

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

Injury No.: 06-119870

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, 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

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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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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) the need for future medical care; (3) the degree of permanent disability; (4) the liability of the Second Injury Fund; and (5) whether the Second Injury Fund has liability for an occupational disease as a preexisting condition.

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,<sup>3</sup> or back;<sup>4</sup> (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. It is uncontested that employee has a preexisting 2000 diagnosis of bilateral carpal tunnel syndrome (CTS) sustained in his work for a previous employer, for which he settled a workers’ compensation claim (together with back and neck injuries) for 20% permanent partial disability of the body as a whole in 2003. Employee alleges he sustained aggravation and progression of his bilateral CTS as a result of repetitive upper extremity movements involved in handling and taping boxes of cheese product in the course of performing his duties for employer through September 13, 2006.

An electromyography and nerve conduction study performed on January 8, 2000, revealed mild left CTS and possible right CTS. It appears that employee did not receive any further medical treatment for these conditions at that time; employee explained, in his testimony, that he did not have the funds to seek further treatment. Employee continued to suffer from numbness and pain in his bilateral upper extremities. On August 11, 2003, in an independent medical examination report generated for employee’s 2000 workers’ compensation claim against the former employer, Dr. P. Brent Koprivica rated a 15% permanent partial disability of the bilateral wrists referable to employee’s CTS, but opined that employee likely would suffer additional

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

<sup>3</sup> Employee does not allege injury to his neck herein.

<sup>4</sup> Employee does not allege injury to his back herein.

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permanent partial disability as a result of further aggravating injury employee was then experiencing in his work for employer.

From February to November 2006, employee's duties for employer involved stacking cardboard boxes into a machine, handling 12 to 18 pound boxes of cheese product, reaching inside to inspect the packages of cheese, and taping the boxes shut using a tape gun. Employee handled between 500 and 600 boxes per shift on one line, and as many as 1,200 per shift on another. Employee credibly testified (and we so find) that this repetitive work caused him numbness and cramping in his hands that was much worse than he experienced previously. Employee asked employer to change his duties, and employer assigned a coworker to help employee so he didn't have to work as fast.

A November 22, 2006, study revealed mild right CTS and moderate left CTS. On December 16, 2006, employee's evaluating expert, Dr. Koprivica, opined that employee's occupational exposure and repetitive duties for employer were the prevailing factor resulting in further repetitive injury to his bilateral upper extremities. On July 3, 2007, employer's authorized treating physician Dr. O. Allen Guinn opined that the progression in employee's CTS between 2000 to 2006 was caused by his work for employer. On August 16, 2007, an administrative law judge entered a temporary award finding the progression in employee's CTS was work-related and ordering employer to provide treatment.

Dr. Guinn performed a right carpal tunnel release on September 10, 2007, and a left carpal tunnel release on October 8, 2007. On December 18, 2007, Dr. Guinn released employee for full-duty work. Employee credibly testified (and we so find) that the surgeries helped relieve his pain, but that he continues to experience numbness in his fingers and problems with dropping things.

Expert medical testimony

Above, we have noted the opinion of Dr. Koprivica in support of employee's claim. Employee also presents expert medical testimony from the orthopedic surgeon Dr. Truett Swaim. Dr. Swaim opined that employee's occupational cumulative trauma aggravated his preexisting bilateral CTS and was the prevailing factor to cause his need for surgical intervention as well as additional permanent partial disability. Dr. Swaim opined employee should avoid repetitive forceful use of the hands and vibrating/jarring equipment and rated a 25% permanent partial disability of each arm at the 175-week level.

We have noted that the authorized treating surgeon Dr. Guinn believes the progression of employee's bilateral CTS was caused by his work for employer. Employer also sent employee for an evaluation with Dr. Terrence Pratt, who opined that any progression of CTS seen on diagnostic study would most likely relate to employee's more recent repetitive use of upper extremities (or in other words, employee's work for employer). On the other hand, employer presents expert medical testimony from the physical medicine and rehabilitation specialist Dr. Eden Wheeler. Dr. Wheeler acknowledged the changes demonstrated on the 2006 studies, but opined that it was difficult to identify the causative factor of such progression because of other jobs employee had before he worked for employer.

Especially where employer's authorized treating and evaluating physicians Drs. Guinn and Pratt agree with employee's experts Drs. Swaim and Koprivica, we do not find the sole contrary opinion from Dr. Wheeler to be especially persuasive. We adopt the opinions of Drs. Koprivica, Pratt, Guinn, and Swaim that employee's repetitive upper extremity work for employer caused aggravation and progression of his preexisting bilateral CTS.

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Employee's experts did not address the issue whether employee will need future medical treatment to cure and relieve the effects of his bilateral CTS, and employee has failed, in his brief, to cite any other evidence indicating that he does. Accordingly, we find that employee has failed to meet his burden of proof with respect to the issue of future medical care. We find that there is not a reasonable probability employee has a need for future medical care referable to his bilateral CTS.

Preexisting conditions of ill-being

In 1994, employee was diagnosed with attention deficit disorder (ADD) and prescribed Ritalin; employee testified this condition impairs his memory and concentration. Employee's counselor at Pathways wrote an October 13, 2005, letter to employer asking that employee's duties be changed to something less stressful in light of his ADD. We find this evidence sufficient to establish that employee experienced a preexisting permanent partial disability referable to ADD, but we note that employee's experts did not provide a rating for this condition. After careful consideration, we find that employee's preexisting permanent partial disability referable to ADD amounted to 5% permanent partial disability of the body as a whole.

As noted above, employee settled a 2000 workers' compensation claim for 20% permanent partial disability of the body as a whole in 2003, but this covered generalized "back, neck, and upper extremity" injuries, so we do not find the settlement particularly enlightening in terms of evaluating the nature and extent of disability referable to each of those individual preexisting conditions. Relying on the settlement, Dr. Swaim opined that employee had a 20% preexisting permanent partial disability of the body as a whole for cervical spine and bilateral upper extremity conditions. Dr. Koprivica, in his August 11, 2003, report generated in connection with the 2000 claim, rated a "global" 30% permanent partial disability of the body as a whole for cumulative work injuries, and also individually rated a 15% permanent partial disability of the body as a whole attributable to symptomatic cervical spondylosis/regional myofascial pain, and 15% of each wrist for the bilateral CTS. On the other hand, Dr. Wheeler found only a 2% preexisting permanent partial disability of the body as a whole for employee's diffuse cervicothoracic or lumbar symptoms and a 5% preexisting permanent partial disability of each wrist.

After careful consideration, we find 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 CTS.

**Conclusions of Law**

Occupational disease

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

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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 credited the opinions from Drs. Koprivica, Pratt, Guinn, and Swaim that employee's repetitive work for employer caused aggravation and progression of his bilateral carpal tunnel syndromes, as well as additional permanent partial disability. We conclude that employee's occupational exposure with employer is the prevailing factor in causing the resulting medical conditions of aggravation and progression of his bilateral carpal tunnel syndromes, as well as additional disability to the extent of 15% permanent partial disability of each wrist at the 175-week level.

#### 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 his occupational disease in the form of bilateral carpal tunnel syndrome. We conclude employee is not entitled to future medical care.

#### 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 15% permanent partial disability of each wrist as a result of his compensable injury by occupational disease. At the stipulated permanent partial disability benefit rate of \$403.83, we conclude that employer is liable for \$21,201.08 in 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. In order to prove a claim for permanent partial disability benefits against the Second Injury Fund, an employee is required to prove that one of his preexisting disabling conditions of ill-being satisfies the applicable thresholds under § 287.220.1. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013).

We have found that, at the time he suffered the last injury herein, employee suffered from the following preexisting conditions of ill-being: 5% permanent partial disability of the body as a whole referable to ADD, 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 CTS. None of these conditions meets the 50-week body as a whole or 15% major extremity thresholds under § 287.220.1. We conclude, therefore, that the Second Injury Fund is not liable for any compensation.

#### **Award**

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

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Employee is entitled to, and employer is hereby ordered to pay, \$21,201.08 in permanent partial disability benefits.

Employer is not required to furnish any future medical care to employee to cure or relieve the effects of employee's bilateral carpal tunnel syndrome.

The Second Injury Fund is not liable for any compensation herein.

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

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

Attest:

\_\_\_\_\_  
Secretary

## **AWARD**

Employee: Billy Tabor Injury Nos: 06-119870  
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: September 13, 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: \$15,866.48
16. Value necessary medical aid paid to date by employer/insurer? \$10,897.70
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: 06-119870  
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*