

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

Injury No.: 06-102519

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."<sup>1</sup> 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,

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<sup>1</sup> 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;<sup>2</sup> (2) whether the accident arose out of and in the course and scope of employment; (3) medical causation; (4) the need for future medical care; (5) the nature and extent of permanent disability; (6) the liability of the Second Injury Fund; and (7) whether Second Injury Fund liability attaches to an occupational disease.

The administrative law judge determined as follows: (1) it appears that employee’s work for employer is not the prevailing factor in causing employee’s current disability to his upper extremities, neck, 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 specifically address the issue of accident or occupational disease.

As noted above, employee filed a timely Application for Review challenging the administrative law judge’s findings and conclusions. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge for the reasons set forth herein.

### **Findings of Fact**

Employee worked for employer from May 5, 2003, to November 13, 2006. From February to November 2006, employee worked a position that required him to perform a task known as “changeovers.” This task required employee to reach into a machine and lift out and replace a suction cup device in order to prepare the line for a new product. Employee credibly testified (and we so find) that this task required him to lift

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<sup>2</sup> We note that employee’s claim for compensation alleges injuries by repetitive motion, i.e., by occupational disease, and does not allege an accident.

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awkwardly with his arms extended in front of him. Employee experienced pain when he performed this task, which he was required to do multiple times per shift. The suction devices weighed between 20 and 45 pounds.

Employee alleges he suffered repetitive cumulative injury to his neck and low back performing the changeover task. It is uncontested that employee suffered from preexisting problems referable to his neck and low back. Employee suffered a low back injury around 1998 that improved with physical therapy, but also left him with ongoing pain sufficient to occasionally cause him to miss work. A February 11, 2000, MRI revealed diffuse spondylitic changes and degenerative disc disease from C4-5 to C7-T1. In 2003, employee settled a workers' compensation claim against a former employer that alleged injury to his back and neck (and also his bilateral upper extremities) for 20% permanent partial disability of the body as a whole.

Employee credibly testified (and we so find) that his duties for employer, and specifically the daily task of performing changeovers, caused an increase in his back and neck pain so severe that he was unable to continue working after November 2006. Employee reported the injury, but employer did not provide treatment, so he sought it on his own. On November 27, 2006, and December 5, 2006, cervical and lumbar MRIs revealed diffuse degenerative changes in the cervical spine, as well as a bulging disc at C3-4; and an L4-5 herniation and diffusely bulging disc at L3-4 in the lumbar spine. On December 4, 2006, employee saw Dr. Roller, who diagnosed lumbar facet syndrome and prescribed facet blocks. Employee underwent a course of facet blocks, epidural injections, radiofrequency ablation, and physical therapy for his low back pain through March 15, 2007.

Expert medical testimony

Employee's evaluating expert Dr. P. Brent Koprivica opined that employee's degenerative disease clearly preexisted his employment with employer, but that employee's repetitive work with employer is the prevailing factor leading to progression of these conditions and additional impairment; Dr. Koprivica identified an occupational disease consisting of repetitive injury to the cervicothoracic and lumbar regions. Employee also presented expert medical testimony from Dr. Truett Swaim, who opined that employee's cumulative occupational trauma was the prevailing factor in aggravating a preexisting lumbar condition and causing development of the L4-5 disc herniation and L3-4 disc bulging, which Dr. Swaim rates at 25% permanent partial disability of the body as a whole, as well as causing employee to develop additional permanent partial disability referable to his cervical condition to the extent of 20% permanent partial disability of the body as a whole.

Employer's evaluating expert Dr. Terrence Pratt opined that employee's work for employer would be the prevailing factor in causing aggravation of employee's underlying degeneration and possibly the L4-5 disc protrusion. The record also contains a report from employer's evaluating expert Dr. Stephen Reintjes, who opined that employee was suffering from cervical spondylosis that predated his October 2006 injury, and that there was no significant change between the 2000 and 2006 cervical MRIs. Dr. Reintjes did not provide any opinion whether the L4-5 lumbar herniation predated 2006. Employer also provides the expert medical testimony of Dr. Eden Wheeler, who opined that because

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employee had back and neck problems before, she could not say employee's work for employer is the prevailing factor in his current complaints. Dr. Wheeler cited a deposition wherein employee testified that his problems in 2006 were the "same only worse," and also pointed to employee's weight gain and the diagnostic studies showing degenerative conditions.

Unlike Dr. Swaim, Dr. Wheeler did not specifically address the changeover activity, or offer any opinion regarding the effect performing this activity might have on employee's preexisting low back and neck condition, and instead provided a generalized opinion that because employee had preexisting problems, his work for employer can't be seen to prevail in causing any of his current problems.

After careful consideration, we find more persuasive the opinions from Drs. Koprivica and Swaim. We specifically adopt the opinion from Dr. Swaim that employee's cumulative occupational trauma was the prevailing factor in aggravating his preexisting lumbar condition and causing development of the L4-5 disc herniation and L3-4 disc bulging, as well as aggravating and causing employee to develop additional permanent partial disability referable to his preexisting cervical spine condition.

We find that employee reached maximum medical improvement for these injuries on March 15, 2007. Dr. Swaim opined that employee needs ongoing conservative treatment for his cervical and lumbar spine injuries, including medications, pain management, and injections. We find persuasive and adopt this opinion from Dr. Swaim.

#### Preexisting conditions of ill-being

In the related claim designated as Injury Number 06-119870, we found that employee suffered the following preexisting permanent partially disabling conditions of ill-being referable to his 2000 injuries: a 10% permanent partial disability of the body as whole referable to employee's neck pain, a 10% permanent partial disability of the body as a whole referable to employee's low back pain, and a 10% permanent partial disability of each wrist referable to bilateral carpal tunnel syndrome. We also found that employee suffered a 5% preexisting permanent partial disability of the body as a whole referable to attention deficit disorder. We hereby adopt and incorporate those findings herein.

#### Permanent total disability

Employee was 51 years old at the time of the last injury. Employee credibly testified (and we so find) that he now suffers from neck and low back pain which prompts him to change positions every 20 to 30 minutes. Employee was taking Hydrocodone to manage this pain, but it stopped working, so now he takes Tramadol. Employee's bilateral carpal tunnel syndrome causes problems with numbness in his hands which affects his ability to grip and causes him to drop things. Employee's attention deficit disorder affects his ability to read and concentrate. Employee's sole source of income is Social Security disability benefits.

The only experts to offer an opinion on the topic opine that employee is permanently and totally disabled owing to a combination of his conditions of ill-being. Dr. Swaim opined that employee is permanently and totally disabled owing to the combined effects

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of his permanent partially disabling conditions. Employee's vocational expert Terry Cordray opined that employee is permanently and totally disabled when Dr. Swaim's restrictions are combined with employee's preexisting limitation of avoiding repetitive use of the upper extremities. Mr. Cordray explains that employee doesn't have any transferable skills and is not a candidate for retraining owing to his low educational ability. We credit this essentially uncontested expert testimony. We find that employee is unable to compete for work in the open labor market owing to the combined effect of his permanent partially disabling conditions referable to his primary injuries and preexisting conditions of ill-being.

### **Conclusions of Law**

Occupational disease arising out of and in the course of employment/medical causation  
Section 287.067 RSMo provides, in relevant part, as follows:

1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
2. An injury or death by occupational disease is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

We have found persuasive the opinions from employee's medical expert Dr. Swaim. We conclude, therefore, that employee's occupational exposure with employer is the prevailing factor in aggravating his preexisting lumbar condition and causing development of an L4-5 disc herniation and L3-4 disc bulging to the extent of 15% of the body as a whole referable to the lumbar spine, as well as aggravating and causing employee to develop additional injury to his preexisting cervical spine condition to the extent of 15% of the body as a whole.

### 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 credited the opinion from Dr. Swaim, which establishes a reasonable probability that employee has a need for future medical

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treatment flowing from his neck and low back injuries by occupational disease. We conclude that employer is obligated to provide that future medical treatment that may reasonably be required to cure and relieve the effects of employee's neck and low back injuries.

*The degree of permanent disability*

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee suffered a 15% permanent partial disability of the body as a whole referable to the lumbar spine, and a 15% permanent partial disability of the body as a whole referable to the cervical spine as a result of his compensable injuries by occupational disease. At the stipulated benefit rate of \$403.83, we conclude that employer is liable for \$48,459.60 in permanent partial disability benefits.

*Liability of the Second Injury Fund*

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from preexisting permanent partially disabling conditions of ill-being referable to attention deficit disorder, bilateral carpal tunnel syndrome, as well as preexisting injuries affecting the neck and the low back. We are convinced these conditions were serious enough to constitute hindrances or obstacle to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1

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requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have determined that, as a result of employee's primary injuries by occupational disease, employee sustained a 15% permanent partial disability of the body as a whole referable to the lumbar spine, and a 15% permanent partial disability of the body as a whole referable to the cervical spine. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We have credited the expert vocational testimony from Mr. Cordray that employee is permanently and totally disabled when Dr. Swaim's restrictions are combined with employee's preexisting limitation of avoiding repetitive use of the upper extremities. We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

*Second Injury Fund liability in cases of occupational disease*

The Second Injury Fund argues that employee's low back and cervical spine injuries by occupational disease do not qualify as "subsequent compensable injur[ies]" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, because "injury" as defined in § 287.020.3 RSMo excludes occupational diseases. The Missouri Court of Appeals has rejected this argument. See *Treasurer of Mo. v. Stiers*, 388 S.W.3d 217 (Mo. App. 2012), and *Peters v. Treasurer of Mo. As Custodian of Second Injury Fund*, 404 S.W.3d 322 (Mo. App. 2012). For this reason, we will not further consider or discuss the Second Injury Fund's argument on this point.

**Award**

We reverse the award and decision of the administrative law judge. We conclude that employee suffered compensable injuries by occupational disease.

Employee is entitled to, and employer is hereby ordered to pay, \$48,459.60 in permanent partial disability benefits.

Employer is required to furnish future medical care to employee that may reasonably be required to cure and relieve the effects of employee's low back and cervical spine injuries by occupational disease.

The Second Injury Fund is liable for permanent total disability benefits at the stipulated weekly benefit amount of \$403.83 beginning 120 weeks after March 15, 2007, the date upon which employee reached maximum medical improvement. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

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This award is subject to a lien in favor of John Stanley, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Mark Siedlik, issued April 12, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 30<sup>th</sup> day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## **AWARD**

Employee: Billy Tabor Injury Nos: 06-102519  
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 6, 2006
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: \$8,884.26
16. Value necessary medical aid paid to date by employer/insurer? \$5,591.31
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$605.74
19. Weekly permanent partial disability compensation rate: \$403.83
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: 06-102519  
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

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*