

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

Injury No.: 03-053994

Employee: Kenneth H. Tilley  
Dependent: Linda Tilley  
Employer: USF Holland Incorporated  
Insurer: Self-Insured with Gallagher Bassett as a TPA  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 22, 2009. The award and decision of Administrative Law Judge Gary L. Robbins, issued May 22, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Kenneth H. Tilley

Injury No. 03-053994

Dependents: Linda Tilley

Employer: USF Holland Incorporated

Additional Party: Second Injury Fund

Insurer: Self Insured with Gallagher Bassett as a TPA

Hearing Date: February 18, 2009

Checked by: GLR/kh

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease? June 6, 2003
5. State location where accident occurred or occupational disease contracted: State of Kentucky
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was unloading rolls of canvas from a truck when he injured his back and body as a whole.

12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability as to the employer-insurer.
15. Compensation paid to date for temporary total disability: \$28,662.84
16. Value necessary medical aid paid to date by employer-insurer: \$157,988.95
17. Value necessary medical aid not furnished by employer-insurer: \$3,973.46
18. Employee's average weekly wage: \$1,100.00
19. Weekly compensation rate: \$649.32 per week for temporary total, permanent total and death disability. \$340.12 per week for permanent partial disability.
20. Method wages computation: By agreement
21. Amount of compensation payable: See Award
22. Second Injury Fund liability: None
23. Future requirements awarded: See Award

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: M. Mercedes Fort.

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

On, February 18, 2009, the employee, Kenneth H. Tilley, appeared in person and by his attorney, M. Mercedes Fort, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Stephen A. McManus. Assistant Attorney General Frank A. Rodman represented the Second Injury Fund. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self-insured employer.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of USF Holland Incorporated and was working under the Workers' Compensation Act.
3. On or about June 6, 2003 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's compensation rates were stipulated to by the parties. The employee's average weekly wage is \$1,100.00 per week. His rate for temporary total disability, permanent total disability and death is \$649.32 per week. His rate for permanent partial disability is \$340.12 per week.
7. The employee's injury was medically casually related to his accident or occupational disease.
8. The employer-insurer paid \$157,988.95 in medical aid.
9. The employer-insurer paid \$28,662.84 in temporary disability benefits.
10. The employee has no claim for mileage or other medical expenses under Section 287.140 RSMo.

### **ISSUES**

1. Past Medical Bills-Whether the employer-insurer is responsible to pay \$3,973.46 in past medical bills?
2. Future Medical Care-Whether the employer-insurer is responsible to provide future medical care?
3. Additional Temporary Disability-Whether the employer-insurer is responsible to pay temporary disability benefits in the amount of \$48,699.00 for a period of seventy five weeks beginning on October 18, 2003 and ending on March 27, 2005?
4. Permanent Partial Disability-Whether the employer-insurer is responsible to pay permanent partial disability benefits?

5. Permanent Total Disability-Whether the employer-insurer is responsible to pay permanent total disability benefits?
6. Second Injury Fund Liability-Whether the Second Injury Fund is liable for either permanent partial or permanent total disability?
7. Dependency of Linda Tilley under the Schoemehl decision.

## **EXHIBITS**

The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

- A. Original Claim for Compensation – Filed November 6, 2003
- B. 1<sup>st</sup> Amended Claim for Compensation – Filed July 21, 2004
- C. 2<sup>nd</sup> Amended Claim for Compensation – Filed November 1, 2007
- D. Deposition of Raymond F. Cohen, D.O.
- E. Raymond F. Cohen, D.O. - Medical Rating, Apr. 20, 2004
- F. Raymond F. Cohen, D.O. - Medical Rating Supplement, March 30, 2006
- G. Raymond F. Cohen, D.O. – Curriculum Vitae
- H. Susan Shea, M.A. - Deposition
- I. Susan Shea, M.A. – Vocational Assessment
- J. Susan Shea, M.A. – Supplement to Vocational Assessment
- K. Susan Shea, M.A. – Curriculum Vitae
- L. Medical Records of Southeast Missouri Hospital
- M. Medical Records of St. Francis Medical Center
- N. Medical Records of Physicians Associates
- O. Medical Records of Orthopaedic Associates (1)
- P. Medical Records of Orthopaedic Associates (2)
- R. Medical Expenses for Kenneth H. Tilley – Out of Pocket

### Employer-Insurer's Exhibits

1. Deposition of James England Jr.
2. FCE Evaluation
3. August 21, 2008 letter regarding possible assessment for Catalyst program
4. August 22, 2008 letter regarding possible assessment for Catalyst program

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

### **STATEMENT OF THE FINDINGS OF FACT-**

Kenneth H. Tilley, the employee, testified personally at trial. In addition, Mr. Tilley's wife Linda Tilley also testified personally at trial. All other evidence was presented through written records, medical records or deposition testimony.

### **Testimony of Kenneth H. Tilley**

Kenneth Tilley testified that he was born on November 12, 1944 and that he is currently married to his wife, Linda Tilley. He testified that he has lived in Jackson, Missouri his entire life and has been married to his wife for twenty-eight years. Ms. Tilley retired from her job fourteen years ago. Mr. Tilley stated that he completed the tenth grade but did not complete high school as he began full-time work following the tenth grade.

When he was sixteen years old, the employee began working on the river as a deck hand. He worked there for about ten years until he started driving a truck in 1968 for Farrow Brothers Logging Company. He stated that he drove a truck for Farrow's until he joined the Teamsters Union and thereafter he worked through the union hall driving a truck. Mr. Tilley worked for various trucking companies until approximately 1997 when he went to work for USF Holland Incorporated (hereinafter referred to as Holland or employer).

Mr. Tilley testified that he was an over-the-road and then a local truck driver for Holland and did the same job for his entire employment. Overall, Mr. Tilley was employed as a truck driver for about 35 years. He explained that it was routine for him to load and unload his trucks and that he always worked overtime. He stated that he liked working at Holland and although he has had other medical problems, he had never had any permanent physical limitations prior to his accident on June 6, 2003. He testified that at the time of trial he weighed about 331 pounds. Before his injury he indicated that his weight for many years was between 310 and 320 pounds. He said his size had always helped him in terms of his strength.

Mr. Tilley had some other accidents/health concerns prior to June 6, 2003. As a deck hand he cracked a couple of ribs. He returned to work with no restrictions. He also indicated that he had a cyst removed from his lower back and had a broken nose. He stated that he takes medications for high blood pressure, diabetes and high cholesterol and that all of these conditions are controlled by the medications and that none of them had ever impeded his ability to work in any way. In addition Mr. Tilley testified that he had trouble with his knees which resulted in injections and left knee surgery in January 2003. He stated that he felt completely normal when he returned to work and that he could do his job with no restrictions or limitations. In addition he had bladder cancer that was treated in 2000-2001. Mr. Tilley testified that the urinary problems he now has are in no way similar to his prior bladder treatment.

Mr. Tilley explained that he worked for Holland until his work injury on June 6, 2003. He testified that on June 6, 2003, while unloading canvas rolls from his truck, he felt a pop in his low back and left hip area. The accident was immediately reported to his employer. After that accident he began a course of treatment that included a back surgery by Dr. K. Charles Cheung on June 24, 2003 and a second back fusion surgery with Dr. Kee B. Park on March 28, 2005. (See Medical Evidence for specific details).

Following his first back surgery, Mr. Tilley testified that his back never quit hurting although the surgery did help relieve some of the burning in his leg. The employee was released by Dr. Cheung on October 17, 2003 with a permanent weight restriction of 70 pounds. Mr. Tilley stated that although the pain continued at that time, he contacted his employer but was told that they would not let him work with restrictions. He said that his union hall representative said no one would hire him having had back surgery.

Mr. Tilley agreed that after his first back surgery no doctor indicated that he could not work, however he did not believe he could work in the period after his first back surgery and before his back fusion surgery. He indicated that he sought and received about 26 weeks of unemployment benefits.

Mr. Tilley testified that his back pain and problems continued after his first back surgery and that is why he sought the care of Dr. Park. Mr. Tilley testified that he had urinary and dizziness/passing out complications from Dr. Park's fusion surgery that required hospitalizations. He testified that after surgery he would pass out when he stood up. He stated that he fell at home multiple times from this problem. He further testified that on one occasion he got dizzy, fell and struck his head resulting in unconsciousness and loss of memory for a few days. Mr. Tilley testified that he had no dizziness problems before his June 6, 2003 accident. In addition he testified that he developed bladder problems after the fusion surgery. He testified that Dr. Landau at Barnes Jewish Hospital concluded that his dizziness was a result of injection that occurred during surgery.

Mr. Tilley stated that he had physical therapy after he was discharged from Barnes Jewish Hospital and was released by Dr. Park with permanent restrictions on September 22, 2005. Dr. Park released him with permanent restrictions of fifteen pounds maximum lifting, no climbing and only occasional bending, squatting or twisting and limited standing. He said that his back pain had improved to some degree but that it continued to the point that he required daily pain medication and was unable to perform even the simplest of tasks. Mr. Tilley indicated that he is taking one to four Hydrocodone a day for pain and Neurontin for nerve damage. He also indicated he still had numbness in his left leg and some in his toes on his right foot that was not there prior to the injury in June of 2003. Mr. Tilley testified that Holland told him they would not let him work if he was not "100%".

Currently, Mr. Tilley complains of pain in his back and left leg from below the knee down to his foot that he has had since the injury. He complains of numbness in his right foot, primarily in his toes that was not there before the injury. He takes multiple daily doses of Hydrocodone and Neurontin for pain, which he says doesn't do much to help the pain. Mr. Tilley testified that the second or third dose makes him groggy. He also indicated that he is unable to sit or stand comfortably for much more than thirty minutes and is unable to walk more than 200 feet without being tired and sore. He stated that he is unable to squat, or bend to pick something up and has trouble lifting anything over ten pounds. He stated he could move a 34 pound bag of dog food from the back of his pickup truck (waist level) if he didn't have to bend and that he could not bend to put it down. He also said that he is unable to walk on uneven or unstable ground.

In describing his daily activities, Mr. Tilley testified that he was up and down during the night due to discomfort in his back and due to bladder urgency which started post surgery. Specifically he stated that he is up 5-7 times a night depending on back and leg pain, and this is in addition to the urinary problems. He stated that he used to hunt and fish but that he was no longer able to do either one as he cannot get in and out of the boat and cannot walk on uneven ground. He said he had land in Wayne County where he would camp and hunt before, but that due to pain and discomfort in his back he could not go anymore. He testified that he was unable

to sit in a car for more than an hour at most and that he and his wife were no longer able to take vacations as they had always done prior to the injury. Mr. Tilley described great difficulty in simple tasks such as tying his shoes and stated that going up and down steps or stairs was extremely difficult. He testified that steps were such a problem for him that his sons built him a wheel chair ramp in the front of his house.

Mr. Tilley also testified that prior to the injury he maintained a farm with livestock which he had to sell following the injury because he could no longer manage it. He stated that he might occasionally go to the grocery store with his wife but that he had to lean on the grocery cart for support.

Mr. Tilley stated that he is unable to perform the job he was previously doing for Holland and when asked said that he believed that he could not work anywhere or at all due to his pain and inability to sit or stand for any period of time. He testified that he does not know of any job he could do as it is hard for him to sit and move around. He testified that he could not go back to work due to his low back and leg problems. He testified that he believes he is permanently and totally disabled.

Mr. Tilley testified that he did not receive any more workers' compensation benefits after September 22, 2005. He testified that since December 2003 he receives \$1,787 per month as social security disability income and \$1,115 per month from the union as long term disability benefits. He testified that he was working towards retirement after 25 years and expected to receive \$2500 a month, however since he did not make his 25 years the amount of his pension dropped.

During cross examination the employee agreed that since 2005 he has not looked for any employment or other training. However, despite any health problems or concerns he had prior to June 6, 2003, he had no restrictions; he had no limitations that affected his job. He indicated that he had no restrictions as to bending stooping walking or sitting, was not taking any prescribed medications or over the counter medications for pain-he could do his job as required. He indicated that all of his problems with his legs, feet, back, fainting and bladder concerns started after he hurt his back in 2003 and following the surgeries for that accident.

Mr. Tilley testified that he received additional testing and evaluations in the form of an FCE, and multiple interviews and evaluations by Susan Shea, Dr. Cohen and Jim England. When questioned about the FCE report, he disagreed with its content stating that he said he was on disability, not that he wanted to stay on it. He testified that he is aware that Mr. England said he could do some jobs. When questioned about some letters concerning Catalyst (Employer-insurer Exhibits 3 and 4), Mr. Tilley indicated he remembers a discussion about putting a computer in his home but denies he ever received a job offer.

Mr. Tilley confirmed that he received unemployment compensation but he did not have to go out and fill out applications for a job. He testified that unemployment was aware of his restrictions and continued to pay him benefits.

The Court observed the employee during the trial. During cross examination, the Second Injury Fund brought to his attention the employee's posture during trial noting that the employee shifted positions in his chair, squirmed around, sat with his arms on the arms of the chair, stood up a couple of times, that he favored his left leg and that when he stood up he had to gather himself up to get going. Mr. Tilley responded by stating that he had none of these problems prior to his accident and his surgeries. He says all of the things he does, including pushing on the arms of the chair with his arms are done to try to help the pain in his back and legs. Mr. Tilley testified that he took pain pills before coming to trial but he still feels the pain.

Mr. Tilley testified that he paid \$3,973.46 out of pocket for medical care and he would like that money to be paid back to him.

### **Testimony of Linda Tilley**

Ms. Tilley testified that she has been married to Kenneth Tilley since 1981. She testified that she retired fourteen years ago and receives retirement and social security income, but is dependent on her husband for support. She testified that prior to his accident her husband was active and now he is not. She indicated that her husband is no longer able to do the activities that he use to such as hunting, camping and vacationing

### **Medical Evidence re: back surgeries**

On June 6, 2003, the employee was unloading canvas rolls which weighed 50 to 160 pounds. He twisted his back when he picked up one of the heavy rolls and felt a "pop" in his back. He then felt a "hot wire" sensation down his left leg. He finished work that day and went to the St. Francis Medical Center emergency room the next day. He was given a shot and some pain pills. He was sent to Dr. Critchlow who served as the company doctor for Holland. Dr. Critchlow prescribed pain medication, mentioned the possibility of disc damage, and ordered an MRI. The employee was referred to Dr. Cheung who noted the MRI showed disc fragments behind the body of L5 and in the L5/S1 foramen. He diagnosed compression of the L5 and S1 nerve roots and recommended surgery. On June 24, 2003, Dr. Cheung removed the disc fragments and performed a unilateral left side L5 laminectomy with L4/5 and L5/S1 discectomies. Dr. Cheung continued to treat the employee until October 17, 2003, when he indicated the employee was at maximum medical improvement. Dr. Cheung gave a permanent 70-pound lifting restriction and noted ongoing complaints of bilateral foot numbness when the employee sat in a chair which he diagnosed as probable nerve damage.

On August 30, 2004, the employee was seen by Dr. Park due to ongoing left leg and low back pain which had not improved since the June 2003 surgery. Dr. Park suggested another MRI. On December 17, 2004, the employee returned to Dr. Cheung who also noted the ongoing back and left leg complaints and recommended an MRI. A January 14, 2005, MRI showed a prominent L4/5 disc bulge with moderate intrusion into the spinal canal. On January 18, 2005, Dr. Cheung noted complaints of left leg pain below the knee with periodic whole leg numbness and low back pain and recommended a myelogram. A February 10, 2005, CT myelogram showed L4/5 instability with an L5 laminar fracture which extended to the facet. On March 28, 2005, Dr. Park performed a second surgery; a left-side L4/5 and L5/S1 redo laminotomy and

microdiscectomy with an L4/5 and L5/S1 interbody fusion with spacers and segmental fixation with pedicle screws and bone graft. Following the surgery, the employee experienced three episodes of complete syncope and was hospitalized from April 11 through April 22, 2005. The employee continued treatment with Dr. Park through September 22, 2005. At that time, Dr. Park released the employee and gave permanent restrictions based upon the employee's condition and a September 16, 2005, functional capacity evaluation (FCE). The permanent restrictions were no lifting over 15 pounds, standing one to four hours in an eight hour work day, sitting six to eight hours in an eight hour work day, no climbing, and only occasional bending, squatting, twisting, reaching overhead, and pushing/pulling of 15 pounds or less. On December 8, 2005, Dr. Park rated the employee's low back disability at 30% of the body as a whole (BAW).

Mr. Tilley underwent an FCE examination on September 16, 2005. The report indicated that the employee gave consistent to maximum effort. In addition it was reported that the employee's scores and tolerances are likely near his true work capacity. The tester concluded that Mr. Tilley is employable on a full time basis as he could drive an automatic vehicle for light delivery. The employee's pain levels were reported 3/10 prior to the test and 5-6/10 after the test. Mr. Tilley testified that he took two Hydrocodone pills shortly before the testing.

### **Testimony of Rating Evaluators**

Raymond F. Cohen, M.D.

Dr. Cohen originally saw the employee on April 20, 2004 and reviewed treatment records to that point. He performed a physical examination. At that time Mr. Tilley reported complaints of:

1. Pain in low back.
2. Charley horse feeling in left thigh.
3. Numbness in left foot.
4. Difficult to walk.
5. Any activity increases back pain.
6. Difficult to pick up anything heavy.
7. Difficult to sit.
8. Has to constantly stretch.
9. Not able to get in and out of tractor trailers.
10. Difficult for him to push the clutch.
11. Mr. Tilley was on social security at this time.

Dr. Cohen performed a physical examination and found:

1. Surgical scar on back.
2. Tenderness on palpation over low back.
3. Low back pain with range of motion testing.
4. 20-25% loss of lumbar motion in all directions.
5. Straight leg was negative.
6. Decreased left ankle reflex.
7. No weakness in legs was noted.
8. Some sensory nerve root loss at S1 nerve distribution.

His diagnosis was:

1. Status post lumbar surgery for disc herniation at the left at L5-S1
2. Left lumbar radiculopathy.

At that time, he recommended that Mr. Tilley be treated by a pain specialist for ongoing complaints. He found the employee to be permanently totally disabled from the primary injury. His first evaluation was prior to the employee's back fusion surgery.

Dr. Cohen saw the employee a second time on March 30, 2006, and reviewed additional treatment records which included the records from the second surgery and follow up treatment. In addition he had the FCE report and the report of Susan Shea. Dr. Cohen testified that he took an updated history and learned that:

1. The employee 61.
2. He was unemployed and on social security.
3. He continued to have back pain and treated with Dr. Park.
4. In April 2005 Dr. Park did a lumbar fusion at L3-4 with hardware.
5. After surgery the employee lost consciousness due to a lumbar injection.
6. After surgery the employee had loss of bladder function and was taken to St. Louis-had a catheter for two months and continued problems.
7. The employee reported he was released to return to work with a lifting restriction of 15 pounds and no bending, stooping, twisting or climbing.
8. The employee reported that after the last surgery he had slight decrease in back pain and the numbness in left leg was better but symptomatic.
9. He can ride in a car for 30 minutes.
10. He will have to get up due to numbness in left leg.
11. At night he is up 10-12 times due to the pain.
12. At is constantly tired during the day.
13. He has to lie down to take a nap in the day.
14. He has numbness into the right leg affecting toes.
15. He takes Hydrocodone for pain.
16. He has to urinate immediately at night.
17. The employee says he recovered from his earlier bladder surgery.
18. Due to back pain he has difficulty with lifting or carrying things or do exercise-if he does this he has constant soreness in back for next 2-3 days.
19. He says it feels like he loses circulation down his left foot from the knee.
20. It is hard to go up and down steps due to back pain-one step at a time.
21. The employee had a past history of left knee surgery.
22. Dr. Park gave restrictions of 15 pound lifting limit and no bending, stooping, twisting or climbing.

After this 2006 exam time Dr. Cohen provided additional diagnoses of

1. Status two lumbar surgeries-disc herniation at L5-S1 and fusion at L4-5 and L5-S1.
2. Failed lumbar back syndrome.
3. His left leg was not really helped a lot.
4. The employee started having right leg pain.

Dr. Cohen testified that the employee's back was a little better as far as pain but it did not help his function/actually his function was worse as far as effects on sleeping, and the right leg symptoms.

After his first examination in 2004, Dr. Cohen opined that his above diagnoses are from Mr. Tilley's injury at work on or about June 6, 2003, and are the substantial factor in his injury as well as disability. In addition he opined that the treatment he received was medically necessary and reasonable and that Mr. Tilley should be followed by a pain specialist with medications and treatment for lumbar and leg pain for the remainder of his life. Dr. Cohen further testified that the employee has a 50% permanent partial disability of the whole person at the lumbar spine, he has restrictions of no work in which he does any repetitive bending, squatting, kneeling or stooping, he should not lift more than ten pounds, he should not do any prolonged sitting or walking, no ladder work, climbing, or walking on uneven surfaces, additionally the employee is permanently and totally disabled and not capable of gainful employment.

After his 2006 examination Dr. Cohen updated his opinions and testified that his above diagnoses are as a direct result of the injuries that the employee sustained at work on June 6, 2003 and that work is a substantial factor in his disability. He also testified that the treatment that he received up to this point was medically necessary and reasonable and that the employee is going to need to be on pain medications for the rest of his life. He further testified that Mr. Tilley is permanently and totally disabled and not capable of gainful employment from his work injury.

On cross examination Dr. Cohen agreed that he had not seen the report of Mr. England and further agreed that if there was a job that is within restrictions, he would tell the person to try to do it. He further agreed that prior to his back accident Mr. Tilley did not have any restrictions related to any pre-existing conditions or injuries-he had no work restrictions and prior to June 2003 there were no permanent restrictions of any kind.

Dr. Cohen testified that the restrictions that he recommended all related to the employee's back problem and that Mr. Tilley is permanently and totally disabled from the back accident and aftermath.

Susan Shea

Ms. Shea originally met with the employee in August 2004 as Mr. Tilley's attorney hired her to determine his employability. After an interview and review of medical records to that point, she opined that he was unable to perform substantial gainful activity on a regular basis and was not a candidate for vocational rehabilitation. She acknowledged the employee worked with no restrictions before the primary injury and was no longer able to perform physical work because of back and leg symptoms. Ms. Shea testified she considered the following factors in support of her opinion that Mr. Tilley was not employable in the national economy:

1. His whole career he did physical work that he was not now able to perform.
2. He is at an age where it would be difficult to adjust to new work.
3. His transferable skills would not transfer to lighter work that he could perform.
4. The employee said he had trouble with driving due to his inability to control his right leg.
5. The employee had a degree of pain that would hinder or presumably preclude acceptable work performance.
6. Moderate to severe pain would preclude work even if he could return.
7. His pain is consistent-increases mistakes, an unacceptable pace, poor interaction with peers, increased absenteeism would provide a hindrance and disincentive to any typical employer.

Ms. Shea saw the employee a second time on June 14, 2007, and reviewed additional medical records. She again stated the employee was unemployable in the open labor market and listed his low back and leg problems and syncope episodes to support this opinion. She reiterated these opinions in her February 22, 2008, sworn deposition.

Ms. Shea testified she reviewed the report of Jim England stating the employee could do some kind of work. She disagreed based on the restrictions that were provided by the doctors, based on what the employee told her about his ability to sit and stand etc. and his urinary problems. She also testified that she believed the employee's pain factor would preclude any of these positions. She testified that we have a man who is about 62, has had two back surgeries, urinary complications, diabetes, hypertension, periods of syncope (fainting), hypertension, he could fall- "I wouldn't hire him" Ms. Shea further testified that it is a combination of the employee's pre-existing problems and the work accident that make him permanently and totally disabled. However on cross examination she agreed that Mr. Tilley was doing his full duties of his job without any restrictions from any prior injury or condition. She further agreed that the syncope, urinary tract infections, bowel urgency, low back pain, leg pain-all of those symptoms occurred after June 6, 2003. She also reported that she found Mr. Tilley to be sincere in his representation of his abilities and his pain-she found him to be credible.

James M. England Jr.

The employer-insurer employed the services of Mr. England for a vocational opinion. He prepared an April 30, 2007 report and testified by deposition on June 4, 2008. He performed what is called a records review. Mr. England testified that it was preferable to interview the employee personally, and he would have interviewed Mr. Tilley had he been available. He indicated he was provided with medical records, the employee's deposition, and Susan Shea's initial report. He further indicated that he saw her addendum prior to his deposition. He indicated that his purpose was to determine if the employee was employable in the open labor market.

In arriving at his conclusions, Mr. England considered the restrictions of Dr. Cheung, Dr. Park and Dr. Cohen and the employee's personal history regarding the accident and health problems. He indicated that he also considered criteria regarding the employee's employment in the open labor market, the employee's transferable skills and his age and education. He also considered

the findings of the FCE which indicated that the employee could perform light level work activity.

Mr. England testified that “I felt based on a review of the overall information and considering the various doctors’ restrictions that he would still be able to perform entry level service employment and that he could compete for that.” He further testified Mr. Tilley is hireable and employable.

Mr. England acknowledged the employee would not be able to return to driving a truck based on his restrictions. But, he thought the employee would qualify for a variety of entry-level service employment, such as security, cashier, and light assembly, courier, or cab driver positions. He did not believe the employee to be totally disabled from all employment and recommended sedentary to light employment.

Mr. England testified that the system can actually penalize a person by going back to work as they may end up with less income then they had by not working. He gave social security as an example indicating that a person needs to be motivated to return to the job market and be employable—a person’s financial situation can be a factor on whether a person desires to work.

Mr. England acknowledged that Mr. Tilley had limitations for employment due to his age his education and vocational history. He also agreed that the employee’s back, leg and associated pain issues all appear after the June 6, 2003 accident and that he had no permanent restrictions from any matters prior to that time. Mr. England also testified that if pain is severe enough it can be a hindrance to employment.

## **RULINGS OF LAW-**

### **Past Medical Bills**

The employee is requesting that he be reimbursed \$3,973.46 in pre-existing medical bills. He has presented Employee Exhibit R in support of his position. The employer-insurer has challenged the payment of these bills on the issues of authorization, reasonableness, necessity and causal relationship.

The employee testified that the medical records of Dr. Landau indicate the medical bills that relate to Syncope are related to the accident or surgery resulting from the accident.

The Court denies the employee’s request for reimbursement for these bills as the employee has not met his burden of proof on this issue. Temporarily speaking the care occurred shortly after the employee’s last back fusion surgery however the employee did not provide reliable evidence that the medical care in question was either authorized or was provided after a denial of care from the employer-insurer. Under the evidence presented in this case the employer-insurer is not ordered to reimburse the employee for past medical bills as claimed in Employee’s Exhibit R.

### **Future Medical Care**

The employee is asking that the Court award him benefits as future medical care. The only direct evidence that was presented on this matter was the testimony of the employee as to the pain and problems he has due to his accident and resulting treatment and the testimony and opinions of Dr. Cohen offered by the employee. The employer-insurer did not present any medical testimony to contradict the opinions of Dr. Cohen. Dr. Cohen's testimony was found to be credible on the issue of future medical care.

Dr. Cohen testified that the employee will need pain medications for the rest of his life. The employee testified that he is in pain and takes 1 to 4 Hydrocodone pills per day for pain depending on the severity of his pain. He also takes Neurontin for nerve damage.

The employer-insurer is ordered to provide future medical care to the employee for the rest of his life in the form of medication to deal with the medical problems caused by the accident or resulting medical care. The Court intends that Hydrocodone and Neurontin be included as part of this ongoing care. In addition, the employer-insurer shall pay for any reasonable medical appointments with a physician for the purposes of monitoring or controlling the employee's use of pain medications.

### **Permanent Total and Temporary Total Disability**

Section 287.020.7 RSMo. provides as follows: The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. **Kowalski v. M-G Metals and Sales Inc.**, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. **Reiner v. Treasurer of the State of Missouri**, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". **Brown v. Treasurer of the State of Missouri**, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. **Reiner** at 365. See also **Thornton v. Haas Bakery**, 858 S.W.2d 831,834(Mo.App.1993).

The employee is requesting that the Court find that he is permanently and totally disabled under the evidence in this case. There is no question that Mr. Tilley had a serious injury and received extensive medical care due to his accident. It is also obvious by his work history, by his testimony and the evidence in this case that any pre-existing medical problems or conditions that the employee had prior to June 6, 2003 were not disabling in any manner. As the evidence indicates the employee was performing the entire requirement of his jobs, without exception, prior to June 6, 2003. It is only after his accident and the surgeries that resulted from that accident that the employee could not perform the requirements of his job. It is only after June 6,

2003 that any doctor placed any permanent restrictions on Mr. Tilley's physical abilities. It is only after June 6, 2003 that Mr. Tilley was required to take medications such as Hydrocodone and Neurontin to deal with his physical problems.

The Court found the employee's testimony to be credible and accepts his testimony regarding his physical limitations and his statement that he is not employable in the open labor market in any capacity. The Court accepts his statement that he is permanently and totally disabled. This position is supported by the most credible evidence in this case.

Other evidence on the issue of permanent total disability is derived from the testimony of Dr. Cohen, Susan Shea and Mr. England. The Court finds the combined testimony of Dr. Cohen and Susan Shea to be more credible than the testimony of Mr. England. In addition, the Court found the testimony of Dr. Cohen to be more credible than the testimony of Susan Shea on the issue of the source of the permanent total disability.

Mr. England opined that the employee could not return to his old job but suggested that he could perform some light duty jobs. The employer-insurer relies on this opinion suggesting that they are only liable for permanent partial disability benefits. The Court finds no merit in this position. The quality and reliability of Mr. England's opinion in this case is hampered by the fact that he did not conduct a personal interview with the employee. Due to this fact he was not able to personally see the employee and make any personal assessment of the employee's physical limitations or the amount of discomfort and pain that he endures. From past experience this is an important component of Mr. England's assessment in any case. The Court does not find credibility in his statement that Mr. Tilley is employable in the open labor market in a light duty capacity or any other capacity. As Mr. England testified, pain can be a hindrance to employment.

Susan Shea saw the employee twice and found that the employee was permanently and totally disabled but indicated that it was from a combination of his disabilities that existed before June 6, 2003 and the disabilities that occurred as a result of the June 6, 2003 accident.

Dr. Cohen saw the employee after the surgery with Dr. Cheung and again after the surgery with Dr. Park. The employee received additional care after Dr. Park's fusion surgery on March 28, 2005. Shortly thereafter is when he had complications due to Syncope and the new urinary problems. The Court has set out the findings, assessments and opinions of Dr. Cohen. Based on his assessments, he testified that the employee was permanently and totally disabled and is unemployable in the open labor market. In addition he opined that the treatment Mr. Tilley received was medically necessary and reasonable. He was making this determination including the care that the employee received for Syncope and urinary problems that began shortly after Dr. Park's back fusion surgery. The Court finds the testimony of Dr. Cohen to be the most credible on the issue of permanent total disability.

To the credit of all of the parties, they made every effort to provide the evaluating experts with all of the records that were available that dealt with the treatment etc. that the employee received. The employer-insurer did not present evidence from a medical evaluator. As always, the employer-insurer attempted to discredit the employee's experts due to the fact that they were

hired by the employee. As always, the employee attempted to discredit the employer-insurer experts due to the fact that they were hired by the employer-insurer. The Court on the other hand considers the quality of evidence. The Court evaluates all of the opinion evidence from each expert, compares that to the medical records from the treating physicians, considers the testimony of the employee, looks for common sense, consistency and credibility, considers the law and then makes a determination on whether the employee has carried the day on his/her burden of proof. The Court finds that the employee has met his burden of proof on the issue of permanent total disability. The Court's own observations of the employee's appearance and actions in the courtroom are supported by the medical record and opinions in this case. Due to his present condition, the employee is not employable in the open labor market. No employer is likely to hire him in his present physical condition and expect him to do the work that he was hired for. The Court finds that due to the employee's medical condition which occurred as a result of his June 6, 2003 accident, he is not competent to compete in the open labor market and is permanently and totally disabled. The Court additionally finds that the employee's permanent total disability resulted from his accident of June 6, 2003, and did not result due to a combination of the results of the accident of June 6, 2003 and any accident or physical condition that existed prior to June 6, 2003.

The employee is asking that he receive \$48,699.00 in temporary total disability payments covering the period from October 18, 2003 to March 27, 2005. Generally this is the period of time after Mr. Tilley was released by Dr. Cheung from his first surgery (October 17, 2003), and when Dr. Park provided care which resulted in the back fusion surgery. The employee claimed that he was not able to return to work due to ongoing persistent low back and leg pain problems. In addition, the employee testified that the reason he went to Dr. Park in the first place was due to the fact that he had continued back pain etc. that never went away after the first surgery. In substance he testified that he could not go to work doing anything. In addition the employee testified that his employer would not let him return to work with any restrictions. It is certainly reasonable that Dr. Park's finding and subsequent fusion surgery support the employee's position that the need for more medical care did not end when Dr. Cheung completed the surgery or when Dr. Cheung released him from further care. There is no evidence of any intervening accident.

The employee has the burden of proving entitlement to temporary total disability. Total disability has been defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged in at the time of the accident. The purpose of temporary total disability is to cover the healing period and is not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after his condition has reached the point where further progress is not expected or in other words when he achieves maximum medical improvement. **Boyles v. USA Rebar Placement, Inc.**, 26 S.W.3d 418 (Mo. App. 2000).

While the law allows temporary total disability compensation to be based on the employee's testimony alone, generally there is testimony of a physician indicating that the employee is not able to work. The employee had no such opinion in this case-no doctor testified that the employee was unemployable in the open labor market in the questioned period. Mr. Tilley's

evidence that he could not work due to pain etc. that resulted from the first back surgery is in competition with his testimony that he filed for and received unemployment compensation for 26 weeks. Mr. Tilley did not provide any evidence as to the period for which he received unemployment compensation or how much money he received. The employer-insurer also did not produce any evidence covering these matters either.

The Court finds that the employee has met his burden of proof that he is entitled to some amount of temporary total disability compensation. The Court further finds that the employee was not employable in the open labor market in the period from October 18, 2003 to March 27, 2005. The employer-insurer is therefore ordered to pay temporary total disability compensation to the employee for the questioned period as required by law. However, under Section 287.170 RSMo., an employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation. Under the provisions of this section the employer-insurer is entitled to credit for any money that the employee received as unemployment compensation. It was the employee who testified that he received unemployment compensation for 26 weeks. The employee should not be able to receive unemployment compensation and temporary total disability benefits for the same period. Any such unemployment compensation payments paid to the employee during the period October 18, 2003 to March 27, 2005 should be credited to the compensation owed by the employer-insurer.

The parties stipulated that the employer-insurer terminated paying benefits to the employee on September 22, 2005. As the Court has found that the employee is permanently and totally disabled, the Court orders the employer-insurer to begin paying permanent total disability compensation payment to the employee as of September 23, 2005 at the rate of \$649.32 per week. It is the intent of the Court that the employer-insurer pays a onetime lump sum payment to the employee up to February 18, 2009, and then to make weekly payments of \$649.32 as are required by law.

## **PPD**

The Court has ruled that the employee is permanently and totally disabled due to the accident of June 6, 2003, in and of itself, and that the employer-insurer is responsible to provide permanent total disability employment benefits to the employee for the remainder of his life as provided by Chapter 287 RSMo. The Court specifically rejects the position that the employee was permanently totally disabled due to a combination of any disabilities he had prior to June 6, 2003 and the disability resulting from the accident of June 6, 2003.

As the employer-insurer is responsible for permanent total disability compensation, the employer-insurer has no responsibility to pay permanent partial disability benefits.

## **Liability of the Second Injury Fund**

Based on the Court's ruling that the employer-insurer is liable for permanent total disability benefits stemming from the June 6, 2003 primary injury alone, there is no assessment of any

alleged preexisting disabilities and no liability on the part of the Second Injury Fund for either permanent partial or permanent total disability.

### **Schoemehl Dependency**

The employee is asking that the Court make a decision whether Linda Tilley, the wife and dependent of Kenneth H. Tilley, the employee is precluded as a party to survivor benefits under the Schoemehl analysis.

He cites Section 287.240 RSMo., and three cases in support of his position: **Schoemehl v. Treasurer of State of Missouri**, 217 S.W. 3d 900 (Mo. Sp. Ct. 2007), **Taylor v. Ballard R-II School District**, 274 S.W. 3d 629 (Mo. Ct. App. 2009) and **Bennett v. Treasurer of State of Missouri**, 271 S.W. 3d 49 (Mo. Ct. App. 2008). The Court looked at these decisions as well as the decision in **Strait v. Treasurer of Missouri**, 257 S.W. 3d 600 (Mo. En Banc).

The employee was injured on June 6, 2003 while working for Holland. He filed an original claim with the Division of Workers' Compensation on November 6, 2003. The employee filed an amended claim with the Division of Workers' Compensation on July 21, 2004. The employee filed another amended claim on November 1, 2007. It is in the last amended claim in paragraph 10 Additional Statements that the employee added the following language "Employee/Claimant's dependent and spouse Linda Tilley is added as a party under section 287.230.2 RSMo 2000 and Schoemehl v Treasurer of the State of Missouri". The employer-insurer filed their answer to the employee's claim on December 9, 2003. Another answer was filed on August 6, 2004. They filed an amended answer on November 13, 2007.

Under the language in **Bennett**: "Therefore, under HB 1883 and the Missouri Supreme Court's later decision in *Strait*, recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in *Schoemehl*, and June 26, 2008, the effective date of HB 1883"; this case was pending no later than November 6, 2003 when the employee filed his amended claim. The employee amended his claim adding Linda Tilley no later than November 1, 2007. Those dates fall between January 9, 2007 and June 26, 2008 and this case is pending.

Under Section 287.240 RSMo., a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or part, upon his wages at the time of the injury. Under Section 287.240 RSMo., a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support. The only evidence on this matter was the testimony of the employee and his wife Linda Tilley. They indicated that they were married and that Linda Tilley was dependent on the employee for support. This testimony was uncontradicted.

The Court finds that Linda Tilley, the wife of the employee, was a conclusively presumed total dependent at the time of the employee's accident and injury and remained in this status at the time of trial on February 18, 2009.

### **ATTORNEY'S FEE**

M. Mercedes Fort, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST**

Interest on all sums awarded hereunder shall be paid as provided by law.

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

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Pearson  
*Division of Workers' Compensation*