

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

Injury No.: 03-059218

Employee: Eric Gillespey
Employer: Cassens, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 9, 2013. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued August 9, 2013, 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 11th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Eric Gillespey	Injury No.: 03-059218
Dependents:	N/A	Before the
Employer:	Cassens, Inc.	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O Broadspire Services.	Jefferson City, Missouri
Hearing Date:	May 9, 2013	Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

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 20, 2003
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
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 occurred or occupational disease contracted:
Claimant was struck in the head by a van door.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Head/Body as a Whole
14. Nature and extent of any permanent disability: 20% PPD
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$4,876.51

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? \$1,822.75
- 18. Employee's average weekly wages: \$1,100
- 19. Weekly compensation rate: \$649.32 / \$340.12
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$1,822.75
3 5/7 weeks of temporary total disability:	\$2,411.76
80 weeks of permanent partial disability from Employer:	\$ 27,209.60

22. Second Injury Fund liability: Open

TOTAL: \$31,444.11

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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: Mark Bahn

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Eric Gillespey	Injury No.: 03-059218
Dependents:	N/A	Before the
Employer:	Cassens, Inc.	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O Broadspire Services.	Jefferson City, Missouri
		Checked by: KOB

PRELIMINARIES

The matter of Eric Gillespey (“Claimant”) proceeded to final hearing on May 9, 2013. Attorney Mark Bahn represented Claimant. Attorney David Green represented Cassens Inc. (“Employer”), a self-insured entity. The Second Injury Fund is a party to the claim, but due to extenuating circumstances, the claim is left open.

The parties stipulated that on or about June 20, 2003, Claimant sustained an accidental injury arising out of and in the course of employment when a van door struck Claimant on the head as he exited the van. The parties agreed Claimant was an employee of Employer, venue is proper in the City of St. Louis, Employer received proper notice, and Claimant filed his claim within the time required by law. At the relevant time, Claimant earned an average weekly wage of \$1,195.05, which results in a rate of compensation of \$649.32 to temporary total disability (“TTD”) benefits, and \$340.12 for permanent partial disability (“PPD”) benefits. Employer paid no TTD benefits, but did pay medical benefits totaling \$4,876.51.

The issues to be determined are:

1. Is the accident the cause of the medical condition for which Claimant seeks compensation;
2. Is Employer responsible for payment of medical expenses;
3. Is Employer responsible for payment of TTD benefits from June 26, 2003 to July 22, 2003, and/or September 16, 2006 to November 1, 2006; and
4. What is the nature and extent of Claimant’s permanent partial disability?

FINDINGS OF FACT

Claimant is a fifty-five year old man who earned his GED while in the military. He worked for Employer from February 1996 to September 2008. In 2003, Claimant was working full-time as a yard worker. His duties included driving vehicles off an assembly line onto a parking lot.

On Friday, June 20, 2003, while talking on a cell phone with his wife and getting out of a panel van, a co-employee slammed the van door, striking his head and knocking him back inside the van. He experienced "serious headache and neck pain," and later reported seeing stars, but initially declined Employer's offer of medical care. Over the weekend, he experienced headaches, nausea and loss of focus. He could not recall the name of his daughter's boyfriend. Upon his return to work Monday morning, Claimant requested treatment.

In response to Claimant's request for treatment, Employer referred him to Barnes Care in Fenton, Missouri on June 24, 2003 where his chief complaint was pain in his neck and headaches. Barnes Care records indicates "no numbness or loss of feeling in arms or hands...had no LOC...says he was dazed after injury...no visual problems...no dizziness." The medical history taken at that time indicated no prior headaches or neck problems.

X-rays taken at BarnesCare on June 24, 2003 indicated a normal skull and degenerative spondylosis along the anterior inferior end plate of C5 and C6 with adjacent intervertebral disc space narrowing at C6-7 and very minimal narrowing at C5. The diagnosis at that time was strained neck and mild frontal head contusion. BarnesCare released Claimant to return to work without restrictions, and discharged him from care on June 25, 2003.

Claimant saw his personal physician, Dr. Tim E. Baker, on June 26, 2003 complaining of "headaches and dizziness....some short term memory loss." Dr. Baker's physical exam reflected "some memory loss...some cognitive impairment," and his diagnosis was a closed head injury. He took Claimant off work. Washington Medical Group charged \$57.00 for the June 26, 2003 date of service. An MRI of the head taken at St. John's Mercy Hospital on June 27, 2003 revealed findings consistent with a small venous angioma within the right cerebellar hemisphere, and an otherwise normal study. The charges from St. John's for the MRI were \$1,189.75, with an additional charge of \$284.00 from West County Radiological Group (\$1,473.75 total charges for June 27th date of service).

On June 27, 2003, Counsel for Claimant demanded additional treatment and TTD, and warned the insurance adjuster that there was "reason to believe that [Claimant] may have suffered a brain contusion." The reply from Employer's counsel, thirteen days later, was a complete denial of the additional medical treatment and TTD.

At his next visit on July 8, 2003, Claimant's complaints included continuing headaches; dizziness, ear ringing, memory loss and trouble hearing.¹

On July 22, 2003, Claimant reported to Dr. Baker that he was feeling better and wanted to go back to work. Dr. Baker authorized Claimant to return to work, and BarnesCare approved Claimant to work, which he did on July 23, 2003. Washington Medical Group charged \$42.00 for the July 22, 2003 date of service. Claimant returned to work performing his normal duties.

¹ According to Exhibit 10, A Notice of Lien from Claimant's Insurance Fund, Dr. Albert Marchiando generated charges of \$190.00 on July 18, 2003. Presumably, Dr. Marchiando evaluated some diagnostic tests associated with Claimant's work injury, but because Dr. Marchiando's records are not in evidence, there is no basis on which to award the charges incurred.

Beginning sometime in early 2004, Claimant began to experience an increase in the frequency of his headaches, and when he complained, Dr. Baker referred Claimant to Dr. Peebles, a neurosurgeon. On May 10, 2004, Dr. Peebles took a history, performed an exam, and issued a report. Dr. Peebles concluded that Claimant had chronic headaches "which were likely at least in part due to a post concussive etiology." He noted the increasing symptoms over time were atypical and additional diagnostic testing was unnecessary, but suggested several options for management of the pain with prescription drug therapy. The charge for Dr. Peebles' exam was \$250.00.

Claimant did not receive any relevant medical treatment until January 27, 2006, when he complained to Dr. Baker of severe headaches for a couple of weeks. Dr. Baker diagnosed "recurrent" headaches and prescribed medication. The charges with this visit were \$57.00.

On March 28, 2006, Dr. Shawn Berkin performed an Independent Medical Examination ("IME"). He took a history, conducted an exam, and issued a report. Claimant complained of violent headaches every other day, migraines with blurred vision, photosensitivity and nausea, and 4/10 neck pain with stiffness. The final impression was: 1) Closed head injury; 2) Postconcussion cephalgia; and 3) Cervical strain. The work accident was the prevailing factor in causing these diagnose. He felt the resulting disability totaled 20% PPD of the body as a whole. Dr. Berkin opined that Claimant's status would not significantly improve from further medical or surgical treatment, although he did recommend conservative measures to help Claimant deal with his ongoing symptoms. Dr. Berkin's deposition was not submitted into evidence.

On May 19, 2006, Claimant presented to Dr. Anthony Guarino for treatment of his neck pain. On exam, Dr. Guarino found no spasm, trigger points or tenderness. He diagnosed cervical radiculitis and spondylsis. He found Claimant had a degenerative process in his neck with symptoms that appear to be coming from the aggravation of C7 bilaterally, and began a series of nerve root injections. Claimant did not get lasting relief.

Claimant consulted neurosurgeon Todd Stewart on or about August 24, 2006. The record of the initial office visit is absent from the Trial Record, specifically Exhibit L, which purports to be the records and billing of Dr. Todd J. Stewart, M.D., and is not fully certified. Claimant submitted to surgery on September 12, 2006, and in the "Indications for Procedure" section of the operative report, Dr. Stewart noted a two-year history of neck pain, which was "worse over the past five months." Dr. Stewart diagnosed right C7 radicuopathy, removed disc osteophyte complex at C6-7 and fused Claimant's neck (C6-7 ACDF). Claimant reported marked improvement in his symptoms.

Two doctors testified by deposition regarding their IME's and the opinions formed therein. Dr. Robert Margolis, testifying for Claimant, gave his expert opinion that the incident of June 20, 2003 was the substantial and prevailing factor in accelerating Claimant's cervical spine degenerative disease leading to the surgery performed by Dr. Stewart. Dr. Margolis assessed Claimant's PPD at 35% of the person as a whole. He further stated that Claimant's persistent unresolved headaches and memory problems, in which the work incident was a substantial factor, lead him to believe that additional evaluation and treatment if indicated was warranted. He felt that Claimant has still not reached maximum medical improvement for headaches and memory problems.

Dr. Daniel Kitchens evaluated Claimant on behalf of Employer. Dr. Kitchens has been a neurosurgeon since 1994. He performs cervical surgery and provides treatment for cervical spondylosis. Dr. Kitchens' diagnosis for the work injury was a mild concussion. Claimant should have reached maximum medical improvement approximately one month after the work accident. Dr. Kitchens testified that Claimant's work accident was not a substantial factor in the need for medical treatment from July 2003 to the present time.

Dr. Kitchens testified about Claimant's cervical spondylosis. He compared the radiographic studies from 2003 and 2006 that showed there was a worsening of Claimant's cervical spondylosis. This worsening of the cervical spondylosis would have been a natural event and would have occurred without trauma.

RULINGS OF LAW

Based on the findings of fact, my observations at hearing, the evidence of record, and the law of the State of Missouri, I find:

I. *Medical Causation*

In every workers' compensation case, the claimant has the burden of proof on all essential elements of the claim, including medical causation between the accident and the injury of which the employee complains. *Groce v Pyle*, 315 S.W. 2d 482 (Mo App W.D. 1958; *Goleman v MCI Transporters*, 844 S.W. 2d 463 (Mo App. W.D. 1992).² Speculation, conjecture or personal opinion cannot form a basis for an award of compensation in any area for required proof. *Tolle v Bechtel Corp.*, 291 S.W. 2d 874 (Mo. 1986). The claimant must prove that the accident was a substantial³ factor in causing the disability. *See, Cahall v Cahall*, 963 S.W. 2d 368 (Mo. App. E.D. 1998).

Furthermore, the element of causation must be proven by medical testimony, "without which a finding *for claimant* would be based on mere conjecture and speculation and not on substantial evidence." *Shelton v. City of Springfield*, 130 S.W. 3d 30, 38 (Mo. App. S.D. 2004) (citations omitted and emphasis added). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v Emerson Electric Co.*, 676 S.W. 2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v Shop 'N Save Warehouse Foods Inc.*, 855 S.W. 2d 460, 462 (Mo. App. ED. 1993); *Hutchinson v Tri-State Motor Transit Co.*, 721 S.W. 2d 158, 163 (Mo. App. 1986).

Claimant's cervical condition that necessitated surgery is not causally related to the work injury of June 20, 2003. I find Dr. Kitchens' opinion with respect to the alleged cervical injury to

² This is one of several cases cited in this Award in support of other principles of law not affected by the *Hampton* ruling, which overruled many workers compensation cases only with respect to the proper standard of review. *See Hampton v. Big Boy Steel Erection*, 121 S.W.3d 200, 224-32 (Mo. banc 2003). No further note will be made of such *Hampton* cases.

³ As the date of accident predated the 2005 statutory changes, a "substantial factor" is the appropriate standard, as opposed to the more stringent "prevailing factor" standard in post-2005 change cases.

be the most credible. He is best qualified by experience to opine as to spinal injuries. He reviewed the appropriate diagnostics and explained that Claimant's degenerative spinal condition worsened naturally, unaffected by the work injury. However, he had no opinion regarding the disability of the mild concussion Claimant suffered as a result of the work accident, or as to the cause of the headaches of which Claimant complains.

Dr. Berkin's opinion is consistent with Dr. Kitchen's opinion regarding the cervical spine. Dr. Berkin agreed Claimant was at maximum medical improvement for the cervical spine because he did not recommend any further treatment or surgery. However, unlike Dr. Kitchens, Dr. Berkin did have an opinion as to the cause, nature and extent of Claimant's head injury. He felt Claimant had a closed head injury, postconcussion cephalgia; and cervical strain. The work accident was the prevailing factor in causing these diagnoses. Only conservative measures were needed. He felt the resulting disability totaled 20% PPD of the body as a whole. I find Claimant was at MMI for the June 20, 2003 work injury as of the date of Dr. Berkin's examination, March 28, 2006.

I am not convinced by Dr. Margolis' opinion that work was a substantial factor in causing any cervical disability or the need for surgery. Claimant's suggestion that he had three years of continuous neck pain from the date of accident was not supported by the evidence, although he did have documented headache complaints. As to headaches, Dr. Berkin's opinion that Claimant reached MMI in March 2006 is more credible than Dr. Margolis' opinion that a decade after the work injury, Claimant needs treatment for his headaches.

In sum, I find the work accident of June 20, 2003 is the medical cause of Claimant's closed head injury with resultant headaches and blurred vision, photosensitivity and nausea. The work accident is not a substantial factor in or the medical cause of his degenerative cervical spine condition. The surgery was required to correct the degenerative spinal condition, not to cure and relieve any effect of the work injury.

II. *Medical Expenses*

Claimant seeks to recover past medical expenses. Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines as may reasonably be required after the injury or disability to cure and relieve [the employee] from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. *Shores v. General Motors Corp.*, 842 S.W.2d 929 (Mo. App. 1992); *Sheehan v. Springfield Seed & Floral*, 733 S.W.2d 795 (Mo. App. 1987); *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71 (Mo. App. 1983); *Hendricks v. Motor Freight Corp.*, 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care

provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. *Wiedower* at 74; *Hendricks* at 709.

I find Claimant was in need of medical treatment to cure and relieve the effects of his injury from the date of injury on June 20, 2003, to the date he reached MMI on March 28, 2006. Despite receiving a demand for treatment for Claimant's closed head injury and its consequences, Employer refused to provide reasonable and necessary treatment to cure and relieve from the effects of the injury. With such refusal, Claimant was free to incur charges for which Employer is responsible. The properly documented charges include \$1,473.75 total charges for a June 27 date of service, \$42.00 for a July 22, 2003 date of service, \$250.00 for Dr. Peoples' May 10, 2004 date of service, and \$57.00 for the January 27, 2006 date of service. All charges incurred after March 28, 2006 are unrelated to the June 20, 2003 work injury, and are not the responsibility of Employer.

III. *Temporary Total Disability*

Claimant seeks to recover TTD benefits for two separate periods of time, the first following the accident and the second following the surgery years after the accident. The purpose of a temporary, total disability award is to cover the employee's healing period. *Birdsong v. Waste Management*, 147 S.W.3d 132, 140 (Mo.App. S.D.2004). Temporary total disability awards should cover the period of time from the accident until the employee can either find employment or has reached maximum medical recovery. *Id.*

Claimant's physician took him off work from the June 26 to July 22, 2003, at which Employer also cleared him to return to work. Employer shall pay TTD for this period. No compensation is due for any other periods since Claimant's subsequent time loss was due to a non-work related surgery.

IV. *Permanent Partial Disability*

Claimant seeks to recover permanent partial disability benefits. Workers' compensation awards for a PPD are authorized pursuant to § 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." *Hankins Const. Co. v. Mo. Ins. Guar. Ass'n*, 724 S.W.2d 583, 587 (Mo.App.1986), *overruled on other grounds by Mo. Prop. & Cas. Ins. Guar. Ass'n v. Pott Indus.*, 971 S.W.2d 302, 306 (Mo. banc 1998). The amount of compensation to be awarded for PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in § 287.190.1. "Permanent partial disability" is defined in § 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." *Wiele v. Nat'l Super Mkts., Inc.*, 948 S.W.2d 142, 148 (Mo.App.1997). "[The fact finder] has discretion as to the amount of the award and how it is to be calculated." *Sapienza v. Deaconess Hosp.*, 738 S.W.2d 149, 151 (Mo.App.1987).. "It is the duty of the [factfinder] to weigh that evidence as well as all the other testimony and reach its *own* conclusion as to the percentage of the disability suffered." *Id.* (citation omitted).

Based on the substantial and competent evidence, the facts found, and the law of the state of Missouri, I find Claimant sustained permanent partial disability of 20% of the body as a whole due to the injuries in which the work accident was a substantial factor.

CONCLUSION

Employer is liable for medical expenses, temporary total disability, and permanent partial disability benefits as specified above. Employer is not responsible for any medical expenses or disability that arose after March 28, 2006, the date of MMI. The Second Injury Fund claim shall remain open. Attorney Mark Bahn is entitled to a lien of 25% for legal services.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation