September 24, 1999, Employee returned to Dr. Chicoine who took a current history and did an exam (Ex P, p 6-7). Dr. Chicoine said he thought much of his neck, right shoulder, low back and right leg pain may be related to degenerative changes and it may be difficult to pinpoint the precise source for all his symptoms. He recommended a myelogram and post myelogram CT scan.

On September 30, 1999, Employee went to Barnes Jewish Hospital for lumbar/cervical myelogram at the request of Dr. Chicoine and was complaining of low back pain and right leg and neck/shoulder pain. When released, Employee was told to call Dr. Chicoine to arrange an MRI of the head (Ex R, p 3-10). The radiology report of September 30, 1999, showed six lumbar nonrib bearing vertebrae with lumbarized S1. Prior surgery at L5-S1 was apparent. At L3-4 level there was a large herniated disc on the left with downward migration to the lower border of the L4 pedicle. At L4-5 level there was a diffuse disc bulge but no nerve root compression. The cervical spine myelogram was normal. There was no nerve root compression seen on the right in the lumbar myelogram (Ex R, p 23-27). On October 1, 1999, Dr. Chicoine reviewed the results of the myelogram and post myelogram CT done on September 30, 1999 (Ex K, p14). Dr. Chicoine sent a report to Dr. Duncan noting that he did not think the herniated disc explained Employee's symptoms and did not recommend disc removal surgery. On February 7,

2000, Employee saw Dr. Chicoine who noted that there was “evidence of a herniated disc at L3-4 eccentric to the left side” (Ex P, p 10).

On March 27, 2000, Employee saw Dr. Kee Park at Cape Neurological Surgeons, P.C. (Ex T, p 2-7). At that time, Employee gave a history of an injury on September 15, 1998 where he was “stacking some paper on pallets and experienced pain in his back.” He further stated that he had been working “for the company about three weeks when this occurred. He has not been able to work since then.” On June 5, 2000, Dr. Park opined that the pain in Employee’s right leg did not correlate with the left-sided L3-4 disc herniation and that Employee would not likely benefit from surgery (Ex T, p 8).

On December 5, 2000, Employee was evaluated by Benjamin H. Soeter, M.D. at Southeast Missouri Pain Treatment Services (Ex U, p. 3-4). An MRI was done on December 12, 2000, at Three Rivers Healthcare - North Campus in Poplar Bluff (Ex U, p 5-6; Ex V p 6-12). Tom Brumitt, D.O., read the MRI and indicated that Employee had:

1. Subannular herniated nucleus pulposis within the midline at L2-3
2. Small subannular herniated nucleus pulposis just to the right of the midline along the posterior disc at L3-4.
3. Degenerative disc changes with broad based annular bulging at L4-5.
4. Broad based bulging at L5-S1.
5. Overall findings are similar to those recorded in 1998.

Although this was the first test result to clearly state that there was some evidence of herniated L3-4 disc on the right, it was not available to Dr. Park when he saw employee on March 27, 2000 (Ex T, p 8).

On December 20, 2000, Dr. Soeter saw Employee and changed his medicines (Ex U, p 9). After a series of steroid injections, a stimulator trial was ordered in one month. Employee was admitted to Three Rivers Healthcare South on May 29, 2001, where Dr. Soeter examined him and scheduled a stimulator trial for May 30, 2001. X-rays verified the implant (Ex X, p 8-10). On June 4, 2001, Employee saw Dr. Soeter and reported 60% relief. On June 12, 2001, he was admitted for “permanent placement of spinal cord stimulator” which was completed successfully on June 13, 2001 (Ex X, p 7-20).

Employee came under the care of Stephen Nagy, M.D. as of February 12, 2003 (Ex Y, p 2-17 and 3-6). The first assessment of Dr. Nagy was HPB (high blood pressure), CLBP (chronic low back pain) and anxiety. On October 28, 2003, Employee underwent a lumbar myelogram at St Francis Medical Center (Ex Z, p 3-6). This confirmed that the herniated disc on L3-4 level is on the right, corresponding with Employee’s long-standing complaints that his major problems were on the right side. On January 15, 2004, Dr. Nagy added a diagnosis of depression and also chronic pain syndrome (Ex Y). Employee continued to complain of back pain and treat with Dr. Nagy until shortly before his death.

The Second Injury Fund offered into evidence Exhibit 1, the deposition testimony of Rolin B. Duncan. Dr. Duncan testified that because of Employee’s history of a disc removal and

scoliosis he was “set up” for chronic back condition (Ex. 1, p 16-17). Dr. Duncan further verified that Employee reported that he had hurt his back at work on September 3, 1998.

The Second Injury Fund also offered into evidence a deposition of Dr. Shahid Choudhary (Exhibit II). Employee’s history to Dr. Choudhary made it clear that his back pain began at work, that it radiated down to his right leg, and that he was unable to walk (Ex. II, p. 8). Dr. Choudhary stated “at work he probably exacerbated his symptoms, but I don’t think that substantially contributed to his overall condition” (Ex. II, p. 15-16). When questioned, Dr. Choudhary first said a disc injury at L3-4 could cause pain in the leg, but not the foot (Ex. II, p. 21). He then admitted that to have leg pain there would be some impingement (or involvement) of the nerve from the disc (Ex II, p. 25).

Dr. Russell’s deposition was also offered into evidence by the Second Injury Fund. Based on his experience and review of records, Dr. Russell opined that Employee’s complaints were all from degenerative disc disease (Ex. III, p. 3), and that there was no initiating injury in August 1998 that produced his back pain (Ex. III, p. 3). His opinion was based on Employee “having constant pain with physical activity prior to that time. . . and (gave). . . no history of injury” (Ex. III, p. 3). He further opined that Employee’s neck and shoulder pain had no initiating factor, i.e. work was not a substantial factor.

On August 21, 2003, Employee was seen for an evaluation by Matthew F. Gornet, M.D., (Ex. G, p 2,9). After examining the Employee and reviewing the records, Dr. Gornet opined that Employee had an annular tear at L2-3, a small disc protrusion at L3-4, and a larger more central disc protrusion/osteophyte complex at L4-5. Further, Dr. Gornet stated “that he is at maximum medical improvement and no further treatment should be performed. . . I believe he will never return to any gainful employment and he remains, in my opinion, permanently totally disabled” (Ex. G, page 2 of Ex. 5). Employee was also evaluated and rated by Raymond Cohen, D.O., a neurologist, on July 22, 2004 (Ex. F, p. 5 and 8). Dr. Cohen opined that lifting a pallet while bent over caused employee’s injury (Ex. F, p 13-14). At his deposition, Dr. Cohen stated that maximum medical improvement was not reached until employee stopped receiving epidural steroid injections and after he got the dorsal spine stimulator (Ex. F, p. 24). Dr. Cohen’s diagnosis for the primary injury was 1) lumbar disc herniation at L3-4, and 2) Lumbar myofascial pain disorder. His disability ratings were:

- A) 55% whole person at the level of the lumbar spine, with 30% pre-existing and 25% as a direct result of the primary work related injury. He was of the opinion that employee should be restricted from repetitive bending, lifting, stooping or twisting. He should not do prolonged sitting or standing (not over 15-20 minutes). He should not climb, do ladder work or be on uneven surfaces.
- B) 10% of the whole person pre-existing due to the depression and panic attacks.
- C) 30% pre-existing permanent partial disability of the left leg at the knee.
- D) He opined that the combination of Employee’s pre-existing disabilities and the primary work-related injury made him permanently and totally disabled.

(Ex. F p 3-4 of Ex 2)

Dr. Cohen stated that within a reasonable degree of medical certainty the Employee's lumbar disc herniation and lumbar myofascial pain disorder were a direct result of injuries sustained at work, and that work was a substantial factor in his disability and the treatment up to that point was reasonable. Dr. Cohen, on redirect, pointed out that the steroid injections in the case of a disc injury are used to try to decrease swelling from a herniation into the disc space, and thus improve the patient's condition (Ex F, p 44-45). He also stated that the exact date of Employee's injury being on September 3, 1998, rather than August 26, 1998, would not change his opinion (Ex. F, p 45).

After reviewing Employee's deposition and records, James M. England, Jr, a rehabilitation counselor, expressed his opinion that to a reasonable certainty that Employee "would not have been able to sustain any type of work activity" (Ex E, p 10 of Exhibit 2), and would not have been a candidate for vocational rehabilitation services absent his death. Mr. England specifically referred to the opinions of Dr. Gornet and Dr. Cohen that Employee was permanently and totally disabled (Ex E, p 9 of report, Ex 2 to depo).

#### **APPLICABLE LAW:**

- Although the workers' compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Meilves v. Morris*, 422 S.W.2d 335 (Mo. 1968), and *Marcus v. Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo. 1968). Therefore, the employee has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W.2d 697 (Mo. App. W.D. 1973).
- Under Section 287.020.2 RSMo., which was effective at the time of the injury, the term accident is defined to only include injuries that are "clearly work related". Under this section, an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor". A number of cases have also established that a pre-existing but non-disabling condition does not bar recovery under the Workers' Compensation Act, if a work related accident causes the pre-existing condition to escalate to a level where it becomes disabling. *Winebauer v. Gray Eagle Distributors*, 661 S.W.2d 652 (Mo. App. E.D. 1983); *Avery v. City of Columbia*, 966 S.W.2d 315 (Mo. App. W.D. 1998); and *Indelicato v. Missouri Baptist Hospital*, 690 S.W.2d 183 (Mo. App. E.D. 1985). The aggravation of a preexisting symptomatic condition is also compensable. See *Rector v. City of Springfield*, 820 S.W.2d 639 (Mo.App. S.D. 1991) and *Parker v. Mueller Pipeline*, 807 S.W.2d 518 (Mo. App. W.D. 1991). In *Kelly v. Banta and Stude Construction Company, Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), the Court of Appeals held that the Employer/Insurer was liable for hip replacements based on a finding that the Employee's work activity aggravated the Employee's pre-existing osteoarthritis.

- It is sufficient that causation be supported only by reasonable probability. *Davis v. Brezner*, 380 S.W.2d 523, 527 (Mo. App. S.D. 1964); *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 655 (Mo. App. W.D. 1995).
- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity 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 employee at the time of the last injury is liable is less than 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 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 287.414.

- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the 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 phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under 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, Inc.*, 631 S.W.2d 919, 922 (Mo. App. S.D. 1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992). Total disability means the “inability to return to any reasonable or normal employment.” *Brown v. Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo. App. E.D. 1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner*, 837 S.W.2d at 365. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo. App. E.D. 1993).
- “Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis . . . the proof of causation is not within the realm of lay understanding.” *Silman v. William Montgomery & Assoc.*, 891

S.W.2d 173, 175, 176 (Mo. App. E.D. 1995). “This requires [Employee's] medical expert to establish the probability [Employee's] injuries were caused by the work accident.” *McGrath v. Satellite Sprinkler Systems, Inc.*, 877 S.W.2d 704, 708 (Mo. App. E.D. 1994). “The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient.” *Id.* A finding of causation is not, however, “solely dependent on medical evidence given by expert witnesses, but [the] findings are to be judged on the basis of the evidence as a whole.” *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Inst.*, 793 S.W.2d 195, 199 (Mo. App. E.D. 1990) (citing *Nelson v. Consolidated Housing Development and Management Co.* 750 S.W.2d 144, 148 (Mo. App. S.D. 1988)). “The testimony of the Claimant . . . can constitute substantial evidence of the nature, cause and extent of the [injury], especially when taken in connection with, or where supported by, some medical evidence.” *Fischer*, 793 S.W.2d at 199. Medical proof of causation need not have the quality of absolute certainty and may be buttressed by lay testimony. See *Johnson v. City of Duenweg Fire Dept.*, 735 S.W.2d 364 (Mo. banc 1987).

- The workers' compensation statutes are to be “liberally construed with a view to the public welfare . . . .” Section 287.800 RSMo. They are “intended to extend its benefits to the largest possible class.” *Alexander v. Pin Oaks Nursing Home*, 625 S.W.2d 192, 193 (Mo. App. E.D. 1981). Any “doubt as to the right of [an employee to] compensation is to be resolved in favor of the employee.” *Bunker v. Rural Elec. Co-op.*, 46 S.W.3d 641, 649 (Mo. App. W.D. 2001) (citing *Mickey v. City Wide Maint.*, 996 S.W.2d 144, 148 (Mo. App. W.D. 1999)).
- Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. S.D. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. E.D. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo. App. S.D. 1986).
- The pivotal question in determining whether Employee is totally disabled is whether any Employer in the usual course of business would reasonably be expected to employ Employee in his present physical condition. *Brookman v. Henry Transportation*, 924 S.W.2d 286, 290 (Mo. App. E.D. 1996).
- The Commission utilized the date of Claimant's rating physician's report to establish Claimant's date of maximum medical improvement. Based on the evidence in the record, that is neither arbitrary or capricious. *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E. D. 1966). The level of permanent partial disability cannot be determined until the injury “reaches a point where it will no longer improve with medical treatment, or in other words, reaches maximum medical improvement.” *Id.* at 910; *Cantrell v. Baldwin Transportation, Inc.*, 296 S.W.3d 17, 22 (Mo. App. S.D. 2009).
- Section 490.065, RSMo governs the admissibility of expert testimony in civil cases. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003). A contested administrative proceeding is a civil action. *State ex rel DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1946). Section 490.065 RSMo. guides the admission of expert testimony in administrative proceedings. *McDonagh*, 123 S.W.3d at 154-155.

The objections not timely made are waived. *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 209 (Mo. banc 1991).

- In general, see 22A Mo. Prac; Missouri Evidence §703.1 (3e ed) Chapter 7. Opinions and Expert Testimony. § 703 Bases of opinion testimony by experts.
- Statements made to a physician, or contained in hospital records, describing the speaker's present symptoms and complaints, are admissible as an exception to the hearsay rule. *Lauck v. Price*, 289 S.W.3d 694 (Mo. App. E.D. 2009) (quoting *Marrow v Fisher*, 51 S.W.3d 468, 472 (Mo. App. S.D. 2001); *State v. Gonzalez*, 652 S.W.2d 719, 724 (Mo. App. W.D. 1983). Statement is admissible if it is made to a nurse for the doctor's use in treating the speaker. *Gonzales*, 652 S.W.2d at 724.
- Statements made to a physician, or contained in hospital records, even if characterized as medical history, are admissible insofar as those statements were reasonably pertinent to diagnosis and treatment. *Brelding v. Dodson Trailer Repair, Inc.*, 679 S.W.2d 281, 285 (Mo. banc 1984).
- Expert opinions - in General - see §703.1 from 22A MOPRAC
  - A. “. . . Missouri courts have long held that expert witnesses may give opinion testimony on the basis of facts within their knowledge, or on the basis of facts in the record, or on the basis of both. The expert's knowledge may be acquired by being present at trial when evidence of facts relevant to his opinion was presented, and his opinion may be given in response to a hypothetical question asking him to assume the truth of certain facts, at least arguably supported by the evidence. However, expert opinion testimony that describes only “what would generally happen in general circumstances” is irrelevant.”
  - B. Civil Cases - “V.A.M.S. §490.065, which applies only in civil cases, provides the facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable. . . It is the responsibility of the trial judge to independently assess the reliability of the facts and data relied upon by the expert in forming his opinion. In determining the whether the foundational requirements of §490.065.3 are satisfied, the trial judge has two tasks: (1) to ‘determine whether the facts and data are of a type reasonably relied upon by the experts in the particular field’ and (2) to ‘ensure that the facts and data are otherwise reliable.’ . . . In other kinds of civil cases, Missouri courts had begun, before the enactment of §490.065, to hold that it was proper for an expert witness to base an opinion, at least in part, on hearsay. §490.065 continues the trend started by these decisions, and states that the evidence on which an expert relies in forming an opinion need not be independently admissible. Thus, an opinion may be based on hearsay as long as it is hearsay that is “reasonably relied upon by experts in that field. . . and otherwise reasonably reliable.”

Medical Experts - Some cases suggest that medical experts may not base their opinions solely on medical history provided by a patient because

that history is hearsay. Most cases dealing with the issue say that medical history is not hearsay if it is reasonably pertinent to diagnosis and treatment, and is admissible if it is only part of the basis for an opinion supported by other proper evidence, including the opinions of other doctors, or if it is offered as background information and not as substantive evidence. Medical records are the quintessential example of the type of facts or data reasonably relied upon by experts in the field of medicine. Opinions of a physician may be drawn from facts which the physician observed in the course of an examination and evidence which he has heard or read as long as it is in the record and is of a type reasonably relied on by other experts in the field; it need not be independently admissible. In forming an opinion, the doctor may rely on statements by third parties as long as they are of a kind reasonably relied on by others in the field, such as the opinions of other doctors, as long as the expert uses those other opinions as data upon which she bases her own opinion and does not offer the non-testifying experts' opinions as her own."

- Under *Tilley v. USF Holland Inc.*, 325 S.W.3d 487 (Mo. App. E.D. 2010) the Missouri Eastern District Court of Appeals held that the right of qualified dependents to receive permanent total disability benefits under *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), is still viable, and was not affected by the legislation rejecting and abrogating that decision was issued on January 9, 2007, and the effective date of the amendment to §287.230.3 RSMo., which was June 26, 2008. *Schoemehl*, was reaffirmed in *Gervich v. Condaire*, \_\_\_\_ S.W.3d \_\_\_\_ (Mo. App. E.D. 2011). filed March 8, 2011, Case No. ED 94726. Wife's rights as a dependent vested at time of husband's injury. Also clarified that if employee's claim was pending when Supreme Court decided *Schoemehl*, his widow is entitled to assume her late husband's place as the employee for purposes of receiving continuing permanent total disability benefits pursuant to *Schoemehl*. Doesn't have to be pending before the Commission or on appeal, but can be before an ALJ.
- Claim for compensation against Fund is timely and date for filing is not limited to original claim, but to any timely filed claim. *Elrod v. Treasurer of the State of Missouri*, 138 S.W.3d 714 (Mo. banc 2004).
- It is appropriate to use date of maximum medical improvement to determine the beginning date for permanent disability benefits, even if employee did not receive temporary total disability benefits. *Cardwell v. Treasurer*, 249 S.W.3d 902, 911-912 (Mo. App. E.D. 2008). *Cantrell v. Baldwin Transportation*, 296 S.W.3d 17, 19-20 (Mo. App. S.D. 2009).
- To determine whether a pre-existing condition rises to the level of being a hindrance or obstacle to employment or reemployment, the "proper focus of the inquiry 'is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.'" *Knisley v. Charleswood Corporation*, 211 S.W.3d 629, 637 (Mo. App. E.D. 2007) (citing *Wuebbling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D. 1995)). The pre-existing condition does not have to be known by Employer/Insurer prior to the

primary work injury. *Messex v. Sachs Electric Company*, 989 S.W.2d 206, 215 (Mo. App. E.D. 1999). Liability of the Second Injury Fund is triggered "by a finding of the presence of an actual and measurable disability at the time the work injury is sustained." *Id.*

## **RULINGS OF LAW:**

### ***Issue 1. Covered Employee***

There is substantial, competent evidence in the record to prove that David Spradling was a covered Employee under the Workers' Compensation Act.

The record reveals that Employer hired David Spradling on August 17, 1998 as a regular employee in the facility located at 1747 Industrial Road, Poplar Bluff, Missouri (See ROI). The wage statement in evidence confirms that David Spradling was actively working during the week ending September 5, 1998 which includes the September 3, 1998 date of injury. David Spradling had gross earnings for that work week totaling \$192.00.

On September 3, 1998, Russell Stover Candies, Inc. d/b/a Smiley Container Corporation was an Employer subject to the Workers' Compensation Act with insurance coverage provided by Hartford Casualty Insurance Company for the policy period April 1, 1998 to April 1, 1999 (See Exhibit AC).

I find that on September 3, 1998, David Spradling was an Employee of Russell Stover Candies, Inc., d/b/a Smiley Container Corporation. I further find that on September 3, 1998 David Spradling was a covered Employee under the Workers' Compensation Act.

### ***Issue 2. Accident***

The final amended claim for compensation alleges an accident and resulting injury in August/September 1998, as a result of Employee lifting in the course and scope of his employment with Employer. The Second Injury Fund (SIF) disputes that there was an accident. The evidentiary record suggests several different dates for Employee's work accident and back injury at Smiley Container. In particular, the following dates are suggested by the record:

- August 16, 1998 (Cox),
- August 26, 1998 (original claim, ROI, wage statement),
- September 3, 1998 (Duncan, Cheung, settlement stipulation, see also ROI),
- September 15, 1998 (Park), and
- October 18, 1998 (Gornet).

Several of these dates can be readily excluded as they are outside the time (either before or after) that Employee was working at Smiley. He was hired on August 17, 1998 (see ROI) and did not

earn wages from his employment with Smiley beyond September 5, 1998 (see wage statement). An accident occurring before August 17<sup>th</sup> or after September 5<sup>th</sup> would not be within the course and scope of his employment with Smiley.

While I find that Employee was clearly not a good historian - not good at remembering dates - he was consistent when reporting other facts of the work accident and his resulting injury whether for treatment or evaluation only. Employee consistently reported to the medical professionals that he was:

- working at the box factory (Smiley Container),
- hand stacking paper/boxes/cardboard on pallets for a machine,
- that he had been working there about three weeks,
- that upon lifting the material he felt a sudden onset of pain,
- the pain was in his back and down into his legs, the right much more so than the left, and
- that he had not worked since the accident and injury.

I find Employee's consistent reporting of the other facts surrounding his work accident and injury are reasonably reliable and credible and support a finding that Employee sustained a legitimate and compensable work accident during the course and scope of his employment with Smiley Container.

The specific dates suggested by the evidence that remain are August 26, 1998 and September 3, 1998. On the day following each of these dates, Employee had an appointment with a doctor.

On August 27, 1998, Employee saw his primary care doctor, Dr. Duncan. This visit to Dr. Duncan was in follow up of a June visit wherein Dr. Duncan believed Employee had fractured some ribs after getting too hot at work and passing out. When Employee returned to see the doctor in August, he was wearing a rib brace and having severe pain when coughing. The only reference to his "back" mentioned in that record is to having a "knot in his back". Dr. Duncan prescribed a muscle relaxer (Robaxin/Methacarbomal) to help with the problems he was still having as a result of the "probable rib fractures". There was no mention of a work injury or accident at Smiley and there was no suggestion that Employee had hurt his low back the day before that August 27<sup>th</sup> office visit. However, the next time Employee saw Dr. Duncan (September 29, 1998), he reported to the doctor that he had hurt his back at work on September 3, 1998 and that he was seeing the workers' compensation doctors.

On September 4, 1998, Employee was seen for the first time by Dr. Cox. Dr. Cox was the authorized treating physician selected by Smiley to treat him for this work injury (See ROI and Cox records). Employee's work accident and injury while working at Smiley are specifically noted in the record of this visit with Dr. Cox. Employee also told the doctor about his back surgery as a teenager and that he had taken Robaxin/Methacarbomal (prescribed by Dr. Duncan for continuing problems from fractured ribs) to help with his current back/hip pain. Dr. Cox diagnosed a "lumbar strain, probably para-lumbar muscle spasms" and changed his medications to flexeril, naprosyn and darvocet.

I find that the work accident Employee consistently describes of hand stacking/lifting when he felt a sharp twinge in his low back occurred on September 3, 1998 in the course and scope of his employment with Employer.

***Issue 3. Notice.***

There is no evidence presented to support a finding that Employee gave written notice of the time, place and nature of the injury Employee sustained within 30 days after the accident as required by Section 287.420 RSMo.

There is, however, substantial, competent evidence in the record to show that Employer/Insurer had actual notice of Employee's September 3, 1998 work accident and injury:

- 09/04/98: Employer notified of injury (see ROI).
- 09/08/98: Teri at Smiley approved MRI (see Cox records).
- 09/14/98: Teri from Smiley inquiring of Dr. Cox when Employee can return to work (see Cox records).
- 09/21/98: Letter to Dr. Cheung from nurse coordinator on behalf SRS for Insurer setting evaluation appointment (see Cheung records).
- 09/23/98: Wage statement regarding injured employee prepared by Employer and received by SRS for Insurer Hartford (see wage statement).
- 09/28/98: Employee seen for evaluation by Dr. Cheung - a doctor selected by ER/IR (see Cheung records).
- 10/02/98: Dr. Cheung 5-page report faxed to Teri at Smiley Container (See Cheung records).

All of the foregoing occurred within 30 days immediately following Employee's September 3, 1998 work accident and injury.

I find that Employer/Insurer had actual notice of Employee's September 3, 1998 work accident and injury and was therefore not prejudiced by the failure to receive written notice from Employee.

***Issue 5. Medical Causation***

The Second Injury Fund has challenged the medical causal relationship of the work accident of September 3, 1998 and Employee's resulting injuries and disability.

The overwhelming weight of the evidence presented supports a finding that the work accident of September 3, 1998 was a substantial factor in causing injury to Employee's lumbar spine, back and body as a whole and resulted in constant, intractable back and leg pain and symptoms, which pain and symptoms persisted up to the time of Employee's death on November 30, 2005.

- Dr. Cox: He was David's authorized treating physician providing initial treatment beginning on the day after the work accident. He diagnosed a "lumbar strain/lumbar disc syndrome," took Employee off work, prescribed pain relieving medications, ordered an MRI of the lumbar spine, noted the MRI suggested "some herniated disc bulging with possibilities of cord or thecal sac" involvement and thereafter referred Employee to Dr. Miller for a neurosurgical consultation. The temporal relationship between the work accident/injury and the treatment provided by Dr. Cox is consistent with there being a medical causal relationship between the work accident and Employee's resulting lumbar spine injury.
- Dr. Miller: On September 17, 1998, David was seen by Dr. Miller. He reviewed the lumbar MRI and noted "one view that suggested . . . the possibility of some recurrent disc, slightly paracentral at L4." Dr. Miller prescribed pain relieving medications, instructed David in some mild back exercises and asked that he begin a walking regimen to become more active.
- Dr. Cheung: A second opinion was requested by the insurance company with respect to Employee's injuries resulting from the work accident. Employee was seen by Dr. Cheung on September 28, 1998 at which time he reviewed the MRI scan of "extremely poor quality" and diagnosed a "right S1 radiculopathy, probably from HNP at L4/5." He prescribed oral steroids and returned Employee to light duty/sedentary work with a 10 pound lifting limit where he is able to sit/stand as needed.
- Dr. Cohen: It was Dr. Cohen's testimony that Employee's lumbar disc herniation at L3-4 and his lumbar myofascial pain disorder were a direct result of his work injuries and that work was a substantial factor in his resulting disability. Dr. Cohen also testified that the medical treatment Employee had received since the work accident had been medically reasonable and necessary as a result of the work accident.

Second Injury Fund offered testimony from Dr. Shahid Choudhary and Dr. Garth Russell to contradict the medical opinions supporting a medical causal relationship between the September 3, 1998 work accident and Employee's resulting lumbar spine injuries.

Dr. Choudhary testified that he didn't think that the work accident "substantially contributed to [Employee's] overall condition" although he did believe that Employee's work at Smiley "probably exacerbated employee's symptoms." On cross-examination it was established that Dr. Choudhary was not familiar with the legal "substantial factor" standard under Missouri Workers' Compensation Law and ultimately agreed that Employee's degenerative disc disease would not preclude the work accident from also being a substantial factor in causing his lumbar spine problems. Dr. Choudhary's testimony was not compelling to negate medical causation.

Dr. Russell did not examine or interview Employee. Dr. Russell was provided with the Employee's deposition testimony and Employee's medical records identified in his report and deposition transcript. It was Dr. Russell's testimony that all of Employee's complaints were from his pre-existing degenerative disc disease. Dr. Russell's opinion was based on there being no "history of [an] injury" in the records and based on his understanding that, even before the

work accident and injury of September 3, 1998, Employee was already experiencing constant back pain and leg symptoms with physical activity. Dr. Russell's testimony was not credible.

I find the opinion of Dr. Cohen is credible on the issue of medical causation and is supported by the treatment records in evidence from Dr. Cox, Dr. Miller and Dr. Cheung.

Based on all of the evidence and testimony adduced, I find that the Employee's accident of September 3, 1998 was a substantial factor in causing the Employee's injuries which resulted in Employee's intractable back pain and leg symptoms which continued unabated until his death in late 2005.

### ***Issue 6. Nature & Extent of Disability***

Prior to his death, Employee asserted in an amended claim for compensation filed with the Division of Workers' Compensation that he was permanently and totally disabled. Employee's dependents herein allege that Employee was permanently and totally disabled prior to his death on November 30, 2005.

Based on a thorough review of the entire record, I find that the competent and credible evidence presented in this case supports a finding that Employee was permanently and totally disabled before he died.

Dr. Cohen stated that Employee's pre-existing conditions or disabilities (back and left leg) combine with the primary work-related injury to create a greater overall disability than their simple sum and that due to this combination of disabilities, he is permanently and totally disabled.

Dr. Gornet found Employee to be at maximum medical improvement with no further treatment to offer. It was Dr. Gornet's opinion that Employee will never return to any type of gainful employment and that Employee is permanently totally disabled.

Mr. England found that Employee was a younger worker at the time of his death with a limited education and a number of medical problems which included pre-existing back problems involving back surgery and a prior leg fracture requiring two surgical procedures . . . as well as difficulties involving the primary injury with resultant pain to the degree that he required a dorsal column stimulator to be implanted by Dr. Soeter, a pain specialist. Based on his review of the majority of the medical evidence, he found Employee to be functioning so poorly that he would not have been able to sustain any type of work activity and considering the opinions of Dr. Gornet and Dr. Cohen, he would not be a candidate for any type of work activity. Mr. England thought that Employee's overall vocational disability would appear to me to be a combination of physical problems, his limited education and his limited intellectual capabilities and that with these together it did not appear that Employee would have been a logical candidate for vocational rehabilitation services absent his death.

I find the opinions of Dr. Cohen, Dr. Gornet and Mr. England credible on the issue of permanent total disability. I also find that the medical records in evidence support the opinions of Dr. Cohen, Dr. Gornet and Mr. England on the issue of Employee's permanent total disability.

Employee was referred to pain management in late 2000 due to his then long-standing intractable back pain and leg symptoms that had continued unabated from the work accident and injury of September 3, 1998. A thorough review of the medical records and reports in evidence reveal that with Dr. Soeter's implant of the spinal cord stimulator on June 13, 2001, Employee had attained maximum medical improvement. The only treatment options made available to Employee after June 13, 2001 were geared toward the control and maintenance of his chronic back pain and leg symptoms. I find that Employee was at maximum medical improvement by June 13, 2001. Based on the credible expert testimony and medical records in evidence, I find that on June 14, 2001, Employee was unable to compete for work in the open labor market and that with his substantial physical limitations, restrictions and level of pain, no Employer would have reasonably been expected to hire him and reasonably expect Employee to have performed the work for which he was hired. I find that as of June 14, 2001, Employee was unable to compete for work in the open labor market and was therefore permanently and totally disabled.

#### ***Issue 7. Liability of Second Injury Fund***

Having found that Employee was permanently and totally disabled, it must next be determined whether the accident of September 3, 1998 alone, caused his permanent total disability. If so, liability for permanent total disability benefits would fall to Employer/Insurer and the Second Injury Fund would have no liability. If not, the Second Injury Fund is only liable for permanent total disability benefits if Employee's permanent total disability was caused by a combination of his preexisting injuries and conditions and the Employee's injury resulting from the accident of September 3, 1998. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the Employee's employment or reemployment.

Cohen: In regard to his pre-existing conditions or disabilities, it was Dr. Cohen's opinion, within a reasonable degree of medical certainty, that Employee has a 30% whole person disability at the level of the lumbar spine which pre-existed the 1998 work accident and injury; a 10% whole person disability due to the depression and panic attacks and a 30% permanent partial disability at the left leg at the knee level and that his pre-existing conditions or disabilities combine with the primary work-related injury to create a greater overall disability than their simple sum and that due to this combination of disabilities, he is permanently and totally disabled. It is further my medical opinion that his pre-existing conditions or disabilities were a hindrance or obstacle to his employment or re-employment.

Duncan: He testified that Employee was "set up" to have these types of problems (low back and leg pain and symptoms) because of his previous back surgery and scoliosis.

- Gornet: In Dr. Gornet's opinion, Employee has long-standing disc degeneration and disc pathology that clearly predated his injury although may not have been symptomatic. Dr. Gornet also acknowledged that his accident "would be the type of mechanism that clearly could aggravate a condition such as that."
- Honomichl: The records from Dr. Honomichl reveal that Employee suffered from back pain for which he sought treatment in 1989 and 1991. Dr. Honomichl took Employee off work for a number of days in 1991 as a result of his back pain and symptoms.
- Choudhary: Dr. Choudhary characterized Employee's symptoms as chronic back pain caused by degenerative as well as disc bulging. He did not find any deficit on his examination and given Employee's history of back problems, in fact, he had surgery when he was 16, which is unusual to have back surgery at age 16. I believe he has problems with his back and work exacerbated his symptoms. He stated that anybody who had back surgery is bound to have more problems down the line as somebody gets older because of arthritic changes and all of that.

Notwithstanding the significance of Employee's injury resulting from the accident of September 3, 1998, the credible medical and vocational evidence indicate that the Employee's permanent total disability has resulted from a combination of the Employee's injuries rather than from the last injury alone. Consequently, I find that the Employee is unemployable in the open labor market and is permanently and totally disabled as a result of a combination of Employee's injuries.

On February 18, 2011, Dependents settled the primary work injury claim with Employer/Insurer for an approximate permanent partial disability of 25% of the lumbar spine and body as a whole.

After considering all of the evidence in the record, I find that the Employee suffered a 25% permanent partial disability to his lumbar spine and body as a whole as a result of the September 3, 1998 accident and injury. Based on all the evidence submitted, I further find that as of September 3, 1998, Employee had pre-existing disabilities of 30% of the body as a whole for pre-existing degenerative disc disease in his lumbar spine and 15% of the left lower extremity as a result of the leg fracture requiring two surgeries. I find that the Employee's preexisting disabilities and conditions regarding his back and left lower extremity were actual, measurable and sufficiently serious to constitute a hindrance or obstacle to Employee's employment or to him obtaining reemployment.

Finally, the medical testimony of Dr. Cohen and the other medical evidence also support a finding that Employee's pre-existing disabilities and the last injury to back and body as a whole on September 3, 1998 combined synergistically and caused Employee to be permanently and totally disabled. I find the Second Injury Fund liable for Employee's permanent total disability benefits.

***Issue 4. Statute of Limitations Regarding Dependents' Claim; and Issue 8. Dependency under Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007).***

Under Missouri Workers' Compensation Law, when an Employee is entitled to compensation and death ensues, compensation ceases when the Employee dies from a cause other than his work injury, "unless there are surviving dependents at the time of death." Section 287.230(2) RSMo. *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, (Mo. 2007). The word 'dependent' is defined to mean a relative by blood or marriage of a deceased Employee, who is actually dependent for support, in whole or in part, upon the Employee's wages at the time of the injury. Section 287.240(4) RSMo. "As such any "dependent" would have to be born and dependent at the time of the injury." *Schoemehl*, 217 S.W.3d at 902.

On the date of Employee's work accident and injury (September 3, 1998), he was single and unmarried with three children under the age of 18: Lee Spradling (dob 07/23/1986), Brittinee Spradling (dob 02/08/1991) and Marinda Spradling (dob 02/25/1993). Section 287.240 RSMo. provides that "[a] natural . . . or adopted child or children . . . under the age of eighteen years" will be ". . . conclusively presumed to be totally dependent for support upon a deceased Employee." Section 287.240(4) RSMo. Lee Spradling, Brittinee Spradling and Marinda Spradling were, at the time of the work injury in 1998, conclusively presumed total dependents of Employee David Spradling. Under *Schoemehl*, Lee Spradling, Brittinee Spradling and Marinda Spradling are entitled to Employee's permanent total disability benefits awarded hereunder with respect to Employee's claim for compensation.

This claim was pending within the time recognized by the *Schoemehl* decision and subsequent cases. Pursuant to Section 287.240A RSMo., Lee Spradling, Brittinee Spradling and Marinda Spradling were total dependents of Employee at the time of the 1998 work injury and are entitled Employee's permanent total disability payments. Under *Schoemehl* the surviving dependents of an injured worker awarded permanent total disability benefits are entitled to the unpaid, unaccrued balance of benefits for the duration of the dependents' life. Recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007 and June 26, 2008. I have taken Administrative Notice of the file in this case. The claim in this matter first alleging permanent total disability was dated August 17, 2005 and filed September 14, 2005, and thus was pending before Section 287.230.3, RSMo was amended. *Tilley v. Holland*, 325 S.W.3d 487, 49 (Mo. App.) controls. This issue is ruled in favor of the dependents. The dependents' claim was timely filed and was pending between January 9, 2007 and June 26, 2008.

The Employer/Insurer's permanent partial disability payments would have commenced on June 14, 2001 and continued for 100 weeks through May 15, 2003. Since there is no difference in the compensation rate for permanent partial disability and the agreed rate of compensation for permanent total disability, the Second Injury Fund is directed to pay the sum of \$156.00 per week in equal shares to Employee's dependents Lee Spradling, Brittinee Spradling and Marinda Spradling commencing on May 16, 2003 and continuing thereafter for life. Upon the death of one of Employee's said dependents, the surviving dependents shall share equally and receive the full benefit of \$156.00 per week. Upon the death of another of Employee's said dependents, the sole surviving dependent shall receive the full benefit of \$156.00 per week.

**ATTORNEY'S FEE:**

Little, Schellhammer, Richardson & Knowlan Law Offices, P.C., attorneys at law, are allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to Dependents. The amount of these attorney fees shall constitute a lien on the compensation awarded herein.

**INTEREST:**

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

Made by:

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Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*

Date: \_\_\_\_\_

A true copy: Attest:

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Ms. Naomi Pearson