

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge  
with Corrected Language  
Pursuant to the Mandate of the  
Missouri Court of Appeals, Western District)

Injury No.: 07-133443

Employee: Willie White

Employer: University of Missouri, Kansas City  
Curators of University of Missouri

Insurer: Self-Insured c/o Corporate Claims Management, Inc.

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

On September 4, 2012, the Missouri Court of Appeals, Western District (Court), issued an opinion that affirmed the May 26, 2011, Final Award of the Labor and Industrial Relations Commission (Commission) in the above-referenced case in all respects except "to the extent that it purports to adjudicate the determination as to Gail White's entitlement to succeed to the disability benefits payable to Willie White upon his death." *White v. Univ. of Mo., Kansas City*, No. WD 74081. Concerning that portion of the Commission's award, the Court vacated that portion and remanded the matter to the Commission for "correction of its ruling in accordance with [its] opinion." By Mandate certified September 26, 2012, the Court confirmed its opinion.

Pursuant to the Court's Mandate, we issue the following award.

The Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

We agree with and adopt the decision of the administrative law judge with respect to the award of permanent partial disability benefits to employee from employer and the award of permanent total disability benefits to employee from the Second Injury Fund.

On the other hand, the administrative law judge misunderstood and misstated the law concerning the application to this case of *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900 (Mo. banc 2007). *Schoemehl* was explained in the subsequent case of *Tilley v. USF Holland Inc.*, 325 S.W.3d 487, 494 (Mo. App. E.D. 2010) (internal citations omitted), as follows:

Under *Schoemehl*, decided on March 20, 2007, 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. The holding has been abrogated by Section 287.230.3, RSMo Cum. Supp. 2009, which became effective June 26, 2008 and says, "[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate the holding in *Schoemehl v. Treasurer of*

Employee: Willie White

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*the State of Missouri*, 217 S.W.3d 900 (Mo.2007), and all cases citing, interpreting, applying, or following this case." The amended statute is not retroactive and will only apply to claims initiated after the effective date of the amendment. Thus, recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in *Schoemehl*, and June 26, 2008, the effective date of [the amendment to Section 287.230.3].

. . . .

Employer misinterprets *Strait v. Treasurer of Missouri*, 257 S.W.3d 600 (Mo. banc 2008), to say that *Schoemehl* only applies to cases that were pending before the Commission or pending on appeal. We do not find that limited holding in our reading of *Strait*. In *Strait*, the question before the court was whether the claim was "final--or still pending." [Emphasis added.]

Here, the administrative law judge equally read *Schoemehl* too restrictively. She held that employee's claim does not qualify for contingent application of the *Schoemehl* case because the claim was originally filed as one for permanent partial disability benefits and was only amended to a claim for permanent total disability benefits after June 26, 2008. We disagree.

*Schoemehl* did not address and did not terminate the dependent's rights based upon whether the claim originated as one for permanent partial disability benefits versus one for permanent total disability benefits. As indicated above in *Tilley*, the key is whether "the claim" was pending between January 9, 2007, and June 26, 2008. Thus, we are persuaded that the fact that employee's claim was not amended to one for permanent total disability benefits until after the expiration of the *Schoemehl* time window is irrelevant.

Accordingly, we make the following additional findings of fact. Employee testified that as of the time of the injury and of the hearing, he was married to and living with Gail Marie White. Dependent status is determined at the time of the injury, not at the time of the employee's death. *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 622 (Mo. banc 2012), Consequently, we conclude that, as of the time of employee's injury, Gail Marie White satisfied the definition of dependent set forth in § 287.240.4 RSMo.

Therefore, we modify the September 16, 2010, award to hold that employee's claim qualifies for contingent application of the *Schoemehl* case. Gail Marie White is entitled to receive employee's permanent total disability benefits so long as at the time of employee's death, all subsequent conditions applicable under the Missouri Workers' Compensation Law and under *Schoemehl* and its progeny are satisfied.

The September 16, 2010, award and decision of Administrative Law Judge Lisa Meiners, as modified, is attached and incorporated by reference.

Employee: Willie White

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The Commission further approves and affirms 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 21<sup>st</sup> day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T  
Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Willie White

Injury No. 07-133443

Dependents: N/A

Employer: University of Missouri, Kansas City,  
Curators of the University of Missouri

Insurer: Self-Insured, c/o Corporate Claims Management, Inc.

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

Hearing Date: July 12, 2010

Checked by: LM/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: Last exposure on August 14, 2007.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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 occurred or occupational disease contracted: While in the course and scope of employee's work, employee sustained left carpal tunnel syndrome due to repetitive exposure of sanding and painting handrails.
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: Left upper extremity at the 175-week level.

14. Nature and extent of any permanent disability: 20 percent permanent partial disability at the 175-week level.
15. Compensation paid to-date for temporary disability: \$3,133.41.
16. Value necessary medical aid paid to date by employer/insurer? \$7,809.62.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$513.07/\$376.55.
20. Method wages computation: Stipulation.

### **COMPENSATION PAYABLE**

21. Amount of compensation payable: The employer is liable to employee for permanent partial benefits in the amount of \$13,179.25.
22. Second Injury Fund liability: The Second Injury Fund is liable to Claimant for permanent total disability benefits beginning November 18, 2008. I find Claimant reached maximum medical improvement for treatment on November 18, 2008. The Second Injury Fund is ordered to pay the difference of permanent total disability rate of \$513.07 - \$376.55 permanent partial disability rate or \$136.52 for 35 weeks beginning on November 18, 2008. Thereafter the Second Injury Fund is ordered to pay weekly benefits of \$513.07 for Claimant's lifetime.
23. Future requirements awarded: No. The Employer is not liable to Claimant for future medical care in order to cure and relieve symptoms of the occupational exposure of the left carpal tunnel syndrome.

Said payments to begin as of the date of the award 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 24 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Keith Yarwood.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Willie White Injury No. 07-076565  
Dependents: N/A  
Employer: University of Missouri, Kansas City,  
Curators of the University of Missouri  
Insurer: Self-Insured, c/o Corporate Claims Management, Inc.  
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund  
Hearing Date: July 12, 2010 Checked by: LM/lh

### **FINDINGS OF FACT AND RULINGS OF LAW**

On July 12, 2010, the parties appeared for hearing. The Employee Willie White appeared in person with counsel, Keith Yarwood. The Employer, Curators of the University of Missouri, and Insurer Corporate Claims Management, Inc., was represented by Brian Fowler. The Second Injury Fund was also a party and represented by Kim Fournier.

### **STIPULATIONS**

The parties stipulated:

- 1) That both Employer and Employee were working subject to Missouri's Workers' Compensation law;
- 2) That it's liability was insured by Corporate Claims Management;
- 3) That the Claimant sustained left carpal tunnel syndrome due to occupational exposure that occurred within the course and scope of his employment;
- 4) That the Employer has paid \$7,809.62 of medical expenses as well as \$3,133.41 of temporary total disability benefits;
- 5) That the Employer had received notice only as to the left wrist;
- 6) That the claim was properly filed within the time allowed by law;
- 7) That the compensation rates were \$513.07/\$376.55.

### **ISSUES**

The issues to be resolved by this hearing were:

- 1) whether the low back and neck are causally related to the repetitive exposure of sanding and painting handrails with the last exposure being August 14, 2007;
- 2) whether notice was given to the Employer regarding the low back and neck;
- 3) whether the Employer is liable to Employee for past medical expenses in the amount of \$1,702.68;

- 4) whether the Employer is liable to the Employee for future medical care in order to cure and relieve the effects of the occupational exposure with the last exposure being August 14, 2007;
- 5) whether the Claimant sustained any disability and, if so, the nature and extent of that disability;
- 6) whether the Employer is liable to the Employee for costs of the proceeding pursuant to §287.560 for unreasonable defense;
- 7) whether the Second Injury Fund is liable to Claimant; and
- 8) whether the Schoemehl decision applies in this matter.

By the summer of 2007, Claimant was a 23-year employee of the University of Missouri, Kansas City. There he worked as a painter and drywaller. On June 11, 2007, Claimant spent approximately 3 ½ hours on top of a 12-foot ladder sanding an area above his head with the end of a sanding vacuum cleaner. Unlike previous painting jobs, Claimant had to work around pipes and conduit which increased the awkwardness of the work.

Claimant felt a pop in his neck and developed extreme pain in the cervical area and into the left shoulder. This injury was reported to the Employer and the Employer sent him to a doctor. Ultimately he was referred to Dr. Hess, a neurosurgeon, who performed a two-level fusion of the cervical region in September of 2007. Prior to September 2007, Claimant continued to perform light duty work until August 14, 2007. In this capacity he sanded and painted handrails on campus. Claimant never returned to the open labor market after his last day of employment on August 14, 2007.

Claimant underwent surgery the day after Labor Day in 2007. In November of 2007, Claimant noted low back pain and left leg pain that went down into his left lower extremity. The Employer refused to provide treatment of the low back so he sought treatment with his own doctor who diagnosed a pinched nerve. As a result, Claimant underwent a series of epidural injections without success.

Claimant was then diagnosed with carpal tunnel syndrome of the left hand in late December 2007. Initially the Employer did not provide treatment for this condition. Dr. Koprivica issued a report May 29, 2008, stating both the low back and the left wrist were related to the occupational exposure of Claimant's job duties of painting and drywalling. The Employer sent Claimant to Dr. Rosenthal. On November 18, 2008, Dr. Rosenthal agreed that Claimant's left carpal tunnel syndrome was result of his work-related activities as a painter and drywaller at University of Missouri, Kansas City. Ultimately she performed a left carpal tunnel release.

Dr. Pang in a report dated November 2008 stated he did not believe Claimant's low back pain was a result of his work activities as a painter or drywaller. Dr. Pang like Dr. Hess (Deposition of Dr. Hess, page 29) felt that Claimant's left leg complaints were part of a cervical myelopathy due to the severity of the cervical disk herniation and spinal cord compression that resulted from the June 11, 2007 injury. Dr. Pang noted the severe cervical myelopathy that resulted from the June 11, 2007 neck injury severely compromised Claimant's ability to perform physical work. Dr. Pang found Claimant's functioning was less than sedentary level of work but found Claimant was at maximum medical improvement on November 21, 2008.

Dr. Koprivica evaluated Claimant a second time in August of 2009. Dr. Koprivica concluded Claimant's work as a painter and drywaller was the prevailing factor in causing the neck injury. He also found Claimant's work was the prevailing factor in causing the chronic low back with the degenerative disk disease at the L4-L5, L5-S1 levels, as well as the radiculopathy. He also found Claimant's repetitive hand activities as a painter and drywaller was the prevailing factor causing the left carpal tunnel syndrome and the need for surgical release. Dr. Koprivica found Claimant had reached maximum

medical improvement for all three conditions in August of 2009. He opined Claimant to be permanently and totally disabled as a result of the repetitive injuries to the neck, low back and wrist combined with the June 11, 2007 accident. He also believed it possible that Claimant could be permanently and totally disabled as a result of the neck injury alone. He assigned a 50 percent permanent partial disability to the body as a whole referable to the neck; 15 percent permanent partial disability body as a whole referable to the low back; and 20 percent permanent partial disability of the left wrist referable to the carpal tunnel syndrome.

Dr. Koprivica placed significant restrictions on Claimant as a result of his work injuries. As a result of the June 2007 neck injury, Dr. Koprivica restricted Claimant to sedentary work with no overhead activity and no climbing. Claimant was to avoid overhead reaching and forceful pushing/pulling, as well as lifting and carrying 10 pounds on an occasional basis only. Claimant was limited to standing less than 20 minutes and walking less than 10. Dr. Koprivica further advised Claimant to walk with a cane. Dr. Koprivica noted that Claimant is currently operating at less than a sedentary level in activities of personal living. Dr. Koprivica testified that Claimant's low back and wrist injuries contributed to the need for these restrictions, but the primary reason for the restrictions were the neck injury.

Due to Claimant carpal tunnel syndrome Dr. Koprivica restricted Claimant from repetitive activities of the left upper extremity, including pinching, grasping, wrist flexion, extension, ulnar nerve deviation of the wrist. He advised Claimant not to use vibrating tools. Dr. Koprivica testified that the double crush injury of Claimant's neck also contributed to the need for these restrictions. As a result of the low back injury, Dr. Koprivica restricted Claimant to sitting no more than 30 minutes, as well as recommended ongoing pain management and warned of risk of adjacent cervical disk disease due to the fusion.

As a result of the June 11, 2007 accident, Dr. Hess, who performed a two-level cervical fusion on Claimant, assigned a 25 percent permanent partial disability referable to the neck. Dr. Hess released Claimant to full duty on November 18, 2008. Dr. Hess testified that left leg condition was the result of the cervical spine cord myelopathy (Hess deposition pages 28 and 29).

Dr. Rosenthal issued a report on Claimant's left carpal tunnel syndrome. Dr. Rosenthal concluded the repetitive nature of Claimant's job was the prevailing factor in causing the carpal tunnel. She noted on the last visit that Claimant still continued with numbness of the left hand and he was no longer working. As a result she assigned a 5 percent permanent partial disability at the 175-week level referable to the left carpal tunnel syndrome.

The parties request this award address whether Claimant's low back and neck are causally related to his repetitive job duties as a drywaller/painter with the last exposure on August 14, 2007. Dr. Koprivica is the only expert to testify his neck and low back are related to Claimant's repetitive job duties. On the other hand, Dr. Pang and Dr. Hess opined Claimant's left leg symptoms and cervical condition are causally related to severe spinal cord compression caused by the June 11, 2007 injury by accident. As such, I find based on Dr. Pang and Dr. Hess that Claimant under Injury No. 07-133443 sustained injury of his left upper extremity by occupational exposure with the last exposure on August 14, 2007. I do not find Claimant's low back or left leg complaints and neck are related to the occupational exposure claim.

As a result of the finding that the neck and left leg are not related to the occupational exposure with the last exposure on August 14, 2007, but rather causally related to the June 11, 2007 accident, the issues of notice, past medical expenses and future medical issues are moot. Indeed, there was no credible evidence to find the Employer is liable to Claimant for future medical care due to the carpal tunnel syndrome, which I find is the only condition related to the occupational exposure claim.

The parties next request whether Claimant is unemployable in the open labor market based on the last occupational exposure of August 14, 2007, or a result of a combination of Claimant's primary injury and the pre-existing residual effects of the June 11, 2007 accident. I find Claimant sustained 20 percent permanent partial disability of the left hand as a result of occupational exposure with the last exposure on August 14, 2007. Indeed, Claimant is unable to grasp, pinch or carry heavy objects with the left hand due to the occupational exposure.

I also find Claimant worked light duty during the period after the June 11, 2007 accident and before the September 2007 cervical fusion. Medical records generated during this time period reflect he was capable of working in the open labor market up to the last day of employment of August 14, 2007. As such, I do not find the June 11, 2007 accident alone rendered Claimant unemployable in the open labor market.

The next issue is whether the Second Injury Fund is liable to Claimant. In order for the Second Injury Fund to be liable to Claimant for permanent total disability benefits, the Claimant must prove the following:

- 1) That he has sustained permanent disability resulting from a compensable work-related injury;
- 2) That he has permanent disability predating the compensable work-related injury which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable." §287 RSMo 1994, Messex v. Sachs Electric Company, 989 S.W.2d (Mo.App. 1997); Garibay v. Treasurer, 964 S.W. 2d 474 (Mo.App. 1998); Rose v. Treasurer, 899 S.W.2d 563 (Mo.App. 1995);
- 3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. Boring v. Treasurer, 947 S.W.2d 438 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App. 1992).

As noted above, I find Claimant sustained a compensable work accident of his left hand. Moreover, I find Claimant sustained 20 percent permanent partial disability of the 175-work week level.

I also find Claimant experienced pre-existing disability of the left leg and neck as a result of the June 2007 accident. Indeed Claimant has left leg radicular symptoms, as well as limited ability to walk, climb, stoop and bend. Claimant also continues with severe medical restrictions of his neck and has limited range of motion of the cervical area. As such, I find Claimant sustained 40 percent permanent partial disability body as a whole due to the June 11, 2007 accident. I also find Claimant permanently and totally disabled as a result of a combination of the left hand due to occupational exposure and the June 11, 2007 accident.

The vocational expert, Michael Dreiling, who I find persuasive in this issue concluded that Claimant is not a candidate for any type of formal academic training and would not be a candidate for vocational type training. Mr. Dreiling testified Claimant would have to have greater physical functioning capability than he is able to perform before he could return to work. Mr. Dreiling concluded Claimant is essentially unemployable in the open labor market and no employer in the usual course of business would reasonably be expected to employ Claimant in his existing physical condition.

Based on Dr. Koprivica, Mr. Dreiling and other medical evidence, as well as testimony presented, I find Claimant is permanently and totally disabled as a result of the left carpal tunnel syndrome combined with the pre-existing June 11, 2007 accident. Therefore, I find the Second Injury Fund liable to Claimant for permanent total disability benefits.

I find Claimant reached maximum medical improvement for treatment on November 18, 2008. The Second Injury Fund is ordered to pay the difference of permanent total disability rate of \$513.07 - \$376.55 permanent partial disability rate or \$136.52 for 35 weeks beginning on November 18, 2008. Thereafter the Second Injury Fund is ordered to pay weekly benefits of \$513.07 for Claimant's lifetime.

The next issue is whether Claimant's wife is entitled to survivor benefits under Schoemehl v. Treasurer of the State of Missouri, 17 S.W.3d 900 (Mo.Banc 2007) as a surviving dependent spouse. Claimant filed his claim on June 26, 2008 alleging a permanent partial disability claim with the last exposure on or about June 11, 2007 and every day before and after, which would have been August 14, of 2007. Because Mr. White was Mrs. White's spouse at the time the injury occurred and at the time the claim was received, he is alleging that she is entitled to lifetime benefits under Schoemehl should he pass away.

"Numerous decisions have defined what type of claim qualifies for survivorship benefits; see Buescher v. Mo. Highway & Transp. Comm'n, 254 S.W.3d 105, 108 (Mo.App. W.D. 2008); Cox v. Treasurer of the State of Missouri, 208 WL 2079106 (Mo.App. E.D. 2008) and Winberry v. Treasurer of Missouri as Custodian of Second Injury Fund, WL 208054. These decisions strictly limited recovery under Schoemehl to situations where the injured worker's case was still pending before the Commission, when no determination had been made on the injured worker's claim against the Second Injury Fund, and when the claim is for permanent total disability benefits. Strait v. Treasurer of Mo., 257 S.W.3d 600 (Mo.banc 2008); Cox v. Treasurer of State, 258 S.W. 3d 835 (Mo.App. 2008); Buescher v. Mo. Highway & Transp. Comm'n, 254 S.W.3d 105 (Mo.App. 2008). Finally, the Schoemehl decision was rejected and abrogated by the Legislature through House Bill No. 1883. The legislation became effective June 26, 2008.<sup>1</sup>

After discussing all the relevant cases, the Court in Bennett v. Treasurer of The State of Missouri, Custodian of the Second Injury Fund, Respondent, 271 S.W. 49 (W.D. 2008), ruled on the timeframe of the Schoemehl decision. The Court ruled that...[] under HB 1883 and the Missouri Supreme Court's later decision in Strait, recovery under Schoemehl is limited to claims for permanent total disability benefits that were pending between January 9, 2007 and June 26, 2008, the effective date of HB 1883. Id @ 52. "

Between the date of January 9, 2007 and June 26, 2008, Claimant's claim was a permanent partial liability claim. As Bennett Court held, recovery under Schoemehl was narrowed to pending permanent total disability claims between that time period. As such, based on the strict construction of the statute, this claim does not qualify for Schoemehl recovery, as it was alleged as permanent partial disability during the limited time period of January 9, 2007 to June 26, 2008. Claimant did not amend his claim for permanent total disability benefits until October 7, 2009, well outside of the limited time period for Schoemehl recovery.

Claimant alleges this proceeding was defended without reasonable ground and requests the whole cost of the proceeding be assessed under 287.560. I disagree with Claimant as the various medical conditions in this matter were extremely complicated and overlapping. Indeed the Employer and Insurer made issue that the low back and neck were unrelated to this claim. I found the medical evidence supported the Employer and Insurer's defense on the causation issue and therefore do not find their defense unreasonable.

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<sup>1</sup> In Bennett v. Second Injury Fund, the Court noted the effective date of HB 1883 was June 26, 2008. 271 S.W. 49, 52 (W.D. 2008).

I find the Employer is liable to Employee for 20 percent permanent partial disability or \$13,179.55. I find the Second Injury Fund liable to Claimant for permanent total disability benefits beginning on November 18, 2008 for Claimant's lifetime.

This award is subject to an attorney's lien for services rendered in the amount of 24 percent to Keith Yarwood.

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

Made by: \_\_\_\_\_

Lisa Meiners  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_, 2010, by:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*