

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

Injury No.: 07-079265

Employee: Brian Guyer
Employer: Express Pet Ford Company, Inc.
Insurer: Hartford Underwriters Insurance Company
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 October 18, 2010. The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued October 18, 2010, 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 7th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: **BRIAN GUYER** Injury No. **07-079265**
Employer: **EXPRESS PET FORD COMPANY, INC.**
Insurer: **HARTFORD UNDERWRITERS INSURANCE COMPANY**
Add'l Party: **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF
THE SECOND INJURY FUND**
Hearing Date: **AUGUST 17, 2010** Checked by: **NGA**

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: **August 16, 2007**
5. State location where accident occurred or occupational disease was contracted: **Buchanan 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? **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: **Employee was unloading a tanker-truck when a high pressure valve exploded hitting employee in the head and knocking him off the truck.**
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: **Head, left thumb and body as a whole.**
- 14. Nature and extent of any permanent disability: **Employee is permanently totally disabled.**
- 15. Compensation paid to-date for temporary disability: **\$6,431.73.**
- 16. Value necessary medical aid paid to date by employer/insurer? **\$22,184.45.**
- 17. Value necessary medical aid not furnished by employer/insurer? **None.**
- 18. Employee's average weekly wages: **N/A**
- 19. Weekly compensation rate: **\$357.32 / \$357.32**
- 20. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: **None**

1-4/7 Weeks of temporary total disability (or temporary partial disability) x \$357.32 = \$510.45

Permanent total disability benefits from Employer beginning September 26, 2008 x \$357.32 per week for claimant's lifetime.

22. Second Injury Fund Liability: **None**

TOTAL:

23. Future requirements awarded: **Such medical treatment as may be reasonable and necessary to cure and relieve the condition caused by claimant's injury of August 16, 2007.**

Each of said payments to begin **September 26, 2007** 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: **Michael A. Knepper.**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **BRIAN GUYER** Injury No. **07-079265**
Employer: **EXPRESS PET FORD COMPANY, INC.**
Insurer: **HARTFORD UNDERWRITERS INSURANCE COMPANY**
Add'l Party: **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF
THE SECOND INJURY FUND**
Hearing Date: **AUGUST 17, 2010** Checked by: **NGA**

ISSUES

Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

1. Are the conditions the claimant is complaining of medically causally related to claimant's accident;
2. Liability of the employer for future medical aid;
3. Nature and extent of claimant's disability;
4. Is claimant subject to a penalty for a safety rule violation under Section 287.120.5;
5. Liability of the Second Injury Fund.

STIPULATIONS

The parties stipulated that the agreed date of injury was August 16, 2007, not August 27, 2007.

The parties agreed that on August 16, 2007, Brian Guyer was an employee of Express Pet Food Company, Inc. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law and was fully insured by Hartford Underwriters Insurance Company.

The parties also agreed that on August 16, 2007, the claimant sustained an injury by accident arising out of and in the course of his employment. The parties further agreed that the correct rate of compensation is \$357.32 per week for temporary total disability, permanent partial disability, and permanent total disability. Compensation has been paid in the amount of \$6,431.73 representing a period of time from August 27, 2007 through September 9, 2007 and June 6, 2008 through September 25, 2008 for a period of 18 weeks. Medical aid has been furnished in the amount of \$22,184.45. The claimant is not asking for any additional past medical aid.

The parties also agreed that the employer had proper notice of claimant's injury and that the claimant has filed a timely claim for compensation.

Exhibits

Claimant offered the following exhibits which were admitted in evidence without objection, provided the depositions were admitted subject to objections contained in the depositions:

- A. Dr. Michael DePriest, MD, 12/93-11/18/01
- B. Dr. Thomas DiStefano, MD, 12/8/05-4/21/06
- C. Family Guidance Center, 2/10/09-4/28/09
- D. Family Guidance Center, 4/29/09-4/15/10
- E. Family Guidance Center, 4/29/10-5/3/10
- F. Heartland Health, 8/7/95-8/17/07
- G. Greg Horton, MD, 9/4/08-11/6/08
- H. KU Medical Center, 9/4/08-11-6-08
- I. MedClinic, 10/14/93-7/18/02
- J. Occupational Health Services, 8/21/07-9/28/07
- K. Occupational Health Services, 10/15/03-5/24/04
- L. Open MRI of St. Joseph, 1/31/05
- M. Orthopedic & Sports Medicine (Dr. Trease) 3/20/08-10/28/08
- N. Patee Market Health Center, 3/22/94-1/14/10
- O. Patee Market Health Center, 4/24/98-7/8/10
- P. P.T. Midwest Rehabilitation, 12/14/05-2/7/06
- Q. St. Francis Hospital, 1/11/06
- R. St. Joseph Foot Clinic (Dr. Larry Piper) 9/27/05-10/17/05
- S. C. Daniel Smith, DO, 1/4/94-9/27/05
- T. Cory Trease, MD, 1/14/94-3/20/08
- U. Deposition-Dr. P. Brent Koprivica 2/8/10 w/Exhibits
- V. Deposition-Dr. Allan Schmidt 11/5/09 w/Exhibits
- W. Deposition-Michael Dreiling 2/23/10 w/Exhibits
- X. 60 Day Submission-Dr. Sheldon Fleischman, DO, 8/26/09
- Y. Sheldon Fleischman, DO, Report 1/15/08
- Z. C.V. of Sheldon Fleischman, DO
- AA. Sheldon Fleischman, DO, Report 12/22/07
- BB. Claim for Compensation
- CC. Amended Claim for Compensation
- DD. Vocational Rehabilitation Records 2/7/02-11/7/05
- EE. Vocational Rehabilitation Records 7/28/08-12/23/09
- FF. School Records, Benton High School
- GG. School Records, Missouri Western University
- HH. Accommodations from Missouri Western University

Employer/Insurer offered the following exhibits which were admitted into evidence without objection:

- 1 Dr. Corey A. Trease 60 Day Submission
- 2 Deposition - Dr. Patrick Hughes 7/6/10
- 3 Deposition – Terry L. Cordray 7/12/10
- 4 ER Basic Safety Rules for Production Area
- 5 ER Employee Warning Notice
- 6 ER/EE Infraction/Violation Notice

The Second Injury Fund offered the following exhibits which were admitted into evidence without objection:

- 1 Employee 2/4/10 Deposition
- 2 Employee 9/19/08 Deposition

All objections contained in the admitted depositions are overruled unless otherwise noted.

Findings of Fact – Summary of the Evidence

The claimant testified in person. He is 36 years old. He is married and has three children. He and his family live with his parents. I found him to be a believable witness.

Mr. Guyer testified that he has a learning disability that stops him from learning how to read and following written instructions. He said this was an obstacle to him receiving employment. It severely limited his employment opportunities.

I agree with the claimant that he did have a pre-existing industrial disability but I do not believe it is necessary to assign a percentage of permanent partial disability as a result of the learning disability.

Terry L. Cordray, M.S., a vocational expert for the employer, tested the claimant and found that his IQ was 78, 3 points above being labeled “retarded”. He said the claimant was qualified for a sheltered workshop. This is not gainful employment.

The claimant is taking classes at Missouri Western University but Mr. Cordray says he does this with special assistance in taking notes and with special assistance in taking his tests. Mr. Cordray said “It is not realistic for the claimant to receive a degree. He has a high school degree but it is for special education. He had taken special education classes.”

Mr. Guyer testified that his accident actually occurred on August 16, 2007 not August 27, 2007. On that date, the claimant was operating a machine. He noticed that there was a tanker that needed to be unloaded. He attempted to unload this tanker. He said he had done this many times previously and that no one had told him not to unload it.

There was a pin that became unlocked that was under considerable air pressure. A hose struck the claimant above his right eye. This caused him to fall backward hitting his head on the dock. He was knocked unconscious and did not regain consciousness until later that day when he was

in the hospital. He suffered a closed head injury along with a right eyebrow laceration and a scalp laceration. The fall also caused him to break his right thumb.

The claimant alleges that he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the claimant must show that, given the employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Worker=s Compensation Act Atotal disability@ is defined as the inability to return to any employment. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The words Ainability to return to any employment@ mean that Athe employee is unable 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 Sale*, 631 S.W.2d 919, 922 (Mo.App. S.D. 1982). The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. *Messex*, 989 S.W.2d at 210. A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment *Gordon v. Tri-State Motor Transit*, 980 SW 2d 849, (Mo. App. 1995). There are many factors that may be considered in this assessment including a claimant=s physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. See *Tiller v. 166 Auto Auction*, 941, SW 2d 863 (Mo. App. 1997).

If a claimant is found to be permanently and totally disabled, it becomes a determination for the finder of fact to determine whether the claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the claimant's pre-existing injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at Section 287.220.1 R.S.Mo. By unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimants who, "at the time of the last injury, had some partial disability" Section 287.220.1 R.S.Mo. The administrative law judge is to consider the degree of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The employer's liability must be determined first, and the statute provides that the employer shall be liable only for the disability resulting from the last injury considered alone, in and of itself. The statute then provides if the compensation for which the employer at the time of the last injury is less than the compensation provided in the chapter for permanent and total disability, then, in addition to the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear that the last injury considered alone and of itself results in permanent and total disability, the employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. *Gassen v. Treasurer of the State of Missouri*, 134 S.W.3d 75 (Mo. App. W.D. 2004).

When these cases and the relevant statutes are applied to the facts of this case, in the event that claimant is found to be permanently and totally disabled and unable to compete in the labor market, based upon all of the evidence, the medical records, claimant's testimony at hearing, and

the medical and vocational testimony, it is clear that the permanent and total disability results from the 8/16/07 primary injury considered alone, in and of itself.

Brian Guyer testified that following his release from treatment by Dr. DePriest in 1994 for his right wrist DeQuervain's first dorsal compartment surgical release, he returned to his full time job working 40 hours per week performing heavy labor work with no restrictions. He made a good recovery from that surgery, and following his release from treatment and return to work, he never missed any time from work due to any problems with the right wrist prior to the primary injury. In addition, he never needed nor did his employer ever provide him with any help or accommodation with his work due to any problems with the right wrist. He never received any ongoing treatment for the right wrist, nor was he taking any prescribed pain medication for the right wrist before the 8/16/07 primary injury.

Mr. Guyer also sustained a fracture in his left hand at the base of the fifth metacarpal on 10/7/96, which was treated with closed management, without surgery. He is left handed. He testified that he made a good recovery from that injury as well. Following his release from treatment on the left hand, he returned to his regular full time job performing heavy labor with no restrictions. He testified that following his release from treatment, he never missed time from work due to problems with the left hand. In addition, he never needed nor was he given any help or accommodation with his work due to any problems with the left hand. He received no ongoing treatment on the left hand, nor was he taking any prescribed medication for the left hand prior to the 8/16/07 primary injury.

In addition to the two prior injuries, Mr. Guyer sustained an open fracture on his distal left ring finger which required surgery performed by Dr. DePriest. He testified that he had an excellent recovery from that surgery and once he was released from treatment, he returned to his regular full time job working 40 hours per week performing heavy labor work with no restrictions. Following his release from treatment, he never missed any time from work due to any problems with the left ring finger, nor did he ever need any help or accommodation with his work due to any problems from that injury. Further, he was not taking any prescribed pain medication for his left hand subsequent to his release from treatment nor did he receive any ongoing treatment for the injury prior to the primary injury.

Brian Guyer testified that following his release from treatment on the 8/17/03 foot injury, he continued to work full time at his regular job 40 hours per week performing heavy labor work without restrictions. Initially, he received a cortisone injection from Dr. Smith on 9/1/04, and he continued working until he underwent surgery on 1/11/06 performed by Dr. DiStefano, after which he missed approximately 6 weeks of work. Thereafter, claimant went to work for Express Pet Food Company working 40 hours per week, performing heavy labor work without restrictions. Following his release from treatment for the foot injury, claimant testified that he never missed any time from work due to any problems with the foot or his back. In addition, his employer never provided any help or accommodation with his work due any problems with the foot. Thereafter, he did not have any ongoing treatment for the foot, nor was he prescribed or taking any pain medication for the foot after being released from treatment. At that time he was still able to lift up to 200 pounds.

Almost immediately after his accident he began experiencing severe headaches 4-5 times per week for which he was prescribed Ultram by his treating physicians. He also testified that following his injury, his back pain worsened. Due to these problems with the head and back pain stemming from his injury, claimant had a difficulty sleeping through the night, and was therefore prescribed Seroquil for assistance in sleeping. However, he testified that he never had any problems sleeping through the night prior to his injury and never took any medication for sleep prior to the injury.

Currently, when he gets a bad headache, he has to lie down during the day and go to sleep for at least two hours to attempt to alleviate the pain. But he never had to lie down during the day and sleep for two hours due to pain prior to the 8/16/07 injury. In addition, he testified that prior to the 8/16/07 injury, he never had the type of headaches similar to the ones he has now subsequent to the injury. Before the injury, he was always able to get rid of a headache by simply taking a Tylenol. Currently, when he gets one of his debilitating headaches, his pain is a 12 on the 0-10 pain scale without his Darvocet/Hydrocodone, and starts from the scar on the back of his head to the front of his forehead.

Mr. Guyer testified that due to his headaches and increased irritability and moodiness following the 8/16/07 injury, he became depressed to the point that he sought treatment for his depression in February 2009 at which time he was placed on anti-depressant medication. However, he testified that he had never been depressed to that point prior to the 8/16/07 injury except for the time when he was incarcerated and put in a 72 hour hold at Fulton State Hospital, which was more of a situational depression. He testified that possibly with the exception of the time at Fulton, he was never prescribed anti-depressant medication before the 8/16/07 injury. Nor did he ever receive and psychological or psychiatric counseling prior to 8/16/07, with possibly the exception of the time at Fulton. Mr. Guyer testified that following the 8/16/07 injury he became angrier with people, had a hard time getting along with people, and he tended to isolate himself more. When he has a headache, he is unable to be around people as he is very irritable, and his ability to concentrate is affected. He testified that he tried to take a test at school when he had one of his headaches and he failed the test due to his inability to concentrate. He had anger management problems and difficulty concentrating and a hard time making reasonable decisions following the 8/16/07 injury; whereas, he did not have those problems prior to the injury. He testified that he felt it was the 8/16/07 head injury which had caused all of these problems.

Due to the residuals of the 8/16/07 injury and his worsened back pain, Claimant has difficulty sitting for extended periods; he is limited to sitting for only 30 minutes at a time. He is unable to stand very long and cannot walk very far due to his increased back pain stemming from the 8/16/07 injury. However, he testified that he did not have those problems prior to the 8/16/07 injury.

In addition to the head injury, Mr. Guyer testified that he injured his left hand in the 8/16/07 injury, and he is left handed. Initially, pins were placed in the left hand, and later, claimant underwent a left thumb fusion. Due to the residual problems with the left thumb, Mr. Guyer testified that he has ongoing pain in his left hand, as well as significant loss of grip strength and pinch strength. As a result, he has a hard time doing tasks requiring significant forceful left hand use. He has difficulty buttoning his pants, tying his shoes, trying to open a jar, and trying to keep

a grip on a pen or pencil for a long time, often dropping them. In addition, he has difficulty buttoning his shirt: at trial he appeared wearing a button down collared shirt which was left unbuttoned at the collar because he was unable to button it. He also loses his grip on objects, often dropping his keys. Mr. Guyer testified that he returned to full time work at regular duty following his release from treatment for the left thumb fusion and worked there until 1/6/09 when the company was sold. However, he was able to obtain a job at Triumph pork processing plant subsequent to losing his job at Express Pet Foods. At that job he was trimming hams, but, due to the difficulty performing that work with his compromised left thumb, as well as his debilitating headaches, he had no alternative but to quit that job. He has been on Social Security Disability since April 2009. However, he testified that he'd rather be working.

Mr. Guyer testified that currently, as a result of the 8/16/07 head and left thumb injury, he has reduced hand strength in his left hand; reduced desire to interact with other people; reduced participation in group activities; reduced participation in recreational activities; reduced communication with friends/family; difficulty remembering and following simple instructions; difficulty performing simple tasks; reduced memory; difficulty making good decisions; difficulty solving everyday problems; difficulty working at an acceptable pace; reduced ability to concentrate for a reasonable amount of time; reduced ability to manage conflict with others; and increased difficulty with comprehension. He testified that since the 8/16/07 injury, he has problems with controlling his temper and has short-term memory problems and frequently can't find his keys, or where the mix-master is in the kitchen. In addition, he has forgotten to give his kids their medicine, as well as forgotten his doctor's appointments, even after having been reminded by his mother the night before. He lamented the fact that, since the 8/16/07 injury, he can't even have his own checking account anymore because he frequently forgets to record checks and bounced many of them.

Mr. Guyer testified that prior to the 8/16/07 injury, he loved to go fishing and walking. But since the injury, he can't even hold on to his fishing pole. Because of his increased back and foot pain, he is no longer able to go on long walks. In fact, at hearing claimant kept standing up to relieve his back pain.

Because of his headaches, he still has to go home from school 4-5 times per week to lie down for at least 2 and one half hours and sometimes all day and into the night because they are so debilitating. On three occasions when his headaches did not subside Mr. Guyer went to the emergency room at Heartland Hospital for headache pain and was administered injections each time to alleviate the pain. He also cannot drive when he has a headache.

Mr. Guyer testified that if he had not had the head injury on 8/16/07, he would still be working for Express Pet Food. He felt that the last injury of 8/16/07 changed his life entirely for the worse.

Both of Brian Guyer's parents testified at hearing regarding his pre and post-injury status. His father, Gary Lee Guyer testified that prior to the 8/16/07 injury, Brian had a slight disability, but that after the injury, it is more evident that he has a disability. He testified that after the injury, Brian completely changed, stating "it wasn't him". He testified that since the 8/16/07 injury, Brian's temperament changed, he gets upset easily, his concentration is not what it should be and

his memory "is not worth a damn." He testified that he has to help Brian with his mail and explain things to him. Gary Guyer testified that Brian has obvious headaches now since the 9/16/07 injury, and when a headache is coming on, he can see the irritability and mood change since it is very noticeable. Gary testified that Brian's headaches can last into the night, and that on several occasions, Brian has had to go to the emergency room in the middle of the night for an injection to lessen the headaches. Gary testified that prior to the 8/16/07 injury, Brian was an avid fisherman, and played football, baseball, went swimming and walked a lot in the park near their home. However, after the 8/16/07 injury, Brian has been unable to participate in any of those activities. Gary stated that Brian's back and foot pain increased after the 8/16/07 injury. He testified that he had to help Brian fill out job applications after being fired from Express Pet Foods. In addition, Gary testified that following the 8/16/07 injury, he had to balance Brian's check book because he forgot to record checks and bounced many, leaving Gary to bail him out.

Mary Guyer, Brian's mother, testified that Brian and his wife and children have lived with her and Gary Guyer for six years. She admitted that Brian had difficulty in progressing through school and was in special education classes part of the time. She testified that since the 8/16/07 injury, Brian's ability to handle his checking account diminished as he forgot to record checks, and would end up being overdrawn on his account and bounce checks to the point that she and her husband would have to bail him out and pay for the overdrafts. She stated that Brian would tell them that he did not remember writing the checks. She helped him balance his checkbook, but since he still had trouble with it, she eventually had to resort to getting money orders for Brian to mail in when paying his bills, but she had to hound him to mail the money orders out, or he would forget to do so. She corroborated Gary Guyer's testimony regarding Brian's inability to continue fishing after the 8/16/07 injury, due to his inability to hold the fishing pole, as it would fall out of his hands, and that his back and foot pain were worsened after the injury. Mrs. Guyer testified that Brian did not remember the 8/16/07 accident for a long time after the injury. Since the injury, she stated that he gets very angry very quickly, and becomes easily agitated if things get on his nerves. If she says to him "I've asked you not to leave things in the sink" he blows up at her and becomes very angry, whereas, he did not do that before the injury. She testified that prior to the 8/16/07 injury, Brian was very outgoing and would never get angry when she corrected him like he does now. Because of his behavior, she can tell when he has a headache, and she will tell him to lie down and she watches his children. She stated that often he will lie down for 5 hours, but sometimes he has to go to the hospital for an injection to relieve his pain. Mrs. Guyer testified that she is only home in the evening because she works full time and does not witness the extent of Brian's headaches. However, she stated that he has the headaches at least three times a week to the point that he has to lie down and go to sleep.

Mrs. Guyer testified that she has witnessed the changes in his personality since the 8/16/07 blow to the head, noting that he doesn't play with his kids like he used to before the injury, "he just lays around." She testified that he used to read to his kids, but now, since the injury, he doesn't read to them at all. She noted that his memory is much worse since the 8/16/07 injury. He will forget to go to his doctor's appointments, even after she reminded him of the appointment the night before. She has to repeatedly tell him to mail out his money orders because he keeps forgetting, saying "do it right now." She testified that often, he forgets to send his daughter to school wither book bag, and that he is always losing his phone and his keys. In addition, Brian forgets where certain items are kept in the kitchen even though they are still in the same place

they've been for years, and she has to tell him where the items are when he asks. Whereas, he never had these problems prior to the 8/16/07 injury, and that he had no memory or temper problems growing up. Mrs. Guyer further testified that she has had to help him fill out job applications since the 8/16/07 injury.

Although claimant's medical expert, P. Brent Koprivica, M.D., testified that Mr. Guyer is permanently and totally disabled from a combination of his prior left foot condition with the 8/16/07 injury, he admitted that claimant's frequent headaches would negatively affect his employability. He opined that if Mr. Guyer's description of his headaches and Dr. Stuber's description of those headaches as outlined in his 12/20/09 report, Exhibit 7, is taken and accepted by the Court, "If I looked at that and accepted that that was representative of his physical injury and the headaches, that would be totally disabling in my opinion." (Koprivica 52). Koprivica opined that he felt part of Mr. Guyer's reaction to his headaches was psychological, but admitted "if it's accepted that that's all physical based on the '07 injury, then I do believe it's totally disabling . . ." (Koprivica 53). When asked whether claimant's current need to lie down during the day and sleep for at least two hours to attempt to alleviate the headaches he experiences is attributable to the August 2007 injury if he has to lie down during the day now and didn't have to before, Dr. Koprivica responded: "It would be my opinion that the work injury would be at least the substantial factor and probably prevailing factor in that need. There's going to be some contribution to psychological responses on his part that I don't know how to measure, but I do think it's due to the '07 injury." (Koprivica 44). He further testified "I agree with you that the need to lay down, the predominant reason for that is because he has headaches now which is related to the '07 injury." (Koprivica 45). In addition, Dr. Koprivica testified that claimant's inability to sleep after the August 2007 injury would be attributable to that injury, commenting "I believe that's credible." (Koprivica 46). Dr. Koprivica opined that he did not believe that either of Mr. Guyer's earlier left hand injuries or the right hand injury constituted a hindrance or obstacle to his employment prior to the 8/16/07 injury.

Vocational expert, Michael J. Dreiling testified on behalf of the claimant, opining that claimant is unemployable in the open labor market. He admitted that claimant's headaches started after the August 2007 injury, that claimant reported to him that his headaches are so bad that he frequently has to go home from school and lie down 4-5 times per week, and that no employer would be expected to hire him if he had to regularly go lie down during the day, opining "That's correct. . . And I think the headache issue is an additional factor that could potentially interfere with maintaining employment in the labor market. . . If it's a chronic condition, and it's just not an isolated incident that happens on occasion, it it's chronic it's definitely a vocational factor, a vocational issue in terms of maintaining any type of employment." (Dreiling 23-24). He further opined that if the headache issue alone is causing claimant to go home and lie down four to five times a week, that would take him out of the work force "If it was a chronic condition, yes." (Dreiling 53).

Terry Cordray, M.S., testified on behalf of the Employer. Mr. Cordray opined that if claimant has headaches so severe that he has to go home 4-5 times per week to lie down and sleep for at least two hours. That need, in isolation constitutes an impediment to employment. He opined "Yes. It precludes employment in his case." (Cordray 41). He acknowledged that Mr. Guyer's

need to go home 4-5 times per week and lie down for at least two hours would take him out of the work force (Cordray 42).

Clearly, based upon the claimant's and his parents' trial testimony, and the medical and vocational evidence, Brian Guyer's unemployability results from the 8/16/07 primary injury, considered alone, in isolation. Since that is the case, pursuant to the Statute, there is no need for this Court to even consider Second Injury Fund liability in this case. Liability for permanent total disability benefits rests with the Employer/Insurer, and should be assessed exclusively against the Employer/Insurer.

I find and believe from the evidence that the claimant is unable to compete in the open labor market because of his frequent headaches and the inability of the claimant to function while he is suffering the headache and his requirement for him to return to his home and lay down for at least a couple of hours. No prospective employer would be expected to employ the claimant with these restrictions.

Because of the claimant's debilitating headaches, I find that the claimant is permanently totally disabled as a result of the head injury alone. Thus, there is no Second Injury Fund liability. The claimant's claim for compensation against the Second Injury Fund is denied.

The employer claims that it should be granted a reduction for a penalty of safety violation under Section 287.120.5 R.S.Mo. because the claimant was not authorized to unload the truck. However, the claimant testified that he had unloaded similar trucks on several occasions. Management must have observed this or had a reason to know that it had been done. There was no evidence that anyone had objected to claimant's actions in the past or disciplined the claimant in any way. It was clear that the employer had acquiesced to the claimant's conduct. No safety violation is assessed.

The claimant is entitled to additional temporary total compensation from August 17 through August 27, 2007, a total of 1-4/7 weeks. I order and direct the employer to pay to the claimant the sum of \$357.32 per week for a total of \$510.45.

The claimant will require future medical treatment for his headaches. I order and direct the employer to provide such future medical treatment as may be necessary to cure and relieve the claimant from the condition caused by his August 16, 2007 injury.

I order and direct the employer to pay to the claimant the sum of \$357.32 per week for the remainder of claimant's life commencing September 26, 2008.

Mr. Michael A. Knepper is hereby assigned alien in the amount of 25% of this award for necessary legal services provided claimant.

Date: October 18, 2010

Made by: /s/ Nelson G. Allen
Nelson G. Allen
Chief Administrative Law Judge
Division of Workers' Compensation

This Award is dated and attested to this 18th day of October, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation