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EMPLOYEE DIES, BUT BENEFITS SURVIVE

By: Mary Anne Lindsey and James B. Kennedy, Members

Schoemehl v. Treasurer of the State of Missouri ruled that the surviving spouse of a permanently and totally disabled employee, who died of causes unrelated to his work injury, could recover the unpaid, unaccrued balance of the employee's permanent total disability benefits upon his death. After sustaining a work related knee injury, Fred Schoemehl filed a claim for compensation against his employer and the Second Injury Fund. Employer paid Fred Schoemehl temporary total disability benefits and medical expenses. Subsequently, the employee died from causes unrelated to his work injury. His 62 year old wife and sole dependent filed and settled an amended claim for compensation against the employer. The only remaining claim was that against the Second Injury Fund for permanent total disability. After hearing, the Administrative Law Judge held that Fred Schoemehl was permanently and totally disabled as a result of the combination of his work related knee injury and his pre-existing disabilities, and found the Second Injury Fund liable to the wife for permanent total disability benefits until the date of the employee's death. The Administrative Law Judge denied the wife's claim for permanent total disability benefits for the remainder of her lifetime, following the employee's death.

The Industrial Commission and the Western District Court of Appeals affirmed. At issue before the Court of Appeals was whether the right to compensation for the permanent total disability of an injured employee, who dies of causes unrelated to his work injury, survives to the dependents of that injured employee. The Court of Appeals ruled that Fred Schoemehl was not entitled to compensation for permanent total disability following his death and, therefore, his wife, as his dependent, was likewise not entitled to compensation for the employee's permanent total disability after the date of the employee's death.

The Supreme Court granted transfer. Before the Supreme Court, the wife argued that since she was Fred Schoemehl's dependent, she should be considered an "employee" under the Workers' Compensation Act and, thus, she was entitled to permanent total disability benefits for the remainder of her lifetime. As the Supreme Court observed, no prior Missouri court had decided whether the right to compensation for permanent total disability of an injured employee, who dies from causes unrelated to his work injury, survives to the dependents of that injured employee. In resolving the issue before it, the Supreme Court looked to Section 287.200, setting forth the period for which permanent total disability benefits are to be paid, as well as Section 287.020.1, defining the word "employee", when deceased, to include his dependents. The Supreme Court relied primarily on Section 287.230.2, providing that when an employee is entitled to compensation and the employee dies from a cause unrelated to his work injury, compensation ceases, "unless there are surviving dependents at the time of death". There was no dispute that Fred Schoemehl died from a cause other than his work injury and that his wife was his sole surviving dependent.

The Supreme Court observed that Section 287.230.2 referred to "compensation" generally, and made no distinction between permanent total disability compensation and other benefit awards. Thus, the Supreme Court held that under Section 287.230.2, Fred Schoemehl's right to compensation for both accrued and unaccrued permanent total disability benefits survived to his wife, because she was the employee's dependent. The wife was therefore entitled to payment of the unpaid, unaccrued balance of the employee's permanent total disability benefits. The Supreme Court reversed the Industrial Commission's Award, and remanded the claim to the Industrial Commission.

The Second Injury Fund filed a Motion For Rehearing with the Missouri Supreme Court. Therein, the Fund argued that the Supreme Court's Opinion was contrary to decades of application of the workers' compensation law, and significantly expanded workers' compensation liability for the Fund. On March 20, 2007, the Supreme Court denied the Second Injury Fund's Motion For Rehearing. Thus, the decision is final.

The Supreme Court's decision will have a far-reaching impact. Schoemehl has, in effect, created an entirely new category of workers' compensation beneficiaries. These beneficiaries are the surviving dependents of a permanently and totally disabled employee, who dies from unrelated causes.

In the case of currently viable and future permanent total disability cases, this will mean that upon the death of the employee, the surviving dependents can step into the shoes of the deceased employee, and receive benefits for permanent total disability in the employee's stead, and potentially for as long as the dependent survives. Thus, in evaluating exposure and settlement value in any actual or potential permanent total disability case, the existence of, ages of, and health of the employee's dependents are factors which now must be considered. If a finding of permanent total disability has been made, the death of the employee will not result in a termination of benefits, except insofar as the employee has no dependents.

In cases where permanent total disability benefits were terminated on account of the employee's death, it is now certain that some of those cases will have to be re-opened for the purpose of paying benefits to the deceased employee's dependents, beginning on the date of death, and going forward. The extent to which the statute of limitations may bar the re-opening of such cases remains unclear, as does the issue of whether

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IN THIS ISSUE

What goes up, must come down: A review of statewide numbers 18 months after the 2005 amendments

Stephen A. Brueggemann, Senior Associate

It has been approximately 18 months since Missouri made substantial changes to the Workers' Compensation system. These were the first significant changes to the statute covering Missouri Workers' Compensation since 1993. The changes took effect on August 28, 2005 and Missouri has now seen a full calendar year under the new law.

A significant focus of the legislative changes included redefining work-related accidents. Other changes addressed alcohol and drug use in the workplace, safety violations, credits for prior settlements, and an impartial and strict standard of review. Prior to the changes, the courts liberally construed the statute in favor of the employee.

Under the new law, an accident is defined as, "an unexpected traumatic event or unusual strain identifiable by time or place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor." An accidental injury is compensable only if the accident was the prevailing factor in causing the resulting medical condition and disability. The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the medical condition and disability. Prior to the changes, an injury need only be "a substantial factor" in the development of the condition and disability.

It is important to note that "the prevailing" factor standard also applies to occupational disease cases. Accordingly, under the statute, "occupational disease due to repetitive motions is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability." The new amendments also included a notice requirement in occupational disease cases. Under the old law, as long the employee remained "exposed" to the hazards of the occupational disease, the statute and notice requirement never tolled. Now, an employee has 30 days from the date of diagnosis of an occupational disease to report the condition to his or her employer. Furthermore, the changes place liability on the employer who last exposed the employee to the occupational hazard, "prior to the evidence of disability", as opposed to the employer at the time of filing.

This article is not intended to outline and detail all specific changes, but rather the effect the changes have had on reports of injury and claims filed. The following data obtained from the Missouri Division of Workers' Compensation helps illustrate the changes in claims filed, injuries reported, and pro se claims filed one year immediately before and one year directly after the August 2005 legislation.

CLAIMS FILED	
8/28/04 - 8/27/05	22,159
8/28/05 - 8/21/06	17,738

INJURIES REPORTED	
8/28/04 - 8/27/05	142,906
8/28/05 - 8/21/06	134,168

PRO SE CLAIMS FILED	
8/28/04 - 8/27/05	1,689
8/28/05 - 8/21/06	929

Assuming there was a small spike in claims filed in the months and weeks leading up to August 28, 2005, the statistics still show a 20% drop in claims from one year to the next. There was a 6% decrease in injuries reported and 45% drop in "pro se" claims filed. The cause for the drop in pro se claims could be attributed to the removal of the legal advisor.

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Kionka Joins Evans & Dixon, L.L.C.

In February 2007 Debra A. Kionka joined our firm's workers' compensation practice group as a senior associate attorney. She is licensed to practice in Illinois and specializes in Illinois workers' compensation matters. Debra is located in our downtown St. Louis office.

Ms. Kionka received her bachelor's degree in German, English and education from Southern Illinois University - Edwardsville in 1975. Prior to becoming an attorney, Ms. Kionka served her community by teaching high school English, German, and creative writing. In 1982 Ms. Kionka obtained her doctorate of law degree from the Southern Illinois University School of Law.

After obtaining her law degree, Ms. Kionka worked for several years in southern Illinois at a practice limited to civil appeals and trial consultation. She placed her legal career on hold after the births of her three children. During that sabbatical, she volunteered at the school, substitute taught, tutored, and worked part-time for a law firm in Belleville, with a practice limited to family law. Most recently Ms. Kionka was employed by Reed & Bruhn, P.C. in Belleville, Illinois, where she worked as a petitioner's attorney in Illinois Workers' Compensation and personal injury cases and defended traffic, criminal and child support cases.

Ms. Kionka resides in O'Fallon, Illinois, with her three children, Jimmy (21), John (18) and Caroline (16). Jimmy is studying computer science in the School of Engineering at the University of Illinois; John is a senior and Caroline a junior at O'Fallon Township High School. Debra looks forward to resigning her band mom role after next year. ■

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The data on the following page, also obtained from the Missouri Division of Workers' Compensation, illustrates a gradual decrease in both the number of injuries reported and the number claims filed from 2002 to 2006.

MO WORK COMP STATS 2002-2006 (Jan 1 - Dec 31)					
	2002	2003	2004	2005	2006
Report of Injury	151,479	142,645	142,117	141,597	131,830
Claims	24,509	23,576	21,525	20,259	17,462
Claim filed/ROI	1/6.18	1/6.00	1/6.60	1/6.98	1/7.54

% DECREASE FROM YEAR TO YEAR			
02-'03	03-'04	04-'05	05-'06
-5.80%	-0.40%	-0.40%	-6.90%
-3.80%	-8.70%	-5.90%	-13.80%

Another way to view the data is to examine the relationship between the number claims filed and injuries reported each year. For example, in 2002 there was one claimed filed for every 6.18 injuries reported. In 2006, one claim was being filed for every 7.54 injuries reported. These figures are not an exact representation of claims filed for injury reports in the same year. Clearly, many claims are filed a year or more after the corresponding injury report, depending upon the circumstances. There are also claims filed with no corresponding injury report, and in some cases an injury report is not filed until after the formal claim has filed. Still, when viewed overtime, the statistics provide some insight into the rate of claims filed per injury reported.

In the end, it seems that total claims filed and the total injuries reported have been decreasing since 2002. Clearly, there was a significant drop-off in both categories after the statutory changes went into effect. Given the multiple variables at play in a complex labor market, there is not one particular reason to explain the changes. However, the data at least suggests an upward focus on safety and a downward trend in injuries, which are positive trends for employers and insurers in the state of Missouri. ■

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the dependents will have to file a new Claim for Compensation, or whether they can simply be substituted as parties in any currently pending, or previously pending case.

Since the Schoemehl decision was an interpretation of statutory provisions that have been in effect for decades, the holding is retroactive, although the state of limitations should constitute a bar to most, but certainly not all, of the cases where benefits have already been terminated on the assumption that death was the end of the permanent total disability.

Although the Supreme Court rejected the Second Injury Fund's concern over the possibility that its decision could allow a claim on the part of a dependent, of a dependent, by pointing out that under Section 287.240, a "dependent" is an individual who is dependent on the date of the employee's injury, that finding provides no guidance as to what effect, if any, that a termination of dependency which occurs between the date of injury and the employee's death, will have on future rights, such as where a permanently and totally disabled employee divorces a spouse, or even re-marries, subsequent to the injury, but prior to the date of death. In fact, it is not entirely clear if the provisions regarding dependency set forth in Section 287.240 (the death benefit section) will apply equally to all surviving permanent total disability claims. But if they do, those provisions, such as the one that terminates benefits upon the re-marriage of a spouse, will constitute a limitation on these new benefits. Section 287.240 may not answer all dependency issues, since that statutory section was enacted to apply to death benefits resulting from a work-related injury or disease, not to permanent total disability benefits.

The decision in Schoemehl will have a great impact, not only on employers and insurers, but on the Second Injury Fund, since it is more often found liable for permanent total disability benefits, than are employers and insurers, who are only liable for the disability from the last injury. Also, the decision will affect insurance pools and self-insurance guaranty funds.

At present, there is legislation pending in both the Missouri Senate and House, which seeks to abrogate the Schoemehl decision, and to make changes in the appropriate statutory provisions to make it clear that permanent total disability benefits are intended to expire upon the unrelated death of the injured employee. Even if such legislation passes, it will address only cases arising after the effective date of the legislation, since substantive changes in the law cannot be applied retroactively. ■

CASE VERDICTS

Compiled by Elizabeth S. Shocklee, Member

■ *Rick Ehrhard v. Western Waterproofing*

FACTS: Claimant alleged he developed tinnitus (ringing in the ears) as a result of prolonged exposure to loud noise on the job. The claimant operated jack hammers for Western Waterproofing from 1986 until February 1999. The claimant went to work for a subsequent employer in March 1999 and filed his claim for tinnitus against Western Waterproofing in July 1999 while working for the subsequent employer.

FINDINGS: Administrative Law Judge and Missouri Industrial Commission denied the claim on the grounds that Western Waterproofing was not the employer of last exposure. The Judge Ruled that the "90 day Rule" had no application because the alleged occupational disease arose from excessive noise, not repetitive motion. The Judge further ruled that the last exposure rule is not a rule of causation, but a rule of convenience and determined that subsequent employer also exposed the claimant to the hazards of the occupational disease. The Administrative Law Judge findings were affirmed by the Missouri Industrial Commission.

Robert N. Hendershot represented the Employer, Western Waterproofing and Travelers Insurance Company.

■ *Margie Goss v. West Plains School District*

FACTS: Claimant was a para-professional teachers' aide who helped special needs students focus in class. One morning she had to physically restrain a 50 pound pre-schooler for approximately 2 hours. Later that morning, while sitting with an older student in another class, she sustained a myocardial infraction that required bypass of three main arteries which were 90-100% occluded. She claimed the exertion of restraining the child was the cause of the heart attack. She claimed past medical expense, temporary total disability benefits, 50% permanent partial disability and future medical treatment.

FINDINGS: The Division denied the claim and did not require the Employer to pay any benefits. The hearing judge found the work activity was not a substantial factor in causing the heart attack, but that her underlying heart disease was the cause. Her examining physician advanced a theory that the physical exertion caused the heart to "call for oxygen" from the bloodstream, but the oxygen couldn't reach the heart because of the blockage. However, her examining physician also testified on cross-examination in his deposition that she was "a heart attack waiting to happen" and that if an angiogram had been performed the day before the heart attack it would have shown the same arterial blockage and a cardiologist likely would have suggested the same bypass surgery she had. The Employer/Insurer presented testimony from a board certified cardiologist that her work activity was merely a triggering factor in the heart attack and that the underlying coronary heart disease and blockage was the real cause.

Michael Mayes represented the Employer, West Plains School District.

■ *Tina Isaac v. Sigma Aldrich Chemical Company*

FACTS: Claimant alleges bilateral plantar fasciitis as a result of standing, walking and the use of safety shoes on concrete surface in the course of her employment as an Order Filler over 10 years. Claimant worked without problem from 1993 to 1996. In approximately 1996, Sigma Aldrich instituted a safety shoe program and Claimant participated in the same. Claimant alleged problems with her feet began in 1996 at which time she was diagnosed with plantar fasciitis.

Claimant presented to her primary care physician in 1996 and was given inserts for her safety shoes. She worked with these inserts from 1996 to 2002 with no further medical care. In 2002 she reported ongoing problems and was sent to BarnesCare by the employer. She was diagnosed with severe plantar fasciitis non work related. She then presented on her own to a podiatrist who restricted her use of safety shoes as well as the amount of walking and standing. Sigma Aldrich followed these work restrictions from 2002 to 2003. In August of 2003 they could no longer accommodate her restrictions and her employment ceased.

In 2004 Claimant underwent bilateral Ossatron surgery, which consists of sending shock waves to the bottom of her feet, by an orthopedic surgeon. She was seen one time in follow up. She was never restricted from work or taken off work following the surgery.

Claimant's expert, a hand surgeon, opined her condition developed as a result of her standing and walking in safety shoes. Employer's expert, an orthopedic surgeon specializing in the treatment of feet, opined she suffered from a very common condition that develops as people age. He opined her work was not a substantial factor in the development of her condition. In addition, he did not find she suffered from any ongoing disability as a result of the condition.

At trial, a representative from the safety department at Sigma Aldrich testified on behalf of Employer. She testified she is involved in every reported injury and participates in the handling of all workers' compensation cases. In this capacity she is unaware of any other allegation of problems with the safety shoes or injury to workers' feet as a result of standing or walking. In addition, she testified approximately 300 to 350 workers participate in the safety shoe program without problem, including her.

FINDINGS: The Administrative Law Judge held Claimant failed to meet her burden of proof. He did not find her expert, a hand surgeon, credible. He also found her expert failed to have an understanding of the specifics of her job duties which led to his unfounded opinion.

Conversely, the Administrative Law Judge found employer's witness to be very credible and gave weight to her testimony regarding the fact that no other employees have reported incidents of plantar fasciitis. He opined employer's expert's opinion was more credible and denied the claim.

APPEAL: Claimant has appealed this decision to the Labor and Industrial Relations Commission with Briefs submitted for consideration in February of 2007.

Elizabeth S. Shocklee represented the Employer, Sigma Aldrich Chemical Company.

■ *Frank Lyles v. Normandy School District*

FACTS: Claimant alleges he developed bilateral carpal tunnel syndrome as a result of his job duties as a custodian from August of 2001 to August of 2005. Claimant sought an Award of Permanent Partial Disability for bilateral carpal tunnel syndrome. Given the date of injury, the Claim falls under the Revised Missouri Workers' Compensation Statute.

Claimant testified his job duties as a custodian include mopping, sweeping, dusting, scrubbing floors, wiping tables along with the use of a floor scrubber, buffing machine and high powered water hose. He testified he began to notice numbness and tingling in both hands in 2001 or 2002. He first sought treatment on his own in August of 2005. He reported to his supervisor that his primary care physician thought he had signs of carpal tunnel syndrome. An incident report was completed.

Based on this report, Employer had Claimant seen for conservative care including physical therapy. Eventually he was examined by a hand surgeon and underwent nerve conduction studies. These studies were interpreted as normal with no evidence of carpal tunnel syndrome. He did recommend any further treatment related to his employment.

Claimant's attorney had him evaluated by a retired family practitioner who concluded Claimant had early suspected carpal tunnel syndrome, bilateral overuse syndrome and chronic strains of the wrists. He opined these conditions were a result of his job duties.

FINDINGS: The Administrative Law Judge found Claimant's to be a credible witness. He held Claimant failed to meet his burden of proof in proving he suffered from carpal tunnel syndrome. He found Claimant's expert lacked credibility when it came to the opinion he suffered from carpal tunnel syndrome. However, he did find Claimant's expert credible in his diagnosis of chronic strains of the wrist. Even Employer's expert admitted his job was hand intensive but that he did not suffer from carpal tunnel syndrome.

The Administrative Law Judge held he suffered only from strains of the wrists and awarded 5% of each wrist.

APPEAL: The parties did not appeal the Administrative Law Judge's Award.

Elizabeth S. Shocklee represented the Employer, Normandy School District.

■ *Doris Lacy v. Federal Mogul*

FACTS: On December 13, 2006 the Division of Workers' Compensation handed down a decision in favor of the employer/insurer in Doris Lacy v. Federal Mogul, workers compensation case. The Court found that the Claimant, did not sustain a compensable work injury and awarded no benefits. The courts decision rested on the medical records which notably lacked evidence of a work related injury.

The court began its decision with a discussion of Claimant's medical history prior to the alleged work accident. Claimant had a history of migraine headaches dating back to 1995. Then in March of 1999 Claimant was involved in a motor vehicle accident and suffered a spinal fracture of the C2 vertebra. The years following this accident Claimant had ongoing severe neck pain, radiculitis and migraine headaches. In 2000, she underwent a cervical facet rhizotomy at C2-3, C3-4 and C5-6. Even after her surgery she continued to be in great amounts of pain, was constantly under a doctors care and taking a significant amount of pain medication leading up to the May 17, 2001 accident.

On May 17, 2001 Claimant slipped in a mixture of oil/water at work. She stated she fell and landed on her buttocks on the concrete. She had immediate complaints of sharp pain in her neck radiating up the right side of her head. However, the records showed he did not seek immediate medical attention and continued working. Her payroll records showed she worked 42 hours for the time period ending May 20, 2001; worked 57.5 hours for the time period ending May 27th; and 53.5 hours for the time period ending June 3rd.

Claimant did not seek medical treatment until June 4, 2001. On that date she saw her primary care physician, Dr. Campbell. There is no mention of a work accident in Dr. Campbell's notes for June 4, 2001. In fact this work accident was not mentioned until July 16, 2001 in his notes, although he saw the Claimant on a weekly basis between June 4 and July 16th. He testified that although he did not mention in his notes that he had a recollection of being told about the work injury in June. However, he could not explain why this accident was not in his notes since he always prided himself on taking pretty good historical information and documentation. Instead, the first mention of the work injury was not until June 28, 2001, over a month after the accident, in Dr. Yingling's medical records.

In addition to noting Claimant's work injury was not mentioned in the medical records the court paid particular attention to the list of medications Claimant was on prior to the alleged work accident and the medications taken after the work accident. The court found that Claimant's medications did not change or increase after her work accident.

Both sides presented experts in this case. The claimant produced Dr. Campbell which stated the fall exacerbated the claimant's work injury. Dr. Burn's felt the claimants' lower back pain was questionably related to the fall. Dr. Volarich felt the claimant sustained a 20% permanent partial disability of the body as a whole at the cervical spine and 20% at the lumbosacral spine from the accident. Meanwhile, the employer/insurer presented Dr. Wagner who did not believe the claimant sustained an injury as a result of this fall. He stated that Dr. Campbell's records were quite good and the he would presume that if a work injury was related to him that it would be included in the medical records. He also stated that if someone has a significant injury with pain right away, they would not wait two months to complain of the pain.

FINDINGS: In the end the court sided with the evidence and found for the employer/insurer. The court cited the Claimant worked over time for 2 weeks following the accident. Moreover, there was a delay in seeking medical attention. In addition, there was no corroborating medical history concerning the problems to the Claimants health and the fall at work. The court sided with Dr. Wagner and found that Dr. Campbell was a meticulous note taker and if a work accident was mentioned it would have been in his notes. Additionally, the court noted that the medication prescribed in the 4 1/2 months prior to the fall and 4 1/2 months after the fall was similar in type and amount. Finally, the court stated that the opinions of Dr. Volarich, Dr. Campbell and Dr. Burns were all affected by the numerous evidentiary problems noted above. As a result the court found for the employer/insurer and found the claimant had failed to meet its burden of proof on the issues of accident and medical causation.

David J. Reynolds, Jr. and David S. Ware represented the Employer, Federal Mogul.

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To Our Readers:

It is our pleasure to bring you this edition of the Evans & Dixon, L.L.C. workers' compensation newsletter. In 2007 we will continue to bring you up to date information through this newsletter and on our website at www.evans-dixon.com.

Evans & Dixon is one of the largest workers' compensation defense firms in Missouri, with substantial practices growing in Kansas and Illinois. To help meet our clients' needs we have offices located in St. Louis, MO., Springfield, Mo., Kansas City, Mo., and Leawood, KS. We strive to give our clients quality, individualized representation, while offering the resources of a large firm.

We realize you have a choice of legal service providers. We believe our years of experience, our resourcefulness, our individualized approach to handling cases, and our commitment to achieving the best outcomes for our clients will prove that Evans & Dixon is the best value for your legal services investment. Thank you for your business and we look forward to working with you in 2007.

Your feedback and suggestions are always welcome as part of our commitment to achieving your goals. Please tell us how we can improve our services by sharing your thoughts with Andrea Shomidie at ashomidie@evans-dixon.com.

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