

FINAL AWARD DENYING COMPENSATION

Injury No.: 04-117102

Employee: Billy Tabor
Employer: Clinton Schreiber Foods, Incorporated
Insurer: Zurich American Insurance Group
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Introduction

Employee filed three claims for compensation alleging various injuries sustained during his employment with employer. The administrative law judge issued three awards denying compensation. Even though employee's claims involved different facts and theories of injury, the awards issued by the administrative law judge were, in all material respects, identical. Employee filed timely Applications for Review in each claim.

On March 1, 2013, the Labor and Industrial Relations Commission (Commission) issued orders finding that the administrative law judge failed to properly address the issues involved in the individual claims, and remanding the cases to the administrative law judge with directions to issue separate awards with specific findings.

On November 20, 2013, employee filed a "Petition to Reconsider the Commission's Order and Requesting the Commission Issue a Final Award." Employee alleges the administrative law judge failed to act on the Commission's orders of remand because the administrative law judge believed the remands were improper. Employee requests that the Commission review the record and issue awards disposing of his claims. The Commission has not received any response by employer or the Second Injury Fund to employee's motion.

The Code of Judicial Conduct for Missouri Workers' Compensation Administrative Law Judges states that "[a] worker's compensation administrative law judge shall dispose of all judicial matters promptly, efficiently, and fairly."¹ More than one year has passed since we issued our remand order. The record reveals no action taken in response to our order. The administrative law judge's reasons for taking no action in response to our remand order do not appear of record. The administrative law judge in the instant matter did not dispose of this matter promptly. He did not dispose of it at all.

Employee's motion of November 20, 2013, suggests the administrative law judge decided he did not have authority to take the action we directed. If the suggestion is true, it does not explain why the administrative law judge did *nothing* in response to our remand order. We believe the Code of Judicial Conduct direction that administrative law judges dispose of matters promptly required the administrative law judge to take some action in response to our remand order long before the passage of an entire year,

¹ Code of Judicial Conduct for Missouri Workers' Compensation Administrative Law Judges, Canon 3.5

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even if that action was merely an order expressing his belief that he had no authority to comply with our order.

We continue to be of the opinion that our order of remand herein was a proper exercise of our authority under § 287.610.5 RSMo, which specifically states that “[t]he labor and industrial relations commission may remand any decision of an administrative law judge for a more complete finding of facts.” However, in the interest of providing the parties with a resolution in this matter, and because the administrative law judge has failed to take any action whatsoever to give effect to our orders of remand, we will conduct a review on the merits, despite the difficulty presented by the administrative law judge’s original failure to fulfill his statutory duty under § 287.460.1 RSMo to render an award “together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question[s] at issue.” See also *Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529 (Mo. App. 2008), discussing the needless burden upon the administrative and judicial system that results where, as here, an administrative law judge declines to fulfill his duty under the law.

Accordingly, we hereby set aside our order of remand dated March 1, 2013, and take up this matter pursuant to our jurisdiction under § 287.480 RSMo.

Preliminaries

At the hearing, the administrative law judge identified the following issues: (1) accident; (2) the need for future medical care; (3) the nature of permanent disability; and (4) the liability of the Second Injury Fund.

The administrative law judge determined as follows: (1) it appears that employee’s work for employer is not the prevailing factor² in causing employee’s current disability to his upper extremities,³ neck,⁴ or back; (2) employee is not entitled to any permanent partial disability from employer; and (3) there is no Second Injury Fund liability. The administrative law judge did not address the issue of accident. Nor did he address the issue whether employer is required to provide future medical care to employee.

As noted above, employee filed a timely Application for Review challenging the administrative law judge’s findings and conclusions. For the reasons set forth herein, we deny employee’s claim for compensation with this separate opinion.

Findings of Fact

On October 29, 2004, employee was moving a pallet full of cheese in the course of performing his duties for employer, when he felt a pop and experienced pain in his low back. Employee reported the accident to employer but did not receive authorized treatment, so he sought care on his own at the Golden Valley Memorial Hospital emergency room, where attending physicians diagnosed an acute lumbar strain and prescribed Toradol and Norflex. Employee followed up with Dr. Wetzel every few

² This claim involves an injury by accident alleged to have occurred on October 29, 2004. We note that the “prevailing factor” standard of compensability did not become law in Missouri until August 28, 2005.

³ Employee does not allege injury to his upper extremities herein.

⁴ Employee does not allege injury to his neck herein.

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weeks until March 14, 2005; the last record shows employee as “clinically better,” and “asymptomatic at this time,” with only occasional stiffness in the low back. See *Transcript*, pages 1333-36.

Employee's medical experts, Drs. Truett Swaim and P. Brent Koprivica, did not identify any permanent partial disability as having resulted from the event of October 29, 2004, nor did they address the issue whether there is a reasonable probability that employee will need future medical treatment as a result of the event of October 29, 2004. Employer's medical expert Dr. Terrence Pratt found the 2004 event significant enough to opine that, together with a later aggravation employee suffered in 2006, employee's work activities are the prevailing factor in causing aggravation to his low back and potentially resulting in a disc protrusion seen on a December 5, 2006, MRI. Employer's medical expert Dr. Eden Wheeler believes employee's 25 years of heavy labor for another employer caused his low back problems. Drs. Pratt and Wheeler did not address the issue of future medical treatment.

The treatment record, as noted above, does not support a finding that employee suffered any permanent partial disability as the result of the event on October 29, 2004. Especially given the failure on the part of employee's experts to address the issue, and because Dr. Pratt lumped the 2004 injury together with a later 2006 injury and did not identify or rate any permanent partial disability as resulting from the 2004 event, we find that employee did not suffer any permanent partial disability as a result of the event on October 29, 2004.

Given the failure on the part of all medical experts to address the issue of future medical care, and given employee's failure (in his brief) to direct us to any other evidence supporting a finding that there is a reasonable probability that employee will need future medical treatment as a result of the accident, we find that employee has failed to meet his burden of proof with respect to this issue. We find that there is not a reasonable probability employee has a need for future medical care flowing from the 2004 event.

Conclusions of Law

Accident

The version of § 287.020.2 RSMo applicable to this claim provides, in relevant part, as follows:

The word “accident” as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

We have found that on October 29, 2004, employee was moving a pallet full of cheese in the course of performing his duties for employer, when he felt a pop and experienced pain in his low back. We conclude that employee suffered an “accident” for purposes of the foregoing definition.

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Future medical care

Section 287.140.1 RSMo provides for an award of future medical treatment where the employee can prove a reasonable probability that he has a need for future medical treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-4 (Mo. App. 2008). We have found that employee failed to meet his burden of proof with respect to this issue, and that there is not a reasonable probability that employee has a need for future medical care flowing from the accident of October 29, 2004. We conclude employee is not entitled to future medical care.

The nature of permanent disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with a compensable work injury, but we have found that employee did not sustain any permanent partial disability as a result of the accident of October 29, 2004. We conclude that employer is not liable for permanent partial disability benefits.

Liability of the Second Injury Fund

Section 287.220.1 RSMo provides for Second Injury Fund liability where an employee who suffers from preexisting disability suffers "a subsequent compensable injury resulting in additional permanent partial disability." There is no "subsequent compensable injury resulting in additional permanent partial disability" herein, thus the issue of Second Injury Fund liability is moot.

Award

Employee's claim for compensation is denied. Employee is not entitled to permanent partial disability benefits from the employer or from the Second Injury Fund. Employee is not entitled to future medical benefits.

The award and decision of Administrative Law Judge Mark Siedlik, issued April 12, 2012, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 30th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING_____
John J. Larsen, Jr., Chairman_____
James G. Avery, Jr., Member_____
Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Billy Tabor Injury Nos: 04-117102
Dependents: N/A
Employer: Clinton Schreiber Foods Incorporated
Additional Party: The Second Injury Fund
Insurer: Zurich American Insurance Group
Hearing Date: January 27, 2012
Briefs Submitted: February 29, 2012 Checked by: MSS/cy

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No. Claimant merely suffered aggravation of underlying degenerative and preexisting conditions.
4. Date of accident or onset of occupational disease: October 29, 2004
5. State location where accident occurred or occupational disease was contracted: Clinton, Henry 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? No
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: The employee alleged his injuries occurred from performing repetitive tasks of

is upper extremities and while operating an auto casing machine and performing quality control tasks as well as "change overs."

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: Bilateral upper extremities, cervical and lumbar spine.
14. Nature and extent of any permanent disability: 0
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$206.10
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$563.97
19. Weekly permanent partial disability compensation rate: \$354.05
20. Method wages computation: Per wage records.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None.
24. Medical treatment? None.
25. Past medical treatment: Employer/Insurer provided treatment for necessary and reasonable medical to cure and relieve the employee's low back, cervical and upper extremity conditions.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Billy Tabor Injury Nos: 04-117102
Dependents: N/A
Employer: Clinton Schreiber Foods Incorporated
Additional Party: The Second Injury Fund
Insurer: Zurich American Insurance Group
Hearing Date: January 27, 2012
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On January 27, 2012 the final hearing on all three claims was held before the Honorable Mark Siedlik, Administrative Law Judge. The employee Mr. Billy Tabor appeared through counsel, John R. Stanley. The employer appeared through Karl L. Wenger. The Second Injury Fund appeared through counsel, Laura VanFleet for the Attorney General's Office. The issue before the Court was the nature and extent of Claimant's alleged injuries.

STIPULATIONS

The parties stipulated that (1) at all times relevant herein, Clinton Schreiber Foods Incorporated was an employer operating subject to Missouri Workers' Compensation Law with its liability fully insured by Zurich America Insurance; (2) at all times relevant herein, claimant Billy Tabor was in its employ working subject to the law in Clinton, Henry County, Missouri; and (3) the claimant Billy Tabor notified Clinton Schreiber Foods, Inc. of his alleged injury and filed this claim within the time allowed by law.

EXHIBITS

Employee: Exhibit A-O

- A Benjamin Williams Deposition Transcript and Exhibits
- B Truett Swaim, MD Deposition Transcript and Exhibits
- C Terry Cordray Deposition Transcript
- D Aurora Plastic & Hand Surgery Records (Dr. Guinn)
- E EMG Laboratory Records (Dr. Pryor)
- F Boone Hospital Center Records
- G Midwest Neuroscience Records
- H Golden Valley Memorial Hospital Records

- I SERC Physical & Hand Therapy Records
- J Garden City Medical Records
- K MO Workers Compensation Records
- L Pathways Records
- M Wetzel Clinic Records
- N Nydic Open MRI
- O Wetzel Clinic
- P KC Neurosurgery (Dr. Reintjes)

Employer: Exhibit 1-6

1. Dr. Wheeler's report & records
2. Dr. Pratt Report and records
3. Dr. Reintjes Report and records (supplemented by Exhibit P)
4. Deposition transcript of Dr. Wheeler
5. Claimant's deposition taken February 16, 2007
6. Pathways letter to HR

Second Injury Fund:

1. Claimant's deposition taken July 19, 2010

ISSUES

The parties request the Division determine (1) the level of Claimant's permanent disability, if any (2) if Claimant is permanently and totally disabled, whether The Second Injury Fund is responsible for the permanent total disability.

FINDINGS OF FACT

Claimant began his employment with Schreiber on May 5, 2003. (Exhibit 5 at 24) Throughout his employment Claimant performed multiple jobs for Schreiber. He worked on the auto-caser line, which required him to pick up cardboard and load a machine with it. (Exhibit 5 at 28) He also worked as a hand palletizer and in a knock down position, which required him to lift blocks of cheese and stack them on a conveyor. (Exhibit 5 at 29-30) Finally, he worked in a position called "Roto-Shred" that required him to shovel cheese in to plastic tubs in order to be steam cooked. (Exhibit 5 at 32)

Claimant suffered multiple aggravation injuries from performing the various tasks at Schreiber. His first reported accidental injury occurred on October 29, 2004. Claimant testified that he was pushing a pallet of cheese that was loaded on a hand pallet while working in the knock-down position when he felt a pop in his lower back. (Exhibit 5 at 35-36) He reported the accident and received conservative treatment at the Wetzel Clinic. He was released to return to work on December 13, 2004. (Exhibit 5 at 40)

Claimant then suffered two more accidents while employed with Schreiber with dates of accidents September 13, 2006 and October 6, 2006. The injuries in 2006 were to his low back, mid-back, neck, shoulders and upper extremities. (Exhibit 5 at 41) Claimant testified that he noticed the pain in his upper extremities while working on the auto-packer line job, which required him to fold and tape boxes. He testified that the neck and shoulder problems likely occurred as a result of his work in the Roto position. (Exhibit 5 at 45-46) Claimant testified that due to pain he ceased his employment with Schreiber on November 13, 2006. (Exhibit 5 at 24)

Claimant was initially provided treatment for his low back through his personal health physician, which included injections and physical therapy. (Exhibit P at 111-13) He later requested additional medical treatment for his upper extremities and his spine from Schreiber. To support his request, Claimant was evaluated by Dr. Koprivica at the request of his attorney on December 16, 2006. Dr. Koprivica found that Claimant's work activities were the prevailing factor resulting in further repetitive injury from his occupational exposure. He recommended additional medical treatment for his bilateral upper extremities and spine. (June 27, 2007 Hearing, Exhibit C at 17; Exhibit P at 45-63) Dr. Koprivica further noted that Second Injury Fund liability issues would be present in this case as Claimant had pre-existent industrial disability of significance. (Exhibit P at 63)

Claimant was also seen by Dr. Pratt on March 8, 2007. He found that Claimant's lumbar complaints were the result of his work at Schreiber and recommended a surgical consult, but referred Claimant to an upper extremity specialist to compare EMG/NCS studies to determine whether there had been a progression of the peripheral nerve entrapment. (Exhibit P at 41-42) Dr. Pratt noted that Claimant's carpal tunnel complaints began in 1998 and despite diminished symptoms for a while, Claimant continued to have difficulties with his carpal tunnel prior to his work at Schreiber. (Exhibit P at 38)

Claimant then filed for a Hardship Hearing, which was held on June 27, 2007. A temporary award was entered on August 16, 2007, which awarded Claimant specialized treatment from Respondent for the alleged injuries. The treatment was provided by Dr. Guinn, which included treatment to Claimant's bilateral hands and wrists. Dr. Guinn performed bilateral carpal tunnel surgeries. The right was performed on September 10, 2007 and the left was performed on October 8, 2007. (Exhibit D at 42, 47) During his treatment of Claimant, Dr. Guinn noted that Claimant also had bilateral elbow pain during his evaluation of Claimant on July 3, 2007. As part of his evaluation, Dr. Guinn had medical records of previous providers, which included two prior IME reports. Dr. Guinn noted that there were no signs of medial or lateral epicondylitis to either arm, which indicated that the elbow symptoms were not related to his work at Schreiber as they developed after he quit in November of 2006. (Exhibit D at 30-32) Dr. Guinn ultimately released claimant with respect to his bilateral carpal tunnel on December 18, 2007. (Exhibit D at 60)

Following this release, Claimant sought additional medical treatment for the bilateral elbow complaints that were first noted by Dr. Guinn on July 3, 2007. Claimant relied on the report of Dr. Koprivica that indicated he needed additional treatment for the bilateral elbows.

Dr. Koprivica's report was admitted as Claimant's Exhibit A at the June 12, 2008 Hardship Hearing. Respondent relied on the reports of Dr. Guinn, Dr. Wheeler and Dr. Reintjes, which were also admitted as Exhibits at the Hearing. Relying on the opinions of Dr. Guinn and Dr. Wheeler that the elbow complaints began after his work with Schreiber ceased, the Court found that Claimant was not entitled to any temporary total disability benefits or additional treatment for the upper extremities as he had reached maximum medical improvement for the carpal tunnel and the bilateral elbow complaints were not related to the original injury sustained in October of 2006. (August 4, 2008 Temporary Award)

Claimant also received treatment for his low back and neck while he was treating for the bilateral carpal tunnel. He initially treated with his primary care physician, but also had an evaluation with Dr. Reintjes on June 20, 2007. (Exhibit P at 6-7) Dr. Reintjes reviewed the MRI scan of the cervical spine from 2000 and the MRI scan of the cervical spine from November 27, 2006 along with an MRI scan of the lumbar spine that noted a small central L4-5 disc herniation. With respect to the cervical spine, Dr. Reintjes found spurring at levels C4-C7 with foraminal stenosis at C5-C7 on the 2006 MRI, but also opined that these were the same findings as the 2000 MRI scan. Dr. Reintjes found that the cervical spine changes predated Claimant's October 2006 injury and therefore the cervical condition was not a direct cause of his alleged work injury. Dr. Reintjes did not comment on whether the lumbar changes predated Claimant's work with Schreiber. Finally, Dr. Reintjes stated in his report that Claimant was not a surgical candidate for either the cervical or lumbar spine, but did recommend follow up with a rehabilitation medicine doctor for evaluation. (Exhibit P at 6-7)

Claimant was then evaluated by Dr. Eden Wheeler on two occasions, January 10, 2008 and January 22, 2009. (Exhibit 1 at 6 & 14) Dr. Wheeler's specialty is physical medicine and rehabilitation with 85 percent of her practice consisting of evaluation and treatment. (Exhibit 1 at 6) On January 10, 2008, Dr. Wheeler took a history of complaints from Claimant and reviewed medical records previously provided to her. (Exhibit 1 at 7) Dr. Wheeler noted that Claimant had multiple prior injuries, including hand tendonitis in 1996 and thoracic strain in October of 1994. She also noted complaints of constant neck pain, pain between the shoulder blades and numbness in the hands from a January 31, 2000 injury from Claimant's employment with AGCO. (Exhibit 1 at Exhibit 2, p. 5) This reference from Dr. Wheeler is a result of her review of Claimant's prior evaluation with Dr. Koprivica on August 11, 2003. She noted that Dr. Koprivica found a 30% disability to the body as a whole for injuries sustained prior to Claimant's employment with Schreiber. She also noted that Claimant told Dr. Koprivica his symptoms never fully resolved following his employment with AGCO. (Exhibit 1 at Exhibit 2, p. 5)

Subsequent to her evaluation of Claimant and review of the medical records provided, Dr. Wheeler found that Claimant was at maximum medical improvement for the upper extremities. She found that while Claimant's low back symptoms were preexisting, he was at maximum medical improvement for that condition as well. (Exhibit 1 at 23-25) With respect to his low back, she stated that she could not relate his condition to his employment with Schreiber. She testified regarding his extensive history of working heavy labor and prior problems that were the prevailing factor in causing the lumbar problems. She further testified

that if the Court disagrees with this finding, that he would have a 5% BAW impairment for the lumbar spine, 2% of which would be pre-existing and 3% related to the injury of 2004. (Exhibit 1 at 24)

Dr. Wheeler further testified that she did not find his work at Schreiber to be the prevailing factor causing Claimants neck symptoms. (Exhibit 1 at 24) She went on to testify that she felt Claimant's work at Schreiber was only a contributing factor with respect to his wrist complaints, but could not state that his work was the prevailing factor based on his significant pre-existing condition, treatment and settlement. (Exhibit 1 at 25) Dr. Wheeler testified that if the wrist complaints were found compensable, Claimant would have a 5% disability at the 175 week-level for each wrist, half of which would be pre-existing and half of which would be related to his work at Schreiber. (Exhibit 1 at 25) Finally, Dr. Wheeler noted that Claimant had other personal medical issues, including morbid obesity, remote tobaccoism, hypertension, ADD and depression. (Exhibit 1 at 22) Despite all of these problems, Dr. Wheeler stated that there is some type of work that Claimant can perform, just probably not in the heavy labor category. (Exhibit 1 at 43)

The injuries and treatment described above are not the only work related injuries that he has had. Prior to his work at Schreiber, Claimant was employed by AGCO, which was formerly Allis-Chalmers from June 1975 until June 2000. (Exhibit P at 48) While employed for AGCO, Claimant suffered a thoracic strain associated with moving tires on October 3, 1994 and a low back injury in 1998. He received some therapy, but did not receive any permanent partial disability from either claim. (Exhibit P at 48, 51) He also alleged another claim in October of 1996 for tendinitis of the hand from mounting tires. (Exhibit B at Exhibit 2, p. 3) Finally, he filed a claim on February 8, 2000 against AGCO alleging injury to his neck, back and for bilateral carpal tunnel from working on a tractor line doing repetitive work for AGCO. (Exhibit 5 at 55) Dr. Koprivica stated with regards to Claimant's injuries sustained from his work at AGCO to his neck, back, bilateral shoulders and bilateral hands that even though he left AGCO, the permanent injury never recovered. (Exhibit P at 51) Claimant settled the claim from February 8, 2000 for 20% permanent partial disability to the whole body. (Exhibit 5 at 56)

Claimant testified during his deposition about the injuries that he previously sustained while employed at AGCO. He stated that the problems he was having with his neck in 2007 were the same as the problems he was having with his neck in 2000 from his work injuries at AGCO, just worse. (Exhibit 5 at 58) He was asked about his carpal tunnel problems and his back condition as well. His response was the same; that the problems in 2007 were close to the same as he was having in 2000, just worse. (Exhibit 5 at 58) Claimant testified that the problems he was having with his back while working at AGCO caused him to miss a day or two per month. (SIF Exhibit 1 at 35)

Claimant further testified that following his work at AGCO he obtained employment with Swisher Mower. He testified that at the beginning of his employment with Swisher he was required to do repetitive activities with his hands in an assembly position. This position continued to aggravate and make worse the carpal tunnel symptoms that initially began while

employed with AGCO. Claimant testified at the trial, that as a result of the increase in problems with his hands and wrists, he requested to be moved from the assembly position as he could not keep up.

Claimant has additional health problems that are personal in nature and do not stem from any work activities, including morbid obesity, remote tobaccoism, hypertension, ADD and depression. (Exhibit 1 at 22) Claimant was first diagnosed with ADD in approximately 1995. At the time of his deposition in 2007, he was treating for the ADD and depression at Pathways in Clinton, Missouri and was taking Concerta for ADD. (Exhibit 5 at 7) Claimant testified at the trial that even before his work at Schreiber he was taking Cymbalta and other anti-depressants as well as Ritalin for his ADD.

Claimant also testified that the ADD and depression affected his ability to focus on his work and to perform multiple tasks at the same time. Employer's Exhibit 6 supports this contention. It is a note from his doctor at Pathways to Lewis West in Human Resources at Schreiber recommending that Claimant be able to switch positions as he was not able to keep up and perform the work that he was requested to do. The Pathways doctor indicated that Claimant was not able to keep up with different tasks due to his ADD and had been under his or her psychiatric care for many months. (Exhibit 6) At his 2007 deposition Claimant stated that the personal health problems described above, in conjunction with all of his work injuries, has made it so he cannot work. He stated that his primary care physician told him he cannot work as a combination of all of these problems, including the ADD and depression. (Exhibit 5 at 64)

Terry Cordray also testified that Claimant, in his opinion, is not capable of performing any job in the competitive labor market. (Exhibit C at 8) He stated that the carpal tunnel injuries Claimant sustained while employed with Schreiber, taken in isolation would not make him permanently and totally disabled. (Exhibit C at 24) He further testified that the back claim, taken in isolation would not make Claimant permanently and totally disabled. (Exhibit C at 24-25) Mr. Cordray agreed that Claimant had significant problems and issues performing tasks prior to working at Schreiber in 2003 and that Claimant's permanent total disability arose from the combined effect of his permanent partial disability and not from one condition. (Exhibit C at 22-24)

Dr. Swaim agreed that Claimant is permanently and totally disabled. Dr. Swaim performed an independent medical examination of Claimant on December 8, 2008. Based on her review of the medical records provided Dr. Swaim noted that in August 2003 Claimant's hands were numb 75% of the time, that he awoke at night with hand numbness and he would drop things due to hand cramps. (Exhibit B at Exhibit 2, p. 4) Dr. Swaim found that Claimant's work at Schreiber was the prevailing factor in causing his bilateral carpal tunnel, his neck complaints and his low back complaints. (Exhibit B at 18-19) Finally, Dr. Swaim found that Claimant was permanently and totally disabled from an occupational standpoint and that the permanent total disability arose from the combined effects of his permanent partial disabilities and not from one condition alone. (Exhibit B at 25-26)

RULINGS OF LAW

Claimant has alleged that he suffered accidental injuries arising out of and in the course of his employment with Schreiber to his neck, back and bilateral upper extremities. He has alleged dates of accident of October 29, 2004, September 13, 2006 and October 6, 2006. Claimant asserts that he is permanently and totally disabled from a combination of these work injuries, his prior work injuries and his personal health conditions. According to R.S.Mo. 287.020.6, the term "total disability" means the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Claimant has failed to prove that he is permanently and totally disabled. Further, Claimant has failed to prove that he is entitled to any permanent partial disability associated with his alleged work accidents at Schreiber.

Prior to beginning his employment with Schreiber, Claimant was already suffering from a number of injuries. Claimant's first work related injury was a thoracic strain associated with moving tires on October 3, 1994 while employed at AGCO. He also suffered a low back injury in 1998. He received some therapy, but did not receive any permanent partial disability from either claim. (Exhibit P at 48, 51) Claimant additionally reported tendinitis of the hand from mounting tires in October of 1996. (Exhibit B at Exhibit 2, p. 3) Claimant also filed a claim for bilateral carpal tunnel, neck and back injuries from his employment at AGCO in 2003. The carpal tunnel complaints began in 1998 and never went away. (Exhibit P at 38)

Claimant testified that the problems he was having with his neck in 2007 were the same as the problems he was having with his neck in 2000 from his work injuries at AGCO, just worse. (Exhibit 5 at 58) He was asked about his carpal tunnel problems and his back condition as well. His response was the same; that the problems in 2007 were close to the same as he was having in 2000, just worse. (Exhibit 5 at 58) Claimant testified that the problems he was having with his back while working at AGCO caused him to miss a day or two per month. (SIF Exhibit 1 at 35)

Claimant further testified that following his work at AGCO he obtained employment with Swisher Mower. He testified that at the beginning of his employment with Swisher he was required to do repetitive activities with his hands in an assembly position. This position continued to aggravate and make worse the carpal tunnel symptoms that initially began while employed with AGCO. Claimant testified at the trial, that as a result of the increase in problems with his hands and wrists, he requested to be moved from the assembly position as he could not keep up.

This testimony is similar to the information Dr. Wheeler obtained during her evaluation of him during her independent medical examination. Based on this information, her review of Claimant's prior medical records and his alleged workers compensation claims, she found that Claimant did not suffer any permanent partial disability as a result of his work at Schreiber. According to R.S.Mo. 287.020.3(1) an injury by accident is compensable only if the accident was the prevailing factor in causing both 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 resulting medical condition and disability.

Pursuant to 287.020.3(1), Dr. Wheeler found that she could not relate his low back condition to his employment with Schreiber. She testified at her deposition regarding his extensive history of working heavy labor and prior problems that she found to be the prevailing factor in causing his lumbar condition as opposed to his work at Schreiber. (Exhibit 1 at 24) Dr. Wheeler further testified that while he may have aggravated the underlying condition, she did not find his work at Schreiber to be the prevailing factor causing Claimant's neck symptoms. (Exhibit 1 at 24) She went on to testify that she felt Claimant's work at Schreiber was only a contributing factor with respect to his wrist complaints, but could not state that his work was the prevailing factor based on his significant pre-existing condition, treatment and settlement. (Exhibit 1 at 25)

The Court agrees with Dr. Wheeler and finds that Claimant never fully healed from his work injuries that he suffered while employed with AGCO, that the MRI scan of his cervical spine was essentially the same in 2007 as it was in 2000 and his subjective complaints of pain, according to his testimony were in the same location, just worse. As such, it appears his work at Schreiber merely aggravated his underlying and significant preexisting conditions and is therefore not the prevailing factor in causing his current disability to his upper extremities, neck or back. As such, Claimant is not entitled to any permanent partial disability from Schreiber for his alleged dates of accident of October 29, 2004, September 13, 2006 and October 6, 2006.

In finding no liability to the Employer/Insurer in this matter, it follows there can be no Second Injury Fund liability for pre-existing conditions.

I find, therefore, the Claimant is not entitled to compensation from the Employer/Insurer or the Second Injury Fund.

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation